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 9

10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

13 ALKIVIADES DAVID, *et al.*,

14 Plaintiffs,

15 v.

16 CBS INTERACTIVE INC., CNET
 NETWORKS, INC.,

17 Defendants.

Case No. CV11-9437 DSF (JCx)

**NOTICE OF MOTION AND
 MOTION OF CBS INTERACTIVE
 INC. AND CNET NETWORKS, INC.
 TO DISMISS COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Hon. Dale S. Fischer

Date: April 9, 2012
 Time: 1:30 p.m.
 Crtrm.: 840

1 **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on April 9, 2012, at 1:30 p.m., or as soon
3 thereafter as counsel may be heard, in the courtroom of the Honorable Dale S.
4 Fischer, located in the United States Courthouse, Courtroom 840, 255 East Temple
5 Street, Los Angeles, California 90012, CBS Interactive Inc. and CNET Networks,
6 Inc. (“Defendants”) will and hereby do move this Court to dismiss the Plaintiffs’
7 complaint (“Complaint”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil
8 Procedure. This Motion is made following the conference of counsel pursuant to
9 Local Rule 7-3, which took place on January 12, 2012.

10 This Motion is made on the grounds that each of the three claims for relief in
11 the Complaint fails as a matter of law: (1) the Third Claim for Relief, for vicarious
12 copyright infringement, fails because the Complaint does not allege that Defendants
13 possessed the right and ability to control the alleged direct infringement of
14 Plaintiffs’ musical works by users of peer-to-peer network services; (2) the Second
15 Claim for Relief, for contributory copyright infringement, fails because the
16 Complaint does not allege that the Defendants had actual knowledge of specific acts
17 of infringement of Plaintiffs’ copyrighted works; and (3) the First Claim for Relief,
18 for inducement of infringement, fails because the Complaint does not allege the
19 requisite “purposeful, culpable expression and conduct” by Defendants, as it is not
20 alleged that Defendants induced conduct they knew to be unlawful, that they knew
21 of Plaintiffs’ copyrights, or that they promoted the use of their own products to
22 infringe copyrights.

23 In addition, the Complaint must be dismissed with respect to nineteen of the
24 Plaintiffs,[†] because these Plaintiffs have not alleged that they have obtained
25 copyright registrations for any works alleged to have been infringed, as is required
26 to state a claim for copyright infringement pursuant to the Ninth Circuit’s
27 construction of 17 U.S.C. § 411(a).


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This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, all of the pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to its ruling.

Dated: March 5, 2012

KENDALL BRILL & KLIEGER LLP

By: 
Richard B. Kendall
Attorneys for CBS Interactive Inc.
and CNET Networks, Inc.

† The following nineteen plaintiffs have not alleged registered works alleged to be infringed: Solid Productions, Steven Batiz, pka DJ CMS, Tony Bell, pka TC Izlam, Derrick Braxton, Reginald Brooks, member of High Council, Eliza Brown, pka DJ Chipman, Oscar Brown, Jonathan Carlton, pka Lord Piff, Dayquan Davis, pka Droptop Slim, member of Square Off, Nacolbie Edwards, pka GLAM.I.ROCK, Isaac Freeman, Jr., pka Fat Man Scoop, Mitchell Graham, pka Peso 131, Keith Jones, pka DJ Alamo, Nailah Lamees, pka Nicole Lyles, Gerald Spence, pka Jerry Hubcap, Irene Stokes, pka Mama, William Tennyson, Kevin Williams, pka OJ Kev-Ski, Raheem Williams, pka Amen.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This lawsuit marks an unprecedented attempt to expand the law of copyright
5 infringement to impose liability not on direct copyright infringers, nor on alleged
6 secondary infringers (such as a peer-to-peer (“P2P”) file-sharing service that end-
7 users may use to commit acts of direct infringement), but rather on alleged tertiary
8 infringers that operate comprehensive informational websites (CNET and
9 download.com) offering descriptions, analysis, ratings, and web links to an
10 enormous range of software products and services.

11 The liability that Plaintiffs seek to impose is not based on any allegation that
12 Defendants directly copied Plaintiffs’ works, or, for that matter, on allegations that
13 any primary infringers – which the Complaint identifies as “unemployed college
14 students and housewives” – used CNET or download.com to make or disseminate
15 unauthorized copies of Plaintiffs’ works. Plaintiffs do not claim that CNET is itself
16 a P2P service or a repository of unauthorized copies. On the contrary, the crux of
17 Plaintiffs’ claims is that by listing P2P file-sharing services in the CNET directory
18 and by providing editorial reviews and links to the services on download.com,
19 Defendants are liable for any copyright infringement carried out by end users of
20 such unaffiliated third-party file-sharing services.

21 This theory of tertiary liability does not fall within any class of secondary
22 infringement that the courts have recognized to date. Instead, it is an expansion of
23 liability that has never been recognized and that would create grave uncertainties for
24 writers and publishers – including search engines, web encyclopedias, blogs and
25 most technology journalists – that seek to communicate truthful information about
26 emerging technologies including P2P file-sharing services.

27 Neither Congress nor the courts have ever designated all P2P file sharing
28 services as *per se* unlawful. *See infra* p. 8; *see also* Complaint (“Compl.”) ¶ 154

1 (noting existence of “P2P clients who operate legally”). Indeed, Congress and the
2 courts have recognized that P2P technology that enables internet users to share files,
3 including their own works, public domain works, and licensed media files, is one of
4 the great benefits of the digital age. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v.*
5 *Grokster, Ltd.*, 545 U.S. 913, 920 (2005) (“*Grokster*”) (describing “benefits in
6 security, cost, and efficiency”).

7 Despite this, Plaintiffs seek to impose liability for conduct far removed from
8 any act of direct infringement of any of Plaintiffs’ works and without alleging the
9 predicate facts that both the Ninth Circuit and Supreme Court require to support
10 claims of secondary (or in this case, tertiary) infringement liability. Under the new
11 expansive tort that Plaintiffs ask the Court to create, numerous restrictions that
12 courts have consistently placed on secondary liability would be eliminated:

- 13 • The Complaint does not allege that Defendants control or have the ability to
14 control any act of direct infringement. Such control, however, has always
15 been the hallmark and necessary basis for liability for vicarious copyright
16 infringement. *See infra* pp. 11-14.
- 17 • The Complaint does not allege that Defendants know of any specific act of
18 infringement by end users. Yet, where a product is capable of substantial
19 non-infringing uses, as here, such knowledge is required as a basis for
20 contributory liability of the kind addressed in *Sony Corp. of Am. v. Universal*
21 *City Studios, Inc.*, 464 U.S. 417 (1984), and *A&M Records, Inc. v. Napster,*
22 *Inc.*, 239 F.3d 1004 (9th Cir. 2001) (“*Napster*”). *See infra* pp. 15-18.
- 23 • The Complaint does not allege that Defendants knew that their activities,
24 linking to and reviewing P2P services, were unlawful, or that they knew about
25 or targeted Plaintiffs’ copyrights, or that they promoted the use of their own
26 websites specifically to infringe copyrights. The “inducement rule . . .
27 premises liability on purposeful culpable expression and conduct,” *Grokster*,
28 545 U.S. at 937, and the Supreme Court has recently affirmed that knowledge

1 of one’s unlawful conduct is required for the requisite culpable intent for an
2 inducement claim. *Global-Tech Appliances v. SEB S.A.*, 563 U.S. ___, 131
3 S. Ct. 2060, 2066-67 (2011) (describing consistency between knowledge
4 requirements in the patent law and culpable intent requirement in *Grokster*).

- 5 • The Complaint admits that not all P2P services are secondary infringers and
6 acknowledges that Defendants have ceased linking to P2P services that a
7 court has determined to be unlawful. Compl. ¶¶ 12, 89. The Complaint does
8 not allege that Defendants knew facts necessary to determine that P2P
9 services they describe and link to are secondary infringers or that Defendants
10 promoted any such service after knowing that the P2P service was unlawful.
- 11 • Plaintiffs cannot reconcile imposing liability on information service providers
12 like Defendants (as opposed to product manufacturers or sellers) with
13 principles of freedom of expression and the Supreme Court’s guarantee in
14 *Grokster* that inducement liability will do “nothing to compromise legitimate
15 commerce or discourage innovation having a lawful promise.” *Grokster*, 545
16 U.S. at 937.

17 No court has ever gone as far as Plaintiffs request in imposing liability on
18 third-party informational websites and linking services like Defendants’. This Court
19 should not be the first.

20 **II.**

21 **BACKGROUND**

22 **A. Allegations of the Complaint**

23 CNET is a popular technology media website network that publishes news
24 articles, blogs, reviews, and podcasts about technology, software, and consumer
25 electronics. *See generally* <http://www.cnet.com>. Download.com is one of CNET’s
26 websites, and is, as the Complaint admits, the world’s largest comprehensive
27 software directory and rating service, providing reviews, ratings, and download
28 links for a vast range of third-party software, including “software of all types.”

1 Compl. ¶¶ 1, 117; *see generally* <http://www.download.com>. CNET and
 2 [download.com](http://www.download.com) are owned and operated by Defendant CBS Interactive, Inc.¹ Among
 3 hundreds of thousands of products listed in the [download.com](http://www.download.com) directory, a tiny
 4 fraction are alleged to be third-party client software used to install and join certain
 5 P2P file-sharing services, such as Frostwire (www.frostwire.com), BitComet
 6 (www.bitcomet.com), BitTorrent (www.bittorrent.com), and µTorrent
 7 (www.utorrent.com). *See, e.g.*, Compl. ¶ 101. It is undisputed that P2P file-sharing
 8 services can operate without violating copyright law, *id.* ¶ 154, and that CNET and
 9 [download.com](http://www.download.com) have removed the P2P client software, such as the LimeWire
 10 software, from the [download.com](http://www.download.com) directory immediately after a federal district court
 11 judge held that LimeWire was liable for inducing copyright infringement. *Id.* ¶¶ 89
 12 & 110. The Complaint admits that [download.com](http://www.download.com) and CNET offer “legitimate”
 13 services as one of the “most heavily visited sites in the world” providing download
 14 support for “non-infringing licensed software such as Quickbooks accounting
 15 software or Adobe Acrobat.” *Id.* ¶ 1.

16 As alleged in the Complaint, Plaintiffs are several dozen individual owners of
 17 copyrights in musical works. Compl. ¶¶ 18-78.² One of the Plaintiffs, Alkiviades
 18 David, is also the owner of the website FilmOn.com. FilmOn is currently defending
 19 a lawsuit filed by a number of broadcasting companies (including Defendants’ sister
 20 company) concerning FilmOn’s business of re-transmitting their transmissions to
 21 FilmOn’s paid subscribers. *Id.* ¶ 5. David organized the Plaintiffs to pursue this
 22 lawsuit in apparent retaliation for that action. *See id.*

23 _____
 24 ¹ The Court may take judicial notice of the fact that defendant “CNET
 25 Networks, Inc.” is no longer an operating entity, having changed its name to CBS
 26 Interactive Inc. in early 2009 following the acquisition of CNET by CBS
 27 Corporation. *See* Fed. R. Evid. 201; CBS Corp. Form 10-Q, dated Aug. 6, 2009,
 28 *available at* www.sec.gov/edgar (Central Index Key: 0000813828).

² Nineteen of the fifty-seven plaintiffs fail to allege that they have registered
 copyrights, and the Complaint must be dismissed as to them. *See infra* p. 24.

1 The Complaint asserts three claims for indirect copyright infringement: (1)
2 inducement of infringement; (2) contributory infringement; and (3) vicarious
3 infringement. Despite fifty pages of discursive allegations, the three claims for
4 relief are essentially predicated on a sole conclusory assertion found in the final
5 paragraph of the general allegations: namely, that “Plaintiffs’ copyrighted works
6 were and are available on P2P file sharing networks developed, distributed and
7 promoted by Defendants.” Compl. ¶ 149.³

8 Beyond this threadbare assertion, however, there are no substantive
9 allegations anywhere in the preceding one hundred and forty-eight paragraphs that
10 Defendants “developed” P2P software, and there are no allegations that CNET or
11 download.com owned or operated any P2P network or software. There is no
12 allegation that the copyrighted work of any particular Plaintiff (let alone any
13 particular song) is available on, or was infringed by means of, any particular P2P
14 network. And it is not alleged when any particular infringement might have
15 occurred, who the primary infringer(s) may have been, and whether they were the
16 same persons who obtained the P2P software via download.com.

17 The Complaint also does not allege that Defendants were aware of the
18 existence of any of the Plaintiffs’ works or aware of any infringement of Plaintiffs’
19 works. There is no allegation that Plaintiffs ever notified Defendants of any
20 instances of alleged infringement of their works or of the availability of their songs
21 on P2P networks. Plaintiffs also do not allege that they ever sent formal takedown
22 notices or even informal requests to any of the P2P networks that are alleged to be
23 tools of infringement, let alone to Defendants. And while the Complaint
24 conclusorily claims that Defendants had the ability to “control” infringement, the

25 _____
26 ³ Plaintiffs mis-describe P2P file-sharing services. As explained by the
27 Supreme Court in *Grokster* (and central to its analysis), music and other files are not
28 stored “on” P2P networks; instead, P2P services allow users to locate other users
and to directly share files with them through the internet. 545 U.S. at 921.

1 Complaint recognizes that the extent of this “control” is the ability to “refuse to list”
2 or to de-list P2P client software from the download.com directory. *Id.* ¶ 109. What
3 Plaintiffs do not allege, and what they cannot allege, is that Defendants have any
4 ability actually to identify, to monitor, to control, or to limit acts of infringement
5 accomplished through the P2P networks, which are wholly independent of
6 Defendants.⁴ And although it is alleged that Defendants can remove P2P client
7 software or refuse to list it, it also is acknowledged in the Complaint that P2P
8 networks are *not* unlawful as a whole. *Id.* ¶ 154 (referring to “P2P clients who
9 operate legally”); *see also id.* ¶ 7 (Gnutella protocol “survived the court decision”
10 against LimeWire).

11 Many of the allegations in the Complaint, insofar as they are directed at
12 Defendants’ conduct (as opposed to the practices of the various P2P services which
13 are not named in the lawsuit), are merely an assemblage of selectively-quoted
14 statements published by CNET editors and journalists over a ten-year period
15 covering developments in the software industry. Many of the excerpts quoted in the
16 Complaint come from news reporting pieces on CNET.com, which cannot
17 reasonably be understood as commercial advertising or promotions. Many of them
18 predate the Supreme Court’s *Grokster* decision, and thus arose during a time when
19 P2P file-sharing was expressly held to be lawful in the Ninth Circuit. *See, e.g.*,
20 Compl. ¶ 10 (Mar. 29, 2001 CNET article); ¶ 102 (Jan. 5, 2005 CNET article); ¶ 135
21 (Feb. 1, 2002 comparison piece); ¶ 138 (Oct. 18, 2000 ZDNet.com article). In
22 addition to these news articles, the Complaint also quotes selectively from the
23 CNET editors’ software reviews, which necessarily involved testing the P2P

24 ⁴ Even after installing a P2P client, a user must find and download the actual
25 files, legal or otherwise, that she wishes to share, with aid of a search engine. *See*
26 Compl. ¶ 100 (“A simple [G]oogle search of ‘torrent music’ yields a half billion
27 results and page after page of websites providing copyrighted music and movies via
28 torrent”). This process is wholly disparate in time and manner from the act of
downloading the P2P client software itself and is not alleged to involve Defendants.

1 services and commenting on their functionality for sharing files. *See, e.g., id.* ¶¶
2 127-33. The Complaint does not allege that any of these articles and reviews is false
3 or misleading, or that Defendants knew the P2P services being reviewed were
4 unlawful at the time of the reviews. In essence, and taking the substantive
5 allegations of the Complaint as true, Plaintiffs' legal theory is that Defendants, by
6 offering truthful descriptions, evaluations, and links to lawful P2P software, are
7 liable for U.S. copyright law violations by end-users of that software.

8 **B. Legal Background**

9 "The U.S. Copyright Act does not expressly render anyone liable for
10 infringement committed by another." *Sony Corp.*, 464 U.S. at 434. Over the
11 decades, courts have developed three discrete (although sometimes confused)
12 doctrines for holding certain parties liable for infringement committed by others:
13 vicarious, contributory, and inducement liability. The scope of each doctrine has
14 been carefully circumscribed in light of the lack of express authorization by
15 Congress. In its 1984 decision in *Sony*, for example, the Supreme Court recognized
16 the "reluctance" of the judiciary "to expand the protections afforded by the
17 copyright without explicit legislative guidance" in view of the "settled" principle
18 "that the protection given to copyrights is wholly statutory." *Id.* at 417. The Court
19 expressed the need to be "circumspect in construing the scope of rights," in cases in
20 which "Congress has not plainly marked our course." *Id.* at 431.

21 In defining the scope of secondary liability, courts have drawn on common
22 law principles of imputed liability, as well as frameworks for secondary liability for
23 patent infringement under the Patent Act, 35 U.S.C. § 271. *See Sony*, 464 U.S. at
24 435, 437 n.18, 440-42 (discussing 35 U.S.C. § 271(b) & (c)); *Grokster*, 545 U.S. at
25 932-37 & nn.10 & 11 (citing *Sony* and 35 U.S.C. §§ 271(b) & (c) and discussing
26 patent cases); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794-95 (2007),
27 *cert. denied*, 128 S Ct. 2871 (2008) ("*Perfect 10-Visa*").

1 Since the blossoming of the Internet over the past fifteen years, Congress has
 2 been actively involved in addressing issues of digital piracy and how to balance the
 3 interests of copyright holders with the interests of technological advancement. *See,*
 4 *e.g.*, Digital Millennium Copyright Act (DMCA), 112 Stat. 2860 (1998), *codified at,*
 5 *inter alia*, 17 U.S.C. §§ 512, 1201-05, 1301-32. No act of Congress, however, has
 6 either expressly or by implication authorized liability under circumstances such as
 7 those alleged in the Complaint. On the contrary, one of the professed concerns of
 8 some opponents of the recently proposed and abandoned antipiracy legislation –
 9 Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) (“SOPA”) and the Protect
 10 IP Act of 2011, S. 968, 112th Cong. (2011) (“PIPA”) – was whether the legislation
 11 might “make YouTube, Google, and numerous other web sites liable for copyright
 12 infringement.”⁵

13 In the judicial arena, no court has come close to imposing liability of the kind
 14 proposed in this action. *Grokster* is the centerpiece of the Complaint because it was
 15 in *Grokster* that the *potential* liability of a P2P service for acts of copyright
 16 infringement by its users was first recognized. Before *Grokster*, however, P2P
 17 services (in contrast to direct download services like Napster) had been exonerated
 18 under the *Sony* rule because of their substantial non-infringing uses and their

19 _____
 20 ⁵ Mark A. Lemley, *et al.*, Introduction to Professors’ Letter in Opposition to
 21 [PIPA], Nov. 15, 2011, *available at* [https://www.cdt.org/files/pdfs/
 SOPA_House_letter_with_PROTECT_IP_letter_FINAL.pdf](https://www.cdt.org/files/pdfs/SOPA_House_letter_with_PROTECT_IP_letter_FINAL.pdf).

22 The New York Times recently reported that Wikipedia’s founder was fearful
 23 that “a site like Wikipedia could be punished because its very informative article
 24 about the aptly named site ‘Pirate Bay’ includes a link to the offending destination,”
 25 although the report noted, “[t]hat kind of prosecutorial overkill seems unlikely, but it
 26 would be appalling.” Bill Keller, *Steal This Column*, N.Y. Times, Feb. 6, 2012, at
 27 A23, *available at* [http://www.nytimes.com/2012/02/06/opinion/steal-this-
 column.html](http://www.nytimes.com/2012/02/06/opinion/steal-this-column.html). Warranted or not, the response to the prospect of liability predicated
 28 on describing and linking to infringing websites (whether by an ad-driven search
 engine like Google or user-generated resources like Wikipedia) is a clear indication
 that the liability Plaintiffs seek to impose is far-reaching and unprecedented.

1 inability to supervise direct infringement. *Metro-Goldwyn-Mayer Studios Inc. v.*
2 *Grokster, Ltd.*, 380 F.3d 1154, 1164 (9th Cir. 2004), *rev'd* 545 U.S. 913 (2005).

3 Yet secondary liability after *Grokster* is not nearly as broad as Plaintiffs
4 would have it. The Supreme Court made clear that it was dealing only with the
5 discrete facts before it concerning particular *Grokster* and StreamCast services,
6 which had won summary judgment below, and that it was *not* prepared to declare all
7 P2P software unlawful. 545 U.S. at 921-22 nn.3 & 4 (noting products not at issue);
8 *id.* at 948 (Ginsburg, J., concurring) (“this case is not about” “uses of peer-to-peer
9 technology generally”). Indeed, defendants *Grokster* and KaZaA settled on remand
10 without an adjudication of the merits. *Metro-Goldwyn-Mayer Studios Inc. v.*
11 *Grokster, Ltd.*, 454 F. Supp. 2d 966, 971 (C.D. Cal. 2006). It simply is not the case
12 that there is now or ever has been an open indictment against all P2P services.

13 Moreover, *Grokster* involved allegations that the defendants had designed
14 *their own product* for the specific purpose of infringement, 545 U.S. at 925-26, and
15 thus the Court had no occasion to address how theories of secondary liability might
16 apply in other circumstances. The cases that have involved efforts to expand
17 *Grokster* to tertiary actors have failed on the pleadings. *See, e.g., Perfect 10 -Visa*,
18 494 F.3d 788 (credit card companies offering payment services to various websites
19 not liable for infringement occurring on those sites with their knowledge); *UMG*
20 *Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d ___, 2011 WL 6357788,
21 at *20 (9th Cir. 2011) (“*Shelter Capital (Veoh)*”) (investors controlling board of
22 video-posting site not liable for acts of infringement said to occur on that site with
23 their knowledge).

24 *Grokster* also involved allegations that the defendants had actual knowledge
25 that millions of infringing files of the plaintiffs’ works were available through their
26 services. *Id.* at 936 (“[M]ere knowledge of infringing potential or of actual
27 infringing uses would not be enough”); *id.* at 923 (plaintiffs had notified defendants
28 “of 8 million copyrighted files that could be obtained using their software”); *id.* at

1 947 n.3 (Ginsburg, J., concurring) (vast majority (75%) of files available through
 2 Grokster were of the plaintiffs’ copyrighted works); *id.* at 952 (Breyer, J.,
 3 concurring) (same). As described further below, *Grokster* does not recognize
 4 potential liability on the facts alleged here, and dismissal is required.

5 III.

6 ARGUMENT

7 A. Legal Standard On A Motion To Dismiss

8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
 9 legal sufficiency of the claims alleged in the complaint. Dismissal is appropriate
 10 where the allegations of a claim do not establish a cognizable legal theory or fail to
 11 allege facts that would support such a theory. *Balistreri v. Pacifica Police Dep’t*,
 12 901 F.2d 696, 699 (9th Cir. 1988). “To survive a motion to dismiss, a complaint
 13 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that
 14 is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949
 15 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Court
 16 must accept as true all of the well-pleaded allegations of the complaint, this rule “is
 17 inapplicable to legal conclusions.” 129 S. Ct. at 1949. Thus, a complaint that
 18 merely offers “‘naked assertion[s]’ devoid of ‘further factual enhancement’” is
 19 insufficient to survive a motion to dismiss. *Id.* (quoting *Twombly*, 550 U.S. at 557).
 20 “Threadbare recitals of the elements of a cause of action, supported by mere
 21 conclusory statements” are likewise insufficient. *Id.* The “plausibility standard . . .
 22 asks for more than the sheer possibility that a defendant has acted unlawfully.” *Id.*
 23 Courts should dismiss a case without leave to amend if the plaintiff is unable to cure
 24 the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

25 In order to state a claim for secondary liability for copyright infringement, a
 26 plaintiff must also competently allege underlying direct infringement for which
 27 defendants are liable. *See MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928,
 28 937 (9th Cir. 2010) amended Feb. 17, 2011; *Napster*, 239 F.3d at 1013 n.2.

1 Moreover, where culpable intent is an element of liability, as is the case under
 2 a theory of inducement liability, *infra* p.19, conclusory allegations of such intent or
 3 knowledge are insufficient to sustain a claim. *Iqbal*, 129 S. Ct. at 1953-54; *Global-*
 4 *Tech*, 131 S. Ct. at 2066-67 (as embraced in *Grokster*, inducement liability requires
 5 that defendant had knowledge that induced activity constitutes infringement);
 6 *Wistron Corp. v. Phillip M. Adams & Assocs., LLC*, No. C-10-4458 EMC, 2011 WL
 7 4079231, at *5-6 (N.D. Cal. Sept. 12, 2011) (citing *Global-Tech* and granting
 8 motion to dismiss “for failure to plead nonconclusory facts establishing a plausible
 9 claim of knowledge”).

10 **B. Plaintiffs Fail to State A Claim For Vicarious Copyright Infringement**

11 **1. Standard For Vicarious Infringement Liability**

12 Vicarious liability for copyright infringement recognizes that under a narrow
 13 set of circumstances one party may be held liable for infringement carried out by
 14 another. “[V]icarious [copyright] infringement’s roots lie in the agency principles
 15 of *respondeat superior*,” and, as such, the hallmark of the doctrine is the nexus of
 16 control between the two parties. *Perfect 10-Visa*, 494 F.3d at 802. To state a claim
 17 for vicarious liability, a plaintiff must adequately allege two elements: (1) that the
 18 defendant has the right and ability to supervise the infringing conduct; and (2) that
 19 the defendant has a direct financial interest in the infringing activity. *Sony Corp.*,
 20 464 U.S. at 437-38 & n.18; *Perfect 10-Visa*, 494 F.3d at 802.

21 With respect to the first element, “a defendant exercises control over a direct
 22 infringer when he has both a legal right to stop or limit the directly infringing
 23 conduct, as well as the practical ability to do so.” *Perfect 10, Inc. v. Amazon.com,*
 24 *Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007) (“*Perfect 10-Amazon*”). The control is
 25 specific to the acts of infringement: “the defendant must have the right and ability to
 26 supervise and control the infringement, not just affect it.” *IO Group, Inc. v. Veoh,*
 27 586 F. Supp. 2d 1132, 1154 (N.D. Cal. 2009) (citing *Perfect 10 - Visa*, 494 F.3d at
 28 802-05, and applying to analysis of DMCA § 512(c) safe harbor).

1 Thus, in *Perfect 10 - Amazon*, the Ninth Circuit affirmed that a search engine
2 did not vicariously infringe by linking to copies of infringing works on third-party
3 websites, because search engines typically have no legal right or practical ability to
4 stop or limit the third parties' direct infringement. 508 F.3d 1146, 1174 (“Without
5 image-recognition technology, Google lacks the practical ability to police the
6 infringing activities of third-party websites. This distinguishes Google from the
7 defendants held liable in *Napster* and *Fonovisa*.”); *see also IO Group*, 586 F. Supp.
8 2d at 1153 (video hosting site’s “spot checks” and removal of infringing videos
9 insufficient control to negate DMCA safe harbor: “Veoh’s right and ability to
10 control its system does not equate to the right and ability to control infringing
11 activity”).

12 A critical consequence of the control requirement is that it is difficult to
13 conceive of the situation in which a party with a *tertiary* relationship to the
14 infringement has a sufficient identity of interest with the *primary* infringer to
15 establish vicarious liability. Indeed, such liability has been rejected in each of the
16 cases featuring a degree of separation, even if not framed in such terms. *See, e.g.*,
17 *Perfect 10 - Amazon*, 508 F.3d at 1173-75 (affirming denial of preliminary
18 injunction under vicarious liability theory due to lack of showing that Google had
19 ability to limit third-party websites from reproducing or displaying plaintiff’s
20 images); *Perfect 10 - Visa*, 494 F.3d at 803 (affirming dismissal of vicarious
21 infringement claim against companies providing payment services to third-party
22 piracy and file-sharing websites); *Shelter Capital (Veoh)*, 667 F.3d ___, 2011 WL
23 6357788, at *20 (affirming dismissal of vicarious infringement claim against
24 controlling investors in video-sharing site); *Luvdarts LLC v. AT&T Mobility, LLC*,
25 No. CV 10-05442 DDP (RZx), 2011 WL 997199, at *3 (C.D. Cal. Mar. 17, 2011)
26 (holding wireless carriers not vicariously liable for infringing content with
27 multimedia text messages transmitted over their network and granting Rule 12(b)(6)
28 motion to dismiss).

1 **2. Plaintiffs’ Vicarious Infringement Claim Fails Because Plaintiffs**
 2 **Have Not Alleged That Defendants Have The Ability To Supervise**
 3 **Or To Control Infringement By The Users Of Peer-to-Peer**
 4 **Services**

5 The Complaint does not even attempt to allege that the Defendants have the
 6 right and ability to control any directly infringing conduct, which is fatal to
 7 Plaintiffs’ Third Claim for Relief for vicarious infringement. Although Plaintiffs
 8 parrot the legal conclusion that Defendants have “the right and ability to control
 9 and/or supervise the infringing conduct (either by direct contractual relation and/or
 10 as a matter of practical control),” Compl. ¶ 167, the Complaint contains no factual
 11 allegations that support this claim.⁶ *Iqbal*, 129 S. Ct. at 1949.

12 It is not alleged, for example, that CNET and download.com host or index
 13 copies of Plaintiffs’ works. Indeed, unlike Google in *Perfect 10-Amazon*, it is not
 14 even alleged here that CNET and download.com can be used *to find* copies of
 15 Plaintiffs’ works. Someone who wants to download a copy of Plaintiff Doug E.
 16 Fresh’s song “Bustin’ Out,” for example, is not going to find the song on the
 17 download.com website or by using download.com. Even assuming the person
 18 obtains P2P software through download.com, he would need at some later time to
 19 find the “Bustin’ Out” file and copy it through the P2P network. *See* Compl. ¶ 100.
 20 There is not a single allegation that Defendants exercise *any* control over, indeed
 21 that they even can identify, those who use the service to find infringing files.

22 Plaintiffs dodge this gaping defect altogether by ignoring Defendants’ lack of
 23 control over primary infringers and focusing on Defendants’ putative control of the

24 ⁶ Although Defendants need not address the “direct financial benefit” element
 25 given Plaintiffs’ inability to satisfy the “control” element, *see Perfect 10-Amazon*,
 26 487 F.3d 731 n.15, it is worth noting that Plaintiffs’ speculative allegation (on
 27 “information and belief”) that download.com was “paid per download” for P2P
 28 software downloads, Complaint ¶ 110, is simply wrong. Even taking the allegation
 as true, any benefit from the download of P2P software would not show a “direct
 financial benefit” from infringement of Plaintiffs’ copyrights.

1 P2P services. *See, e.g.*, Compl. ¶ 109 (“Download.com possessed the ability to
 2 refuse to list the publisher’s software”); ¶ 149 (Defendants had control through
 3 “their ability to cut off distribution of P2P clients”). But the law is clear that the
 4 ability to block or remove links to P2P client software altogether is not sufficient
 5 control. *See Perfect 10-Amazon*, 506 F.3d at 1174-75 (search provider’s ability “to
 6 avoid indexing websites with infringing content and linking to third-party infringing
 7 sites” insufficient); *Perfect 10-Visa*, 494 F.3d at 805-06 (credit card companies’
 8 ability to withhold services, making infringement unviable, insufficient).

9 Indeed, Plaintiffs have not even alleged that the P2P services themselves
 10 exercise the requisite control of direct infringement to be vicariously liable, and
 11 there is no basis in the Complaint to draw any such inference. *See, e.g.*, Compl. ¶¶ 7
 12 n.1, 102 (explaining how P2P networks are decentralized and self sustaining).
 13 Indeed, in the *Grokster* litigation, the Ninth Circuit affirmed summary judgment for
 14 Grokster on vicarious liability precisely because of the decentralized P2P networks’
 15 lack of control. 380 F.3d at 1165;⁷ *accord Sony*, 464 U.S. at 418 (“the only contact
 16 between petitioners and the users of the VTR’s occurred at the moment of sale”);
 17 *Adobe Sys. Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1055 (C.D. Cal. 2001)
 18 (holding no vicarious liability where computer fair operator lacked “identity of
 19 interest” and “pervasive participation” with infringing vendors).

20 Simply put, Plaintiffs have not and cannot allege that Defendants had the right
 21 and ability to identify or supervise, let alone stop, primary infringers from sharing
 22 allegedly infringing recordings on third-party P2P networks. The third claim fails as
 23 a matter of law.

24 _____
 25 ⁷ When the Supreme Court reversed the grant of summary judgment in
 26 *Grokster* on the issue of inducement, it did not squarely address vicarious liability,
 27 *see* 545 U.S. at 931 n.9, and the issue was not considered on remand. Nothing in
 28 more recent Ninth Circuit or Supreme Court decisions suggests that the standards
 governing vicarious liability for copyright infringement have changed.

1 **C. Plaintiffs Fail To State Claim A Claim For Contributory Infringement**

2 **1. Standard For Contributory Liability**

3 Contributory liability for copyright infringement is a theory that developed in
4 the Second Circuit in the 1960s. Contributory liability arises from the common law
5 principle that “one who knowingly participates or furthers a tortious act is jointly
6 and severally liable with the prime tortfeasor.” *Gershwin Publ’g Corp. v. Columbia*
7 *Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *see also Perfect 10-*
8 *Amazon*, 508 F.3d at 1171 (quoting same).

9 As technology has evolved, courts have recognized important limitations on
10 the scope of contributory liability. Significantly, in 1984 the Supreme Court
11 examined whether U.S. copyright law could impose liability on Sony based on
12 allegations that its Betamax machine could be used by third parties for infringement.
13 Following the example of patent law, under which contributory liability cannot be
14 based on the distribution of staple articles of commerce that have non-infringing
15 uses, the Court held that the “the sale of copying equipment, like the sale of other
16 articles of commerce, does not constitute contributory infringement if the product is
17 widely used for legitimate, unobjectionable purposes. Indeed, *it need merely be*
18 *capable of substantial noninfringing uses.*” 464 U.S. at 442 (emphasis added).
19 Moreover, although it was alleged that Sony knew its machine was widely used for
20 infringement, the Court refused to impute knowledge of specific acts of
21 infringement in light of the legitimate uses. *Id.*

22 The Ninth Circuit addressed contributory liability in the context of internet
23 file-sharing in its 2001 decision in *Napster*, holding that “in an online context,
24 evidence of *actual knowledge of specific acts of infringement* is required to hold a
25 computer system operator liable for contributory infringement.” 239 F.3d at 1021
26 (citing *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp.
27 1361, 1371 (N.D. Cal. 1995)). In *Napster*, the Ninth Circuit upheld a preliminary
28 injunction despite Napster’s potential for non-infringing use, but did so in light of

1 significant evidence of Napster’s “actual knowledge that specific infringing material
 2 is available using its system, that it could block access to the system by suppliers of
 3 the infringing material, and that it failed to remove the material,” including specific
 4 notice of “12,000 infringing files.” *Id.* at 1021-22 & n.6. The Court cautioned that
 5 “absent any specific information which identifies infringing activity, a computer
 6 system operator cannot be liable for contributory infringement merely because the
 7 structure of the system allows for the exchange of copyrighted material.” *Id.*; *see*
 8 *also id.* at 1021 (“We are bound to follow *Sony*, and will not impute the requisite
 9 level of knowledge to Napster merely because peer-to-peer file sharing technology
 10 may be used to infringe plaintiffs’ copyrights.”).

11 These limitations on contributory liability continue to be the law following
 12 the Supreme Court’s decision in *Grokster*, as has been recognized by the Ninth
 13 Circuit on several occasions, including in the *Perfect 10* cases and more recently in
 14 the *Veoh* appeal. *See, e.g., Perfect 10-Amazon*, 508 F.3d at 1171-72 & n.11 (noting
 15 that Google could not be held liable under *Grokster* because it did not induce
 16 infringement and that in order to proceed under pre-*Grokster* caselaw, including
 17 *Napster*, the plaintiff would have to show, among other things, that Google “had
 18 knowledge that infringing . . . images [of plaintiff’s works] were available using its
 19 search engine”) (quoting *Napster*, 239 F.3d at 1022); *see also Shelter Capital*
 20 (*Veoh*), 2011 WL 6357788, at *20.⁸

21 _____
 22 ⁸ “Inducement” liability, the form of secondary liability imposed in *Grokster*,
 23 has confusingly been described by courts alternately (a) as a distinct theory of
 24 liability, separate from contributory infringement, and also (b) as a subset of a larger
 25 category of contributory liability along with “material contribution” (*e.g., Napster*).
 26 The approaches are different only in terminology, and courts following both
 27 taxonomies recognize and apply distinct elements to the alternate theories. *See*
 28 *Arista Records LLC v. Lime Grp. LLC*, 715 F. Supp. 2d 481, 508 & 525 (S.D.N.Y.
 2010), opinion withdrawn and superseded, 784 F. Supp. 2d 398 (S.D.N.Y. 2011);
Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578 SVW (JCx), 2009 WL
 6355911, at *7-8 (C.D. Cal. Dec. 21, 2009). The Complaint follows the former

1 Thus, following *Sony* and *Napster* and binding Ninth Circuit precedent since
2 *Grokster*, when a defendant’s product has substantial non-infringing uses, the
3 plaintiff alleging contributory infringement must establish that the defendant had
4 knowledge of specific acts of direct infringement of the plaintiff’s works.

5 **2. Plaintiffs’ Contributory Infringement Claim Fails Because**
6 **Plaintiffs Do Not Allege That Defendants Had Actual Knowledge**
7 **Of Specific Acts Of Infringement Of Plaintiffs’ Works**

8 The Second Claim for Relief asserts that Defendants are contributorily liable
9 for infringement because they “have knowledge of the massive infringement that
10 has occurred and continues to occur through P2P client software that they created,
11 distributed and promoted.” Compl. ¶ 160. As noted above, there are no allegations
12 supporting the assertion that defendants “created” P2P network software, and
13 Defendants also dispute that publishing an online directory with reviews and web
14 links for free third-party software may justly be categorized as “distribution” or
15 “promotion.” Setting these issues aside, however, the Complaint fails to state a
16 claim for contributory infringement for the simple reason that the Complaint does
17 not allege that Defendants have *actual knowledge of specific acts* of infringement of
18 Plaintiffs’ works. *Perfect 10 -Amazon*, 508 F.3d at 1172; *Napster*, 239 F.3d at 1022.

19 The Complaint claims that “actual and constructive” “knowledge of
20 infringement” may be inferred based on user comments posted on CNET and
21 download.com and reviews, side-by-side comparisons, and product demonstrations
22 by CNET editors wherein copyrighted songs (of non-parties) were allegedly used as
23 test bogies. Compl. ¶¶ 135, 161. Yet none of this alleged activity, even when taken
24 as true and as characterized by Plaintiffs, has anything to do with specific instances

25 (footnote continued)
26 approach. For convenience and to avoid confusion, so does this Motion.
27 References to “contributory liability” in this Motion refer to the species of liability
28 recognized in *Sony* and *Napster*. References to “inducement” refer to the type of
liability recognized in *Grokster*.

1 of infringement of Plaintiffs’ works. To wit, the Complaint does *not* allege that (1)
2 Defendants knew of the existence of Plaintiffs’ songs; (2) Defendants knew of any
3 infringement targeting Plaintiffs’ songs; (3) Defendants knew or could have known
4 anything about the primary infringers, including their identity; (4) there existed any
5 means for Defendants to learn whether and what infringement was taking place on
6 the P2P networks; (5) there existed any way for Defendants to purge or control
7 specific instances of infringement on P2P networks; or (6) Plaintiffs ever gave
8 notice of infringement to Defendants or to any of the P2P networks (as was done in
9 both *Napster* and *Grokster*). Under these circumstances and in stark contrast to
10 *Napster*, the Complaint does not support an inference that Defendants knew of any
11 specific act of direct infringement; indeed, given that Defendants’ alleged
12 involvement with P2P networks does *not* include *operation* of those networks, the
13 opposite inference is far more plausible.

14 Indeed, rather than attempting in vain to meet an insurmountable pleading
15 hurdle, Plaintiffs appear to be trying to allege constructive knowledge predicated on
16 alleged knowledge of pervasive general infringement. Compl. ¶ 161. But this is
17 precisely what the Supreme Court rejected in *Sony*. 464 U.S. at 417& 439 (finding
18 “no precedent in the law of copyright for the imposition of” liability based on the
19 theory that the defendant had “sold equipment with constructive knowledge of the
20 fact that their customers may use that equipment to make unauthorized copies of
21 copyrighted material” so long as the product is “capable of substantial noninfringing
22 uses”); *see also Grokster*, 545 U.S. at 932-33 (as distinct from the inducement
23 theory, “the [contributory infringement] doctrine absolves the equivocal conduct of
24 selling an item with substantial lawful as well as unlawful uses”). Here, Plaintiffs
25 admit facts showing that CNET and download.com, as well as the P2P networks,
26 have substantial non-infringing uses. Compl. ¶¶ 1, 154.

27 The black letter rule is a bright line: “absent any specific information which
28 identifies infringing activity, a computer system operator cannot be liable for

1 contributory infringement merely because the structure of the system allows for the
2 exchange of copyrighted material.” *Napster*, 239 F.3d at 1022. Defendants are not
3 alleged to have the requisite degree of knowledge for contributory liability, and the
4 contributory infringement claim thus fails as a matter of law.

5 **D. Plaintiffs Fail To State A Claim For Inducement Of Infringement**

6 **1. Standard For Inducement Liability**

7 In *Grokster* the Supreme Court responded to the situation where evidence of a
8 defendant’s culpable intent to cause acts of copyright infringement was abundantly
9 clear, but where the defendant might not have had the requisite knowledge of
10 specific acts of infringement to support contributory liability under *Napster*.

11 Drawing again from patent law’s statutory authorization of secondary liability, the
12 Supreme Court held that a defendant could be liable for “inducement of
13 infringement” upon proof of the defendant’s “intent to bring about infringement and
14 distribution of a device suitable for infringing use.” *Grokster*, 545 U.S. at 940.

15 Recognizing that inducement, so defined, could “compromise legitimate commerce
16 or discourage innovation having a lawful purpose,” the unanimous Supreme Court
17 held that liability applies only where there is also clear proof of the defendant’s
18 “purposeful, culpable expression and conduct.” *Id.* at 937-38 (finding that
19 *Grokster*’s “unlawful objective is unmistakable”). Subsequent decisions have
20 elaborated the substantive limitations imposed on inducement liability and the
21 culpable intent requirement.

22 The Ninth Circuit, which in the last five years has addressed *Grokster*
23 inducement claims filed against search engines, payment services, and video-hosting
24 sites (and declined to find liability in each instance), has held that an inducement
25 plaintiff must plead and prove that the defendant promoted its *own services* for
26 purposes of infringement. *See Perfect 10-Amazon*, 508 F.3d at 1171 n.11 (Google
27 could not be held liable for inducement because it “has not promoted *the use of its*
28 *search engine* specifically to infringe copyrights.”) (emphasis added); *see also*

1 *Luvdarts LLC*, 2011 WL 997199, at *2 (granting cellular carrier defendants’ motion
 2 to dismiss inducement claim stemming from hosted mobile service on grounds that
 3 “[p]laintiffs have not alleged that [d]efendants’ network[] was designed with the
 4 ‘object of promoting’ infringement of [p]laintiffs’ copyright”) (emphasis added).

5 In the past term, the Supreme Court revisited the law of inducement in a
 6 patent case and confirmed that inducement liability is confined to instances of
 7 clearly culpable action, requiring “knowledge that the induced acts constitute patent
 8 infringement” and “requires knowledge of the existence of the patent that is
 9 infringed.” *Global-Tech*, 131 S. Ct. at 2068. The Court explained that the
 10 “purposeful, culpable expression and conduct” requirement adduced in *Grokster*
 11 showed that it had been the Court’s longstanding view of existing precedents that
 12 such knowledge was required. *Id.* at 2067. The Court also noted that in *Grokster*
 13 “the Court found ample evidence that Grokster and StreamCast were fully aware –
 14 in the ordinary sense of the term – that their file-sharing software was routinely used
 15 in carrying out the acts that constituted infringement . . . and that these acts violated
 16 the rights of copyright holders.” *Id.* at 2070; *see also Grokster*, 545 U.S. at 923
 17 (noting that plaintiffs had given Grokster notice of 8 million copyrighted files).

18 **2. Plaintiffs’ Inducement Claim Fails Because Plaintiffs’ Allegations**
 19 **Do Not Support An Inference Of “Purposeful, Culpable Expression**
 20 **And Conduct” By Defendants**

21 For all the broadsides seeking to inspire CNET as the virtual reincarnation of
 22 Grokster, the Complaint is devoid of the allegations required under *Perfect 10-*
 23 *Amazon* and *Global-Tech* to make out the requisite malicious intent necessary to
 24 render Defendants liable for the unlawful acts of users of P2P software.

25 First, the Complaint does not allege that Defendants promoted their *own*
 26 service specifically to infringe copyrights. *Perfect 10-Amazon*, 508 F.3d at 1171
 27 n.11 (inducement claim against Google not viable due to lack of such an allegation).
 28 The Complaint instead asserts that Defendants “distribute and promote several P2P

1 clients,” while “inform[ing] their users that the clients were optimized for
2 unauthorized copying,” Compl. ¶ 152, but says nothing about Defendants’ own
3 sites, which are advertising-supported information and location tools like Google
4 and the Amazon “product search engine” exonerated in *Perfect 10-Amazon*. Failure
5 to allege that Defendants’ own sites were intended for infringement is fatal;
6 *Grokster* is, after all, a case about imposing liability on a company “whose principal
7 object was use of their software to download copyrighted works,” 545 U.S. at 926,
8 not a condemnation of P2P, which the Court recognized as having “benefits in
9 security, cost, and efficiency.” *Id.* at 920. That Defendants are not alleged to
10 promote their own businesses, CNET and download.com, as tools of infringement
11 demonstrates that they do not have infringement as their “principal object.”

12 Second, the Complaint does not allege that Defendants had “knowledge that
13 the induced acts constitute . . . infringement.” *Global-Tech*, 131 S. Ct. at 2068.
14 Plaintiffs admit that there are “P2P clients who operate legally.” Compl. ¶ 154.
15 They admit that the 2006 *Grokster* decision was “groundbreaking,” and they do not
16 dispute that P2P services had not theretofore been prohibited. *Id.* ¶ 11. They admit
17 that when LimeWire was ruled liable for secondary infringement, Defendants
18 removed it from their sites. *Id.* ¶¶ 89 & 110. And they do not allege that any other
19 torrent-based P2P networks, including any currently listed on Defendants’ sites,
20 have been adjudicated to infringe. Nor do they deny that determining whether or
21 not such services are secondary infringers would involve knowledge of detailed
22 facts beyond any Defendants are claimed to know.

23 In short, Plaintiffs do not allege that Defendants supported or promoted any
24 P2P service that was known to be unlawful at the time, and as such they have not
25 alleged that Defendants knew they were inducing an activity constituting copyright
26 infringement. There is no precedent for placing the burden on Defendants to decide
27 which P2P services are legal and which are not; to impute liability to Defendants in
28 circumstances where the P2P services might themselves be outside the scope of

1 liability; or to use the threat of liability as a cudgel to outlaw Defendants’
2 publication of reviews and links to lawful P2P products and services.⁹ Especially in
3 light of the chilling effect such liability would have both on freedom of expression
4 and the development of “innovation having a lawful promise,” *Grokster*, 545 U.S. at
5 937, this Court should not be the first to stretch the law so far.

6 **E. The Overbroad Application Of Secondary Liability Sought By Plaintiffs**
7 **Would Constrain Speech Rights**

8 Defendants are not the designers, manufacturers, owners, publishers, or
9 operators of P2P software. Nor is there a single material allegation supporting the
10 assertion that Defendants “developed” or “created” P2P software. Compl. ¶ 149.
11 Rather it is clear from the lengthy allegations that Defendants are not *Grokster* or
12 *LimeWire*. CNET and download.com provide software location tools, technology
13 news, and product reviews for a vast array of software and technology products.
14 Compl. ¶¶ 1, 3. Their reporting, opinions, descriptions are matters of public interest
15 and concern.

16 As explained above, there is no statutory authorization for the imposition of
17 liability under the circumstances alleged in the Complaint, *supra* p. 8, and no
18 precedent in the case-law, *supra* p. 9. The expansion of secondary liability that
19 Plaintiffs seek to impose would raise serious First Amendment issues, and the Court
20 should reject this construction of the copyright law. *Harper & Row Publishers Inc.*
21 *v. Nation Enters.*, 471 U.S. 539, 582 (1985) (observing that limitations on copyright
22 are appropriate when necessary to “ensure[] consonance with our most important
23 First Amendment values.”).

24

25 ⁹ Plaintiffs also do not allege that Defendants knew of Plaintiffs’ copyrighted
26 works. Under such circumstances, Defendants cannot be liable for inducement as to
27 the direct infringement of Plaintiffs’ works, because the intent requirement demands
28 that a defendant know of a legally protected interest before it can be charged with
inducing infringement of that interest. *Global-Tech*, 131 S. Ct. at 2068.

1 Opinions are protected by the First Amendment. *Hurley v. Irish-Am. Gay*
2 *Grp. of Boston*, 515 U.S. 557, 573 (1995) (“general rule” protecting freedom of
3 speech applies to “expressions of value, opinion, or endorsement”; the point of this
4 rule “is simply the point of all speech protection, which is to shield just those
5 choices of content that in someone’s eyes are misguided, or even hurtful.”). This
6 protection includes product reviews and ratings. *Compuware Corp. v. Moody’s*
7 *Investors Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (affirming dismissal of
8 claims based on opinions about third-party products); *Jefferson Cnty. Sch. Dist. No.*
9 *R-1 v. Moody’s Investor’s Servs., Inc.*, 175 F.3d 848, 856 (10th Cir. 1999) (same);
10 *First Equity Corp. v. Standard & Poor’s Corp.*, 690 F. Supp. 256, 260 (S.D.N.Y.
11 1988) (same).

12 Moreover, efforts to impose liability on a party on the grounds that its speech
13 caused *someone else* to act unlawfully are constitutionally suspect. *See, e.g.*,
14 *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) (holding wire-tapping statute invalid
15 as applied to disclosure by third party who had not directly engaged in unlawful
16 interception; “it would be quite remarkable to hold that speech by a law-abiding
17 possessor of information can be suppressed in order to deter conduct by a non-law-
18 abiding third party.”); *Simon & Schuster, Inc. v. Members of N.Y. State Crime*
19 *Victims Bd.*, 502 U.S. 105, 116 (1991) (invalidating Son-of-Sam law, finding statute
20 burdened speech and was not narrowly tailored, where state interests could be
21 accomplished by punishing crime directly).

22 The liability scheme that Plaintiffs propose would abrogate the culpable intent
23 requirement imposed by the Supreme Court in *Grokster*, which in addition to
24 protecting against “compromis[ing] legitimate commerce or discourag[ing]
25 innovation having a lawful promise,” *Grokster*, 545 U.S. at 937, is also essential to
26 safeguarding free speech rights in the situation, as here, where a defendant’s
27 business and its alleged acts of inducement are speech-related. A liability doctrine
28 that ignores the nature and “principal object” of CNET’s business and instead

1 penalizes the defendant for alleged proselytic discussion of P2P services that have
 2 both infringing and non-infringing uses knows no reasonable boundary. The
 3 Internet is a wide and varied landscape, and such judicially noticeable services as
 4 Wikipedia, Facebook, Twitter, and Google all offer commentary, evaluation, user
 5 tips and links to P2P services, all of them, save Wikipedia, supported by advertising.
 6 *See, e.g.*, <http://en.wikipedia.org/wiki/FrostWire>; [http://www.facebook.com/](http://www.facebook.com/Frostwirep2p)
 7 [Frostwirep2p](http://twitter.com/#!/frostwire); <http://twitter.com/#!/frostwire>; www.google.com (displaying list,
 8 links, and information upon the entry of the word “frostwire”). All of the fire-and-
 9 brimstone allegations in the Complaint could be applied to Facebook’s P2P pages
 10 with little rewriting. Are these sites to be liable for secondary infringement, not
 11 because they advocated anything with respect to Plaintiffs like Doug E. Fresh, but
 12 because they facilitate the use of P2P services by providing truthful information and
 13 links to such services?

14 The expansion of liability that Plaintiffs propose is tantamount to letting four
 15 dozen musicians effectively shut down comprehensive, reliable information services
 16 with obvious public benefits intimately entwined with speech, and whose alleged
 17 conduct has at most a tertiary connection to some unknown persons’ volitional acts
 18 of copying Plaintiffs’ songs. *Sony* and *Grokster* do not authorize such liability and
 19 the restraint it would impose on CNET and other information services.

20 **F. The Complaint Must Be Dismissed As To Nineteen Plaintiffs For Failure**
 21 **To Allege Copyright Registration**

22 Nineteen of the Plaintiffs fail to allege that they have registered copyrights,
 23 which is a prerequisite to state a claim for copyright infringement. The Copyright
 24 Act provides that “no civil action for infringement of the copyright in any United
 25 States work shall be instituted until preregistration or registration of the copyright
 26 claim has been made in accordance with this title.” 17 U.S.C. § 411(a). Following
 27 the Supreme Court’s decision in *Reed Elsevier Inc. v. Muchnik*, ___ U.S. ___, 130
 28 S.Ct. 1237 (2010), the Ninth Circuit treats the section 411 registration requirement

1 as an element of a copyright infringement claim. *See Cosmetic Ideas, Inc. v.*
2 *IAC/Interactive Corp.*, 606 F.3d 612, 618 (9th Cir. 2010). As noted above, Plaintiffs
3 must allege primary infringement in order to claim secondary infringement. *See*
4 *MDY Indus.*, 629 F.3d at 937.

5 Here, the Complaint contains no allegation that *any* Plaintiffs have registered
6 works. With the Complaint, Plaintiffs filed a Form AO-121 listing the registered
7 works alleged to be at issue in this action as required by Local Rule 3-1. *See* Docket
8 No. 4 (Nov. 14, 2011). Nineteen Plaintiffs listed in the Notice of Motion are not
9 holders of copyrights listed on Form AO-121. Defendants brought this deficiency to
10 the Plaintiffs' attention during the meet and confer process, but Plaintiffs did not
11 amend the Complaint or Form AO-121. Thus, even if the court is willing to treat the
12 Form AO-121 as a sufficient allegation of registration for the listed Plaintiffs, the
13 Complaint should be dismissed as to the nineteen Plaintiffs who have failed to make
14 any such claim to ownership of a registered work.

15 **IV.**

16 **CONCLUSION**

17 For the foregoing reasons, the Complaint must be dismissed in its entirety and
18 with prejudice for failure to state a claim upon which relief may be granted.

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