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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE DALE S. FISCHER, JUDGE PRESIDING

Alkiviades David,)	
)	
Plaintiff,)	
)	
vs.)	Case No.
)	CV 11-9437-DSF(Jcx)
CBS Interactive, Inc., et al.,)	
)	
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, July 2, 2012

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1 Los Angeles, California, Monday, July 2, 2012

2 2:09 p.m.

3 -oOo-

4 THE CLERK: Calling Item No. 7, CV 11-9437-DSF(Jcx),
5 *Alkiviades David vs. CBS Interactive, Inc., et al.*

6 THE COURT: Counsel, while you are setting up, excuse
7 me for a moment. I seem to have left that file in chambers.

8 (Off the Record)

9 THE COURT: You may be seated. Thank you. I'm sorry.
10 All right. Counsel, your appearances.

11 MR. MARQUART: Good afternoon, your Honor. Jaime
12 Marquart and Christian Anstett on behalf of plaintiffs.

13 MR. KENDALL: Good afternoon, your Honor. Richard
14 Kendall and Laura Brill on behalf of defendants.

15 THE COURT: Good afternoon.

16 We have three different aspects here to look at: The
17 vicarious liability; the contributory liability, which is
18 material contribution and inducement; and then there was another
19 issue, which was lack of registration of copyrights for, I think
20 it was, 19 of the plaintiffs, and I didn't see any response to
21 that particular issue.

22 Did plaintiffs have a position?

23 MR. MARQUART: May I approach the lectern?

24 THE COURT: Yes.

25 MR. MARQUART: Your Honor, today we, after meeting and

1 conferring pursuant to Rule 26(f) regarding parties, among other
2 things, amended our Form A0121 to list an additional number of
3 works for at least 14 out of the 19 that were identified to us
4 by counsel during that meet and confer effort, among others.
5 Five still remain. We are attempting to hunt down applications
6 for those. Given the nature of this coalition, we're working
7 through an intermediary, and it's not been easy to contact
8 everyone, so as to those five, we still at this point do not
9 have proof nor have we amended our form to contain copyright
10 registration for them.

11 We would seek the Court's guidance as to whether
12 registration -- we certainly have good faith reason to believe
13 that they have works or are aware of those works, but as to the
14 actual registration of those works, we would seek the Court's
15 guidance as to whether an amendment of the plaintiffs should we
16 required or whether we should dismiss, perhaps without
17 prejudice, pursuant to looking that up should be required.

18 THE COURT: Did you want me to research that for you?

19 MR. MARQUART: No, your Honor. We actually have and
20 the Ninth Circuit's rule -- your Honor actually had an opinion
21 in 2005 which pointed out in a footnote -- it was the Kimball
22 opinion, I believe.

23 THE COURT: I don't remember what I ordered last week,
24 Counsel.

25 MR. MARQUART: Okay. Well, I'll get you the cite if

1 you need it, but you pointed out in the footnote that the Ninth
2 Circuit had not yet decided whether registration or a mere
3 application was required, and the Ninth Circuit has since
4 decided that an application is enough to confer jurisdiction.

5 I would also point out that in Judge Kimball Wood's
6 opinion in the *LimeWire* matter, it's pointed out and observed
7 that it's -- cases of this nature are, by definition, moving
8 targets. There are new works constantly being distributed by
9 the plaintiffs. There are new plaintiffs that may possibly be
10 added. The Court has its own rules for deadlines for adding
11 those plaintiffs. And our argument would be that we're
12 certainly comfortable with dismissal without prejudice of the
13 five parties for which we do not yet have proof subject to their
14 amending and subject to, of course, all of the risks that come
15 along with amending later and the damages that are then
16 available to those plaintiffs for amending later.

17 THE COURT: Well, I'm not sure the moving target
18 really applies here for people who have actually sued but for
19 whom you can't even find an application, but I will leave it to
20 you to decide what course you want to attempt and perhaps you
21 can confer with Mr. Kendall and Ms. Brill about that and work
22 something out.

23 MR. MARQUART: Gladly, your Honor.

24 THE COURT: With regard to the more substantive
25 issues, why don't you briefly explain to me, so I have a little

1 bit more clearly in mind, exactly what it is -- well, first of
2 all, you mentioned a coalition. I don't know what that means.
3 I have individual plaintiffs here.

4 MR. MARQUART: Yes, your Honor. I was simply
5 referring loosely to the fact that the plaintiffs are united in
6 this cause against CBS Interactive as artists whose works have
7 been infringed through inducement, vicarious liability, and
8 contributory infringement liability.

9 THE COURT: Well, the suggestion seemed to me to be
10 that it was difficult to communicate with all of them
11 individually, and I will caution you that each of them is your
12 client and it's your obligation to communicate with them about
13 whatever needs to be done, so if you don't have a satisfactory
14 line of communication, it's going to cause you many headaches
15 later on.

16 MR. MARQUART: I appreciate that, your Honor. My
17 understanding was that I was communicating with an authorized
18 agent of each of the parties, to clarify. But I just wanted to
19 point out that the practicalities of working through the
20 authorized agent presented an additional obstacle.

21 THE COURT: Well, at the moment I'll leave that on
22 your shoulders to deal with, but at some future point if it
23 causes a problem for the Court or timing and preparation for
24 anything that may turn out to be an issue, that you'll need to
25 be more concerned with.

1 With regard to the, as I say, the substance -- why
2 don't you just tell me briefly what you believe is happening
3 here and how this operation works which, as I understand it, is
4 now really, although we've been referring to defendants -- is
5 really now one entity because CBS Interactive has taken over the
6 CNET operation; is that correct?

7 MR. MARQUART: That's correct, your Honor. And so
8 I'll refer at times to Download.com, which is a website that's
9 undisputedly operated by CNET. Likewise CNET.com contains the
10 same content and references the same content.

11 What's happening here -- and I'd like to start by
12 pointing out that we're obviously very well aware of opinions
13 that deal with liability for Google, for example, or Visa, and
14 this case is very, very different. I'll start with inducement
15 because I think it's the simplest and most obvious claim for
16 what's happening here.

17 What's happening here is very different from a mere
18 passive search engine that we would call infringement neutral in
19 its own content. It simply allows a user to search for
20 something and Google would claim *we can't be responsible for*
21 *what people use us to search for and then do.*

22 Likewise, Visa provides a very important function as
23 it was noted in the *Visa* opinion, which is processing payments.
24 They process payments very passively. They don't in any way
25 induce others to process more payments for infringement than

1 otherwise, nor do they encourage anyone to use their processing
2 to induce infringement. They simply allow or facilitate in an
3 infringement-neutral manner.

4 What has happened here and what the *Grokster* opinion
5 focuses on is there has been an expression of a specific intent
6 to induce others to come to CNET and to use that website to
7 download tools from which then they can induce copyright -- or,
8 rather, infringe copyrights, and that is inducement.

9 The best source in a 12(b)(6) motion is the Complaint,
10 and so I point your Honor specifically to Paragraphs 121 through
11 151 of the Complaint, and I'll read a couple of those out loud
12 for the Court.

13 THE COURT: Only if you do it slowly.

14 MR. MARQUART: Sure, your Honor.

15 Let me know when you're ready, your Honor --

16 THE COURT: Well, I'm ready. It's my court reporter
17 who can't type at the speed of light --

18 MR. MARQUART: Okay.

19 THE COURT: I listen more quickly than she types.

20 MR. MARQUART: I think we just caused another problem
21 for her by talking over one another. I apologize.

22 I'll read from page -- Paragraph 127 which is page 37
23 of the Complaint. It begins, *For example in a, quote,*
24 *first-look video that Download.com posted to its website,*
25 *defendants reviewed LimeWire 5 and demonstrated how it worked to*

1 *Download.com users. The video shows a close-up of the LimeWire*
2 *search screen as the CNET reviewer enters, quote, Nine Inch*
3 *Nails, close quote, a popular band and then shows the search*
4 *results which include many of the band's copyrighted songs.*

5 *Later in the video, as the viewer looks at the screen*
6 *demonstrating another sample search, they see a list of*
7 *copyrighted works from artists including Will.I.Am, Usher, Trick*
8 *Daddy, Nas, Ray Stiles, and many others.*

9 The paragraphs that follow -- and these, by the way,
10 your Honor, are videos produced by CNET employees and agents.
11 These are not user-generated content. These are produced by
12 agents of CNET. The paragraphs that follow go on -- and
13 incidentally, what's happening in these videos is direct
14 infringement. They're downloading the software, and they're
15 showing screen shots, and they are saying say you're a fan of
16 Nine Inch Nails and you want to download one of their songs,
17 let's type it in. Here we go. Click, download, and there you
18 go. So they're literally showing direct infringement on behalf
19 of -- their own agents are directly infringing and showing
20 others how to download them.

21 They've been very successful in doing that. They've
22 induced over two hundred million downloads of LimeWire software
23 and other related software. The paragraphs that follow,
24 Paragraphs 128 through 131, talk about another aspect of their
25 inducement which is the -- I believe it was called the -- yeah.

1 *The file-sharing smackdown*, your Honor, wherein two CNET
2 employees take, I believe it was, 18 popular songs and use
3 different P2P software to attempt to download those songs and
4 then compare for the users in a live format which is recorded
5 and then available on the website and is still, as we understand
6 it -- still available but certainly was available during the
7 relevant periods. They record which of the P2P software
8 downloaded those infringed -- those protected works fastest.

9 So in doing that, they again have generally and
10 specifically directly infringed those 18 works, but more
11 generally -- and it's not necessary that it be specifically --
12 have intended to induce any user to use the works to do that.

13 There are no, as I recall -- no videos but certainly
14 if there any, it is a very, very small, small minority of videos
15 wherein, for example, a CNET editor says, *Say your friend has a*
16 *file that's open source and he wants you to download that*, that
17 doesn't exist, your Honor. Every single one of the comments by
18 CNET editors that we could find -- and I'll challenge defendants
19 to point to others, but I can assure you it's a minority if they
20 do. Every single one of these editorials were geared toward
21 infringing copyrights of known protected works.

22 Also the throughout the history of CNET, it has shown
23 a pattern of when Napster gets busted by the courts, they remove
24 Napster. Then they go to LimeWire. When LimeWire -- when
25 Kendall Woods' opinion came out and LimeWire was judged to be an

1 infringer, they removed LimeWire. And then there is CNET
2 editorials and there are even podcasts that talk about
3 BitTorrent technology, the next wave of how to get around this.

4 CNET is geared toward infringing copyright. It
5 doesn't matter how the cat is skinned, your Honor, and that's
6 not required under the law after the *Grokster* opinion.

7 THE COURT: Well, I agree that inducement is the
8 easiest, so why don't you move on to the other aspects of the
9 case.

10 MR. MARQUART: Certainly, your Honor. As to the other
11 two, I want to start with an opinion in the Central District by
12 the late Honorable Florence Marie Cooper.

13 THE COURT: Well, let me tell you before you do
14 that -- first of all, the late Honorable Florence Marie Cooper
15 was a dear friend of mine, but we had very differing opinions on
16 a lot of things, and to cite an opinion of hers means no more to
17 me or any of my colleagues than if I were to walk across the
18 hall to my friend, the Honorable Judge Klausner and say, *Hey,*
19 *Gary, what do you think?*

20 So, A, you should keep that in mind when citing
21 district court opinions, and, B, no district court opinion in
22 the Ninth Circuit or elsewhere is an opinion of the circuit in
23 which that district court sits and it should not be cited as
24 such.

25 MR. MARQUART: I understand, your Honor, and I'm about

1 to address part of that concern.

2 THE COURT: All right.

3 MR. MARQUART: The first part was I was simply paying
4 respect to Judge Cooper.

5 The second part of your concern is that this opinion
6 is quoting directly from the *Grokster* case. I'm citing it as an
7 example of the Central District observing the *Grokster* opinion
8 and applying it in a new instance.

9 THE COURT: Well, as I say, you can cite whatever you
10 want so long as there's no rule against it, but it is a lot more
11 persuasive to me if you would just cite the *Grokster* case
12 because when I see a district court decision, I really don't pay
13 nearly as much attention to it as you would hope, even if the
14 district court opinion is mine.

15 MR. MARQUART: I understand.

16 THE COURT: So --

17 MR. MARQUART: I understand.

18 This particular opinion, before I cite *Grokster*, was
19 decided under Rule 8 and also pertains to the notice pleading
20 standard and has quite a bit to say about the notice pleading
21 standard and the minimum standard that it is, so in that
22 instance, it's also instructive.

23 For what it's worth, at the risk of violating your
24 admonishment, it is 2006 WL 5383789, and it's -- I'm reading
25 from page 3.

1 I will now, your Honor, cite the *Metro-Goldwyn-Mayer*
2 *Studios vs. Grokster LTD*, which is 125 SCT 27642776, Note 1.
3 And it states, quote, *One infringes contributorily by*
4 *intentionally inducing or encouraging direct infringement and*
5 *infringes vicariously by profiting from direct infringement*
6 *while declining to exercise a right to stop or limit it.*

7 So I'll start with the later. After *Grokster* it's
8 clear that *control* means the ability to stop or limit
9 infringement. Defendants own papers have admitted, in conceding
10 that they have removed the offensive LimeWire content, that they
11 had the ability to stop and limit it at any point.

12 The issue in the Google case was that their search
13 algorithms were such that it was very, very difficult for them
14 to be able to do it. And again -- this is still related -- they
15 didn't have a motive that was infringement biased. They were
16 infringement neutral.

17 In this instance, not only in the LimeWire instance,
18 but throughout history -- Napster first, then Grokster, then
19 LimeWire -- the defendants have shown the ability -- which is
20 alleged in the Complaint and I'm happy to point out the
21 paragraphs. They've shown the ability to stop or to limit the
22 infringing activity. And I believe that this issue of control
23 is really where the action's at in defendants' motion.

24 I want to add, though, that we've also alleged on
25 information and belief that they have direct contractual

1 relationships, but, your Honor, they've got that information.
2 We don't have that. That's an issue for discovery, but
3 certainly it's not required when control has been alleged.

4 THE COURT: Well, maybe I misunderstood what they were
5 saying, but obviously they can remove -- I shouldn't say
6 *obviously* because I don't know how all this works very well, but
7 they can say, *Okay, we're not going to have LimeWire here*
8 *available for download anymore*, but that doesn't mean that
9 nobody can download copyrighted material using LimeWire. It
10 just means it can't be done by getting it through CNET.

11 MR. MARQUART: That's right, but the cases focus on
12 the defendants' ability to stop its contribution, and it's also
13 noted in the Complaint that 95 percent of all of the downloads
14 of LimeWire came from Download.com so it's a significant effect.

15 Let me --

16 THE COURT: Are they using Download.com to download
17 it, to download the copyrighted material, or do they get
18 LimeWire itself from Download.com and then --

19 MR. MARQUART: They get -- what they do is they go to
20 Download.com. They search for peer-to-peer software. They
21 immediately get all sorts of links with tutorials as to which
22 software are better by CNET agents telling them how to download
23 those tools and then instructing them, as they themselves
24 directly infringe, how to use those tools to infringe.

25 And our contention is -- there's a lot made about this

1 secondary versus tertiary offense. There's no evidence in any
2 of the authority, *Grokster* or otherwise, in any of the
3 authority, including the remanded *Grokster* opinion from 2007,
4 that suggests that it matters what level you're at. What
5 matters is the intent. Again, I'm going back to inducement.

6 Sticking to the point of vicarious, what matters is
7 their ability to stop or limit the infringement. Clearly if
8 they're able to stop or limit 95 percent of the LimeWire
9 downloads, as they did, then they're able to stop or limit users
10 from using LimeWire to infringe.

11 THE COURT: But I'm still not understanding how they
12 do that. If -- if the -- if I wanted to do that, I would
13 download LimeWire itself to my computer; right?

14 MR. MARQUART: Right.

15 THE COURT: And then I would find somebody who wants
16 to share a copyrighted item, and my computer and that person's
17 computer would communicate. Do we need Download.com for
18 something? Do we use Download.com for something?

19 MR. MARQUART: Well, Download.com is providing
20 instructions as to how to use it.

21 THE COURT: Yes. But once I know how to use it, then
22 what? There's a lot of things people teach me. I don't need to
23 go back --

24 MR. MARQUART: I will concede that once LimeWire is
25 downloaded, there is no need to access Download.com any longer

1 unless one needs instruction as to how to do it. I think we've
2 already covered that. That's inducement.

3 But if I may, I want to read in the record what is
4 alleged as to vicarious liability and control. This is
5 Paragraph 167 of the Complaint on page 49: Quote, *Defendants*
6 *are liable as vicarious infringers for the copyright*
7 *infringement committed via P2P client software that defendants*
8 *distributed and promoted, including LimeWire and others as noted*
9 *above. At all times relevant to this action, defendants/I have*
10 *had the right and ability to control and/or supervise the*
11 *infringing conduct of P2P client software publishers and*
12 *individual users, either by direct contractual relation or as a*
13 *matter of practical control, including, without limitation,*
14 *through their ability to cut off distribution of P2P clients and*
15 *listing on Download.com any and all versions of software and*
16 *defendants' ability to cease publishing articles promoting and*
17 *instructing users on the use of P2P software for infringement.*

18 And of course we allege they've had a direct financial
19 interest and that's been alleged throughout the Complaint. I
20 don't think there's any dispute about that allegation.

21 So, your Honor, clearly I just simply do not believe
22 that the law requires under the element of control that
23 Download.com actually, in every instance the infringement is
24 occurring after a download of LimeWire, participate meaningfully
25 in that particular instance. Clearly they provided both the

1 means and the instruction and in fact encouraged and profited
2 thereby for users to download the tool, and once that happens,
3 it sets in motion a network of events, a network of songs that
4 include millions and millions of protected works and sets forth
5 a sequence of events whereby users are now sharing protected
6 works which Download.com is very well aware of.

7 THE COURT: What more does vicarious liability, if
8 there is such, give you than inducement?

9 MR. MARQUART: I would concede, your Honor, that the
10 damages -- in our mind, the damage theories are the same. In
11 fact, there's an open question as to -- and many cases -- many
12 of the cases in the circuit are confused sometimes, various
13 versions of secondary liability, particularly contributory
14 inducement and inducing copyright infringement -- sorry --
15 contributory infringement. A lot of courts look at those as one
16 and the same.

17 The damages model would be absolutely the same. The
18 difference is that we haven't yet discovered what I pointed out
19 which was either by direct contractual relation and/or as a
20 matter of practical control.

21 Your Honor is taking issue with the practical control,
22 as I understand your question, but we don't -- we've alleged on
23 information and belief that there's direct contractual
24 relations, and we do in fact believe that there were particular
25 relationships. We talk about a pay-per-download system that was

1 a separate contract whereby individual LimeWire-type
2 participants could pay and achieve a higher rank in the search
3 listing and then would pay per download, sort of the way that
4 Google's AdSense worked, but again that was in an
5 infringement-neutral setting.

6 So there a number of different facts that we believe
7 weren't appropriate under Rule 8(a) or Rule 12(b)(6) that need
8 to be discovered as to that element of control, and we would
9 suggest that this is a premature motion for summary judgment.

10 THE COURT: All right. Is there anything else you
11 want to say? I'm not sure you've addressed material
12 contribution, although everything kind of runs together here.

13 MR. MARQUART: Yes, your Honor, I do want to address
14 that. Thank you.

15 Just to be clear, the elements of contributory
16 infringement do differ slightly. Reading again from -- at the
17 risk of citing the opinion that cites the opinion, I will read
18 from *Newborn vs. Yahoo, Inc.* which is 391 F.Supp.2d, 181, 185
19 through 86.

20 *A claim for contributory copyright infringement must*
21 *allege, one, direct infringement by a third party; two,*
22 *knowledge by the defendant that third parties were directly*
23 *infringing; and, three, substantial participation by the*
24 *defendant in the infringing activities.*

25 So I think the materiality concern deals with that

1 third prong there. It's been described in different ways, but
2 the Complaint alleges again that 95 percent of the downloads for
3 LimeWire occurred through Download.com; that people came to
4 Download.com and CNET for advice as to how to infringe; and that
5 once there, CNET participated by literally showing them how
6 their own paid editors could download this content on the fly,
7 showing them their own direct infringement, and telling them to
8 go and do it. And in our mind, all of it does bleed together,
9 we agree, and the bases of damages are very similar once
10 liability is determined. But in our mind, that clearly
11 satisfies the materiality requirement or, as I had quoted,
12 substantial participation by the defendant in the infringing
13 activities.

14 THE COURT: All right. Thank you. And before I let
15 you go, you mentioned something about an amendment for at least
16 14 or 15 of the plaintiffs. What do you plan to do with that so
17 I can --

18 MR. MARQUART: Yes, your Honor. That was not an
19 amendment to the Complaint. That was an amendment for
20 plaintiffs who already are named in the Complaint who are among
21 those 19 pointed out to us, and that was filed today, and so it
22 should be in the Court's files. I do have an extra copy if you
23 would like me to provide it, but it's in the Court's record now.

24 THE COURT: All right. Well, if you filed anything,
25 there should be a mandatory paper chambers copy. We used to

1 call it a *courtesy copy* but we discovered that lawyers weren't
2 really all that courteous so now we call it mandatory --

3 MR. MARQUART: Well, I'm both courteous and aware of
4 the mandate.

5 THE COURT: All right. Thank you.

6 Mr. Kendall or Ms. Brill?

7 MR. KENDALL: Your Honor, the theory of this case is
8 an unprecedented one. The argument is that a tertiary actor
9 that is in the business of maintaining a directory with some
10 editorial comment associated with that directory can be liable
11 at two removes from infringement that takes place. And there's
12 no case that's been cited by my learned opponent that's anything
13 like this. So what we're left to do is reason from precedents
14 that are pretty far from the facts that we have here.

15 And I'll say at the beginning that as the Court's
16 comments indicate, there's more crispness with respect to the
17 vicarious infringement and contributory infringement theories of
18 liability which, in my view, makes them easier for us to succeed
19 on this motion than there is for inducement. But I believe when
20 you look hard at the precedents and the analysis in the cases
21 and the policies that underlie that analysis, the same
22 conclusion would be true of inducement.

23 But if I may, let me start with vicarious
24 infringement. Vicarious infringement is a common law doctrine
25 that emerged from traditional vicarious liability. And

1 vicarious liability in the typical tort context depends on one
2 party's control of the alleged tort-feasor. Control is the key
3 point and so it's been in the area of vicarious liability for
4 infringement.

5 Now, we have two cases in this circuit which has been
6 the leading circuit, in fact, I think really the only circuit
7 that has been faced with cases and has needed to address claims
8 against tertiary actors, those being the credit card companies
9 in the *Visa* case and Google and Amazon in the *Amazon* case.

10 So the *Visa* case states the rule pretty clearly: *For*
11 *vicarious liability, a plaintiff must allege that the defendant*
12 *has first the right and ability to supervise the infringing*
13 *conduct, and that, of course, is the conduct of the users of a*
14 *peer-to-peer software, and secondly, a direct financial interest*
15 *in the infringing activity.*

16 Now, the Court in the *Amazon* case went on and
17 explained that control over direct infringer occurs when the
18 party in that case, Google or Amazon, has a legal right to stop
19 or limit the infringing conduct, as well as the practical
20 ability to do so.

21 In the example that your Honor gave, the user of
22 LimeWire who can get LimeWire from any of a number of different
23 sources was not under the control of either of the defendants in
24 this case. Now we'll just call it CBS Interactive. CBS
25 Interactive has no knowledge of who that individual may be.

1 That individual can conduct the unlawful activity without any
2 assistance whatsoever of any sort from my client.

3 The only cases that are actually cited in the brief
4 that address the vicarious infringement issue and are relied
5 upon that come from this circuit -- and by the way, that *Newborn*
6 case that was just cited to you, not only was that not cited in
7 their briefs, but it's a District of -- district court from the
8 District of Columbia case. And so let's just understand that it
9 either has analysis or not, but merely quoting some language
10 doesn't really advance the ball very much.

11 CBS has no privity at all with these alleged direct
12 infringers. We don't know who the direct infringers are.
13 They're not alleged in the Complaint as to who they are. And no
14 right and no practical ability to stop them from infringing.
15 And this is very different from the concert promoter who can
16 stop the concert where the allegedly infringing music was
17 performed in the *Gershwin* case, and it's very different from the
18 swap meet owner who can say sellers of pirated CDs, *You can no*
19 *longer sell CDs here*. But we don't have that practical ability
20 and we don't have the *de jure* right to stop the primary
21 infringer.

22 Now, with respect to contributory infringement, there
23 are two types. Let me first focus on the contributory
24 infringement that is not inducement. We have here the *Napster*
25 case, the *Perfect 10/Amazon* case to look to in this circuit.

1 And the *Perfect 10/Amazon* case says that a computer system
2 operator, such as Download.com, could be contributorily liable
3 if it has actual knowledge that specific infringing material is
4 available using its system, meaning its website, and can take
5 simple measures to prevent further damage to copyrighted works
6 yet continues to provide access to infringing works. Well, none
7 of that is happening here, none of those things is happening
8 here.

9 The most that can be said that is happening here is
10 that you can go to Download.com, as you can to many other
11 websites, and in addition to being able to find thousands upon
12 thousands of other software programs, you can also find
13 peer-to-peer programs, and you can then follow a link to the
14 website of a peer-to-peer operator and take it from there, if
15 you choose to, with that peer-to-peer operator's website,
16 including downloading the software from that website.

17 None of that entails any specific infringement of any
18 work of any kind by the Download.com website or the defendants
19 who operate it. None of it entails any knowledge of any
20 specific acts or infringement by any end user who happens to
21 come to our website first before going to the peer-to-peer
22 website and going on with its activities, and none of it entails
23 that we knew or could have known anything about what people who
24 visit our website do. What this amounts to is a claim that
25 merely making a link available, together with some editorial

1 content, which I'll get to in a moment -- but focusing on the
2 link for a moment, making a link available to create liability.

3 Now, Google did more than that in the *Amazon* case.
4 Google not only linked to the specific infringing conduct --
5 content, unlike here where we only link to the peer-to-peer
6 software site; we're not linking to any infringing content of
7 any kind. But Google also had a thumbnail copy of that content
8 on a website that a consumer would then see a copy of Perfect
9 10's copyrighted material but only in a thumbnail form.

10 We don't have any content of any of these plaintiffs
11 on our website at all. So we are at a more attenuated
12 relationship with the content; in fact, no relationship with the
13 content than was Google.

14 So I think, your Honor, under the elements that have
15 been found as to vicarious infringement and contributory
16 infringement in the Ninth Circuit, it's quite clear that those
17 elements are not satisfied here, which brings me to inducement.

18 The problem with inducement is that the language of
19 the *Grokster* opinion, which deals with a very different set of
20 facts, is, I think we all have to recognize, loose enough to
21 make it possible to make allegations that would seem at first
22 blush to fit within some of that language, and what I now wish
23 to do, your Honor, is argue why the Complaint, which I'm struck
24 with obviously, doesn't do that. If this case goes forward,
25 there will be questions about the satisfying of Rule 11 with

1 respect to some of those allegations, but I can't make those
2 arguments now.

3 Let me start with what is alleged in the Complaint and
4 what is also conceded by other allegations in the Complaint.

5 So what is alleged in the Complaint is that CBS
6 Interactive maintains the world's most comprehensive directory
7 of software, and that among the software programs that are
8 discussed and to which links are provided -- not to the software
9 program itself, but to the website where the software program
10 can be found -- include some peer-to-peer software programs.
11 There is no question that based on the Complaint that a massive
12 amount of information is available on Download.com and CNET.com
13 that has nothing whatsoever to do with peer-to-peer software at
14 all.

15 But they're focusing on what does have to do with
16 peer-to-peer software. What they have to satisfy under the
17 *Grokster* language is that the defendants here intended -- and
18 I'm now going to quote from *Grokster* at page 940: *To bring*
19 *about infringement and distributed a device suitable for*
20 *infringing use.*

21 Now, the Supreme Court was discussing that in the
22 context of *Grokster* and also, I think it's fair to say, a
23 discussion of the prior *Napster* case in which the whole purpose
24 of *Napster* and then *Grokster* at issue was to further
25 infringement. That's what those companies did. That's what

1 those programs were for, and there was evidence that literally
2 millions of infringing works were available through those
3 networks that were operated by Grokster and its predecessor,
4 Napster. There is nothing like that here because Download.com
5 and CNET.com don't operate anything that has any infringing
6 content on it, according to this Complaint.

7 But the other question is did the defendant intend, in
8 addition, to bring about infringement. Now, here we get to a
9 problem because CNET.com is probably the leading source for
10 information about software. So in addition to trying to find
11 the boundaries of culpability, we also have to take account that
12 we're finding the boundaries of First Amendment protection here.

13 The Complaint concedes that peer-to-peer software is
14 not per se illegal. That's at Paragraph 154 of the Complaint.
15 And obviously then it follows that there's nothing per se
16 culpable about being a user of peer-to-peer software, and in
17 fact the Court in *Grokster* noted that peer-to-peer technology
18 that enables internet users to share files which can include
19 their own works or public domain works or licensed media files
20 is a great benefit. So there's nothing wrong with a directory
21 pointing to peer-to-peer software for appropriate uses. And
22 there's certainly nothing wrong with reporting on how to use it
23 or reporting on which softwares can download files more
24 efficiently.

25 So there has to be more in order to find liability

1 here, and whatever that liability is premised on has to be
2 something from which the Court could draw, you know, a principle
3 that would govern activity particularly in this First Amendment
4 area.

5 So what do we have on what could constitute culpable
6 conduct that would satisfy the inducement standard? Really the
7 best way to think about that, I believe, is to look at what the
8 *Global Tech* case, the patent case that was recently decided by
9 the Supreme Court, said about what was at issue in *Grokster*. So
10 the issue in the *Global Tech* case was the level of knowledge and
11 culpability that was required in order to be liable for patent
12 infringement based on an inducement theory.

13 And as the Court will remember from reading *Grokster*,
14 the *Grokster* court goes on at great length to describe the
15 various forms of secondary liability at issue in *Grokster*. Here
16 we have to be tertiary. *The various forms of secondary liability*
17 *either derive from the common law or from the patent law.* So
18 the patent law is a good place to look, and that's why in --
19 what the court said in *Global Tech* I think it's very helpful to
20 try to interpret *Grokster*.

21 The Supreme Court in *Global Tech* last term reiterated
22 that inducement liability is confined to instances of culpable
23 action requiring knowledge of the existence of the patent that
24 is being infringed. That's in the *Global Tech* case, 131 Supreme
25 Court at 2068.

1 So here the analog would be that Download.com would
2 have knowledge of the fact that primary users of its website,
3 the Download.com website, are using that site to infringe the
4 plaintiff's specific copyrighted works. Well, of course, as
5 I've said, that's not happening at all.

6 The next level of remove, which I submit is not a
7 basis for liability at all, is to say that the operators of
8 Download.com are aware of specific infringing activity occurring
9 at a peer-to-peer software site, which is not an illegal one.
10 LimeWire, once it's declared illegal, that's another story.
11 That's why it comes down off of our website, but the question is
12 should Download.com be removing all peer-to-peer software since
13 all of them are subject to misuse, just like the Betamax was
14 subject to misuse.

15 The *Global Tech* court pointed out at page 2070 that in
16 *Grokster*, the defendants were fully aware of the acts that
17 constitute infringement and violated the rights of copyright
18 holders that were occurring on the *Grokster* network, and of
19 course they had to be. That was the whole purpose of the
20 network.

21 That I submit, your Honor, is the standard that's not
22 met here for inducement. There's no showing -- there's no
23 allegation other than the bald conclusory allegations that don't
24 suffice under the *Iqbal* case. There's no specific fact of any
25 kind showing awareness, and that's where I believe the

1 inducement claim fails.

2 It also fails, we would argue, based on Ninth Circuit
3 law. In the Ninth Circuit, the Court held in the *Perfect*
4 *10/Amazon* case that the plaintiff must plead and prove that the
5 defendant promoted its own services for the purpose of
6 infringement, and I submit there's no allegation to that effect
7 here nor could there be. Similar law, your Honor, from the
8 *Luvdarts* case that we also cited, 2011 Westlaw 997199 at page 2,
9 which was the wireless carrier case.

10 And finally, your Honor, if I could discuss the
11 editorial commentary on which they rely. I don't think it's a
12 fair characterization for counsel to say that Download.com tells
13 the user -- and, I mean, even as alleged in the Complaint --
14 *download this and here's how to use it*. They have pointed to
15 some editorial commentary that is not on the link page but is
16 just available on the website. A lot of the editorial
17 commentary they point to is pre-Grokster when it wasn't clear
18 what the status was of even Grokster. But some of it is
19 post-Grokster. But it is not as if it is a -- an advertisement
20 to use Grokster coming from the operator of Grokster. Instead,
21 this is a discussion of the merits of different peer-to-peer
22 softwares coming from an organization whose news gathering
23 includes that sort of commentary.

24 So the question this raises is whether that content
25 can be the basis for distinguishing us from the credit card

1 company, which is their argument. That's how he began his
2 argument. And I submit that we're in very dangerous territory
3 if the content is the only basis for liability here.

4 In the *Sony* case, the Court pointed out the reluctance
5 of the judiciary to expand copyright protections without
6 explicit legislative guidance because of the settled principle
7 that the protection given to copyrights is wholly statutory. So
8 this isn't supposed to be judge-made. That's at page 417 in the
9 *Sony* case.

10 The Court expressed a need to be circumspect in
11 construing the scope of rights where Congress has not plainly
12 marked the course, page 131. And then the Ninth Circuit has
13 echoed these concerns that we evaluate, in that case, the
14 *Perfect 10 against Visa* case. *Perfect 10's* claims: *With an*
15 *awareness that Congress has determined it to be the policy of*
16 *the United States to promote the continued development of the*
17 *internet and the interactive computer services and the other*
18 *interactive media and to preserve the vibrant and competitive*
19 *free market that exists for it.*

20 Your Honor, the problem here is that if CBS
21 Interactive can be liable here, there would be -- on an
22 inducement theory on this Complaint, it would be very difficult
23 to advise a client that wishes to have any commentary about an
24 internet cite. Suppose I was giving advice to the *Los Angeles*
25 *Times* and they came to me and they said, *We provide links to*

1 many different kinds of electronic products, including websites.
2 We provide editorial comment. Do we need to tailor our
3 editorial comment so that we do not cover software that is
4 highly controversial and may one day be adjudged but has not yet
5 been adjudged to be illegal?

6 The result in this case could affect the kind of
7 advice you give in that situation, and that's why I think that
8 in analyzing the situation, even on the toughest claim, which is
9 the inducement claim, the Court should find in this case that
10 not enough has been alleged to establish the kind of liability
11 that was present in *Grokster* or the other secondary inducement
12 cases but instead find that this is much more like the tertiary
13 liability cases in which the courts have declined to find
14 liability.

15 Thank you, your Honor.

16 THE COURT: All right. Thank you.

17 Mr. Marquart, if you have more than two or three
18 minutes, we'll take a break.

19 MR. MARQUART: I think I can finish it, your Honor.

20 THE COURT: Okay.

21 MR. MARQUART: First I want to point out that the
22 *Perfect 10* cases, the Amazon and Google vs. *Perfect 10* cases
23 were decided on preliminary injunctions where the Court had in
24 front of it the AdSense agreements between Google and the direct
25 infringer. That is one example among many of factual arguments

1 that counsel has made here that simply aren't appropriate on a
2 12(b)(6) motion.

3 Secondly, it is not the content but the intent that is
4 at issue here which is itself, we concede, a factual issue, a
5 deeply-rooted factual issue. We could present to the Court --
6 it's premature now -- evidence from prior BitTorrent executives,
7 for example, that suggest that there was direct privity where
8 counsel says there was not direct privity. We need to discover
9 similar instances from others and we haven't had the opportunity
10 to do that.

11 Let me read, though, real quickly from the *Grokster*
12 opinion the two mere elements for inducement. Notably none of
13 them have anything to do with what I would consider
14 hairsplitting by counsel as to the level of command, as it were,
15 or hairsplitting the actual technical use of particular software
16 and how it's downloaded. They all have to do with intent.

17 The two elements are that *One distributes a device*
18 *with the object of promoting its use to infringe copyright as*
19 *shown by clear expression or other affirmative steps to foster*
20 *that infringement.*

21 Your Honor, clearly this did not work for LimeWire.
22 LimeWire, Napster, Grokster all said, *Look, we just download*
23 *software from which anyone can do anything they want with it.*
24 Why was that different than the *Sony/Betamax*? Simply because
25 *Sony* in that case did not distribute a two edit VCR with

1 advertisements accompanying it saying, *here's how to download*
2 *Pirates of the Caribbean* and a 40-page guideline as to how to do
3 it written by *Sony* agents. That's what alleged here.

4 We concede that it's a factual issue, but everything
5 else that counsel has mentioned are factual issues. And we've
6 clearly -- this Complaint is dripping with fact. The
7 pay-per-download allegations, the file-sharing smackdown, quotes
8 from screen shots of infringement.

9 We simply submit, your Honor -- and there's really no
10 reason to argue it any further -- that it's unfair
11 hairsplitting. And the only case that I'd like your Honor to
12 focus on -- I apologize, it's not a Ninth Circuit case, but I
13 think it's very telling and is an interpretation of the *Grokster*
14 opinion -- is the *Fung* case which I will read the citation into
15 the record for your Honor. It's 2009 WL 6355911. It's a
16 Central District of California case, your Honor, wherein the
17 defendant merely provided indexing, just the ability to search
18 for various torrent files for known copyrighted movie content.
19 And he claimed to the Court there, *Well, your Honor, I'm only*
20 *providing an index. I'm only providing people the ability to*
21 *search for these things and then the torrent files exist*
22 *somewhere else.* He was splitting hairs.

23 What the *Grokster* opinion and all the cases, including
24 the *Grokster* remand opinion, are doing is taking a practical
25 view now and saying if the intent through expression and conduct

1 is shown to be that to induce others to infringe known
2 copyrighted works and if it has that effect and if there's a
3 profit motive, which clearly there is or it's alleged there is,
4 then inducement exists.

5 I will rest upon my original argument, your Honor, as
6 to vicarious liability. I gave as an example that the privity
7 argument of counsel relied upon *Perfect 10 vs. Google*. That
8 case had before it the contracts. We're not at that stage.

9 THE COURT: Thank you.

10 One minute, if you'd like.

11 MR. KENDALL: Your Honor, actually all I would like to
12 point out is that I addressed that argument relating to the *Fung*
13 case at page 9 of our reply brief.

14 THE COURT: All right. Thank you.

15 We will take a 10-minute recess.

16 (Recess taken)

17 THE COURT: Why are you here?

18 MR. MARQUART: We weren't sure if the matter stood
19 submitted, your Honor.

20 THE COURT: Yes. Usually people leave when I'm in the
21 middle of talking to them.

22 MR. MARQUART: We couldn't get enough today.

23 THE COURT: Thank you.

24

25 (Proceedings adjourned at 3:09 p.m.)

