

No. C10-0116-1

In The

Supreme Court of the United States

October Term 2010

RUNAWAY SCRAPE, L.P.,

Petitioners,

v.

CHATNOIR, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

- I. Whether Chatnoir, Inc. intentionally induced or encouraged the infringement of Runaway Scrape, L.P.'s copyrights through its advertising efforts, failure to implement filtering tools, and reliance on infringement for the success of its business.

- II. Whether the domain name, "www.aardvarks.com," registered by Runaway Scrape, L.P. to promote legal downloads of its music, dilutes Chatnoir, Inc.'s trademarks by blurring, where there is no substantial similarity or actual association between the marks.

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OPINIONS BELOW

The decision of the United States District Court for the Northern District of Texas is unpublished and appears in the Record at page 9. The decision of the United States Court of Appeals for the Fourteenth Circuit is also unpublished and appears in the Record at pages 3-20. The Order granting certiorari by the Supreme Court of the United States is set forth on page 2 of the Record.

STATUTORY PROVISIONS INVOLVED

This case involves Section (c) of the Federal Trademark Dilution Revision Act ("TDRA"), 15 U.S.C. § 1125(c). This provision is reproduced in the appendix to this brief.

STATEMENT OF THE CASE

I. Facts of the Case

A. Runaway Scrape's Background and Copyrighted Works

The rock band Runaway Scrape was founded in 1999 by four college roommates and an art student. (R. at 6.) They have recorded several albums and are one of the most popular independent bands in the country. (R. at 6.) As an independent band, Runaway Scrape is unattached to any major record label. (R. at 6.) In order to record, license, and distribute its music, the band formed Runaway Scrape, L.P., which owns the copyright in all of the band's songs, videos, and merchandise. (R. at 6.) Runaway Scrape's copyrighted materials are registered with the U.S. Copyright Office. (R. at 6.)

VuToob, a media company owned by Poodle Corporation, operates a popular website that allows users to upload videos accessible to anyone on the internet. (R. at 5.) VuToob users upload their own home and artistic videos, as well as commentary. (R. at 5.) Many users, however, upload copyright-infringing material, which VuToob does its best to prevent. (R. at 5.) VuToob's main method of regulation is filtering software. (R. at 5.) This software searches for and blocks potentially infringing material. (R. at 5.) Although VuToob's filters are unable to detect all infringing material, the company has a policy and reputation for removing infringing videos when contacted by the copyright holders. (R. at 5.)

To promote its music, Runaway Scrape occasionally licenses its videos strictly for use by VuToob. (R. at 6.) Unfortunately, other, unlicensed videos are also frequently uploaded to VuToob. (R. at 6.) These unlicensed videos can take the form of pirated versions of Runaway Scrape's copyright protected music, concert footage, or users' own homemade videos. (R. at 6.) These homemade videos often feature the band's copyrighted "avant-garde psychedelic" images, while the album version of the song plays in the background. (R. at 6.)

B. Chatnoir, Inc.'s Aardvark Media Software

Chatnoir, founded in 1997, is an electronics and communications company based in New Jack City, Texas. (R. at 3.) The company has continued to grow as a leader in communications software and hardware, especially in the area of teleconferencing. (R. at 3.) Chatnoir earns revenue from advertisements displayed on its website, as well as sales of its media software. (R. at 17.) As a result of the

advertising agreement, Chatnoir receives money each time one of its website's users clicks on an advertisement. (R. at 17.)

In 2003, Chatnoir introduced Aardvark Media, an internet-based videoconferencing program. (R. at 3.) The mark "Aardvark Media" is a federally registered trademark. (R. at 3.) Aardvark Media allows any user with a camera and microphone to stream live video and audio over the internet and is one of Chatnoir's biggest sellers. (R. at 3-4.)

Chatnoir received customer feedback that, although Aardvark Media worked well in areas with ample bandwidth, the software was slow or otherwise malfunctioned in remote areas. (R. at 4.) In response, Chatnoir developed a new feature for its Aardvark Media software in 2006. (R. at 4.) This new feature allows users in low-bandwidth areas to strip a videoconference of its video features, while still streaming the audio live. (R. at 4.) This enables some users to hear and take part in the conversation without the video while others can use both the audio and video features. (R. at 4.) Chatnoir's additions also included a feature that permits users to store the video and audio from a teleconference on their computers for future use. (R. at 4.) Users can also strip the video portion of the teleconference and save the audio portion as an MP3 file. (R. at 4.) Chatnoir planned to incorporate these features into a new version of its software called "Aardvark Pro," but first decided to test the new features by offering a promotion that allowed users to download "Aardvark Lite," a free, limited version of the software. (R. at 4.)

C. Chatnoir's Promotion of Aardvark Lite

Aardvark Lite was designed to promote the new features of Aardvark Pro. (R. at 4.) In addition to performing the functions of Aardvark Pro, Aardvark Lite also allowed users to make audio recordings of VuToob videos. (R. at 4-5.) Chatnoir made Aardvark Lite universally available for anyone to download through its company website, "www.chatnoir.com." (R. at 5.) The Aardvark Lite download functioned for six months, at which time users could only use the video stripping and archiving functions by purchasing Aardvark Pro. (R. at 4.) Chatnoir distributed Aardvark Lite until Aardvark Pro was ready to launch. (R. at 5.)

Chatnoir used several methods to promote Aardvark Lite. (R. at 5.) First, Chatnoir sent emails to its current customers describing the upgrades to the software and providing a link to its webpage where customers could download Aardvark Lite. (R. at 5.) These emails further suggested that the Aardvark Lite software could strip the video and store the sound from VuToob videos. (R. at 5.) Second, Chatnoir promoted Aardvark Lite through advertising on various business webpages. (R. at 6.) Finally, Chatnoir purchased customized advertising on internet search engines. (R. at 6.) This third advertising strategy targeted anyone searching for "VuToob," "downloads," or "music" by displaying an advertisement for Aardvark Lite in the search results. (R. at 6.)

On the webpage where users could download Aardvark Lite, Chatnoir included three statements. (R. at 5.) The first statement provided instructions for using the software. (R. at 5.) Chatnoir then

included the caveat, "Please don't use our product for illegal or unethical purposes." (R. at 5.) The last statement suggested uses for the software and included the phrase, "Make audio recordings of your favorite VuToob videos." (R. at 5.)

D. Runaway Scrape's Initial Contact with Chatnoir

Runaway Scrape worried about the potential use of Aardvark Lite to infringe its copyrighted materials. (R. at 6.) Between November 2006 and January 2007, the band sent three letters to Chatnoir asking them to police the use of Aardvark Lite to prevent copyright infringement. (R. at 6.) Chatnoir did not respond to any of these letters. (R. at 7.) Chatnoir's internal emails indicate that it was aware of the possibility of infringement, but that it did not consider infringement a problem, because the infringing use was not the primary purpose of the software, and because Aardvark Lite would cease to function after a limited time. (R. at 7.) Chatnoir knew that some filtering tools would allow Aardvark Lite to reduce potential infringement. (R. at 11.) The company dismissed this option, relying instead on VuToob's policy of policing its website for unauthorized copyrighted works. (R. at 7.) Chatnoir was aware that VuToob's policing measures were inadequate to prevent a significant amount of infringing materials from appearing on its website. (R. at 16.)

Although copying many of VuToob's videos would not constitute infringement, roughly seventy percent of users were using Aardvark Lite to infringe copyrighted material, including Runaway Scrape's music. (R. at 8, 10.) Due to this infringement, Runaway Scrape sent Chatnoir a cease and desist letter, demanding that they stop offering

Aardvark Lite. (R. at 7.) Chatnoir did not respond to Runaway Scrape's letter. (R. at 7.) During the trial below, Stanley Rucker, the President and CEO of Chatnoir, testified that he was surprised by the number of downloads of Aardvark Lite in the short time the product had been available. (R. at 8.) He further admitted that the number of downloads far exceeded the number of anticipated users of the Aardvark Pro software package, which would not include the VuToob feature. (R. at 8, 17.)

Rucker's former Executive Secretary, Kasey Stinger, also testified at trial. (R. at 8.) Stinger worked for Chatnoir for five years and was fired after a video, anonymously uploaded on VuToob, revealed that she was having an extramarital affair with Rucker. (R. at 8-9.) Stinger testified that Rucker often confided in her about confidential Chatnoir business. (R. at 9.) She recorded one such conversation shortly after Rucker learned of Runaway Scrape's cease and desist letter. (R. at 9.) To protect her privacy, Stinger used her free download of Aardvark Lite to convert the video into an MP3 file which she later provided to the trial court. (R. at 9.) In the video, Rucker called Runaway Scrape "fools" and commented that a successful release of Aardvark Lite would more than pay for a copyright infringement suit. (R. at 9.) He added that a lawsuit brought by a popular band would provide great publicity for the Aardvark Products and expose Chatnoir to a demographic that it otherwise would not have reached. (R. at 9.)

E. Runaway Scrape's Website, "www.aardvarks.com"

Several months after Chatnoir launched Aardvark Lite, Runaway Scrape created a website with the registered domain name "www.aardvarks.com." (R. at 7.) The website contained a link reading, "Get it the right way," which directed users to the band's official website, where they could download a Runaway Scrape song titled "Aardvarks." (R. at 7.) The actual creation and promotion of the song is unclear. (R. at 7.) Chatnoir contends that the song was not promoted until the creation of the website and does not appear on any albums released by Runaway Scrape. (R. at 7.) Runaway Scrape insists that the song was part of the band's performance repertoire prior to the creation of the website. (R. at 7.) Nothing in the lyrics to the song "Aardvarks" suggests that it has anything to do with Chatnoir or any of its trademarks. (R. at 19.) The only lyrics are: "My love runs deep, like Aardvarks huntin' for an ant. Oh yeah, yeah, yeah. Darlin' open your soul hill to the Aardvarks. Oh yeah, yeah, yeah." (R. at 19.) Additionally, one of the band members had a pet aardvark as a child. (R. at 19.)

F. Legal Responses

Within a few weeks of the launch of "www.aardvarks.com," Chatnoir sent Runaway Scrape two cease and desist letters. (R. at 7.) The letters insisted that the band either take down the website or transfer the domain name to Chatnoir. (R. at 7.) In response, Runaway Scrape filed suit against Chatnoir, alleging contributory copyright infringement on the grounds that Chatnoir intentionally encouraged copyright infringement by promoting and distributing

Aardvark Lite. (R. at 7-8.) Chatnoir responded by filing a countersuit, alleging that Runaway Scrape's use of the domain name diluted Chatnoir's trademarks by blurring. (R. at 8.)

Runaway Scrape concedes that Chatnoir's marks "Aardvark Media," "Aardvark Pro," and "Aardvark Lite" are both famous and distinctive. (R. at 13.) It also concedes that the domain name, "www.aardvarks.com," is the use of a mark in commerce. (R. at 13.) In a survey conducted by Chatnoir, only two percent of the general public and eight percent of its own customers responded that the name brought to mind Chatnoir's marks. (R. at 8.)

II. Procedural History

The United States District Court for the Northern District of Texas found that Chatnoir's advertising and distributing of its videoconferencing and archiving software did not contributorily infringe Runaway Scrape's copyright. (R. at 3.) The district court also found that Runaway Scrape's domain name, "www.aardvarks.com," diluted Chatnoir's trademarks by blurring and enjoined Runaway Scrape from using the domain name. (R. at 3, 9.) On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the judgment of the district court. (R. at 3.)

SUMMARY OF THE ARGUMENT

I.

This Court should hold that Chatnoir is secondarily liable for the direct infringement committed by Aardvark Lite users. Copyright laws were enacted to encourage creativity by protecting the works of

artists and authors. Allowing a company to develop, promote, and distribute a product that is used for substantial copyright infringement undermines the stated goals of copyright law, particularly when the company takes no steps to limit that infringement.

Chatnoir's promotion and distribution of Aardvark Lite exposes it to secondary liable for copyright infringement under three different theories: inducement, contributory infringement, and vicarious infringement. Chatnoir intentionally induced others to use its software for copyright infringement through targeted advertising that suggested the software's infringing use. Additionally, Chatnoir contributed to direct infringement by providing a product that was capable of substantial infringement and by failing to implement available measures to reduce or eliminate the infringing uses. Lastly, Chatnoir financially benefitted from the infringing use of its software and declined to exercise its right and ability to stop the infringement. Therefore, this Court should hold that Chatnoir is secondarily liable for Aardvark Lite users' direct infringement.

II.

This Court should find that Runaway Scrape's mark, "www.aardvarks.com," does not dilute Chatnoir's marks by blurring. The theory of dilution differs from traditional trademark infringement. Dilution does not require any confusion between the marks, only that the new mark causes consumers to associate that mark with the original product. Dilution was originally asserted as a narrow cause of action, limited to protecting unique and fanciful

marks from other users who wish to profit from the renown of the original mark.

In this case, Runaway Scrape's mark is not substantially similar to Chatnoir's marks because the marks are not identical or nearly identical and do not appear in the same context. Further, Runaway Scrape did not intend to create any association between the marks. Runaway Scrape had several independent reasons for using the domain name, including the promotion of its song "Aardvarks." Finally, the general public and Chatnoir's own customers did not make any actual association between the two marks. Because there can be no dilution without association, Runaway Scrape is exempted from any potential liability. Therefore, this Court should hold that Runaway Scrape did not dilute Chatnoir's marks by blurring.

STANDARD OF REVIEW

In reviewing the Fourteenth Circuit's decision, Federal Rule of Civil Procedure 52(a) requires this Court to defer to the trial court's findings of fact unless clearly erroneous. Fed. R. Civ. P. 52(a); *Pullman-Standard v. United Steelworkers of America*, 456 U.S. 273, 287 (1982). A finding of fact is clearly erroneous when the reviewing court "is left with the definite and firm conviction that a mistake has been made," even if some evidence supports the lower court's conclusion. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The clearly erroneous standard of review does not apply to conclusions of law. *Id.* In a mixed question of law and fact, the facts are accepted unless clearly erroneous, while the application of

the rule of law is reviewed *de novo*.¹ *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 526 (1961). Because both issues on appeal in this case involve mixed questions of law and fact, this Court should admit the factual conclusions of the Fourteenth Circuit, unless clearly erroneous, and should review the conclusions of law *de novo*.

ARGUMENT

I. CHATNOIR IS SECONDARILY LIABLE FOR THE DIRECT INFRINGEMENT OF AARDVARK LITE USERS UNDER ANY THEORY OF SECONDARY COPYRIGHT LIABILITY

Copyright laws exist to promote and encourage creativity by rewarding authors and inventors and protecting their work. U.S. Const. art. I, § 8, cl. 8; see, e.g., *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The Copyright Act specifically provides relief for direct infringement. 17 U.S.C. § 501. In addition, well established common law principles recognize that secondary liability is appropriate in cases of large scale copyright infringement or when the direct infringer is hard to identify. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1995). Further, this Court in *Sony* stated that, due to the historical connection between patent and copyright law, the application of patent law theories of secondary liability is appropriate when dealing with copyrights. *Sony*, 464 U.S. at 439.

¹Mixed questions of law and fact are questions in which “the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard.” *Pullman-Standard*, 456 U.S. at 288.

This Court expanded this notion in *Grokster* to adopt the inducement theory of liability. *Grokster*, 545 U.S. at 936.

In *Grokster*, this Court discussed three separate theories of secondary infringement: inducement, contributory infringement, and vicarious infringement. *Id.* at 930. All three theories of secondary infringement require underlying direct infringement. *Id.* at 940. In addition to direct infringement, the inducement theory requires that the defendant, through a clear expression or other affirmative steps, intends to induce or encourage the direct infringement. *Id.* at 936–37. Contributory infringement occurs when a defendant has actual or constructive knowledge of direct infringement and materially contributes to that infringement. *Id.* at 930. Finally, vicarious infringement arises when a defendant profits from direct infringement while declining to exercise a right and ability to stop or limit it. *Id.* Although a defendant can be held liable under all three theories at once, a court does not need to find evidence of each type of secondary infringement in order to hold the defendant liable.

A. Chatnoir actively induced and encouraged others to infringe Runaway Scrape’s copyrighted material through various methods of promoting Aardvark Lite

Chatnoir’s advertising and business model actively encouraged and induced the users of Aardvark Lite to infringe copyrights. Anyone who actively induces or encourages another to commit copyright infringement is secondarily liable for that infringement. *Grokster*, 545 U.S. at 936. The standard established by this Court in *Grokster* requires actual or constructive knowledge that infringement is

occurring, as well as intent to induce that infringement. *Id.* at 937. Intent can be shown by clear expression or other affirmative steps taken to foster infringement. *Id.*

1. Chatnoir knew or should have known that the promotion and free distribution of Aardvark Lite would induce and encourage the software's users to infringe copyrighted works

Chatnoir knew of the infringing activities of Aardvark Lite users. Courts look to the facts of each specific case to determine if there was actual knowledge of infringement. *See e.g., Grokster*, 545 U.S. at 936–38. In *Napster*, the court found actual knowledge of infringement based on an internal company document which discussed its users exchanging pirated music. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001). *Napster* also received letters from the Recording Industry Association of America informing it of the sharing of infringing files. *Id.* Similarly, Chatnoir's internal emails indicate that executives were aware of Aardvark Lite's infringing potential. (R. at 7.) Further, Runaway Scrape sent multiple letters to Chatnoir informing it of the widespread infringement. (R. at 6.) Taken together, these factors establish Chatnoir's actual knowledge of infringement.

Furthermore, Chatnoir had constructive knowledge of infringing activities. Constructive knowledge exists when circumstances indicate that a software developer knows or should know that its users are infringing. *Napster*, 239 F.3d at 1020. In *Napster*, the court found constructive knowledge based on the company executives' recording industry experience, *Napster's* history of enforcing its own

intellectual property rights, and the company's advertising of the software's infringing potential. *Id.*

Chatnoir had similar constructive knowledge. Chatnoir's website contained a statement urging people not to use its products for illegal purposes. (R. at 5.) The company would not need to warn against illegal uses of its software if the software was incapable of an infringing use. Additionally, Chatnoir knew or should have known that the large demand for Aardvark Lite was a result of users downloading the software for its infringing capabilities. Rocker, the CEO of Chatnoir, admitted that the number of downloads of Aardvark Lite far exceeded the number of anticipated users of Aardvark Pro. (R. at 8.) Further, Chatnoir considered equipping Aardvark Lite with filtering mechanisms. (R. at 11.) The company would not have considered these measures if it did not know that the software was capable of copyright infringement. Therefore, Chatnoir had both actual and constructive knowledge of the infringing potential of Aardvark Lite.

2. Chatnoir demonstrated its intent to induce and encourage third party infringement through its advertisements and the candid statements of its CEO

The Fourteenth Circuit was clearly erroneous in finding that Chatnoir did not intend to encourage infringement based on its marketing strategy and internal communications. The classic example of inducing infringement is stimulating others to infringe through advertising messages. *Grokster*, 545 U.S. at 937. Internal company communications may also evidence a defendant's unlawful purpose. *Id.*

at 938. In *Grokster*, the defendants advertised their software's infringing capabilities by promoting their products as replacements for Napster. *Id.* at 924-25. Even though many of these advertisements were never shown to the public, this Court still found that they were probative of Grokster's true intent to encourage infringement. *Id.* at 938. Similarly, Chatnoir's advertising strategy shows a clear expression to induce infringement. In order to expand its customer base, Chatnoir advertised Aardvark Lite to new users through a targeted marketing campaign on an internet search engine. (R. at 6.) Through this strategy, users searching for terms such as "download," "VuToob," or "music" would see an advertisement for Aardvark Lite in the search results. (R. at 6.) As a result of Chatnoir's marketing strategy, users associated Aardvark Lite with downloading music from VuToob.

Chatnoir's internal communications also show clear expression of Chatnoir's intent to encourage infringement. In *Grokster*, this Court found that a company executive's statement, "The goal is to get in trouble with the law and get sued. It's the best way to get in the news," was probative of a clear intent to induce infringement. *Grokster*, 545 U.S. at 925. Similarly, the CEO of Chatnoir stated that a lawsuit brought by Runaway Scrape would be great publicity for the Aardvark products. (R. at 9.) Chatnoir's refusal to mitigate Aardvark Lite's infringing capabilities and its desire for increased exposure shows its intent to encourage continued infringement.

3. Aardvark Lite's software design, free distribution, and user instructions evidence Chatnoir's clear expression and affirmative steps towards inducing and encouraging infringement

In addition to Chatnoir's clear expression of intent to induce infringement, it took other affirmative steps to encourage its users' unlawful activities. The absence of any efforts to diminish infringing activity demonstrates intent to facilitate direct infringement. *Grokster*, 545 U.S. at 939. In *Grokster*, the defendants chose not to use any filtering devices to prohibit or diminish infringing uses of their software. *Id.* Similarly, Aardvark Lite chose not to implement filtering software to limit its users' infringing activities. (R. at 11.) Chatnoir had the ability to employ such software. (R. at 11.) However, instead of using its own technology, Chatnoir chose to rely on VuToob's filters, even though it knew that they did not block all infringing material. (R. at 5.) Further, even if VuToob's filters were flawless, Aardvark Lite users could still infringe Runaway Scrape's copyrights by creating MP3s from Runaway Scrape videos authorized to appear on VuToob. Chatnoir's failure to implement any filtering software, however minimal, shows that the company took steps to promote infringement.

Additionally, Chatnoir took affirmative steps to induce infringement by instructing its users how to create MP3 files from VuToob videos. Distributing a product and demonstrating to users how to employ that product for the purposes of infringement shows an affirmative intent that the product be used for that purpose. *Grokster*, 545 U.S. at 936. The court in *Napster* found that, without

the services Napster provided its users, they would be unable to locate and download the song they wanted. *Napster*, 239 F.3d at 1022. Similarly, without Chatnoir's free product and instructions about downloading songs from VuToob, users would not have been able to directly infringe Runaway Scrape's copyrights. Chatnoir's distribution of Aardvark Lite and instructions for its use, taken with the lack of any filtering software, demonstrates Chatnoir's intent to induce infringement.

B. Regardless of whether this Court finds that Chatnoir intentionally induced or encouraged infringement, Chatnoir is still contributorily liable for its users' direct infringement

Even if Chatnoir did not induce users to infringe Runaway Scrape's copyrights, it is still secondarily liable under the theory of contributory infringement. The principle of contributory liability originated in tort law and holds that one who knowingly participates in or furthers another's infringement should be held accountable for that infringement. See *Fonovisa*, 76 F.3d at 264; *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Contributory infringement requires actual or constructive knowledge of the direct infringement, and a material contribution to the infringing conduct. *Napster*, 239 F.3d at 1020. Unlike the inducement theory, contributory infringement is subject to an affirmative defense when the product is capable of commercially significant noninfringing uses. *Sony*, 464 U.S. at 440. Because Chatnoir had both actual and constructive knowledge of the unauthorized, infringing copies made by Aardvark Lite users, the only

remaining issues are Chatnoir's material contribution to the direct infringement and whether the affirmative defense applies.

1. Chatnoir materially contributed to others' direct infringement by distributing a product that was used for a substantial amount of infringement

Chatnoir's distribution of Aardvark Lite materially contributed to its users' direct infringement. Material contribution exists when a company distributes a product that is capable of infringement. *Napster*, 239 F.3d at 1022. This element is similar to the affirmative steps element of the inducement theory, but does not require intent. A computer system provider materially contributes to infringement if it learns of the infringing uses of its system but fails to limit the infringement. *Id.* at 1021. In *Perfect 10*, the court held that Google would be contributorily liable for the infringement of Perfect 10's images if it knew that the infringing images were available and could take simple measures to prevent further damage. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007). Like Google, Chatnoir knew of the direct infringement committed by Aardvark Lite users. However, it failed to take the simple measure of supplying filtering software. (R. at 11.) By providing the Aardvark Lite software to users without any filters to limit direct infringement, Chatnoir materially contributed to the resulting direct infringement.

In addition, Chatnoir materially contributed to Aardvark Lite users' direct infringement by providing instructions for how to use the software to make copies of VuToob videos. Supplying support services to aid in others' direct infringement contributes to that

infringement. *Fonovisa*, 76 F.3d at 264. In *Fonovisa*, the court held that, without the support services provided by the defendant, users could not engage in the same massive levels of infringement. *Id.* Similarly, without Chatnoir's instructions on how to download songs from VuToob, users would not be able to use Aardvark Lite to infringe.

**2. Allowing Chatnoir to seek refuge behind the
staple article of commerce defense would
expand the doctrine beyond its purpose**

Even though Aardvark Lite is capable of noninfringing uses, the software is different from that in *Sony*, and the infringing use is not necessary for the product to function. The staple article of commerce defense is intended to protect the sellers of products capable of substantial noninfringing uses from liability for their customers' illegal actions once the seller no longer has control over the product. *Sony*, 464 U.S. at 440-41. In *Sony*, this Court applied the staple article of commerce defense to the VTR, a precursor to the VCR. *Sony*, 464 U.S. at 456. This defense applied because the VTR was capable of "time-shifting." *Id.* at 442. "Time-shifting," which this Court determined is a noninfringing use, involves recording a program to watch at a later time. *Id.* at 423. Despite this noninfringing use, the VTR was still capable of some infringement. *Id.* at 446. However, it would have been difficult for Sony to eliminate these infringing uses once the product was already on the market. *Id.*

In this case, any video on VuToob can be accessed at the users' convenience, unlike the TV shows recorded by the VTR. Therefore, users do not have to "time-shift" to listen to music available on VuToob. Additionally, unlike Sony, Chatnoir retained control over its

product, as evidenced by its ability to discontinue the software after six months. (R. at 4.) This control likely would allow Chatnoir to discontinue the VuToob feature or install filtering software to limit the amount of infringing. Further, even though the Aardvark Lite software was only available for a limited time, the software was capable of making virtually unlimited copies in that short time, unlike the VTR in *Sony*. The differences between the VTR in *Sony* and Aardvark Lite highlight why the VTR was deemed a staple article of commerce, while Aardvark Lite, and specifically its VuToob feature, should not be afforded this defense.

Additionally, the infringing use of Aardvark Lite can be separated from the noninfringing functions. A product which is capable of both infringing and noninfringing uses is not a staple article of commerce unless the infringing use is incidental to and inseparable from the noninfringing use. *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003). In *Sony*, the infringing and noninfringing uses were inherently connected by virtue of the purpose and function of the VTR. In contrast, the VuToob feature of Aardvark Lite is distinct and separable from its videoconferencing features. (R. at 4.) Further, the purpose of Aardvark Lite is to promote and test the new features of Aardvark Pro, software that is not capable of downloading VuToob videos. (R. at 4.) Therefore, the removal of the VuToob feature would not inhibit the development of Aardvark Pro and it would not be overly burdensome for Chatnoir to remove the infringing capability.

C. Chatnoir is vicariously liable for its users' infringement because it failed to exercise its legal right to limit the infringement and profited from the resulting expansion of its user base

Even if Chatnoir is not liable for inducement or contributory infringement, it is vicariously liable for the direct infringement by the users of Aardvark Lite. Vicarious liability exists when a company profits from direct infringement while failing to exercise a right and ability to stop or limit it. *Grokster*, 545 U.S. at 930. Vicarious liability was initially based upon the doctrine of *respondeat superior* and has been extended beyond employer-employee relationships to cover instances where one party has the right and ability to limit the infringing activity of another and profits from that direct infringement. *Gershwin*, 443 F.2d at 1162. This extension allows for the enforcement of copyrights against parties whose economic interests are linked to a third party's direct infringement, but who do not directly employ the infringer. *Fonovisa*, 76 F.3d at 263. In this case, Chatnoir exercised control over Aardvark Lite users' direct infringement and received a financial benefit from that infringement.

1. Chatnoir had the legal right and ability to stop or limit direct infringement and the practical ability to do so, yet chose to do nothing

Chatnoir did not exercise its right and ability to control or limit Aardvark Lite users' direct infringement. A defendant possesses the requisite control for vicarious liability when it has both a legal right to stop or limit the direct infringement as well as the practical ability to do so. *Grokster*, 545 U.S. at 930. In *Grokster*, the software provider did not make any efforts to filter copyrighted

material or impede the sharing of copyrighted files. *Id.* at 926. On remand, the district court found that the provider could have taken steps to filter its software, showing that it had control over its users' infringement. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 989 (C.D. Cal. 2006).

Similarly, Chatnoir did not use any filtering software to limit the direct infringement by Aardvark Lite users. (R. at 11.) The company's internal emails and communications establish that even though it was possible for Chatnoir to install filtering software on Aardvark Lite, it chose not to because of VuToob's existing filtering software. (R. at 11.) However, this reliance on VuToob's filters does not excuse Chatnoir from liability. Chatnoir knew that VuToob's filters do not block all infringing material uploaded to its cite. (R. at 7.) Furthermore, Chatnoir knew that VuToob's filters were not designed to prevent the uploading of licensed videos and therefore Aardvark Lite would require additional filters to prevent the copying of these licensed materials. Although Chatnoir knew of these shortcomings, it chose not to employ independent filtering software on Aardvark Lite to stop or limit its users' ability to infringe.

In addition, Chatnoir's disclaimer on its website advising users not to use its products for any illegal purposes does not shield it from liability. To avoid liability, a company must exercise its reserved right to police its software. *Napster*, 239 F.3d at 1023. In *Grokster*, the defendants sent email warnings and threatening notices to infringing users. *Grokster*, 545 U.S. at 926. Despite these warnings, the company was found liable because no user was ever

blocked from using the software to share copyrighted files. *Id.* In this case, although Chatnoir displayed a disclaimer on its website, it took no action to stop or limit its users' direct infringement.

2. Chatnoir financially benefitted from Aardvark Lite users' direct infringement through free publicity and exposure

The increase in Chatnoir's user base because of the VuToob feature on Aardvark Lite provided it with a financial benefit. For the purposes of vicarious liability, a financial benefit exists when the infringing material acts as a draw for customers. *Napster*, 239 F.3d at 1023. In *Napster*, even though the company offered its file sharing services for free, it received money from advertising. *Id.* The larger its user base, the more advertising revenue it received. *Id.* As a result, Napster's future revenue was dependent on increasing its user base. *Id.* Likewise, even though Chatnoir provided the Aardvark Lite software for free, it relied on the infringing uses of Aardvark Lite to increase its user base and future revenue. Users who downloaded Aardvark Lite only for the VuToob copying feature were exposed to the videoconferencing features as well. Because of that exposure, some of those users might choose to buy the full version of Aardvark Pro, even though it lacked the VuToob feature that originally brought them to the product. This would increase Chatnoir's revenue from Aardvark Pro beyond what it would have been without the draw of the infringing capabilities of Aardvark Lite.

Even if no infringing Aardvark Lite users purchased the full version of Aardvark Pro, Chatnoir still received revenue from the

increased downloads of Aardvark Lite prompted by the infringing capabilities. Similar to Napster, Chatnoir displays advertisements on its website and receives revenue each time a visitor clicks on an advertisement. (R. at 17.) Users must visit the Chatnoir website to download Aardvark Lite. (R. at 5.) The increase in traffic to Chatnoir's website due to the popularity of Aardvark Lite's infringing function exposes more people to the advertisements and increases Chatnoir's potential ad revenue. Between its increased user base and increased traffic to its site, Chatnoir financially benefitted from the popularity of Aardvark Lite's infringing function.

D. Public policy and the purposes of copyright law dictate that this Court should apply a flexible standard of secondary liability

Even if this Court does not find liability based on the standards set out above, Chatnoir should still be liable for the direct infringement committed by Aardvark Lite users. Copyright law protections are intended to motivate and reward creativity. *Sony*, 464 U.S. at 429. However, the increasing ease of copying songs that programs such as Napster, Grokster, and now Aardvark Lite provide fosters public disdain for copyright protection. *Grokster*, 545 U.S. at 1020. Further, the software creates copies of equal quality to the original and allows for rapid and limitless distribution. Additionally, software will always develop faster than courts can respond. Therefore, courts should employ a flexible standard so that companies cannot simply tailor their software around current laws to avoid liability. Based on the *Napster* decision, *Grokster*, *Aimster*,

and many other companies tailored their business models to avoid liability for distributing similar software. See *id.* This Court adapted to the changing nature of copyright infringement by introducing the inducement standard to copyright cases. *Id.* at 929. Given the large amount of infringing that resulted from the use of Aardvark Lite, it would be difficult to pinpoint and prosecute each direct infringer. However, because of its ability to regulate and limit the infringing uses of Aardvark Lite, Chatnoir should be held liable to show that this Court still values copyright protections, even though the public may not.

II. THE DOMAIN NAME, "WWW.AARDVARKS.COM," DOES NOT DILUTE CHATNOIR'S TRADEMARKS BECAUSE THE MARKS ARE NOT SUBSTANTIALLY SIMILAR OR ASSOCIATED

According to the Trademark Dilution Revision Act of 2006, dilution occurs when a mark that was previously associated with one product or service becomes associated with a second product or service. 15 U.S.C. § 1125(c); *Visa Int'l Serv. Ass'n v. JSL Corp.*, 610 F.3d 1088, 1090 (9th Cir. 2010). There are two forms of dilution: by tarnishment and by blurring. 15 U.S.C. § 1125(c). Dilution by tarnishment is an association between two marks that harms the reputation of the famous mark. 15 U.S.C. § 1125(c)(2)(C). Dilution by blurring is an association occurring when one mark identifies two sources and weakens the distinctiveness of the famous mark. 15 U.S.C. § 1125(c)(2)(B). This additional association weakens the trademark's selling power by inhibiting consumers' ability to bring to mind the original product when viewing the mark. *Visa*, 610 F.3d at 1090. Both

forms of dilution differ from trademark infringement, which involves mistakenly connecting similar marks with the same source. *Autozone, Inc. v. Tandy Corp.*, 373 F.3d 786, 804 (6th Cir. 2004). Dilution does not require any showing of actual or likely confusion, competition, or economic injury. 15 U.S.C. § 1125(c)(1).

A. Runaway Scrape's trademark is not likely to dilute Chatnoir's trademarks by blurring because it does not satisfy the relevant factors of the TDRA

Based on the factors from the TDRA, Runaway Scrape's mark is not likely to dilute Chatnoir's marks by blurring. The TDRA requires Chatnoir to show that its marks are famous and distinctive; that Runaway Scrape began using "www.aardvarks.com" in commerce after Chatnoir's marks became famous and distinctive; and that Runaway Scrape's mark is likely to dilute Chatnoir's marks by blurring. 15 U.S.C. § 1125(c)(1); *Visa*, 610 F.3d at 1089-90. Runaway Scrape concedes that Chatnoir's marks "Aardvark Media," "Aardvark Pro," and "Aardvark Lite" are both famous and distinctive. (R. at 13.) Further, Runaway Scrape concedes that the domain name, "www.aardvarks.com," is a mark used in commerce. (R. at 13.) Thus, the only factor for consideration is whether Runaway Scrape's mark is likely to dilute Chatnoir's marks.

Under the TDRA, dilution by blurring requires an association arising from the similarity between the marks which impairs the distinctiveness of the famous mark. 15 U.S.C. § 1125(c)(2)(B). Although courts may consider all relevant evidence in determining if a mark is likely to dilute, the TDRA provides six factors as a guide.

15 U.S.C. § 1125(c)(2)(B); *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 635 (9th Cir. 2008). These factors are: (1) the degree of similarity between the junior mark and the famous mark; (2) the degree of inherent or acquired distinctiveness of the famous mark; (3) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (4) the degree of recognition of the famous mark; (5) whether the user of the junior mark intended to create an association with the famous mark; and (6) any actual association between the junior mark and the famous mark. 15 U.S.C. § 1125(c)(2)(B). In this case, although Runaway Scrape concedes that Chatnoir's marks are both famous and distinctive, the record does not indicate how distinct or recognizable the marks appear to the average consumer, or the extent to which Chatnoir is engaging in substantially exclusive use of its marks. (R. at 13.) As a result, only the remaining factors – the degree of similarity between the marks, whether Runaway Scrape intended to create an association with Chatnoir's marks, and any actual association between the marks – can be examined and weighed to determine whether Runaway Scrape's mark dilutes Chatnoir's marks.

1. The marks do not reach the level of similarity required by the TDRA because they are not identical or nearly identical and appear in different contexts

Runaway Scrape's mark, "www.aardvarks.com," is not substantially similar to Chatnoir's marks "Aardvark Media," "Aardvark Pro," and "Aardvark Lite." Courts have held that marks must be identical or nearly identical to be substantially similar. *Perfumebay.com, Inc. v.*

Ebay, Inc., 506 F.3d 1165, 1180 (9th Cir. 2007); *Autozone*, 373 F.3d at 806. The TDRA does not require a substantial similarity between the marks in order to find a likelihood of dilution. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 108 (2d Cir. 2009). Under the likelihood of dilution standard, the degree of similarity is weighed as one of several factors. *Starbucks*, 588 F.3d at 108. However, the similarity factor becomes more important when the marks are found in different contexts or are not used in closely related products. *Id.*

The mark, "www.aardvarks.com," is not identical or nearly identical to Chatnoir's marks. The Ninth Circuit held that the new mark must be identical or nearly identical to the protected mark for a dilution claim to succeed. *Perfumbay*, 506 F.3d at 1180; *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1011 (9th Cir. 2004). For marks to be nearly identical, they must be so similar that a significant portion of the target group of consumers sees the two marks as essentially the same. *Perfumbay*, 506 F.3d at 1180. In *Starbucks*, the court found that the "Mister" prefix and "Blend" suffix that always appeared with the "Charbucks" marks lessened their similarity to the Starbucks' marks. *Starbucks*, 588 F.3d at 107. Further, the court rejected Starbucks' argument that the terms "Mister" and "Blend" were generic and too weak to serve a brand-identifying function, finding that those words were enough to make the marks different. *Id.* In this case, Chatnoir's "Aardvark" marks are always singular and appear with the suffix "Media," "Pro," or "Lite," while Runaway Scrape's mark is plural and appears on its own. (R. at

19.) Similarly, the presence of the additional words following Chatnoir's marks is enough to distinguish them from Runaway Scrape's mark.

Further, within the context they are presented, Runaway Scrape's mark and Chatnoir's marks are even less similar. In determining the similarity between two marks, courts strongly consider the context and use of the marks. *Starbucks*, 588 F.3d at 108. In *Visa*, the court emphasized that the "e" before the "evisa" mark was significant because the mark appeared on the internet, where an "e" often designates an electronic version. *Visa*, 610 F.3d at 1090. In this case, the contexts used are not analogous to those in *Visa*. Nothing about the use of the word "aardvarks" in Runaway Scrape's domain name suggests that it is the same as Chatnoir's marks, just in a different context. For example, the domain name, "www.aardvarks.com," never appears as, "www.aardvarkmedia.com," or with any of the other suffixes Chatnoir employs. Consumers searching for Chatnoir's Aardvark products online would likely expect these suffixes to appear, given that the word "aardvark" never appears on Chatnoir's products without an accompanying suffix. (R. at 19.)

Additionally, because Runaway Scrape's and Chatnoir's marks serve different purposes and do not compete, any similarities between the marks becomes less significant. Although the TDRA does not require competition between brands for a finding of *dilution*, courts are likely to find that two marks are similar if they are used for closely related products. 15 U.S.C. § 1125(c)(1); *Perfumbay*, 506 F.3d at 1180. In *Perfumbay*, both marks were used to sell perfume.

Perfumebay, 506 F.3d at 1181. Even though the two marks – eBay and *Perfumebay* – were not substantially similar, their slight similarity was more significant because they were competitors in the same market. *Id.* Chatnoir’s marks are used to label videoconferencing software. (R at 3–4.) On the other hand, Runaway Scrape’s domain name is used to promote its song, “Aardvarks,” and to provide a way to buy its music legally. (R. at 7.) Given these different purposes, this Court should require a higher level of similarity between the marks.

Although the marks at issue are marginally similar, they are not identical or even nearly identical, especially given the contexts in which they are found, as well as their disparate use in commerce. Therefore, the Fourteenth Circuit erred in concluding that the marks have a high degree of similarity.

2. There is no intended or actual association of the marks because Runaway Scrape had independent motives for creating its mark and an insignificant number of people associated the marks

The court of appeals was clearly erroneous in finding that Runaway Scrape intended to associate its mark with Chatnoir’s mark. The only evidence of any intent to create an association comes from the theory that Runaway Scrape created the website “www.aardvarks.com” in response to its conflict with Chatnoir. (R. at 14–15.) In drawing this conclusion, the majority improperly relied on the timing of the website’s creation and one interpretation of its content. (R. at 15.) However, the website was not created until a few months after Chatnoir released Aardvark Lite, starting the conflict. (R. at 7.) Further,

Runaway Scrape offered sufficient evidence to explain its motivation for creating its website, including promoting the song, "Aardvarks," which, despite Chatnoir's contention otherwise, Runaway Scrape had been performing for several years. (R. at 7.) Runaway Scrape also asserts that its lead singer had a pet aardvark as a child, and that the band chose this domain name independent of Chatnoir because of the unique qualities of the word "aardvark" and its place at the top of any alphabetized list. (R. at 19.) These facts suggest that Runaway Scrape had independent motives for the creation and naming of its website, and the court of appeals' holding otherwise constitutes clear error.

In addition, the court of appeals erred in concluding that the link on the website reading, "Get it the right way," refers to Runaway Scrape's conflict with Chatnoir, and thus shows an intent to associate. (R. at 15.) Given widespread copyright infringement and illegal downloading, Runaway Scrape was likely discouraging fans from illegally downloading their music in any form, not just through the use of the Aardvark Lite software. Therefore, the court of appeals committed clear error by failing to give proper weight to the substantial evidence Runaway Scrape presented to explain the creation of its website.

Even if Runaway Scrape had intended to associate its mark with Chatnoir's, neither the general public, nor Chatnoir's own customers associated the name, "www.aardvarks.com," with Chatnoir's Aardvark marks. Actual association occurs when consumers no longer associate the senior mark with that mark's products because of the presence of

the new mark. *Perfumebay*, 506 F.3d at 1181. In *Jada*, the court found an actual association between the marks where twenty-eight percent of survey respondents associated Jada's junior mark with Mattel's senior mark. *Jada*, 518 F.3d at 637. Similarly, in *Starbucks*, the court found actual association where 30.5 percent of customers associated the "Charbucks" marks with Starbucks. *Starbucks*, 588 F.3d at 109. In contrast, only two percent of the general public and eight percent of Chatnoir's own customers associated "www.aardvarks.com" with "Aardvark Media," "Aardvark Pro," and "Aardvark Lite." (R. at 15.) Although the TDRA factor states any actual association, these low levels of association do not constitute an actual association.

B. Trademark law's purpose of providing clarity in the market should not allow the extension of antidilution laws to provide exclusive rights in marks

Even if Runaway Scrape's mark is likely to dilute Chatnoir's marks based on the above factors, liability for trademark dilution should not be expanded beyond the original scope envisioned. The idea of trademark dilution was first articulated by Frank Schechter in 1925. Robert G. Bone, *Schechter's Ideas in Historical Context and Dilution's Rocky Road*, 24 Santa Clara Computer & High Tech. L.J. 469, 474 (2008). He proposed a narrow scope of protection that would extend only to fanciful or coined terms which had the uniqueness he sought to protect. Stacey L. Dogan, *What is Dilution, Anyway?*, 105 Mich. L. Rev. First Impressions 103, 103-04 (2006). This idea fits with the aims of trademark law, which do not seek to provide exclusive rights in marks, but rather to provide informational clarity in the

market. *Id.* at 106. As a result, antidilution laws should be applied with care to avoid granting the owner of a famous mark the right to exclude all similar marks.

In this case, the word “aardvark” is not coined or fanciful. Prohibiting all other companies from using the name of the animal in their marks solely because Chatnoir used it first would expand dilution liability beyond what it was originally meant to protect and would substantially limit the words and phrases available for use in a trademark. In view of the history and purposes of antidilution laws, this Court should limit its expansion and reverse the Fourteenth Circuit’s finding that Runaway Scrape’s mark is likely to dilute Chatnoir’s mark by blurring.

CONCLUSION

For all of the reasons stated above, this Court should reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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APPENDIX

Trademark Dilution Revision Act 15 U.S.C. § 1125(c)

(c) Dilution by blurring; dilution by tarnishment

(1) Injunctive relief

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

(2) Definitions

(A) For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.

(ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.

(iii) The extent of actual recognition of the mark.

(iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(B) For purposes of paragraph (1), "dilution by blurring" is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

(i) The degree of similarity between the mark or trade name and the famous mark.

(ii) The degree of inherent or acquired distinctiveness of the famous mark.

(iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.

(iv) The degree of recognition of the famous mark.

(v) Whether the user of the mark or trade name intended to create an association with the famous mark.

(vi) Any actual association between the mark or trade name and the famous mark.

(C) For purposes of paragraph (1), "dilution by tarnishment" is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

(3) Exclusions

The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with--

(i) advertising or promotion that permits consumers to compare goods or services; or

(ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

(B) All forms of news reporting and news commentary.

(C) Any noncommercial use of a mark.

(4) Burden of proof

In a civil action for trade dress dilution under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that--

(A) the claimed trade dress, taken as a whole, is not functional and is famous; and

(B) if the claimed trade dress includes any mark or marks registered on the principal register, the unregistered matter, taken as a whole, is famous separate and apart from any fame of such registered marks.

(5) Additional remedies

In an action brought under this subsection, the owner of the famous mark shall be entitled to injunctive relief as set forth in section 1116 of this title. The owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity if--

(A) the mark or trade name that is likely to cause dilution by blurring or dilution by garnishment was first used in commerce by the person against whom the injunction is sought after October 6, 2006; and

(B) in a claim arising under this subsection--

(i) by reason of dilution by blurring, the person against whom the injunction is sought willfully intended to trade on the recognition of the famous mark; or

(ii) by reason of dilution by garnishment, the person against whom the injunction is sought willfully intended to harm the reputation of the famous mark.

(6) Ownership of valid registration a complete bar to action

The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register under this chapter shall be a complete bar to an action against that person, with respect to that mark, that--

(A) (i) is brought by another person under the common law or a statute of a State; and

(ii) seeks to prevent dilution by blurring or dilution by garnishment; or

(B) asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark, label, or form of advertisement.

(7) Savings clause

Nothing in this subsection shall be construed to impair, modify, or supersede the applicability of the patent laws of the United States.