

**No. 09-55902, No. 09-56777**  
Opinion Filed December 20, 2011  
Before: Harry Pregerson, Raymond C. Fisher and Marsha S. Berzon,  
Circuit Judges

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

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**UMG RECORDINGS, INC.; UNIVERSAL MUSIC CORP.; SONGS OF  
UNIVERSAL, INC.; UNIVERSAL-POLYGRAM INTERNATIONAL  
PUBLISHING, INC.; RONDOR MUSIC INTERNATIONAL, INC.;  
UNIVERSAL MUSIC—MGB NA LLC; UNIVERSAL MUSIC—Z  
TUNES LLC; UNIVERSAL MUSIC—MBG MUSIC PUBLISHING  
LTD.,**

**Plaintiffs-Appellants**

**v.**

**SHELTER CAPITAL PARTNERS LLC, SHELTER VENTURE FUND  
LP, SPARK CAPITAL LLC, SPARK CAPITAL, L.P., TORNANTE  
COMPANY, LLC, AND VEOH NETWORKS, INC.,  
Defendants-Appellees.**

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**On Appeal from the United States District Court  
for the Central District of California, Western Division—Los Angeles  
Honorable A. Howard Matz, District Judge**

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**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR  
REHEARING AND REHEARING *EN BANC* PER JUNE 7 ORDER**

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Steven A. Marenberg, Esq.  
State Bar No. 101033  
Brian D. Ledahl, Esq.  
State Bar No. 186579  
IRELL & MANELLA, LLP  
1800 Avenue of the Stars  
Suite 900  
Los Angeles, California 90067  
Telephone: (310) 277-1010  
Facsimile: (310) 203-7199

**ATTORNEYS FOR  
APPELLANTS**

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## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Pursuant to the Court's Order of June 7, 2012, Appellants (collectively "UMG") respectfully submit this supplemental brief in support of their pending Petition for Rehearing or Rehearing *en banc* ("the Petition"). UMG addresses the questions identified in the June 7 Order as follows:

### **1. § 512(c)(1)(A) – Actual vs. "Red Flag" Knowledge**

The Court asked whether "the Second Circuit draw[s] the correct distinction between actual and red flag knowledge"? In short, although the Second Circuit, unlike the panel decision, correctly held that there is a difference between the actual knowledge standard (section 512(c)(1)(A)(i)) and the red flag knowledge standard (section 512(c)(1)(A)(ii)), its opinion is flawed insofar as it fails to meaningfully differentiate between these standards as Supreme Court precedent requires. Nonetheless, even under the Second Circuit's imperfect interpretation of red flag knowledge, UMG's case should survive summary judgment.

As UMG's Petition explained, the panel decision conflated Section 512(c)(1)(A)(i) (actual knowledge) and Section 512(c)(1)(A)(ii) ("red flag" knowledge). The Second Circuit's decision in *Viacom International v. YouTube, Inc.*<sup>1</sup> ("YouTube") recognized the need to differentiate between these

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<sup>1</sup> 676 F.3d 19 (2d Cir. 2012).

two very different statutory standards, holding that the actual knowledge provision of § 512(c)(1)(A)(i) refers to a service provider's subjective knowledge of specific infringement as distinguished from "red flag" knowledge which results from evidence that a specific infringement is objectively obvious to a reasonable person. Although the Second Circuit articulated a difference between the standards – and that difference affects the disposition of this case on the record before the District Court on summary judgment – the *YouTube* standard is incorrect. The *YouTube* standard fails to comport with Supreme Court precedent insofar as it does not provide meaning to Congress's deliberate decision to create two knowledge standards, using different language, in different statutory provisions of the DMCA. In contrast to § 512(c)(1)(A)(i), where reference to a specific infringement is appropriate from the language of the provision (i.e., "actual knowledge that *the material* or an activity using the material on the system or network *is infringing*"), the "red flag" provision of § 512(c)(1)(A)(ii) requires only "aware[ness] of facts or circumstances from which *infringing activity* is apparent." The record before the district court was certainly such that a reasonable trier of fact could have concluded that Veoh possessed such awareness, rendering summary judgment inappropriate under either the *YouTube* standard, or that which UMG respectfully submits is mandated by law. For example, UMG presented

evidence that Veoh's highest executives *admitted* in email communications that they were aware that a majority of the content on the Veoh service was unauthorized infringing content, and that it would be better not to discuss such facts in writing – *i.e.*, evidence showing full guilty knowledge of Veoh's extensive infringement.

**2. § 512(c)(1)(B) – "Right and Ability to Control"**

The Court asked several questions regarding "right and ability to control," which are addressed in turn below. In sum, in § 512(c)(1)(B), Congress deliberately enacted a standard in the DMCA that mirrored the common-law standard for vicarious liability – *i.e.*, receipt of a direct financial benefit from infringing activity where one has the right and ability to control or supervise that activity.<sup>2</sup> Congress stated in the legislative history that it was adopting the common-law standard for vicarious liability, and upon making this statement, never thereafter amended the statutory language. In adopting this standard, Congress made clear that service providers should not have protection from liability when they receive direct financial benefits from infringement, except where they lack the right and ability to control that infringement. Nonetheless, the panel decision imported a standard duplicative

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<sup>2</sup> See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001).

of its actual knowledge standard, which would render this provision superfluous. The Second Circuit correctly rejected the approach of the panel decision, but erroneously suggested that the DMCA requires "something more" than the common-law standard Congress incorporated into the statute. Here, UMG indisputably presented evidence raising a genuine issue of fact under *either* the standard articulated by the Second Circuit, or as UMG urges be adopted, a standard that parallels common-law vicarious liability. For example, UMG presented evidence that Veoh had multiple available means to control infringing activity, but instead chose to encourage infringement – precisely the type of conduct that the Supreme Court recognized giving rise to liability in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>3</sup>

## **DISCUSSION**

### **I. §§ 512(c)(1)(A)(i) & (ii): Actual and "Red Flag" Knowledge**

#### **A. Though Better Than The Panel Decision, The Second Circuit's YouTube Opinion Does Not Adequately Distinguish Between Actual and "Red Flag" Knowledge**

Under section 512(c)(1)(A)(i), a service provider will not have protection under the DMCA unless it "does not have actual knowledge that the material or an activity using the material on the system or network is

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<sup>3</sup> 543 U.S. 913, 939 (2005)



infringing." Section 512(c)(1)(A)(ii), the "red flag" provision, presents a very different requirement, couched in very different language: to wit, that a service provider will not have protection under the DMCA unless it "in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent." The "red flag" provision recites that it applies "in the absence of such actual knowledge." This confirms that Congress required something different than actual knowledge. The Court asked if the Second Circuit drew the correct distinction. As set forth below, though better than the panel decision, the Second Circuit still failed to articulate a proper interpretation.

The Second Circuit correctly recognized that the actual and red flag knowledge standards differ. To distinguish these two standards, the Second Circuit ruled that the actual knowledge standard requires "subjective" knowledge of a specific act of infringement, while the "red flag" standard requires that a service provider be "subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person." Nonetheless, the Second Circuit erred because under its dichotomy, both standards require some kind of knowledge of a specific individual act of infringement.

While the *YouTube* court attempted to draw some daylight between §§ 512(c)(1)(A)(i) and (ii), which the panel decision in this case did not, ultimately, the Second Circuit created a semantic distinction that fails to properly account for the substantially different language of the two standards. It is not clear how one could have objective knowledge of a particular specific act of infringement, but lack subjective knowledge of that same particular specific act of infringement. Subjective knowledge of a fact is inevitably proven by inference from circumstantial evidence, as admissions of such knowledge are rare.<sup>4</sup> Certainly such evidence would be sufficient to prevent summary judgment and allow a trier of fact to determine whether the service provider possessed actual (subjective) knowledge. Thus, UMG submits, while the *YouTube* opinion warrants reconsideration of the panel opinion insofar as *YouTube* correctly recognizes that actual knowledge and red flag knowledge

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<sup>4</sup> See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (acknowledging the distinction between a requirement of subjective knowledge, and the fact that such knowledge is proven through circumstantial evidence); *Wyatt v. Cole*, 504 U.S. 158, 173-74 (1992) (recognizing that subjective bad faith is proven through circumstantial evidence). The same principle is recognized generally in Copyright Law. See *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990) ("Because, in most cases, direct evidence of copying is not available, a plaintiff may establish copying by showing that the infringer had access to the work and that the two works are substantially similar.").

are different standards with different meanings, ultimately the Second Circuit's definition of red flag knowledge is incorrect.

The Second Circuit failed to take proper account of the statutory language in reaching its decision. The actual knowledge provision refers to knowledge "that *the material* or an activity using *the material* on the system or network is infringing." (Emphasis added). By contrast, the "red flag" provision makes no such mention of "the material" but instead refers only to awareness "of facts or circumstances from which infringing activity is apparent." "It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words."<sup>5</sup> Congress's decision not to include a reference to "the material" in the "red flag" knowledge provision, as well as its reference to "infringing activity" generally, as opposed to "*the*" infringing activity, indicates that it refers to a more general class of conduct than a specific individual act of infringement.<sup>6</sup> The Second Circuit based its interpretation on combining the "red flag" knowledge provision of

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<sup>5</sup> *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003).

<sup>6</sup> *See generally* Menell, Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of *Viacom v. YouTube and UMG Recordings v. Shelter Capital Partners*, UC Berkeley Public Law Research Paper No. 2049445 (May 1, 2012). Available at SSRN: <http://ssrn.com/abstract=2049445>.

Section 512(c)(1)(A)(ii) with the language of Section 512(c)(1)(A)(iii), but that fails to properly account for the disjunctive "or" between the subsections.

UMG submits that the correct distinction is between actual knowledge – which relates to specific acts of infringement – and "red flag" knowledge, which relates to knowledge of infringing activity more generally and is not limited to knowledge of particular specific acts of infringement. This interpretation is more faithful to the plain meaning of the statute. It also preserves the basic principle that statutory exceptions to rules of general liability are to be construed in a way that does not swallow up the underlying statute.<sup>7</sup> Likewise, it is consistent with the legislative history, linking the term "red flags" with an intent to exclude from the safe harbor any "pirate" sites "where sound recordings, software, movies, or books were available for unauthorized downloading, public performance, or public display . . . ."<sup>8</sup>

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<sup>7</sup> See, e.g., *Regents of the Univ. of California v. Public Employment Relations Bd.*, 485 U.S. 589, 600 (1988) (refusing to construe an exception to the Private Express Statutes to swallow the underlying statute); *Bolt v. U.S.*, 509 F.3d 1028, 1034 (9th Cir. 2007) (recognizing that the Federal Tort Claims Act, as a remedial statute must have its exceptions construed narrowly); *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672, 680-81 (9th Cir. 2005) (refusing to construe a non-commercial use exception in Section 1125 of the Lanham Act so as to swallow the provisions of the Anticybersquatting Consumer Protection Act).

<sup>8</sup> H.R. Rep. No. 105-551, pt. 2, at 57 (1998).

The panel decision and the Second Circuit appear to have resisted this straightforward interpretation of the "red flag" provision out of some concern over the language of Section 512(m), which provides that eligibility for the "safe harbor" is not premised on a service provider affirmatively monitoring its service. The panel and the Second Circuit reasoned that anything less than knowledge of a specific infringement would require some type of further investigation, and thus should not be within the concept of "red flag" knowledge.

This reasoning misapprehends Section 512(m), which merely provides that a service provider need not engage in monitoring in the absence of such "red flag" knowledge. It does not suggest that no knowledge which might require some further investigation could ever qualify. Congress explained this distinction, stating that the statute "imposes no obligation on a provider to seek out such red flags. Once a provider becomes aware of a red flag, however, it ceases to qualify for the exemption."<sup>9</sup> Thus, while a provider may not (under Section 512(m)) have an obligation to seek out acts of infringement in the absence of any evidence from which infringing acts would be apparent (a red flag), once such evidence becomes available, a provider cannot ignore it or

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<sup>9</sup> H.R. Rep. No. 105-551, pt. 1, at 25 (1998).

blind itself to that evidence. Under these circumstances, a provider must take further action or face liability for its failure to do so.

**B. Even Under The Second Circuit's Standard, Reversal Of The Trial Court Is Necessary**

Even under the Second Circuit's formulation, the record evidence here requires reversal of the trial court's grant of summary judgment. Similar to the evidence that caused the Second Circuit to reverse and remand the *YouTube* case, UMG presented extensive evidence from which a reasonable trier of fact could conclude that a reasonable person would have had knowledge of specific acts of infringement.<sup>10</sup> For example, UMG presented evidence that Veoh purchased (or sought to purchase) the titles of specific infringing videos on the Veoh service as internet search terms to direct users seeking the infringing videos to the Veoh service, reflecting Veoh's knowledge (and indeed exploitation) of these specific acts of infringement.<sup>11</sup> UMG also presented evidence that Veoh personnel reviewed the Veoh service on a daily basis and thus necessarily uncovered specific infringing videos that were clearly identified with specific copyright information, but willfully turned a blind eye

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<sup>10</sup> *See Viacom Int'l., Inc. v. YouTube, Inc.*, 676 F.3d 19, 33-34 (2d Cir. 2012).

<sup>11</sup> *See generally* RE 389-90, 393, 395, 399, 407, 414, 587, 596, 604-605, 613-14, 665, 1537.

to such infringements.<sup>12</sup> A trier of fact should be entitled to determine whether a reasonable person would have concluded that Veoh had knowledge of specific acts of infringement based on such evidence.

Moreover, when red flag knowledge is delinked from specific instances of infringement, as it should be, even more evidence demonstrates Veoh's "red flag" knowledge. For example, the panel decision ignored the following evidence in which a Veoh employee (charged with reviewing the Veoh service to find unauthorized material) wrote to his superior:

*"isn't [infringing content] a majority of Veoh content? . . . And what should I do, for example, with music videos which are all copyrighted."*

His superior responded:

*"You are correct, we have many unauthorized content, and we should use 'unauthorized' to describe them in any email or skype exchange. I will explain you later on the phone, why and what to do with it."<sup>13</sup>*

Such evidence shows that Veoh had extensive awareness of its infringing activity – and tried to conceal it by instructing employees to use euphemisms like "unauthorized" to obscure massive infringement on the Veoh service. Additional evidence confirmed that Veoh's rampant infringement was

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<sup>12</sup> See, e.g., RE 951.

<sup>13</sup> RE 1233-34 (emphasis added).

obvious, even to outside observers – so obvious that it was the subject of an article in the New York Times (circulated among Veoh executives) pointing out that Veoh was "host to a wide range of unauthorized and full-length copies of popular programs."<sup>14</sup> Thus, the evidence showed that Veoh was exactly the type of site Congress described as a "pirate" site "where sound recordings, software, movies, or books were available for unauthorized downloading, public performance, or public display."<sup>15</sup> This evidence shows that Veoh willfully turned a blind eye to its rampant copyright infringement in the hope of maintaining the fiction that it lacked knowledge of such infringement and thus could allow it to continue. Such willful blindness is actual knowledge under the law and certainly sufficient to permit the case to proceed to the trier of fact.<sup>16</sup>

## **II. Right And Ability To Control**

The June 7 Order asked the parties to address five questions regarding the requirements of Section 512(c)(1)(B), which provides that a service provider can only have limited liability if it "does not receive a financial

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<sup>14</sup> RE1226-28.

<sup>15</sup> H.R. Rep. No. 105-551, pt. 2, at 57 (1998).

<sup>16</sup> *See Global-Tech Appliances, Inc. v. SEB S.A.*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2060, 2070-71 (2011) ("a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.").



benefit directly attributable to the infringing activity, in a case where the service provider has the right and ability to control such activity." We address these questions below.

**A. A Service Provider Does Not Need To Be Aware Of Specific Infringing Material To Have The Right And Ability To Control The Infringing Activity**

As UMG's Petition explained, the panel decision conflates the provisions of Section 512(c)(1)(B) with the actual knowledge provision of Section 512(c)(1)(A)(i) by holding that a service provider could only have the right and ability to control infringing activity if it had actual knowledge of specific infringing activity. This approach imports the requirement of a mental state into a provision that has no language relating to a mental state. The statutory text does not support such a requirement. Indeed, none of the words in Section 512(c)(1)(B) refer to knowledge (of any kind). We address the correct interpretation of this provision in greater detail below.

**B. Importing A Knowledge Requirement Would Make The Provision Duplicative Of The Actual Knowledge Provision**

Under the panel decision, there could never be a circumstance where a service provider lacked actual knowledge, but nonetheless failed to meet the bar of Section 512(c)(1)(B). As explained in the Petition, this approach

incorrectly renders Section 512(c)(1)(B) a nullity. The Second Circuit correctly recognized this and expressly rejected the approach of the panel decision for this reason.<sup>17</sup>

**C. The Ability To Block Access Is Sufficient To Show A Right And Ability To Control**

Both the panel decision and the Second Circuit struggled to avoid the ordinary presumption that where Congress chose to use the words of a common law standard, they intended to employ the meaning of that standard.<sup>18</sup> The language of Section 512(c)(1)(B) tracks the common law standard for vicarious liability. Congress even stated that they drafted this section to track the common-law standard for vicarious liability – and the statutory language of this provision was never changed after that statement.<sup>19</sup> This Court and the Supreme Court have routinely applied that common law standard as articulated in *Napster* and *Grokster*.<sup>20</sup> Indeed, this Court has previously recognized that the language of Section 512(c)(1)(B) utilizes the common law standard.<sup>21</sup>

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<sup>17</sup> *Viacom Int'l., Inc. v. YouTube, Inc.*, 676 F.3d 19, 36 (2d Cir. 2012).

<sup>18</sup> *See, e.g., Neder v. United States*, 527 U.S. 1, 21 (1999).

<sup>19</sup> *See* H.R. Rep. No. 105-551, pt. 1, at 25-26 (1998).

<sup>20</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)

<sup>21</sup> *See Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1117 (9th Cir. 2007).

Both the panel decision and the Second Circuit hesitated to apply this clear principle of statutory construction, asserting that it would create a Catch-22 for service providers. Specifically, both decisions concluded that a service provider must have the ability to block access to material to be eligible for protections under Section 512, so it would be illogical for that ability to simultaneously render the protections unavailable under Section 512(c)(1)(B). This argument might have some force if Section 512(c)(1)(B) withdrew protection solely based upon the right and ability to control infringing activity. But it does not.

Both the panel and the Second Circuit failed to place appropriate weight on the full text of Section 512(c)(1)(B), which leaves the safe harbor intact for a service provider who "does not receive a financial benefit directly attributable to the infringing activity." In expressing concern over a potential Catch-22, both the panel decision and the Second Circuit assumed that Congress intended to protect those service providers who receive a financial benefit directly attributable to infringing activity. But nothing in the text of the DMCA or its legislative history suggests that Congress ever intended safe-harbor protection for those who directly profit from infringement.

Congress never expressed the intent to create such remarkable protection: the right to profit directly from copyright infringement without

liability. Instead, Congress made clear that it was seeking to create *limited* protections for those that were *not* profiting directly from infringement – and created "safe harbors" for activities that would not ordinarily confer such direct financial benefits. Recognizing, however, that there might be circumstances where one could construct a system that met other provisions of the "safe harbor" yet still profit from infringement, Congress closed any such loophole in Section 512(c)(1)(B). The "right and ability to control" language is thus a safety valve which contemplates that if a service provider directly benefitted from the infringement under the unlikely circumstance in which it was nonetheless unable to control the infringement through traditional means (e.g., the infringing activity was separated in some way from the service provider's services), it might avoid liability under such circumstances.

Service providers like Veoh, ignoring the deliberately narrow safe-harbor provisions in the DMCA, try to separate the language of Section 512(c)(1)(B) and focus only on the second clause (i.e., the right and ability to control) because they indisputably receive a financial benefit directly attributable to the infringing activity. They suggest that this fact should be ignored, rather than given the primary significance that Congress intended. Congress drafted Section 512 so that such entities were presumptively *not* entitled to protection by virtue of their financial interest in infringement. This

creates the perfectly rational result that those who would profit from infringement bear the responsibility to avoid such infringement.

**D. If "Something More" Were Required, The Supreme Court Set Forth Appropriate Standards In *Grokster***

As discussed above, UMG respectfully submits that it is error to require "something more" than the common law right and ability to control infringing activity under Section 512(c)(1)(B). Were the Court to adopt such a requirement, however, the Supreme Court's *Grokster* decision provides a variety of appropriate considerations. For example, the Supreme Court focused upon the failure to implement tools (such as filtering) to reduce infringement as a basis for finding culpability.<sup>22</sup> Similarly, the Supreme Court pointed to various other aspects of culpable conduct in the *Grokster* decision which would likewise constitute "something more" if the Court were to adopt such a requirement (though UMG submits that it should not).<sup>23</sup>

**E. This Court Should Not Adopt The Second Circuit's Interpretation Of Section 512(c)(1)(B)**

As previously noted, the Second Circuit properly recognized that Section 512(c)(1)(B) must have a meaning and application distinct from Section

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<sup>22</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 (2005).

512(c)(1)(A) and the *YouTube* decision supplies an interpretation of Section 512(c)(1)(B) that is preferable (while imperfect) to that articulated in the panel decision because it avoids completely rendering the provision a nullity. Nonetheless, the Second Circuit fell short of the correct interpretation by failing to focus on the entire language of Section 512(c)(1)(B) and indulging the incorrect assumption that interpreting the statute as written would create a Catch-22. In reality, there is no Catch-22; the provision can sensibly and logically be understood according to its plain meaning and its clear adoption of a common-law standard, as stated by Congress in the legislative history and recognized by this Circuit in its *CCBill* decision.<sup>24</sup>

Dated: June 28, 2012

IRELL & MANELLA LLP  
Steven A. Marenberg  
Brian D. Ledahl

By: /s/ Brian D. Ledahl  
Brian D. Ledahl

Attorneys for Appellants

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<sup>23</sup> *Id.* at 939-940.

<sup>24</sup> *See* H.R. Rep. No. 105-551, pt. 1, at 25-26 (1998); *Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1117 (9th Cir. 2007).

**CERTIFICATE OF COMPLIANCE**

**PURSUANT TO CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a) and Ninth Circuit Rule 32-1, the attached supplemental brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,778 words.

Dated: June 28, 2012

IRELL & MANELLA LLP  
Steven A. Marenberg  
Brian D. Ledahl

By: /s/ Brian D. Ledahl  
Brian D. Ledahl

Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Alisa Shu Edelson  
Kulik Gottesman Mouton & Siegel, LLP  
Suite 1400  
15303 Ventura Blvd.  
Sherman Oaks, California 91403

Maria K. Vento  
Wilmer Cutler Pickering Hale and Dorr LLP  
950 Page Mill Road  
Palo Alto, California 94304

Mark G. Matuschak  
Wilmer Cutler Pickering Hale and Dorr LLP  
60 State Street  
Boston, Massachusetts 02109-1803



Rebecca L. Calkins  
Winston & Strawn, LLP  
38<sup>th</sup> Floor  
333 South Grand Avenue  
Los Angeles, California 90071

By: /s/ Brian D. Ledahl

Brian D. Ledahl