UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES INDUSTRIES, INC., *et al.*, Plaintiffs, v. GARY FUNG, *et al.*, Defendants.	CV 06-5578 SVW (JCx) ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY [249]

I. INTRODUCTION

In September 2006, Plaintiffs[1] filed a Complaint alleging copyright infringement against Defendant Gary Fung ("Fung"). [Doc. No. 1.] Plaintiffs' Complaint contends that Fung operated a file-sharing service as well as related computer servers as a part of an ongoing file-sharing network that profits from alleged copyright infringement

[1] The Plaintiffs in this action are: Columbia Pictures Industries, Inc.; Disney Enterprises, Inc.; Paramount Pictures Corporation; Tristar Pictures, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Universal City Studios Productions LLLP; and Warner Bros. Entertainment, Inc.

by its users. Plaintiffs then filed a First Amended Complaint adding Defendants Isohunt Web Technologies, Inc. ("Isohunt, Inc.") and Does 1 through 10. [Doc. No. 13.]. (The Court refers to Fung and Isohunt, Inc. collectively as "Defendants.")

Plaintiffs now bring this Motion for Summary Judgment [Doc. No. 249] on the grounds that Defendants' users have infringed their copyrights and are liable under theories of inducement, contributory infringement, and vicarious infringement. The Court requested Supplemental Briefing in an Order dated April 3, 2008. [Doc. No. 342.] The Court requested further Supplemental Briefing and augmentation of the record in an Order dated August 25, 2009. [Doc. No. 358.]

The material facts supporting Plaintiffs' claims are almost wholly unrebutted. Generally, Defendants' rest their case on legal arguments and meritless evidentiary objections, and offer little of their own evidence that directly addressed Plaintiffs' factual assertions. Accordingly, summary judgment is appropriate in the present case. Having considered the moving papers, as well as arguments presented at hearing and in supplemental briefing, the Court Grants Plaintiffs' Motion for Summary Judgment on Liability.

II. FACTUAL BACKGROUND

A. The Torrent Structure

Plaintiffs own or control a large quantity of copyrights within the entertainment and popular media fields. (Plaintiffs' Statement of Undisputed Facts ("Pls.' SUF"), ¶ 1). Defendant Fung maintains and operates a number of websites, including www.isohunt.com,

www.torrentbox.com, www.podtropolis.com, and www.ed2k-it.com (collectively "Fung sites" or "Defendants' sites"), that allow users to download files to their computers.

Plaintiffs maintain that Fung and his websites facilitate their users' infringement of copyrighted files. Specifically, Plaintiffs assert that, through his operation and promotion of the websites, Fung allows users to download infringing copies of popular movies, television shows, sound recordings, software programs, video games, and other copyrighted content free of charge. Users of the Fung sites have downloaded works that are copyrighted by Plaintiffs; these downloads have taken place without authorization from Plaintiffs. (Pls.' SUF, ¶¶ 2-3.)

The Fung sites are an evolutionary modification of traditional "peer-to-peer" sharing sites such as Napster and Grokster. A peer-to-peer service provides a method for users of a network to exchange files quickly and easily between the individuals on the network – other "peers". See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd, 545 U.S. 913, 919 (2005). (See also Horowitz[2] Decl., at ¶ 12.)

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[2] Ellis Horowitz is a Professor of Computer Science and Electrical Engineering at the University of Southern California. Mr. Horowitz has served as a tenured professor since 1983 and his relevant research has been in the field of software development. (Horowitz Decl., at ¶¶ 3, 5.)

On summary judgment, expert opinions are admissible under the general requirements of Fed. R. Evid. 702, which requires that the testimony be based on sufficient facts and be the product of reliable principles and methods, and that the witness has applied the principles and methods reliably to the facts of the case. On summary judgment, expert testimony is also subject to Fed. R. Civ. P. 56(e)(1), which requires a showing [1] that "the affiant is competent to give an expert opinion and [2] the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985).

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1 The content of the files shared therefore resides on the computers of
2 individual users rather than on central servers. (Horowitz Decl., at ¶
3 12.)
4 Through use of the Fung sites, which are commonly known as
5 "BitTorrent" or "torrent" sites, users download content directly from
6 the computers of other users and not directly from the servers of the
7 Defendants, thus operating as a sharing service of the peer-to-peer
8 variety. (See Horwitz Decl., at ¶ 16.) In a BitTorrent network,
9 however, the download process is unique from that of previous systems
10 such as Napster and Grokster.[3] Rather than downloading a file from an

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11 [cont'd from prev. page]
12 Here, Horowitz's testimony is admissible on summary judgment. See also Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124,
13 130-31, 133, 150, 152 (S.D.N.Y. 2009) (relying on Horowitz's testimony).
14 Further, the Court notes that both parties' experts (Dr. Horowitz and Dr. Waterman for Plaintiffs, and Dr. Gribble for
15 Defendants) are generally unrebutted. (See also footnotes 7 and 13, *infra*, for a discussion of the other experts' qualifications.)
16 Generally, the Court relies on the experts with respect to three
17 matters: first, the technological structure of Defendants' websites, which is agreed-upon in all material respects by Dr. Gribble (for
18 Defendants) and Dr. Horowitz (for Plaintiffs); second, the statistics regarding Defendants' users' downloading activities, which is set
19 forth by Dr. Waterman (for Plaintiffs) and wholly unaddressed by Defendants' evidence; and third, the dispute over whether or not
20 Defendants were technologically capable of filtering copyright-infringing materials from their websites, upon which Dr. Gribble and
21 Dr. Horowitz disagree (and is discussed in greater detail *infra*, Part IV.B.4).
22 Accordingly, the experts' declarations set forth admissible
23 facts. Where unrebutted, these facts allow summary judgment in favor of the party proferring the expert testimony on that particular
24 issue. Where the experts' disagreement raises a genuine dispute, the Court will address the dispute accordingly.

25 [3] Napster involved a peer-to-peer network with a central "search index"
26 that served as Napster's collective directory for the files available on the server at any given time. In order to download the files from
27 another user in the Napster network, the individual would search the Napster server for the desired file and then select the desired file
28 [cont'd on next page]

individual user, users of a bit-torrent network will select the file that they wish to download, and, at that point, the downloading will begin from a number of host computers that possess the file simultaneously. (See id. at ¶¶ 23-24.) BitTorrent technology relies on a variety of mechanisms in order to accomplish the ultimate downloading of an given file, including: (1) a software application that users download, which is commonly referred to as a "client application"; (2) websites, also known as "torrent sites," which allow users to select "dot-torrent files" that they wish to download; and (3) servers, also known as "trackers," that manage the download process. (Horwitz Decl., at ¶ 17.) The client applications and trackers work together through the use of a "BitTorrent protocol" which standardizes the client-client and client-tracker communications. (Id.) These components essentially work together to allow individuals to visit a torrent site, download files, and keep track of those downloads - as well as discover additional persons to download from - through the use

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from a list of available users in the network. Similar to other peer-to-peer networks, the actual files shared never passed through or resided on the Napster servers. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011-1013 (9th Cir. 2001).

In contrast, the technology in the Grokster and Kazaa networks provided a distinct form of the peer-to-peer network. Unlike Napster, there was no central indexing of available files. Instead, an individual scanning through the Grokster software would enter a search term and the software itself, through use of a supernode - or indexing computer - would contact other computers seeking matching files. When a result was found matching the query, the information regarding the results (the IP address and other information) would be sent to the requesting computer. The searching user would then download directly from the relevant computer and the file would be placed in the designated folder of the requesting computer. See Grokster, 545 U.S. at 921. In a variation of this network, known as Gnutella, the process is similar but involves no supernodes. Instead, the peer computers communicate directly with each other through the network and requests go directly to other connected users. See id. at 922.

of trackers. In such a system the downloading of the desired content is occurring from multiple source points at the same time and allowing larger downloads to move more expeditiously. During this simultaneous downloading process users form what is known as a "swarm," which allows for quick exchange of the downloading material.[4]

Accordingly, in order to download files from others in a BitTorrent network, users must engage in a number of steps. First, users must install a BitTorrent client application. (Horowitz Decl., ¶ 18.) Standing alone, a BitTorrent client application does not possess the ability to search other computers for files. Instead, as part of the second step, users must visit a torrent site for the purpose of locating dot-torrent files containing the content that they wish to download. (Id. at ¶ 19.)[5] These torrent sites maintain indexes of available torrent files for download that users may search, or, in the alternative, users may upload torrent files to share with others through the torrent site. (Id.) These torrent files are referred to as "dot-torrent" files in reference to their file extension name.[6] The dot-torrent files do not contain the actual content item searched for;

[4] Plaintiffs acknowledge that one of the Fung sites, www.ed2k-it.com, is based on another form of technology known as "eDonkey." (Mot., at 6 n.4.) The Court agrees with Plaintiffs' expert that "the basic elements of eDonkey and BitTorrent technology play similar roles," and that the minor technical distinctions are not material to the present dispute. (See Horowitz Decl. ¶¶ 30-34.) Notably, Defendants do not provide any arguments specifically premised on the difference in technology of "eDonkey."

[5] Torrent sites are websites accessible through the use of an Internet browser. (Horowitz Decl., ¶ 20.)

[6] Accordingly, the extension of those files searched on a torrent site would be ".torrent" in contrast to prior incarnations of peer-to-peer networks where users would search for a file with an extension such as ".mp3" or ".doc".

rather, the dot-torrent file contains the data used by the BitTorrent client to retrieve the content through a peer-to-peer transfer. (Id. at ¶ 21.) In the third step, once the user clicks on the desired dot-torrent file, the BitTorrent client will locate and download the actual content item. (Id. at ¶ 22.) This is accomplished through the use of trackers that are contained within the dot-torrent file. The dot-torrent file contains "hash" values that are used to identify the various pieces of the content file and the location of those pieces in the network. The BitTorrent client application then simultaneously downloads the pieces of the content file from as many users as are available at the time of the request, and then reassembles the content file on the requesting computer when the download is complete. (Id. at ¶ 23.) Once a user downloads a given content file, he also becomes a source for future requests and downloads. (Id.)

The advantage of BitTorrent technology is the cumulative nature of its downloading and economies of scale. As more users download a given file, there are more sources for the file pieces necessary for others. This process, whereby individuals maybe be uploading and/or downloading from many sources at any given time is known as a "swarm." (Id. at ¶ 24.) This prevents a backlog of users waiting to download from one individual user with the source file.

B. Sites Maintained by Defendant Fung

Defendant Fung operates a number of websites, including www.isohunt.com ("Isohunt"), www.torrentbox.com ("Torrentbox"), www.podtropolis.com ("Podtropolis"), and www.ed2k-it.com ("eDonkey"). The structure and manner in which users download files from these sites differs in certain respects. The BitTorrent websites – Isohunt,

Torrentbox, and Podtropolis – all provide users the ability to search for and download BitTorrent files. (Horowitz Decl., at ¶ 26.) As explained by Defendants' expert Steven Gribble,[7] "the defendants' Web sites collect, receive, index, and make available descriptions of content, including so-called 'dot-torrent files,' and they also provide access to 'open-access' BitTorrent Trackers." (Gribble Decl. ¶ 4A.)

Users of BitTorrent websites click on a "download torrent" button or link on the website that will begin the downloading process described above. (Id. at ¶ 27.) The elements of the downloading process work together to bring the desired content to the user's computer without any further actions by the user. (Id.) As one of Plaintiffs' experts explains: "[t]he only purpose of a dot-torrent file is to enable users to identify, locate, and download a copy of the actual content item referenced by the dot-torrent file. . . . Once a user has clicked the 'download' torrent button or link, the . . . desired content file should begin downloading to the user's computer without any further action or input from the user." (Horowitz Supp. Decl., ¶¶ 5-6.)

The BitTorrent websites, as set forth in further detail below, also contain a number of categories from which users can select files to download, including "Top Searches," "Top 20 Movies," "Top 20 TV Shows," "Box Office Movies." (SUF ¶¶ 8-12, 47-55.)[8] For example, the

[7] Steven Gribble is an Associate Professor of Computer Science and Engineering at the University of Washington. Dr. Gribble's research focuses on computer systems and computer security, and has focused in the past on the operations of peer-to-peer systems. (Gribble Decl. ¶ 1.)

For the reasons discussed in footnote 2, *supra*, Gribble's testimony is admissible on summary judgment.

[8] The "Box Office Movies" feature, although once available, is no

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Isohunt home page contains a listing of "Top Searches," which provides a listing of the most commonly searched-for terms by users of the websites. This category contained code filtering out pornography-related terms from the "Top Searches" display. (Id. at ¶ 59.) The items found within the "Top Searches" category are all associated with copyrighted content. (SUF, at ¶ 8.) Much the same holds true for the "Top 20 Most Downloaded Torrents" on Defendant Fung's Torrentbox site. (Id. at 9.) Another of Defendants' sites, Podtropolis, simply contains lists of the "Top 20 Movies" and "Top 20 TV Shows," all of which correspond to copyrighted content. (Id. at ¶ 10.) The ed2k-it website contains files in lists entitled "High Quality DVD Rips" and "TV Show Releases," all of which correspond to copyrighted content.[9] (Id. at ¶ 11.)

Plaintiffs note that the meta tags[10] used on Fung's websites often included the term "warez" as a header for every page.[11] Plaintiffs also

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longer an element of the website. (Horowitz Decl., ¶ 39-40; Defs.' SGI, ¶ 57.) There is no dispute, however, that this category was once on the BitTorrent website.

[9] Defendant Fung attempts to dispute these facts, but not on the grounds that the factual statements are inaccurate. Instead, he contends that these elements of the website provide only a small sample of what is available on the website. Whether or not this is true, it does not rebut the factual accuracy of the claims that Plaintiffs set forth. Defendant Fung also asserts that the lists created by these categories are user-generated and, therefore, simply reflect user demand on the site. This argument ignores the fact that Defendants created and operated the websites in a manner that placed these "user-generated" categories on the websites.

[10] Meta tags are terms commonly embedded into web pages in order to allow search engines to more quickly categorize the substance of a given webpage.

[11] The term "warez" is a term used to refer to pirated content. See Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 133 (S.D.N.Y. 2009). (See also SUF, at ¶ 25.)

point to certain other elements of the webpage that related to known copyrighted material. Defendants, on the home page of the Isohunt website, asked users to upload dot-torrent files of Box Office Movies and also maintained a list of the top twenty grossing movies in U.S. theaters at the time. (SUF, at ¶¶ 50-51.) These lists served the function of getting users to upload dot-torrent files of the latest blockbuster films and have them posted on the Isohunt website. (Id. at 52-54.)[12]

Plaintiffs engaged in a randomized statistical analysis of the works available on the Isohunt and Torrentbox sites. According to Plaintiffs' expert Richard Waterman,[13] approximately 95% of downloads occurring through Defendants' sites are downloads of copyright-infringing content. (See Waterman Decl. ¶¶ 6-7.) Waterman's study of the Torrentbox downloads used actual user downloads from log files that were made available upon discovery requests. Waterman further states that 95.6% of all dot-torrent files downloaded from Torrentbox are for either copyrighted or highly likely copyrighted material. (Id. at ¶ 31.) In a study of the Isohunt website, Waterman found that approximately 90% of files available and 94% of dot-torrent files downloaded from the site are copyrighted or highly likely copyrighted. (Id. at ¶¶ 24, 28.) Though Defendants raise conclusory boilerplate objections to Waterman's declaration, Defendants fail to call

[12] Plaintiffs acknowledge that, at some point, the "Box Office Movies" feature was discontinued on the website. (SUF, at ¶ 54.)

[13] Richard Waterman is an Adjunct Associate Professor of Statistics at the University of Pennsylvania's Wharton School of Business. (Waterman Decl. ¶ 1.) Dr. Waterman operates a statistics consultancy and has testified in a similar case involving secondary copyright infringement. See Arista Records LLC, 633 F. Supp. 2d at 143-44.

For the reasons discussed in footnote 2, *supra*, Waterman's testimony is admissible on summary judgment.

Waterman's factual conclusions into doubt. (See Defs.' Evidentiary Objections, at 10-19.) Despite Defendants' repeated assertions that the evidence is based on "junk science," (id.) Defendants fail to rebut Waterman's statement that he relied on the standard statistical sampling techniques used in his field. (Waterman Decl. ¶ 8 n.1.) It is also noteworthy that numerous courts have relied on such statistical sampling. See Arista Records, 633 F. Supp. 2d at 144-45; MGM Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 985 (C.D. Cal. 2006); A & M Records, Inc. v. Napster, 114 F. Supp. 2d 896, 902-03 (N.D. Cal. 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001). To the extent that the evidence suggests an unrealistic level of accuracy, the Court notes that Waterman's data shows that these numbers are accurate to a 95% confidence level, and include margins of error of plus-or-minus 5% or less. (See Waterman Decl. ¶¶ 13, 14, 18, 25, 29, 32, 34.) Further, Plaintiffs provide the specific data upon which Waterman based his categorization of available files as infringing, likely infringing, and non-infringing. (See Pls.' Ex. T, Waterman Depos., at 39, 48; Friedman Decl. ¶¶ 11, 15, 16.) In any event, for the purposes of this case, the precise percentage of infringement is irrelevant: the evidence clearly shows that Defendants' users infringed on a significant scale. It simply does not matter whether 75% (to pick a number) of available materials were copyrighted or 95% of available materials were copyrighted; and even if this distinction *did* matter, Defendants have simply failed to satisfy their summary judgment burden by submitting admissible evidence that raises a triable dispute regarding Plaintiffs' evidence that a substantial percentage of the available files included copyright-infringing or highly likely copyright-infringing content.

See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'") (internal citations omitted).

C. Fung's Participation in the Websites

In addition to the general structure of the pages maintained by Defendants, Defendant Fung has personally made a number of statements regarding the copyrighted nature of the works available on his sites. In one such post on the Isohunt website Defendant Fung responded to a user's post by stating "they accuse us for [sic] thieves, and they r [sic] right. Only we r [sic] 'stealing' from the lechers (them) and not the originators (artists)." (SUF, at ¶ 14.) In an interview Fung stated: "Morally, I'm a Christian. 'Thou shalt not steal.' But to me, even copyright infringement when it occurs may not necessarily be stealing." (Id. at ¶ 15.) In another post Fung stated: "We completely oppose RIAA & Co. so do not be alarmed by our indexing activities. . . ." (Id. at ¶ 18.) In another interview Fung also stated that users were attracted to his website by the availability of a blockbuster film of the time, *The Da Vinci Code*. (Id. at ¶ 20.) Fung's other statements included references to aiding individuals in the download of then-popular movie titles such as *Matrix Reloaded* and *Lord of the Rings: Return of the King*, pointing users to links where they could download copies of these movies through the torrent sites. (Id. at ¶¶ 27-29.) Other statements made on the website encouraged or made

available the downloading of illegal content by users who were browsing the discussion forums on Fung's websites. (Id. at ¶¶ 33-46.)

Plaintiffs also provide details relating to the assistance that Fung would give website users in downloading copyrighted material within the forum discussions of the various websites. In one such instance, in response to a user query on how to make a DVD from a downloaded copy of the film *Pirates of the Caribbean*, Fung provided a link to a website that would allow the individual to burn a DVD of the downloaded copy. (SUF, at 68.) Fung provided users with assistance on a number of occasions regarding how they could go about playing or extracting the copyrighted films that they downloaded from the Defendants' websites. (Id. at 70, 72.) Fung also provided assistance to a user who was searching for episodes of the television series *Star Trek: Enterprise*; Fung provided links to search possible search queries that would turn up the work. (Id. at 71.) Fung also provided technical advice regarding the use of "trackers" in response to emails containing dot-torrent files connected with copyrighted television programs, such as the NBC series *The Office*. (Id. at 79.)

III. SUMMARY JUDGMENT STANDARD

A. Rule 56 Standard

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. See Fed.

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R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex Corp v. Catrett, 477 U.S. 317, 323-24 (1986). When a party moves for summary judgment under Rule 56(c), that party bears the burden of affirmatively establishing all elements of its legal claim. See Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) (per curiam) (adopting District Court order as its own); see also Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) ("[I]f the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor.") (emphasis in original).

Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. See Celotex, 477 U.S. at 323-34; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is precluded only if there is a genuine dispute "where the evidence is such that a reasonable jury could return a verdict for the nonmoving party" over facts that might affect the outcome of the suit under the governing law. See Anderson, 477 U.S. at 248; see also Aprin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must identify specific

evidence from which a reasonable jury could return a verdict in its favor).

B. Evidentiary Standards

Under the Local Rules of this Court, the Court may base its judgment on the facts stated in the moving party's "Statement of Uncontroverted Facts and Conclusions of Law," L.R. 56-1, but only to the extent that the facts are "adequately supported by the moving party" -- i.e., with evidence in the record -- and are uncontroverted by evidence submitted or identified by the opposition. L.R. 56-3.

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." Orr v. Bank of Am., 285 F.3d 764, 773 (9th Cir. 2002); see also Fed. R. Civ. P. 56(e). Of course, the court need only consider evidentiary objections if the Court actually relies on such evidence. Thus, to the extent that the Court relies on evidence to which a party has properly objected, the Court will address these objections in the course of this Order.

IV. ANALYSIS

A. Preliminary Issues Regarding Secondary Liability

1. Secondary Theories of Liability

Plaintiffs move for summary judgment against defendants on three separate grounds: inducement of copyright infringement, material contribution to copyright infringement, and vicarious copyright infringement. The Court will only address the first theory, because Defendants' inducement liability is overwhelmingly clear. Discussion of Plaintiffs' alternative theories of liability would be unnecessarily

duplicative with respect to the central question at issue in this Motion: Defendants' secondary liability for its users' copyright infringement.

The first two theories (material contribution and inducement) are known collectively as "contributory liability." Perfect 10 v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 795 (9th Cir. 2007) ("One contributorily infringes when he (1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement."), *cert. denied*, 128 S.Ct. 2871 (2008). Despite the analytical similarities between the inducement and material contribution theories, it is now established in this Circuit that inducement and material contribution are distinct theories of contributory liability through which defendants can be found liable. Id.; see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1227 (C.D. Cal. 2007) ("Grokster V") ("material contribution and inducement are two doctrinal subsets of the contributory infringement theory of liability."). Generally, inducement requires that the defendant has undertaken purposeful acts aimed at assisting and encouraging others to infringe copyright, see Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 545 U.S. 913, 936-37 (2005) ("Grokster III"); in contrast, material contribution (in the context of "computer system operator[s]") applies if the defendant "has *actual* knowledge that *specific* infringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works." Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007) (internal citations and quotations omitted) (emphasis in

original). The third theory, vicarious liability, is similar to contributory liability but includes some contours that differ from these other theories of liability. A defendant "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." Grokster III, 545 U.S. at 930.

2. Actual Infringement by Defendants' Users

With respect to all three of Plaintiffs' theories of liability, Plaintiffs must first demonstrate that there has been direct infringement of their copyrights by third parties. Amazon, 508 F.3d at 1169 (citing A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 n.2 (9th Cir. 2001)) ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party."). Plaintiffs have provided direct evidence of copyright infringement by Defendants' users, and Defendants have not introduced any evidence creating a triable issue of fact on this issue.

To establish copyright infringement, Plaintiffs must show that they own the copyrights that have been infringed, and that third parties have made unauthorized copies, downloads, or transfers of this material. 17 U.S.C. § 106(1), (3). Implicit in 17 U.S.C. § 106 is a further requirement at issue in the present case: that the infringement of Plaintiffs' copyrights occur inside the United States. The Ninth Circuit has determined that "United States copyright laws do not reach acts of infringement that take place entirely abroad." Subafilms, Ltd. v. MGM-Pathe Comm'ns Co., 24 F.3d 1088, 1098 (9th Cir. 1994) (en banc), *cert. denied sub nom.* Subafilms, Ltd. v. United Artists Corp., 513 U.S. 1001 (1994). As a later panel of that court wrote, "in order for U.S. copyright law to apply, at least one alleged infringement must be

completed entirely within the United States." Allarcom Pay Television, Ltd. v. Gen'l Instrument Corp., 69 F.3d 381, 387 (9th Cir. 1995).

In the context of secondary liability, an actor may be liable for "activity undertaken abroad that knowingly induces infringement within the United States." 3 Nimmer on Copyright, § 12.04(D)(2) (citing Armstrong v. Virgin Records, Ltd., 91 F. Supp. 2d 628, 634 (S.D.N.Y. 2000); Blue Ribbon Pet Prods., Inc. v. Rolf C. Hagen (USA) Corp., 66 F. Supp. 2d 454, 462-64 (E.D.N.Y. 1999)). Once Plaintiffs have established that an act of infringement has taken place within the United States, Defendants may be held liable for their conduct that constitutes inducement, material contribution, or vicarious infringement, even if Defendants' conduct took place abroad. Id.[14]

Here, there is not a genuine factual dispute over whether the users of Fung's websites infringed Plaintiffs' copyrights. It is undisputed that Plaintiffs "own or control the copyrights, or exclusive rights under copyright" for the works at issue in this case. (SUF, ¶ 1.) It is also undisputed that Plaintiffs have not authorized the distribution of their copyrighted works by Defendants or Defendants' users. (SUF, ¶ 3.)

The only purported dispute with respect to third parties' direct infringement is whether Plaintiffs have provided any evidence that users of Fung's sites have violated 17 U.S.C. § 106(1) and § 106(3) by reproducing and distributing Plaintiffs' copyrighted works. (SUF, ¶ 2; SGI, ¶ 2.)

Defendants argue that Plaintiffs must provide evidence that both

[14] The Court notes that Defendants have operated computer servers in Maryland and Texas. Columbia Pictures Inds., Inc. v. Fung, 447 F. Supp. 2d 306, 310 (S.D.N.Y. 2006) (order granting motion for change of venue and transferring case to this Court).

the transferor and the transferee are located in the United States. (See Defs.' Supp. Opp. at 3-4.) However, United States copyright law does not require that both parties be located in the United States. Rather, the acts of uploading and downloading are each independent grounds of copyright infringement liability. Uploading a copyrighted content file to other users (regardless of where those users are located) violates the copyright holder's § 106(3) distribution right. Downloading a copyrighted content file from other users (regardless of where those users are located) violates the copyright holder's § 106(1) reproduction right. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001). Accordingly, Plaintiffs need only show that United States users either uploaded or downloaded copyrighted works; Plaintiffs need not show that a particular file was both uploaded and downloaded entirely within the United States.

Defendants also assert that Plaintiffs rely on inadmissible hearsay and inadmissible statistical data. (SGI, ¶ 3.) Contrary to Defendants' assertions, Plaintiffs' expert evidence is admissible; and, in any event, Plaintiffs provide direct evidence of specific acts of infringement. There is abundant evidence of copyright infringement using Defendants' websites.

Plaintiffs' expert Richard Waterman conducted a study showing that more than 95% of files available through Defendants' websites are copyrighted or are highly likely to be copyrighted. (SUF, ¶¶ 5-6.) Even taking into account Waterman's margins of error (5% or less), such overwhelming statistical evidence is sufficient to establish that Defendants' websites allowed third party users to access copyrighted material, and that users of Defendants' websites made copyrighted

material available for others to access.[15]

Plaintiffs' broad statistical evidence is corroborated by evidence of specific instances of downloads and transfers of copyrighted works through Defendants' websites. In his deposition, Defendant Fung admitted to using the Isohunt website to download copyrighted broadcast television shows such as *The Simpsons* and *Lost*. (SUF, ¶¶ 2, 57, 122.) Similarly, Fung admitted to downloading the copyrighted film *The Lord of the Rings: The Fellowship of the Ring*. (SUF, ¶ 58.) Declarant Chris Masciarelli stated that he used Defendants' website isohunt.com to download a copyrighted work entitled *Family Guy Presents Stewie Griffin: The Untold Story*. (SUF, ¶ 2; Masicarelli Decl.).

Although Defendants argue that there is no clear evidence that any infringement took place in the United States, Plaintiffs have presented admissible evidence of domestic infringement involving a copyright owned by each of Plaintiffs. Plaintiffs provide evidence based on internet protocol ("IP") address[16] data and usage-summary data produced

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[15] As noted *supra*, this expert evidence is admissible and unrebutted. Notably, other courts dealing with similar issues have relied on similar studies based on statistical samples of the relevant products or services. These courts have approved the basic statistical methodologies employed by Plaintiffs' expert. See, e.g., Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 145 (S.D.N.Y. 2009); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 985 (C.D. Cal. 2006); A & M Records, Inc v. Napster, Inc., 114 F.Supp.2d 896, 902-03 & n.6 (N.D. Cal. 2000), *aff'd in part and rev'd on other grounds*, 239 F.3d 1004 (9th Cir. 2001).

[16] "An IP address is a standard way of identifying a computer that is connected to the Internet. With an IP address, a party could identify the Internet Service Provider providing internet service to the user of the computer corresponding to such IP address." (June 8, 2007 Order Granting in Part and Denying in Part Plaintiffs' Motion to Require Defendants to Preserve and Produce Server Log Data and for Evidentiary Sanctions) (Magistrate Judge) (citing United States v. Heckenkamp, 482 F.3d 1142, 1144 (9th Cir. 2007)) [docket no. 146].)

Defendants' own expert has opined that IP-based location

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by Defendants themselves. Plaintiffs have also have used IP-address data to locate Defendants' users and show that particular infringing downloads took place in the United States. (Pozza Supp. Decl. ¶¶ 3, 4, Ex. 5; see also Masciarelli Decl.) Further, in an examination of roughly 400 downloads (the only available evidence containing users' IP addresses), approximately 50% of the actual downloads using Defendants websites were made from the United States. (Waterman Supp. Decl. ¶ 7; Horowitz Supp. Decl. ¶ 21 & Ex. 1.)[17]

Plaintiffs have also provided evidence that, contrary to Defendants' wholly unsupported assertions, dot-torrent files downloaded from Defendants' sites correspond to and automatically cause the downloading of Plaintiffs' copyrighted content.[18] (Bedser Supp. Decl., ¶ 4; Ishikawa Supp. Decl., Ex. 2; Grodsky Supp. Decl., Ex. 2; Sehested

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analysis is highly accurate. (Gribble Decl. ¶ 30.) Plaintiffs' expert agrees. (Horowitz Supp. Decl. ¶ 11.)

[17] Defendants' own usage summaries show that approximately 25% of Defendants' users are located in the United States. (Horowitz Supp. Decl. ¶ 24, Ex. 5.) This 25% figure is further supported by evidence from Alexa and Quantcast, which are third-party sources of internet traffic information. (See Horowitz Supp. Decl. ¶ 24 & Ex. 6.) Defendants do not object to the exhibits which contain this 25% figure. (See Defs.' Objections to Horowitz Supp. Decl, ¶ 14; Defs.' Objections to Waterman Supp. Decl., ¶ 3.)

[18] The fact that the dot-torrent files automatically cause content files to be downloaded and assembled (see also *supra* Part II.A) rebuts Defendants' assertions that users' act of downloading dot-torrent files does not constitute actual copyright infringement. It may be true that the act of downloading a dot-torrent file is not itself a copyright-infringing action; but once that dot-torrent file triggers the process of downloading a content file, copyright infringement has taken place. Because dot-torrent files *automatically* trigger this content-downloading process, it is clear that dot-torrent files and content files are, for all practical purposes, synonymous. To conclude otherwise would be to elevate form over substance.

Supp. Decl., Ex. 2). Finally, Plaintiffs have linked the United States-based downloads (as identified by Plaintiffs' experts) with copyrighted works owned by each of the individual Plaintiffs. (Whitehead Supp. Decl., Ex. 1; Clinton Supp. Decl. Ex. 1; Sunderland Supp. Decl., Ex. 1; Kang Supp. Decl., Ex. 1; Cherkoori Supp. Decl., Ex. 1; Kaplan Supp. Decl., Ex. 1.)

Accordingly, Plaintiffs' evidence conclusively establishes that individuals located in the United States have used Fung's sites to download copies of copyrighted works. Defendants fail to introduce any evidence that raises a triable issue regarding the fact that Plaintiffs' copyrights have been infringed by third parties.

B. Inducement of Infringement

Plaintiffs first seek summary judgment under the "inducement" theory articulated in the Supreme Court case Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 545 U.S. 913 (2005) ("Grokster III"). In an opinion by Justice Souter, the Supreme Court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." Grokster III, 545 U.S. at 936-37. The Supreme Court further explained,

> [M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor [of the device] to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable

> expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.

Id. at 937 (emphasis added). Importantly, liability may attach even if the defendant does not induce specific acts of infringement. Id. at 940 n.13 (emphasis added).[19] Instead, the court may "infer[] a patently illegal objective from statements and actions showing what [the defendant's] objective was." Id. at 941.

An unlawful objective to promote infringement can be shown by a variety of means. "The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations." Id. at 937; see also Visa Int'l., 494 F.3d at 800. For example, in Grokster III, the defendants "respond[ed] affirmatively to requests for help in locating and playing copyrighted materials." 545 U.S. at 938.

However, showing that the defendant sent out a specific message is "not [the] exclusive way of" demonstrating inducement. Grokster III, 545 U.S. at 938. The Supreme Court in Grokster III highlighted three

[19] In its opinion, the Supreme Court noted the defendant's argument that a court must make a determination of their liability on the basis of specific past acts that encouraged inducement. Defendants here offer a similar argument. The Supreme Court, however, rejected such a proposition, stating:

> This contention misapprehends the basis for their potential liability. It is not only that encouraging a particular consumer to infringe a copyright can give rise to secondary liability for the infringement that results. Inducement liability goes beyond that, and the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe. In such a case, the culpable act is not merely the encouragement of infringement but also the distribution of the tool intended for infringing use.

Grokster III, 545 U.S. at 940 n.13 (internal citations omitted, emphasis added).

facts from which a reasonable factfinder could infer intent to foster infringement in that case. First, the Court noted that the defendant's owns communications and advertising designs had expressed an intent to target Napster users, a community well-known for copyright infringement. Although it was not known whether some of the advertising designs were actually communicated to the public, "whether the messages were communicated is not to the point on this record." Id. at 938. "The function of the message in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection." Id. Second, the Court found it probative that defendants did not attempt to develop filtering tools or other means of diminishing the use of its products for infringement. Taken alone, the failure to develop a filter would be insufficient to support liability; but viewed in conjunction with other evidence it underscored the defendants' unlawful objective. Id. at 939 n.12. Third, the Court considered the fact that the defendants' business model depended on high-volume use of its software, which was overwhelmingly infringing, as circumstantial evidence of intent to induce infringement. Id. at 939-40. Again, this evidence would not alone justify the imposition of liability, but it supported an inference of unlawful intent when viewed in context with other evidence in the record. Id. Based on these elements of the factual record, the Court held that the defendants' "unlawful objective is unmistakable." Id. at 940.

On remand from the Supreme Court, the District Court took into account other factors in finding the defendants' intent to induce infringement, including the "the staggering scale of infringement"

occurring through use of defendants' products, technical assistance provided by the defendants to users for the playback of copyrighted content, and affirmative steps taken by defendants to ensure that their products would be capable of infringing use. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 985-92 (C.D. Cal. 2006) ("Grokster IV").

Upon review of all the evidence in the present case, the Court determines that evidence of Defendants' intent to induce infringement is overwhelming and beyond reasonable dispute.

1. Defendants' message to users

Plaintiffs present a variety of undisputed evidence that Defendants disseminated a message "designed to stimulate others" to commit infringements. Grokster III, 545 U.S. at 916. The clearest instance of Defendants' solicitation of infringing activity is the "Box Office Movies" feature of Defendants' Isohunt site. As Defendant Fung admitted in his deposition, this feature essentially involved Defendants' periodic posting of a list of the top 20 highest-grossing films then playing in United States, which linked to detailed web-pages concerning each film.[20] Each of these pages contained "upload torrent" links allowing users to upload dot-torrent files for the films. Though Defendants eventually discontinued this feature, they did not remove pages that had already been created. (SUF, ¶¶ 50-55.) By implementing this feature, therefore, Defendants engaged in direct solicitation of infringing activity. Defendant Fung, in his subsequent declaration filed with Defendants' Opposition, denies that this feature was

[20] It goes without saying that the highest-grossing films currently in theaters are copyrighted works. See Grokster V, 454 F. Supp. 2d at 992 ("it is common knowledge that most popular music and movies are copyrighted"). Defendants have not rebutted this obvious inference.

intended to induce copyright infringement and asserts that the web-pages "did not lead anywhere." (Fung Decl., ¶ 58.) However, "actions speak louder than words," Arista Records, 633 F. Supp. 2d at 153 n.20, and Fung cannot dispute the objective historical fact that the websites included a "Box Office Movies" feature at one time. This feature evidences Defendants' intent to encourage their users' infringement.

In addition to the "Box Office Movies" feature, Plaintiffs present other evidence that Defendants disseminated messages designed to stimulate inducement. In particular, Plaintiffs demonstrate that, Defendants' websites present available torrent files (the vast majority of which contain infringing content) in browseable categories and provide further information about the works contained in the files. (SUF, ¶¶ 47-48.) Defendants also generate lists of the most popular files in categories like "Top 20 Movies." (SUF, ¶ 49.) Defendants do not dispute the presence of such information on their web-site, but instead merely assert that the lists' content originates from users or from automated processes that simply reflect user activity. (SGI ¶ 11; Fung. Decl., ¶¶ 54-55, 57). Defendants' assertions ignore the material fact that Defendants designed the websites and included a feature that collects users' most commonly searched-for titles. The fact that these lists almost exclusively contained copyrighted works (see SUF ¶¶ 8-13) and that Defendants never removed these lists is probative of Defendants' knowledge of ongoing infringement and failure to stop this infringement.

Plaintiffs also provide evidence of what the Supreme Court has termed the "classic instance of inducement" — a statement that "broadcasts a message designed to stimulate others to commit

violations." Grokster III, 545 U.S. at 938. Defendant Fung made statements on the Isohunt website encouraging or assisting infringement. He posted on his website a message telling the website's users that they should "try Peer Guardian," a software application that can be used to frustrate copyright enforcement against file sharers. (SUF, ¶ 94.) Accord Grokster III, 545 U.S. at 937-38. Fung also provided a link to a torrent file for the recent film *Lord of the Rings: Return of the King* on the Isohunt site and stated, "if you are curious, download this." (SUF, ¶ 29.) Additionally, Fung created a promotional page inviting users to upload torrent files for *Matrix Reloaded*, another recent film. (SUF, ¶ 28.)

It is also undisputed that certain key terms known to the pirating community, such as "warez," were meta tags embedded in the websites for reference by search engines. Additionally, the Fung websites have honorary ranking systems for those who posted a certain number of forum users messages; ranks include titles such as "I pir4te, therefore I am" and "All Day I Dream About W4rez." (SUF, ¶ 22.) In other words, the websites bestowed honors by identifying users as copyright infringers. This is strong circumstantial evidence that Defendants promoted their users' infringing activities by consciously fostering a community that encouraged - indeed, celebrated - copyright infringement.

Perhaps most tellingly, Fung has personally engaged in a broad campaign of encouraging copyright infringement. In a statement on the Isohunt website, Fung stated: "they accuse us for [sic] thieves, and they r [sic] right. Only we r [sic] 'stealing' from the lechers (them) and not the originators (artists)." (SUF, at ¶ 14.) In an interview with another website Fung stated: "Morally, I'm a Christian. 'Thou

shalt not steal.' But to me, even copyright infringement when it occurs may not necessarily be stealing." (Id. at ¶ 15.) Fung's statements provide further evidence that he has encouraged third parties to engage in copyright infringement. These statements also provide probative evidence regarding Fung's intent in creating the Defendant websites to aid others' infringement.

2. Defendants' assistance to users engaging in infringement

There is also evidence that Defendants directly assisted users in engaging in infringement. As in Grokster III, Defendants in the present case have "respond[ed] affirmatively to requests for help in locating and playing copyrighted materials." 545 U.S. at 938.

Defendant Fung personally posted messages in the Isohunt discussion forums in which he provided technical assistance to users seeking copyrighted works. Specifically, in response to an Isohunt user who posted a message stating he did not know how to watch a file containing *Lord of the Rings: Return of the King* which he had recently downloaded, Defendant Fung provided directions on how to extract and play the video file. (SUF, ¶ 69.) The record is replete with such instances of technical assistance provided to users by Defendant Fung through the forum. (See, e.g., SUF, ¶ 70 (Fung provided technical assistant to users who downloaded the film *Kill Bill*); SUF, ¶ 71 (Fung provided assistance to user searching for *Star Trek: Enterprise* episodes by giving search tips); SUF, ¶ 79 (Fung explained how to attach a tracker URL to a dot-torrent file sent to him by an Isohunt user, and recommended the user use the tracker at torrentbox.com).)

In addition to Fung's personal statements, statements by the "moderators" of Fung's websites provide further evidence of the

Defendant websites' active inducement of infringing activities. There are numerous individuals who are known as "moderators" or "admins." The term "moderators" refers to "individuals whose job it is to look after the running of the forums from day to day." (SGI, ¶ 41.) Moderators can edit, delete, and reorganize postings in the forums. (SGI, ¶ 42.) Some moderators, referred to as "admins," also have the ability to ban selected abusive users and remove user-posted dot-torrent files. (Id.) There is no substantive dispute by Defendants regarding their relationship to these individuals. Defendants assign this status and give these individuals authority to moderate the forums and user discussions. These individuals were under the control of Defendants and assigned duties related to the administration of the web forums. Therefore, there is an agency relationship between these individual moderators (or "admins") and Defendants.[21]

[21] An agency relationship is created "by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf." Restatement (Third) of Agency, § 3.01 (2006); see Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 & n.31 (1989) (looking to Restatement to determine federal common law of agency under Copyright Act).

Under common law principles of agency, the "moderators" were the Defendants' agents with respect to their interactions with the online message boards and forums. Even though there is no evidence that the moderators were specifically authorized to post messages in these forums, the websites' act of designating them as "moderators" and providing them with specific forum-related powers leads a "third party reasonably [to] believe[] the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement (Third) of Agency, § 2.03 (2006) (describing "apparent authority").

There is no genuine dispute that agency is established here, as Defendants introduce no evidence that would provide a triable issue to rebut Plaintiffs' prima facie showing of agency. Defendants merely assert that Plaintiffs evidence "suggests triable issues of fact." (Opp. at 19 n.10.) Unsupported assertions do not give rise to a genuine dispute of fact. Plaintiffs' evidence, unless refuted,

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The Defendant websites are full of statements by moderators who assisted users seeking to download files or provided links to other websites containing the requested items. In a post on the Isohunt forums, moderator "Estranged" provided instructions regarding DVD ripping and conversion. (SUF, ¶ 45.) In a post on Torrentbox, moderator "Skull and Bones" referred a user to 353 dot-torrent files including *King Kong* and *Silent Hill*, which were "very good quality" and stated that "[m]ost of your films are here at Torrentbox or search on isohunt.com." (SUF, ¶ 46.) In a post on the website Podtropolis, moderator "NewAgePirate" responded to a user who posted a list with films such as *The Godfather*, *Clockwork Orange*, and *One Flew Over the Cuckoo's Nest*, with a post that stated "Great list by the way man. Great to have you here." (SUF, ¶ 35.) All of these statements demonstrate that there was an active role played by the administrators of the websites within the forum, encouraging and providing technical assistance for users seeking to engage in infringing activities.

All of these statements demonstrate the assistance Defendant Fung and the corporate Defendant provided to the websites' users in infringing Plaintiffs' copyrights. Such actions demonstrate that Defendants did not maintain a hands-off approach to the operation of the sites. Instead, various of Defendants' representatives gave technical assistance and aid in the organized forum discussions that furthered the third parties' infringement using the sites.

Defendant Fung argues that the First Amendment protects any statements made by him or the agents. Such an argument, however, is

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compels a finding of an agency relationship. Plaintiffs' evidence has not been refuted, and agency is accordingly established.

unavailing. The central premise of the Supreme Court's decision in Grokster III is that a defendant's statements can be probative of an intent to induce infringement. Explicit statements by defendants will often form the most substantial form of proof in inducement or material contribution cases. See generally Grokster III, 545 U.S. 913; Napster, 239 F.3d 1004. Additionally, the statements themselves are not the activity prohibited by this doctrine, but rather are evidence of the "intent to induce," which is the underlying wrongful act. It is well-established that such statements are not protected by the First Amendment:

> The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes . . . frequently involve the use of speech as part of the criminal transaction. . . . To the extent . . . that [the defendant] appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct.

United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982).[22]

[22] In one of the main arguments in Defendants' Opposition, Defendants offer an extended discussion of the intersection between the First Amendment and the internet. (Opp. at 18-23.) Quoting from a broad selection of caselaw, Defendants largely appear to advocate that the First Amendment immunizes any and all activity on the internet. Defendants' various First Amendment arguments are inapposite and unavailing. See Religious Tech. Ctr. v. Netcom On-Line Communcations Svcs., 907 F. Supp. 1361, 1377-78 (N.D. Cal. 1995); see generally 4 Nimmer on Copyright § 19E.03-04.

Notably, it appears that copyright law incorporates First Amendment considerations by providing for "fair use" defenses and by distinguishing between uncopyrightable "ideas" and copyrightable

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3. Defendants' implementation of technical features promoting copyright infringement

Defendants' implementation of certain technical features in their web-sites is also probative of Defendants' intent to induce copyright infringement. Most obviously, Defendants' websites allow users to locate dot-torrent files. Once downloaded to a users' computer, torrent files automatically engage in a "swarm" downloading process that permits users to download a single content file simultaneously from many other users. (SUF ¶¶ 23-24.) This process expedites the exchange of large, content-rich files such as television programs and movies.

Defendant Fung also implemented a "spider" program, which locates and obtains copies of dot-torrent files from other web-sites, including well-known infringing sites such as "The Pirate Bay." (SUF, ¶¶ 86-87.) Defendant Fung additionally directs the program to specific web pages containing terms like "seinfeld-videos," which one would infer contains infringing content from the television show *Seinfeld*. (SUF, ¶ 88.)

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"expressions." See Los Angeles News Svc. v. Tullo, 973 F.2d 791, 795-96 (9th Cir. 1992). Further, secondary copyright liability is sensitive to First Amendment concerns in that it generally regulates *intentional* behavior. See Grokster, 545 U.S. at 937; Amazon, 508 F.3d at 1772; cf. Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 339-41 (S.D.N.Y. 2000) ("Anything that would impose *strict liability* on a web site operator for the entire contents of any web site to which the operator linked . . . would raise grave constitutional concerns") (emphasis added), *aff'd on other grounds sub nom.* Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2002).

Finally, and most importantly, it must be emphasized that the present case involves *conduct* not *expression*, and to the extent that Defendants' expression is being curtailed, they should recall that they "could have expressed their theme without copying [Plaintiffs'] protected expression." Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 759 (9th Cir. 1978), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979).

Defendants do not rebut this obvious inference.

Defendants also organized files using a program that matches content filenames with specific terms. Some of the specific terms used by the program describe likely infringing content, such as "Screener" or "PPV".[23] (SUF, ¶¶ 91-92.)

Defendants no do not dispute these facts except to assert that the spider programs were automated, generic components that operated in a copyright-neutral manner. (SGI, ¶¶ 89-91.) Essentially, Defendants argue that they merely assembled a website that combined already-existing technologies, and that they did not include any unique innovations that were specifically tailored to assist the distribution of copyrighted works. These assertions are inapposite. The unrebutted factual evidence shows that Fung designed programs which improved the functioning of his websites with respect to infringing uses. Combined with other evidence regarding Defendants' improper purposes, these technological features support a finding of inducement liability.[24]

[23] "Screener" refers to an advance copy of a film given to critics for review, while "PPV" refers to "pay-per-view." Defendants offer no authority contesting these standard meanings.

[24] Given that Defendants' "unlawful objective is unmistakable," see Grokster III, 545 U.S. at 940, the Court refrains from addressing the factual disputes regarding whether or not Defendants were technologically capable of implementing filtering mechanisms to reduce copyright infringement through their websites. (See SUF, ¶¶ 103, 107; SGI ¶¶ 110-11, 143.) In Grokster III, the defendants' failure to implement a copyright filter was probative circumstantial evidence of the defendants' intent to induce infringement. However, the failure to implement a copyright filter is not a determinative factor in analyzing a defendant's inducement of infringement. Rather, the relevant question is whether "the summary judgment record [establishes that the defendants] acted with a purpose to cause copyright violations by use of software suitable for illegal use." Id. at 938. This improper purpose can be shown in a variety of ways; the factors considered by the Supreme Court in Grokster were not exhaustive or exclusive. See Grokster III, 545 U.S. at 938-39.

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4. Defendants' business model depends on massive infringing use

Plaintiffs assert that Defendants' business model depended on massive infringing use. In the instant litigation, just as with the programs at issue in Grokster III, Defendants' business generates its revenue almost exclusively by selling advertising space on the sites. (SUF, ¶ 109; Pltf. Ex. 1, Fung Dep., at 326-27.) Similarly, the revenue depends on users visiting Defendants' sites and viewing the advertising. (SUF, ¶ 110.) As discussed previously, Defendant Fung acknowledges that the availability of popular works is what attracts users to the sites. (See, e.g., Ex. 173 (interview of Fung admitting that the availability of the then-popular *Da Vinci Code* film was a key attraction to his website).) Defendant Fung also solicited advertisement on the basis of the availability of works on his website. For example, in an email to a potential advertiser, moviegoods.com, Fung wrote that Isohunt would "make a great partner, since TV and movies are at the top of the most frequently searched by our visitors." (SUF, ¶ 112; Pls.' Ex 174.)

In short, there is no factual dispute that the availability of copyright material was a major draw for users of Fung's websites, and there is no dispute that Defendants derive revenue from the websites

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In the present case, given Defendants' overwhelming affirmative conduct to encourage and assist copyright infringement, Plaintiffs are entitled to summary judgment in their favor even if Defendants were incapable of creating an effective copyright filter. Indeed, Plaintiffs have established that Defendants engaged in "[t]he classic instance of inducement . . . by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations." See Grokster III, 545 U.S. at 937. Given that Defendants so clearly acted to induce infringement, it is immaterial that they may or may not have been able to prevent such infringement by implementing a copyright filter.

and that this revenue increases along with the number of users. (SUF ¶¶ 109-110, 132-133.)[25] This is further evidence of Defendants' intent to assist infringing uses.

5. Additional Considerations

Throughout their legal memoranda and supporting evidentiary papers, Defendants argue that there is no evidence of infringing activity. This argument obviously fails in light of the evidence discussed *supra*, Part IV.A.2. However, to the extent that Defendants subjectively believe that their users have not engaged in copyright infringement, Defendants' "ostrich-like refusal to discover the extent to which its system was being used to infringe copyright is merely another piece of evidence" of Defendants' purposeful, culpable conduct in inducing third party infringement. See In re Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003).

6. Summary of Inducement

The undisputed evidence shows that Defendants (both Fung and the websites) engaged in "purposeful, culpable expression and conduct" aimed at promoting infringing uses of the websites. See Grokster III, 545 U.S. at 937. Accordingly, Plaintiff's motion for summary judgment on Defendants' liability for inducement of infringement is GRANTED.

C. Alternative Theories of Secondary Liability

Having determined that Defendants are liable under an inducement theory for their users' infringing activities, the Court refrains from addressing Plaintiff's Motion for Summary Judgment on the theories of material contributory infringement and vicarious infringement.

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[25] Defendants assert that "there is no detail, no dollar amounts," (Opp. at 35), but Plaintiffs correctly point out that the present Motion involves *liability* not *damages*, so such detail is unnecessary. (Reply at 12.)

V. DEFENDANTS' DIGITAL MILLENNIUM COPYRIGHT ACT AFFIRMATIVE DEFENSES

The Digital Millennium Copyright Act provides affirmative defenses for providers of certain internet services. In many ways, the Digital Millennium Copyright Act is simply a restatement of the legal standards establishing secondary copyright infringement - in many cases, if a defendant *is* liable for secondary infringement, the defendant *is not* entitled to Digital Millennium Copyright Act immunity; if a defendant *is not* liable for secondary infringement, the defendant *is* entitled to Digital Millennium Copyright Act immunity. The two sets of rules do not entirely overlap, but this framework is helpful for understanding the Act's statutory text and structure. Cf. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001) ("We do not agree that . . . potential liability for contributory and vicarious infringement renders the Digital Millennium Copyright Act inapplicable per se.").

Here, the relevant section of the Digital Millennium Copyright Act, 17 U.S.C. § 512(d), reads:

> **Information location tools.**--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider–

(1) **(A)** does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

17 U.S.C. § 512(d).

In other words, a provider of "information location tools" (such as Defendants' websites[26]) must satisfy the three conjunctive

[26] See Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d
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requirements of § 512(d) in order to obtain safe harbor. These three safe harbor requirements are that the defendant: [1] does not know (§ 512(d)(1)(A)) or have reason to know (§ 512(d)(1)(B)) of infringing activities, or does not remove infringing materials upon receipt of such knowledge (§ 512(d)(1)(C); and [2] does not profit from infringement where it has the power to control the infringement (§ 512(d)(2)); and [3] upon receiving notice (in the statutorily-prescribed manner) from the copyright holder, removes the infringing material (§ 512(d)(3)).

In the present case, Plaintiffs have established that Defendants have reason to know of their users' infringing activities. Defendants have not satisfied their summary judgment burden by identifying facts

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1146, 1175 (C.D. Cal. 2002) ("[S]ection 512(d) . . . creates a 'safe harbor' for copyright infringement resulting from the use of information location tools by service providers, which include directories, indexes, references, pointers and hypertext links.").

Defendants also argue that they fall within the safe harbor provisions of 17 U.S.C. § 512(a) ("transitory digital network communications") and 17 U.S.C. § 512(c) ("information residing on systems or networks at direction of users"), but these categories are inapplicable to Defendants' particular technologies as well as Defendants' substantive conduct upon which Plaintiffs are suing. Defendants themselves assert that "[n]o infringing materials are posted on or pass through defendants' systems," (Opp. at 34), which is factually supported by the record because Defendants' websites are used to download dot-torrent files, not content files (Gribble Decl. ¶ 21; Fung Decl. ¶¶ 9, 52). Because infringing materials do not pass through or reside on Defendants' system, Defendants may not rely on § 512(a) and § 512(c).

In addition, Plaintiffs claims are unrelated to secondary liability "by reason of the *storage* [of data] . . . on a system or network controlled or operated by" Defendants, 17 U.S.C. § 512(c)(1) (emphasis added), or "by reason of [Defendants'] *transmitting, routing, or providing connections for*[] material through a system or network controlled or operated by" Defendants, 17 U.S.C. § 512(a) (emphasis added). Plaintiffs' claims are premised on active inducement of infringement, not passive transmission or storage of infringing materials.

showing that Defendants were "not aware of facts or circumstances from which infringing activity [wa]s apparent." 17 U.S.C. § 512(d)(1)(B). Further, Defendants have not introduced any evidence that they "act[ed] expeditiously to remove, or disable access to, the [infringing] material" once they became aware that this infringing activity was apparent. (See generally Defs.' SGI ¶¶ eee-lll.) Thus, Defendants are not entitled to statutory safe harbor under 17 U.S.C. § 512(d).[27]

In order to obtain safe harbor, a defendant cannot have knowledge of ongoing infringing activities. This "knowledge" standard is defined as "actual knowledge" or "willful ignorance." According to the widely-cited House and Senate Report on the law, "if the service provider becomes aware of a 'red flag' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action." H.R. Rep. 105-551(II), at 53; see also Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1114 (9th Cir. 2007). The Congressional Report notes that the service provider is only liable if it "turned a

[27] The Court refrains from addressing at length the second prong of the safe harbor rule, the § 512(d)(2) "financial benefit" requirement. Defendants have profited from their users' infringement, see *supra* Part IV.B.5, and Defendants undisputedly have the ability to block users from Defendants' websites. (SUF ¶¶ 136-139; see also SUF ¶ 106, SGI ¶ 109; SGI ¶¶ 141-142; Fung Decl. ¶ 61.) As the Ninth Circuit explained in Napster, the "ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise." 239 F.3d at 1023.

Accordingly, Defendants have also failed to raise a triable issue of fact regarding the second requirement for receiving § 512(d) safe harbor, because they "receive a financial benefit directly attributable to the infringing activity," and they have "the right and ability to control such activity." 17 U.S.C. § 512(d)(2).

As for the third safe harbor requirement, there appears to be a triable issue of fact as to the adequacy of the statutory notice that Plaintiffs provided to Defendants. (See Parker Decl. ¶¶ 9, 12-14.) However, because Defendants have not identified any triable issues of facts regarding the first two safe harbor requirements, summary judgment is appropriate in Plaintiffs' favor.

blind eye to 'red flags' of obvious infringement." H.R. Rep. 105-551(II), at 57. Other courts have applied this test as requiring "willful ignorance of readily apparent infringement." UMG Recordings, Inc. v. Veoh Networks Inc., __ F. Supp. 2d __, 2009 WL 3422839, at *7 (C.D. Cal. 2009) (citing Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004)).

Even under this stringent "willful ignorance" test, it is apparent that Defendants have "turned a blind eye to 'red flags' of obvious infringement." See H.R. Rep. 105-551(II), at 57. Most importantly, Defendant Fung himself has engaged in unauthorized downloads of copyrighted material; even if those downloads were done abroad and were not actionable under United States copyright law (and thus would not provide "actual knowledge" of illegal activity for purposes of 17 U.S.C. § 512(d)(1)(A)), Fung's actions show that Fung was aware that infringing material was available on the Defendant websites. Given the "worldwide" nature of the world-wide web, it would have been obvious that United States-based users could access these same infringing materials and thus engage in infringing acts. Defendants provide no evidence to rebut this obvious conclusion that United States-based users would have been able to download the same copyrighted works that Fung himself downloaded.

Furthermore, Plaintiffs introduce evidence produced by Defendants themselves that shows that approximately 25% of Defendants' websites' users were based in the United States. (Horowitz Supp. Decl. ¶ 24, Ex. 5.) This evidence further shows that, at its height, over ten million unique users visited Defendants' websites each month (see Horowitz Supp. Decl., Ex. 5 at 25; Horowitz Supp. Decl., ¶ 19 n.4), which

1 strongly suggests that some 2.5 million United States citizens visited
2 Defendants' websites each month. Further, this evidence shows that at
3 one point, Defendants' websites were accessed over 50 million times
4 from the United States in a single month. (Horowitz Supp. Decl., Ex. 5
5 at 32.) Upon accessing Defendants' websites, these American users
6 would have found that 90% to 95% of the available materials contained
7 copyrighted content. (See Waterman Decl. ¶¶ 6, 7, 24, 28, 31.)
8 Defendants fail to introduce any evidence rebutting this overwhelming
9 evidence, and thus fail to raise a triable issue of fact as to whether
10 Defendants had actual knowledge of copyright infringement or were
11 willfully ignorant of ongoing copyright infringement.
12 There is a variety of other evidence of Defendants' willful
13 ignorance to ongoing infringement. Defendants designed their website
14 to include lists such as "Top Searches," "Top 20 Movies," "Top 20 TV
15 Shows," and "Box Office Movies," and Defendants designed these lists to
16 automatically update to reflect user activities. These lists included
17 numerous copyrighted works. (SUF ¶¶ 8-12, 47-55.) See Grokster V, 454
18 F. Supp. 2d at 992 ("it is common knowledge that most popular music and
19 movies are copyrighted"). Thus, unless Defendants somehow refused to
20 look at their own webpages, they invariably would have been known that
21 (1) infringing material was likely to be available and (2) most of
22 Defendants' users were searching for and downloading infringing
23 material.
24 In addition, Plaintiffs submit overwhelming statistical evidence
25 of the prevalence of copyrighted material available through Defendants'
26 websites. (SUF ¶¶ 5-7.) This evidence shows that 90%-95% of the
27 material was likely to be copyright infringing, a percentage that is
28

nearly identical to the facts in Napster, in which "eighty-seven percent of the files available on Napster may be copyrighted." 239 F.3d at 1011. In that case, the district court rejected the defendant's plainly meritless arguments seeking safe harbor under § 512(d). A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 919 & n.24 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). Given that Defendants' own statistics show that millions of Defendants' users are located in the United States (Horowitz Supp. Decl. ¶ 24, Ex. 5), Defendants were certainly "aware of a 'red flag' from which infringing activity is apparent." H.R. Rep. 105-551(II), at 57. Defendants do not introduce any evidence to raise a triable issue of fact on this question.

In light of this overwhelming evidence, the only way Defendants could have avoided knowing about their users' infringement is if they engaged in an "ostrich-like refusal to discover the extent to which [their] system[s] w[ere] being used to infringe copyright." See In re Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003). In other words, to avoid actual knowledge of infringement, Defendants would have had to engage in willful blindness.

There is one last reason why Defendants are unable to benefit from the 17 U.S.C. § 512 safe harbors. As stated by Judge Posner in In re Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003):

> The common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by 'repeat infringers.' 17 U.S.C. § 512(i)(1)(A). Far from doing anything to discourage repeat infringers of the plaintiffs' copyrights, Aimster invited them to

do so, showed them how they could do so with ease using its system, and by teaching its users how to encrypt their unlawful distribution of copyrighted materials disabled itself from doing anything to prevent infringement.

In other words, inducement liability and the Digital Millennium Copyright Act safe harbors are inherently contradictory. Inducement liability is based on active bad faith conduct aimed at promoting infringement; the statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business. Here, as discussed *supra*, Defendants are liable for inducement. There is no safe harbor for such conduct.

Accordingly, Defendants are not entitled to the affirmative defenses provided by the Digital Millennium Copyright Act.

VI. DEFENDANTS' RULE 56(f) REQUEST

Defendants argue that they must conduct more discovery. Defendants seek information regarding the practices of online search companies such as Google and Yahoo. (Opp., at 33-35; Rothken 56(f) Decl. ¶ 6.) Defendants also seek information related to the likelihood that Defendants' technologies will be used for non-infringing tasks in the future. (Rothken 56(f) Decl. ¶¶ 7-9.) Finally, Defendants seek information related to the potential for Plaintiffs to create a centralized database listing copyright-infringing works and copyright-infringing users.[28]

[28] Defendants further seek information regarding the prevalence of Defendants' non-United States users (Rothken 56(f) Decl. ¶ 5); however, Plaintiffs' supplemental evidence regarding U.S.-based [cont'd on next page]

Rule 56(f) requires "specified reasons" that are "essential" to the opposition. Defendants meet neither requirement.

Such discovery is utterly irrelevant to the present Order, which relates specifically to Defendants' efforts directed at inducing third parties' infringement. Inducement liability does not turn on whether *other actors* would or not be liable (as with Google and Yahoo), or whether Defendants' websites' *future uses* might be lawful. Nor does inducement liability turn on whether Plaintiffs could have mitigated their damages by making efforts to reduce third party infringement. Rather, inducement liability turns on whether Defendants, through their own conscious conduct, actively encouraged others to infringe Plaintiffs' copyrights. Defendants provide no evidence as to how the further discovery would diminish their liability in the instant action. Indeed, the relevant evidence, as presented by Plaintiffs' Motion for Summary Judgment and discussed throughout the present Order, is largely undisputed and, further, is in Defendants' possession.

Accordingly, Defendants' Rule 56(f) request is DENIED.

VII. CONCLUSION

This case contains the same general pattern presented in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), A&M

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infringement has directly answered each one of Defendants' purportedly unanswered questions. Defendants failed to renew or amend their Rule 56(f) request in light of Plaintiffs' new evidence, and their previous requests for additional discovery have been mooted by Plaintiffs evidence. Further, in light of the IP address-based location methods discussed *supra*, Defendants have been in possession of the sought-after evidence throughout the course of this litigation.

Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), and, more recently, Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009). The Defendants in the present case attempt to distinguish their situation on three main grounds: first, that the BitTorrent technology is different from the other technologies because users do not download content files through Defendants' websites; second that Defendants' conduct is protected by the First Amendment; and third, that Defendants' users are located across the globe, not just in the United States.

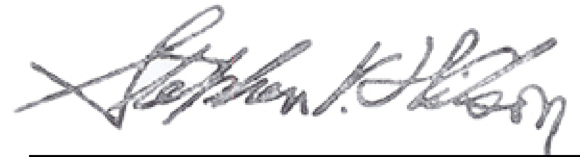
On the evidence presented to the Court, none of these arguments raises a triable question of fact for the jury to decide. Defendants' technology is nothing more than old wine in a new bottle. Instead of logging into a proprietary network in order to download files from each others' computers, Defendants' users access Defendants' generally-accessible website in order to download those files. And instead of downloading content files directly through Defendants' website, Defendants' users download dot-torrent files that automatically trigger the downloading of content files. These technological details are, at their core, indistinguishable from the previous technologies. In fact, Defendants' technologies appear to improve upon the previous technologies by permitting faster downloads of large files such as movies. Such an improvement quite obviously increases the potential for copyright infringement.

Regarding Defendants' second main argument, caselaw establishes that Defendants are misguided if they think that the First Amendment provides blanket protection to all internet-based activities, particularly where those activities involve copyright infringement.

Finally, Defendants third main argument ignores the unrebutted fact that millions of United States citizens have accessed Defendants' websites, and a substantial proportion of the files made available to them through those websites contained copyrighted or highly-likely copyrighted works. Further, Plaintiffs have provided undisputed evidence of specific infringing acts done in the United States.

Thus, as in Grokster, summary judgment is appropriate on the question of inducement liability. For the foregoing reasons, the Court GRANTS Plaintiff' Motion for Summary Judgment on Liability as to inducement of infringement. The Court sets a status conference for January 11, 2010, at 1:30 p.m.

IT IS SO ORDERED.



DATED: December 21, 2009

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE