

*Appeal Nos. 15-55500, 15-55523, 15-56026*

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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PERFECT 10, INC.,

*Plaintiff-Appellant,*

v.

GIGANEWS, INC. AND LIVEWIRE SERVICES, INC.,

*Defendants-Appellees.*

On Appeal from the U.S. District Court for the Central District of California  
Hon. André Birotte  
Case No. 2:11-cv-07098-AB-(JPRx)

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**BRIEF *AMICUS CURIAE* OF i2COALITION,  
THE INTERNET ASSOCIATION AND COMPUTER &  
COMMUNICATIONS INDUSTRY ASSOCIATION  
IN SUPPORT OF DEFENDANTS-APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT**  
**(Federal Rule of Appellate Procedure 26.1)**

The undersigned counsel for i2Coalition, The Internet Association and Computer & Communications Industry Association states that none of these associations has any parent corporation, and no publicly held corporation owns stock in the associations.

DATE:        March 2, 2016        CONSTANTINE CANNON LLP

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## INTEREST OF THE *AMICI*<sup>1</sup>

The Internet Infrastructure Coalition (“i2Coalition”) is the non-profit voice of companies from the internet infrastructure industry. i2Coalition members are primarily small to medium sized businesses with global businesses in web hosting, data centers and Cloud infrastructure, as well as companies who provide services to those industries.<sup>2</sup>

The Internet Association is the unified voice leading internet companies and their global community of users.<sup>3</sup> The Internet Association is dedicated to advancing public policy solutions that protect internet freedom, promote innovation and economic growth, and empower customers and users.

The Computer & Communications Industry Association (“CCIA”) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and

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<sup>1</sup> No counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* made such a contribution. Counsel for both parties consented to the filing of this brief.

<sup>2</sup> A complete list of the i2Coalition’s members is available at <https://www.i2coalition.com>.

<sup>3</sup> A complete list of The Internet Association members is available at <http://www.internetassociation.org>.

internet products and services—companies that collectively generate more than \$465 billion in annual revenues.<sup>4</sup>

As the Supreme Court has recognized, “The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) (“*Grokster*”), citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (“*Sony*”). The issues raised in this appeal represent an important aspect of that tradeoff, as correctly struck by Congress and the courts. Here, the district court properly stated and applied the legal principles that permit copyright holders to seek relief from those who commit infringement without subjecting internet providers to virtually boundless liability for the actions of their customers. A contrary holding expanding the limits of copyright liability could have serious consequences not only for *amici* and their members, but also for future innovators and technology developers. As predictability and clarity in copyright law decrease, so does investor appetite to support innovation.<sup>5</sup> *Amici* therefore

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<sup>4</sup> A complete list of CCIA members is available at <https://www.cciagnet.org/members>.

<sup>5</sup> See Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 Wis. L. Rev. 891, 914-17 (2012); Matthew Le Merle *et al.*, Booz & Co., *The*

urge this Court to uphold the district court's sound and clear reading of copyright law, and in particular, to find that:

- Liability for direct copyright infringement must be reserved for the actor that *does* the infringing act;
- Internet and online service providers cannot face vicarious liability simply for failing to supervise the conduct of their users;
- To find vicarious liability, there must be a direct financial benefit to the alleged vicarious infringer from the infringement of that plaintiff's works;
- Deficient "takedown" notices that fail the minimal Digital Millennium Copyright Act safe harbor standards do not and cannot create knowledge of infringement sufficient for a finding of secondary infringement liability; and
- An online service provider that has not engaged in "purposeful, culpable ... conduct" with the objective of promoting

infringement of a plaintiff's works is not liable for contributory infringement or active inducement of infringement.<sup>6</sup>

### **SUMMARY OF ARGUMENT**

Congress and the courts have established a stable, sensible set of copyright liability rules, grounded in a clear distinction between direct and secondary infringement doctrines, as well as the statutory system of notice-and-takedown established by the Digital Millennium Copyright Act ("DMCA"). Appellant Perfect 10 has made a business of gaming this system, seeking a copyright windfall by distorting established copyright law principles. Perfect 10 now asks this Court, in the absence of any evidence of direct infringement, or any purpose to infringe or to foster or induce infringement, to impose liability on online service providers ("OSPs"), based on Perfect 10's calculated manipulation of a statute enacted to protect, not ensnare, those service providers. *Amici* urge this Court to join all other courts of appeal that have considered such tactics, and to reject Perfect 10's attempt to exploit the DMCA "notice and takedown" system.

Perfect 10 does not invest substantially in content; instead, it is a litigation entrepreneur, investing in lawsuits based on distortions of the law

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<sup>6</sup> *Grokster*, 545 U.S. at 936-37.

and imposition of legal costs on OSPs.<sup>7</sup> Upon finding that some users of OSPs such as Giganews have provided infrastructure to users who subsequently post some of its copyrighted content, Perfect 10 sends “takedown” notices that deliberately do not comply with Section 512 of the DMCA.<sup>8</sup> Perfect 10 then seeks legal settlements, and in the absence of settlement, files lawsuits. While Perfect 10 has never won such a case,<sup>9</sup> the nuisance cost of its litigation campaign has induced some parties to pay settlements. These are not takedown notices; these are *shakedown notices*.

The district court correctly refused to find Giganews liable for not acting on “knowledge” purportedly imparted by these deliberately defective DMCA Section 512 takedown notices. When Giganews received these

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<sup>7</sup> See, e.g., *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (“Google”); *Perfect 10, Inc. v. Visa Int’l Service Ass’n*, 494 F. 3d 788 (9th Cir. 2007) (“Visa”); *Perfect 10 v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (“CCBill”); *Perfect 10, Inc. v. Yandex N.V.*, 962 F. Supp. 2d 1146 (N.D. Ca. Jul. 12, 2013); *Perfect 10, Inc. v. Megaupload Ltd.*, No. 11cv0191-IEG, 2011 U.S. Dist. LEXIS 81931, 2011 WL 3203117 (S.D. Cal. July 26, 2011); *Perfect 10, Inc. v. Rapidshare A.G.*, No. 09-CV-2596 H, 2010 U.S. Dist. LEXIS 146053 (S.D. Cal. May 18, 2010).

<sup>8</sup> *Perfect 10 v. Giganews, Inc.*, No. 11-07098-AB, 2015 U.S. Dist. LEXIS 54063, at \*25-26 (C.D. Cal. Mar. 24, 2015) (“Perfect 10 has a long, documented history of sending service providers inadequate takedown notices under the DMCA that fail to specify infringing material, and then bringing suit for the service providers’ failure to respond to deficient DMCA takedown notices. . . . Perfect 10 *never attempted* to submit a takedown notice in this action that Giganews could actually use.”) (emphasis added).

<sup>9</sup> *Id.* at \*24 (“Perfect 10 has never obtained a judgment in a contested proceeding in any of its roughly two dozen copyright lawsuits.”).

notices, which lacked information both legally necessary and functionally required, Giganews requested the missing information. Perfect 10 refused to provide it. The district court found that Giganews' policy and practice was to expeditiously take down any content properly identified in an adequate and compliant notice. Had Perfect 10 provided such notices, the allegedly infringing content would have been removed. Perfect 10's refusal to provide Giganews with the information necessary to identify and remove infringing material confirms what other courts have found – that Perfect 10's true interest is in setting up OSPs for liability,<sup>10</sup> rather than in protecting its copyrighted works from infringement.<sup>11</sup> The district court correctly sanctioned Perfect 10 for abusing the law and its processes.<sup>12</sup>

Congress repeatedly has stated its intent to support innovation and growth in the technology sector.<sup>13</sup> The DMCA generally, and Section 512(c) specifically, were enacted to protect OSPs from undue liability. Section 512 gives copyright holders a clearly defined mechanism for securing the

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<sup>10</sup> *Id.* at \*23 (“All of the evidence before the Court demonstrates that Perfect 10 is in the business of litigation, not protecting its copyrights ...”).

<sup>11</sup> *Id.* at \*24 (“In the life of the company, more than half of Perfect 10's revenues have been generated by litigation ...”). *See also* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1108 (2015) (“The essence of trolling is that the plaintiff is more focused on the business of litigation than on selling a product or service or licensing their IP to third parties to sell a product or a service.”).

<sup>12</sup> *Id.* at \*23-25.

<sup>13</sup> S. Rep. No. 105-190, at 1-2 (1998).

removal of known infringing materials from the internet, and protects complying internet providers from related copyright claims as well as claims by users for wrongful takedown. Congress certainly did not intend it to be more profitable for a copyright owner to provide a defective notice than a compliant one.

What Perfect 10 and *amicus* Recording Industry Association of America (“RIAA”) ask this Court to do now is to turn the law on its head, and to work *backward* to impute “knowledge” from a plaintiff’s abuse of and noncompliance with Section 512(c). Were this Court to do so, settled understandings of direct and secondary liability and of the explicit safe harbor of Section 512 would be sharply curtailed. This would frustrate the explicit statutory scheme, intended to replace the uncertainties of secondary liability litigation with the clearer rules set out in Section 512. Rather than a “safe harbor,” OSPs would be left with an inefficient and costly obligation to approximate the information that would have, and should have, been provided in a compliant notice by the entity best equipped to provide it—the copyright owner. Such an undertaking would not only be prohibitively expensive for many OSPs; it would also result in wrongful takedowns that would chill legitimate speech. Further, the large statutory damages available in such a case almost completely undermine the incentives created by the

DMCA. Adopting the arguments proposed by Perfect 10 and the RIAA would encourage companies to game the system, moving away from the balance carefully created by the DMCA.

The continued viability of the internet depends on the reliability of its rules, practices, and assumptions. A 2011 Booz & Co. study of digital content intermediaries (“DCIs”)—entities that provide “search, hosting, and distribution services for digital content”—concluded that “[h]olding DCIs liable for the content uploaded by users would have a significantly negative effect on investment in this space.”<sup>14</sup> The authors observed that investors are wary of the ambiguity surrounding potential liability for copyright infringement, and deterred by increased risk. *Id.*

Accordingly, *amici* urge that in this case this Court re-affirm these key principles as a basis for a vital internet:

First, direct infringement requires a volitional act. A defendant directly infringes only if it “does” the infringing act, not if it merely supplies the means used by others to infringe.

Second, the copyright holder has the burden under Section 512 to properly and accurately identify and report allegedly infringing uses to OSPs. Perfect 10’s proposed formulations of secondary liability seek to

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<sup>14</sup> Le Merle, *supra* note 5. *See also* Carrier, *supra* note 5.



impose duties of investigation and monitoring on OSPs. This flies in the face of settled law and policy and would impose an impossible burden on OSPs.

Third, a defective Section 512 takedown notice does not and cannot impart “actual knowledge” sufficient to create secondary liability where none would otherwise exist. It defies both reason and the underlying purpose of Section 512 to suggest that a plaintiff can send a deliberately defective notice, which does not itself provide a reliable or efficient basis for a provider to remove the content, and then seek to hold the provider liable solely on the basis of “knowledge” imparted by such a notice. To avoid such a perverse result, this Court should affirm that a defective notice cannot be a basis for finding actual knowledge and hence secondary liability.

## **ARGUMENT**

### **I. The Volitional Act Requirement Assures that Liability is Assigned to Those Who “Do” Infringing Acts.**

The district court correctly held that direct infringement requires proof that a defendant “does” the infringing act. For more than fifteen years the case law has embraced this requirement of volition for OSPs.<sup>15</sup> *Amici* urge

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<sup>15</sup> See *Fox Broad. Co. v. Dish Network L.L.C.*, No. 12-4529, 2015 WL 1137593, at \*11 (C.D. Cal. Jan. 20, 2015) (“The volitional conduct doctrine is a significant and long-standing rule, adopted by all Courts of Appeal to have considered it ...”).

the Court to unambiguously confirm the necessity of finding volition if an OSP is to be held liable for direct infringement.

Today's consumers share information not by hand or mail, but through servers, routers, and hard drives. Courts recognize that if a user decides to engage in online infringement, the internet companies and OSPs that only enable such speech should not be directly liable for it, any more than the phone company or postal service should be liable for misconduct by their customers. The volitional act doctrine keeps liability on the culpable party, without diminishing any rights of copyright owners or putting OSPs in the position of judge or jury. It reserves direct infringement liability, with its attendant strict liability and statutory damages, for those who "do" the infringing act.

**A. Courts Widely Recognize Volition as an Essential Element of Direct Infringement.**

When addressing direct infringement claims against OSPs—not the end users posting the infringing content—the Second and Fourth Circuits, as well as district courts across the country, have explicitly accepted volition as a necessary element. Beginning with *Netcom*,<sup>16</sup> courts have recognized that where an end user commits and can be directly liable for an action, "it does

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<sup>16</sup> *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*").

not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for functioning of the Internet,” even where the technology provider has knowledge of the potential for copyright infringement by its subscribers. 907 F. Supp. at 1372-73.<sup>17</sup>

In *CoStar*,<sup>18</sup> the Fourth Circuit held that hosting and thus enabling users to post real estate listings that could be infringing did not make the site itself an infringer: “While the Copyright Act does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner’s rights, it nonetheless requires *conduct* by a person who causes in some meaningful way an infringement.” 373 F.3d at 549; *see id.* at 555 (direct infringement cannot be found from “the automatic copying, storage, and transmission of copyrighted materials” in response to user requests).

The Second Circuit endorsed the *Netcom/CoStar* volition requirement in *Cablevision*.<sup>19</sup> Where Cablevision furnished its subscribers with a system through which they could record and store cable programming on

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<sup>17</sup> Other district courts in this Circuit have followed *Netcom*. *See Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1114-15 (D. Nev. 2006); *Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1996).

<sup>18</sup> *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004).

<sup>19</sup> *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”).

Cablevision’s network for later playback, the Second Circuit found that the user who “presses the button to make the recording ... supplies the necessary element of volition,” and therefore is subject to direct liability. *Cablevision*, 536 F.3d at 131. The Court found it inappropriate to “impose liability as a direct infringer on a different party for copies that are made automatically upon [the user’s] command.” *Id.*

Federal district courts in at least four other circuits have also endorsed the volition requirement. *See Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303, 1309-10 (S.D. Fla. 2011) (granting motion to dismiss direct infringement claim; automatic copying by software does not constitute volition);<sup>20</sup> *Flava Works, Inc. v. Gunter*, No. 10-6517, 2011 WL 1791557 (N.D. Ill. May 10, 2011) (dismissing direct infringement claim against an online video bookmarking site; volitional copying was done by users, not defendant’s automated processes);<sup>21</sup> *Parker v. Google, Inc.*, 422 F. Supp. 2d

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<sup>20</sup> *Disney* criticized a district court case in another circuit, *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009), which, while accepting the requirement of volition, erroneously construed conduct relevant to secondary liability as indicia of volition. *Disney*, 798 F. Supp. 2d at 1309. Thus, *amicus* RIAA’s reliance on *Arista Records* is misplaced; and, notably, RIAA’s brief omits mention of the *Disney* precedent and its criticism of *Arista Records*.

<sup>21</sup> On later appeal from a preliminary injunction, the Seventh Circuit reversed the district court finding of contributory infringement; and although the court did not explicitly adopt a volition requirement, it affirmed that the

492 (E.D. Pa. 2006), *aff'd*, 242 Fed. App'x 833 (3d Cir. 2007) (non-precedential), *cert. denied*, 552 U.S. 1156 (2008); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. & Nw. Nexus, Inc.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997) (volition element not met for direct infringement where defendant “only provided the means to copy, distribute or display plaintiff's works, much like the owner of a public copying machine used by a third party to copy protected material”); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997) (volition required for direct infringement of distribution right).

The district court here consistently and correctly held that Giganews could not be directly liable for infringing acts done by its users. The court explained that at its core, volition “is a basic requirement of causation,”<sup>22</sup> and that “*direct* liability must be premised on conduct that can reasonably be described as the *direct cause* of the infringement.” *Perfect 10 v. Giganews, Inc.*, No. 11-07098, 2013 WL 8628034 at \*10 (C.D. Cal. Nov. 14, 2014)

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user, not the defendant online service, directly infringed. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757, 760 (7th Cir. 2012).

<sup>22</sup> *Amicus* RIAA's concern that the volitional act requirement is inconsistent with the strict liability standard applicable to copyright infringement is misplaced. “The requirement of volitional conduct does not undermine the strict liability nature of copyright, but rather serves to ensure that there is a casual connection between the conduct in question and the person alleged to have violated the copyright owners' Section 106 rights where direct infringement is alleged.” William F. Patry, 3 *Patry on Copyright* § 9:5.50 (2015).

(“Op.”) “A system that ‘automatically transmits users’ material but is itself totally indifferent to the material’s content’ is no more the direct cause of acts committed by its subscribers than is ‘a traditional telephone company when it transmits the contents of its users’ conversations.’” *Id.* at \*9, quoting *CoStar*, 373 F.3d at 551.

A recent Ninth Circuit opinion further supports this district court’s requirement of volition as “a basic requirement of causation.” *Id.* at \*10. In *Fox Broad. Co. v. Dish Network, L.L.C.*, 747 F.3d 1060 (9th Cir. 2014), the Ninth Circuit affirmed the district court’s holding that there was no likelihood of success on a direct infringement claim where defendant’s “program create[d] [a] copy only in response to [a] user’s command,” and therefore did not meet the direct liability requirement “that the defendant cause the copying.” *Id.* at 1067, citing *Cablevision*, 536 F.3d at 130. This holding recognized that directly liability must be limited to he who causes the copy to be made. The Ninth Circuit did not disturb the district court’s analysis, which relied on *Netcom* and *Cablevision*, and found that because “[t]he user ... and not Dish [wa]s the ‘most significant and important cause’ of the copy,” Fox had not proven a likelihood of success on its claim that Dish “directly infringe[d] on its exclusive right to reproduction.” *Fox Broad.*

*Co. Inc. v. Dish Network, L.L.C.*, 905 F. Supp. 2d 1088, 1102 (C.D. Cal. 2012) (“*Fox*”).

Based on this substantial precedent, this Court should continue on the path it began in *Fox* and affirm that a volitional act is a necessary predicate to a finding of liability for direct infringement.

**B. The Volition Requirement Serves a Critical Role in Keeping the Internet Running.**

In attacking the district court’s holding that Giganews’ systems did not directly cause infringement, Perfect 10 urges this Court to expose a wide array of online innovators to liability for merely knowing that another party might be infringing. Failure to require volition would imperil all OSPs and thus public access to the internet. *Netcom* aptly describes why thus burdening OSPs would be mistaken as both law and policy:

Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party directly liable for causing the copies to be made. Plaintiffs occasionally claim that they only seek to hold liable a party that refuses to delete infringing files after they have been warned. However, such liability cannot be based on a theory of direct infringement, where knowledge is irrelevant. The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred.

*Netcom*, 907 F. Supp at 1372.

Settled copyright law already provides consequences for OSPs that engage in purposeful, culpable conduct that encourages or induces infringement. Under doctrines such as contributory infringement, vicarious liability, and inducement, indirect liability attaches where a defendant takes additional actions (i.e., over and above merely operating its system) clearly intended to promote infringement. The courts developed these secondary liability doctrines and considerations specifically to give judges the tools and discretion to meet the needs of both copyright protection and innovation. *See Sony*, 464 U.S. at 442; *Grokster*, 545 U.S. at 929-30; *Visa*, 494 F.2d at 794; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21, 1027 (9th Cir. 2001) (“*Napster*”).

Requiring volition as a necessary element of direct infringement liability is the only way to provide reasonable expectations for those who would invest in providing any online service that facilitates free speech communications and posting capabilities to its users. To assure continued innovation and investment in the structure and services of the internet, this Court should hold unambiguously that direct infringement requires a showing of volitional conduct.



## **II. The Internet Could Not Exist Under Perfect 10's Construction of Secondary Liability.**

Perfect 10 would expand liability for internet companies far beyond any precedent, effectively obliging OSPs to police and monitor the conduct of each of their users. Neither Congress nor the judiciary has ever forced an OSP to affirmatively police the conduct of each of its users. Any such rule would impose an impossible burden on the entities that maintain the internet.

### **A. The District Court's Articulation and Application of Vicarious Liability Doctrine Appropriately Protects Internet Companies from Liability for the Independent Bad Conduct of Users.**

The law of this circuit does not permit imposing vicarious liability unless an entity has “(1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity.” *Visa*, 494 F.2d at 802 (citing *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004), and *Napster*, 239 F.3d at 1022). As this Court stated in *Google*, “to succeed in imposing vicarious liability, a plaintiff must establish that the defendant exercises the requisite control over the direct infringer.” *Google*, 508 F.3d at 1173. OSPs have no general right or ability to supervise the speech of their users, nor should they do so. In order to have the ability to control and supervise user conduct *sua sponte*, a service provider would have to have actual knowledge of each specific infringing activity. But

OSP's systems and networks daily support the transmission of data by billions of users.<sup>23</sup> It would be

simply impossible for a search engine – to say nothing of an ISP or bandwidth conduit – to cull through the literally billions of links and messages they process every day and identify all those messages and Web pages that may create liability under any law. This is not just a technical problem of assessing those petabytes of data, though comparing everything on the Web to everything ever copyrighted in real time is computationally infeasible with existing or any foreseeable technology. Rather, the deeper problem is that there is no way to automate the process of determining legal liability.

Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. on Telecomm. & High Tech. L. 101, 110 (2007). It is thus patently infeasible to demand that service providers monitor the conduct of each of those users and then make determinations of the legality of that conduct. *See, e.g., Google*, 508 F.3d at 1174 (quoting the lower court's finding that Google could not possibly “analyze every image on the [I]nternet, compare each image to all the other copyrighted images that exist in the world ... and determine whether a certain image on the web infringes someone's copyright”). If such a requirement were imposed, many internet companies, particularly smaller enterprises that today serve hundreds of millions of users worldwide, would

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<sup>23</sup> The Statistics Portal estimated that in 2015, 3.17 billion people worldwide used the internet. Statista, *Number of worldwide internet users from 2000 to 2015 (in millions)*, <http://www.statista.com/statistics/273018/number-of-internet-users-worldwide/> (last visited Feb. 26, 2016).

collapse under this impossible burden. Simply put, a small business that provides services to 1,000 other small businesses would not have the resources to create and staff a mechanism that would meet the standards proposed by Perfect 10 to be shielded from liability.

With respect to the financial benefit element of the vicarious liability inquiry, the district court correctly required that this metric be based on infringement of *plaintiff's* copyrighted works. Op. at 4-6. This requirement is consistent with *Ellison*, which clearly stated that “[t]he essential aspect of the ‘direct financial benefit’ inquiry is whether there is a casual relationship between the infringing activity and any financial benefit a defendant reaps.” *Ellison*, 357 F.3d at 1079. The district court correctly interpreted the reference to “the infringing activity” to refer to *the infringement of plaintiff's works*. Op. at 4-5. Plaintiffs have no standing to base their claim on allegations that a defendant benefitted financially from the infringement of *another's* works—such a claim would offend Article III of the United States Constitution’s requirement of “a causal connection between the injury and the conduct complained of.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42) (1976)). Furthermore, Perfect 10’s proposed construction of the law would render virtually every internet company liable for any bad

conduct by its users, and would eliminate plaintiffs' burden of proving that the defendant financially benefitted from that *specific infringement*. The district court's articulation of the elements of vicarious liability supports the rational result that internet companies cannot incur vicarious liability simply because they charge users a fee for general access to their services, unrelated to any alleged infringement, *even though* some users may then use those internet services for infringing purposes.

**B. The District Court Correctly Rejected Perfect 10's Attempt to Manufacture Contributory Liability By Sending Defective Section 512 Notices, Purportedly Imputing Knowledge of Infringement.**

A cause of action based on contributory infringement requires proof that a defendant "(1) ... has knowledge of a third party's infringing conduct, and (2) induces, causes, or materially contributes to the infringing activity." *Visa*, 494 F.3d at 795 (quotations omitted). A defendant is not liable for contributory infringement where its product "is capable of substantial noninfringing uses." *Sony*, 464 U.S. at 445. "Mere knowledge of infringing potential or of actual infringing uses does not subject a product distributor or service provider to liability." *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1038 (9th Cir. 2013).

Perfect 10 argues that it put Giganews in the position of “contributor” by sending Giganews defective DMCA takedown notices. This proposition stands on its head both the law of contributory liability and the purpose of Section 512 of the DMCA. Any attempt to impute knowledge from a legally-deficient notice would turn Section 512(c) from a provision meant to limit liability into one that imposes it.

The Ninth Circuit has rejected multiple attempts to assign knowledge of infringement to defendants through defective takedown notices, including in a case involving this same plaintiff. *See Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1071-73 (9th Cir. 2013) (Plaintiff’s non-compliant notices could not support claim that defendants had “requisite specific knowledge of infringement” for contributory liability, as defective notices failed to provide sufficient identifying information about alleged infringing works, and were thus “indistinguishable from a generalized notification that infringement is occurring”); *CCBill*, 488 F.3d at 1113 (“Since Perfect 10 did not provide effective notice, knowledge of infringement may not be imputed to CCBill or CWIE based on Perfect 10’s [inadequate notices]”).

Congress enacted Section 512 to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand,” and to avoid “the specter of

liability ... chill[ing] innovation.” *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) (quoting S. Rep. No. 105-190, at 8 (1998)). There is nothing inequitable about requiring a copyright owner, who bears the burden of proving infringement, to come forward with the minimal factual information and assurances that Congress prescribed for the Section 512(c) notice.

Under Perfect 10 and RIAA’s proposed construction, unscrupulous plaintiffs could provide intentionally defective notices in an effort to *create* apparent or purported knowledge for OSPs, turning into a sword a provision intended as a shield. But it is not even this simple. There is a *reason* that notices should comply with the law. In the absence of such compliance, notices are defective *in fact* as well as in law.

Without having received a notice fully complying with the statutory obligations under the DMCA, providers would be compelled to engage in expensive, burdensome, and often impossible investigations to attempt to both identify potentially infringing material, and to determine whether that material is actually infringing. As *amici* discuss below, the realities of risk and expense of review will mean that OSPs will have an incentive to over-remove content, and the result will be that lawfully posted material is taken down.

To avoid the curtailment of free speech, and to facilitate innovation, the law requires that copyright holders bear the burden of policing and proving copyright infringement. “[T]he law ‘impose[s] no such investigative duties on service providers.’” Op. at \*3 (quoting *CCBill*, 488 F.3d at 1114); accord *Grokster*, 545 U.S. at 940 n.12. The DMCA also, as the district court correctly noted, “place[s] the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.” *CCBill*, 488 F.3d at 1113; *UMG Recordings*, 718 F.3d at 1023. Section 512 states clearly that service providers have no obligation to “monitor[] [their] service[s] or affirmatively seek[] facts indicating infringing activity.” See 17 U.S.C. § 512(m)(1).

Several important considerations support these settled rules. First, the copyright holder is the only party able to accurately determine whether a use is infringing. “Copyright holders know precisely what materials they own, and are thus better able to efficiently identify infringing copies than service providers ... who cannot readily ascertain what material is copyrighted and what is not.”<sup>24</sup> Thus, Congress imposed the duty on the copyright holder, as

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<sup>24</sup> *UMG Recordings*, 718 F.3d at 1021-22 (citing S. Rep. No. 105-190, at 48 (“[A] [service] provider could not be expected, during the course of its brief cataloguing visit, to determine whether [a] photograph was still protected by

the entity best positioned to assess in good faith whether use of a work they own is unauthorized or intentionally tolerated,<sup>25</sup> and whether it could not reasonably constitute fair use.<sup>26</sup> Otherwise, an OSP is saddled with the impossible task of scouring its constantly-changing system for potentially infringing material, with no colorable way to assess the relative rights of third parties.

Even the task of removing materials identified by *compliant* takedown requests consumes substantial resources.<sup>27</sup> Requiring service providers to go

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copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.”); H.R. Rep. No. 105-551, pt. 2, at 57-58 (1998) (same)).

<sup>25</sup> See Tim Wu, *Tolerated Use*, 31 Colum. J. L. & Arts 617, 619 (2008) (describing the common occurrence of copyright owners choosing not to enforce their exclusive rights to their copyrighted work, for reasons including “a desire to create goodwill, or a calculation that the infringement creates an economic complement [to] the copyrighted work . . .”).

<sup>26</sup> See, e.g., *UMG Recordings*, 718 F.3d at 1021 (Recognizing presence of “videos subject to copyright protection but lawfully available on [defendant’s] system”) (internal quotations omitted); cf. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1138 (9th Cir. 2015) (“Copyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notification— whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law.”).

<sup>27</sup> Since the enactment of the DMCA in 1998, use of the statutory takedown provisions has increased exponentially. For example, as of February 24, 2016, Google reported that it had received over 75 million copyright removal requests in the previous month. Google’s publicly available Transparency Report shows a clear and dramatic rise in the number of URLs requested to be removed from Search each week due to copyright between



above and beyond responding to compliant takedown requests that adequately identify and locate the allegedly infringing material would impose an impossible and unnecessary burden on them. Shifting the burden of copyright policing to OSPs “would dramatically shrink the playing field for new companies in the user-generated content space.”<sup>28</sup>

As this Court wrote in 2007, the notice requirements of Section 512(c)(3) are “not superfluous”.<sup>29</sup> OSPs receive an enormous number of defective notices that cannot support a takedown,<sup>30</sup> including notices from entities other than the copyright holder,<sup>31</sup> automatically-generated notices

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2011 and the present. Google Inc., Google Transparency Report (2016), <http://www.google.com/transparencyreport/removals/copyright/> (last visited Feb. 29, 2016). Similarly, Twitter reported receiving more than double the number of copyright notices in 2015 compared to 2014. Twitter, Inc., Twitter Transparency Report (2016), <https://transparency.twitter.com/copyright-notices/2015/jul-dec> (last visited Feb. 29, 2016).

<sup>28</sup> Elliot Harmon, “*Notice-and-Stay-Down*” Is Really “*Filter-Everything*”, Electronic Frontier Foundation, Jan. 21, 2016, <https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything>.

<sup>29</sup> *CCBill*, 488 F.3d at 1112.

<sup>30</sup> For example, nearly ten percent of the DMCA takedown notices served on Google in 2012 either failed “to identify the infringed work and the infringing material and provide [the copyright owner’s] contact information,” or “misidentif[ied] the copyright owner or provide[d] inactive URIs as takedown requests.” Daniel Seng, “*Who Watches the Watchmen?*” *An Empirical Analysis of Errors in DMCA Takedown Notices*, Jan. 23, 2015, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2563202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563202).

<sup>31</sup> Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium*

that fail to present a bona fide infringement issue,<sup>32</sup> and notices from senders seeking to stifle competition<sup>33</sup> or suppress legitimate information sharing.<sup>34</sup>

The Supreme Court in *Sony* described copyright law as “managing the tradeoff” between technological innovation and artistic protection. The Court envisaged no room for gamers of the system, financially interested in exacting revenue from the infringement rather than protecting their own works, to impose burdens and third-party liability on OSPs who comply with valid takedown notices.<sup>35</sup> The district court found that Perfect 10 “ha[d] a long, documented history of sending service providers inadequate takedown

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*Copyright Act*, 22 Santa Clara Computer & High Tech. L. J. 621, 651 (2006) (noting that “55% of the Google § 512(d) notices [studied] [we]re competition-related. Entities send these notices to request the removal of links to their competitors.”).

<sup>32</sup> Jamie Williams, *Absurd Automated Notices Illustrate Abuse of DMCA Takedown Process*, Electronic Frontier Foundation, Feb. 24, 2015, <https://www.eff.org/deeplinks/2015/02/absurd-automated-notices-illustrate-abuse-dmca-takedown-process> (“[T]he notice ... purports to protect an album ... But *not one* of the seven allegedly infringing URLs listed in the notice even refers to the album, let alone in an infringing way.”).

<sup>33</sup> Urban, *supra* note 31, at 672 (“[M]any of these notices appear to be related to competitors seeking to de-list their competitors in the Google search engine ...”).

<sup>34</sup> See, e.g., *Online Policy Group v. Diebold Inc.*, 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (“Diebold sought to use the DMCA's safe harbor provisions — which were designed to protect ISPs, not copyright holders — as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”).

<sup>35</sup> *Amici* do not suggest that, by themselves, DMCA notices that comply with Section 512(c)(3) would supply the requisite knowledge for infringement liability.

notices under the DMCA that fail to identify specific infringing material, and then bringing suit for the service providers' failure to respond to deficient DMCA notices.” *Perfect 10, Inc. v. Giganews, Inc.*, *supra* n.8 at \*10. Perfect 10 decided deliberately *not* to use an available method to create a notice “that would [have] result[ed] in almost immediate removal of ‘90 percent of the Perfect 10 content on Giganews’ servers” and would have taken only “15 minutes” to create. *Id.* Perfect 10 declined to provide additional information to enable Giganews to remove any infringing content, and filed suit instead.

Plaintiffs seeking unjustified windfalls at the expense of the very technology innovators that the DMCA is intended to protect must not be permitted to turn the safe harbor provision into a basis for expanded liability. The court should affirm the district court’s holding that a defective notice cannot itself impart actual knowledge sufficient to form the basis of a claim for contributory liability.

**C. *Grokster*’s Mandate That Liability for Inducement Requires Purposeful, Culpable Conduct Ensures That Technologies with Significant Non-Infringing Uses Remain Available.**

The Supreme Court in *Grokster* proclaimed that “mere knowledge of infringing potential or of actual infringing uses” is an insufficient basis to impose liability on a distributor of software, even if the software were to be

widely or mostly used for infringement. *Grokster*, 545 U.S. at 937. Rather, inducement liability requires that the defendant have engaged in “purposeful, culpable expression and conduct” with the “object of promoting ... infringe[ment].” *Id.* at 936-37.

It is important that this Court apply the Supreme Court’s test for inducement unambiguously. Failure to faithfully apply *Grokster*’s insistence on “purposeful, culpable ... conduct” as a prerequisite to liability for inducement would lead to boundless liability for a vast array of technology innovators who happen to know or suspect that some users, somewhere, may be infringing copyright. In fact, such a test would reach far beyond the online context, potentially imposing liability on the manufacturers of photocopiers, hard drives, blank recordable media, and video recorders (as all of these technologies are surely used for infringing purposes by someone, somewhere). Similarly, nearly every OSP is aware that some users will engage in infringing acts. “Mere knowledge” to that effect cannot form a basis for inducement liability, nor can it impose a fair or practical duty to “take affirmative steps to prevent infringement.” *Id.* at 939 n.12.

In sum, the *amici* urge the Court to affirm that, in the absence of competent evidence that a defendant actively induced the infringement of a plaintiff’s copyrighted works, no liability can attach. This rule allows OSPs

to continue to provide services to the public without risking unjustified and unlimited liability. It is necessary to a robust and growing internet infrastructure.

## CONCLUSION

The decision of the district court should be affirmed on its judgment dismissing Perfect 10's claims of direct and secondary copyright liability.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief *amicus curiae* is proportionately spaced, has a typeface of 14 points, and contains 6,621 words.

DATED: March 2, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2016, I electronically filed the foregoing Brief *Amicus Curiae* of i2Coalition, The Internet Association, and Computer & Communications Industry Association, in Support of Defendants-Appellees, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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