

No. C10-0116-1

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IN THE  
SUPREME COURT OF THE UNITED STATES

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RUNAWAY SCRAPE, L.P.,  
*Petitioner- Appellant,*  
v.  
CHATNOIR, INC.,  
*Respondent-Appellee.*

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

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BRIEF FOR THE PETITIONER

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### QUESTIONS PRESENTED

1. Whether the circuit court erred in finding Respondent not liable for contributory copyright infringement under the standard announced in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. where Respondent took affirmative steps to promote its video-stripping and MP3-archiving software for use on VuToob, failed to implement available means to mitigate copyright infringement, and depended on the infringing use to garner publicity, increase its customer base, and generate revenue.
2. Whether the circuit court erred in finding that Runaway Scrape's registered domain name "www.aardvarks.com" was likely to dilute Respondent's trademarks by blurring in violation of the Trademark Dilution Revision Act, 15 U.S.C. § 1135(c), when the degree of similarity between the marks was slight, Runaway Scrape's intent was uncertain, and an actual association was absent.

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### **OPINIONS BELOW**

The opinions of the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fourteenth Circuit are unreported. The opinion of the Fourteenth Circuit is provided in the Record at pages 3–20.<sup>1</sup>

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The constitutional and statutory provisions involved in this litigation include: U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C § 102; 17 U.S.C. § 106; 17 U.S.C. § 501; and 15 U.S.C. § 1125(c).

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<sup>1</sup>All citations to the Record are hereinafter referred to as ("R. at \_\_\_\_").



## STATEMENT OF THE CASE

### A. Statement of Facts

Runaway Scrape ("Petitioner") is one of the most popular bands in the country. R. at 6. Founded in 1999 by four college roommates and an art student, the group has recorded several albums and has experienced considerable success. Id. To promote the band, Runaway Scrape occasionally uploads licensed music on VuToob in the form of professional productions and home videos of live performances. Id. at 5, 6. In April of 2007, the group also launched a website, "www.aardvarks.com," named after a pre-2007 Runaway Scrape song entitled "Aardvarks." Id. at 7. The song is a musical tribute to a band member's childhood pet and has been performed at concerts but never released on an album. Id. at 7, 19 n. 6. The website also includes a link that reads "Get it the right way," which leads visitors to the band's official homepage where they may purchase other Runaway Scrape music and band merchandise. Id. at 7.

In late 2006, the band became very concerned with the launch of Aardvark Lite, a product manufactured and sold by Chatnoir, Inc. ("Respondent"). Id. at 6. Respondent is a Texas-based electronics and communications company. Id. at 3. In 2003, Respondent created Internet-based videoconferencing software under the registered trademark "Aardvark Media." Id. Aardvark Media products allow a user with a camera and a microphone to communicate visually and aurally over the Internet. Id. In 2006, Respondent, in response to customer feedback, created a method to allow users to strip the video portion of the conference and record the audio as an MP3 file. Id. at 4. This new product, called "Aardvark Pro," was provided free to

Respondent's customers through Respondent's website, [www.chatnoir.com](http://www.chatnoir.com). Id. at 4–5. Once downloaded, the free version was operable for six months. Id. at 4. Thereafter, Aardvark Pro must be purchased in order to continue using the video stripping and archiving functions. Id.

Respondent extensively marketed and promoted Aardvark Lite. Id. Respondent contacted its current customers via email, described the upgrades, and provided links to the webpage from which Aardvark Lite could be downloaded. Id. The emails highlighted the video-stripping and audio-archiving technological advances of the product, which Respondent suggested be used on VuToob. Id. at 5–6. Respondent also purchased space on business webpages and advertised links to its download page. Id. at 6. In its Internet marketing, Respondent targeted users who entered the search terms "VuToob," "downloads," and "music," and these search queries directed the user to the Aardvark Lite advertisement. Id. Once at the Aardvark Lite download webpage, customers encountered instructions for using the software; a disclaimer reading, "[P]lease don't use our product for illegal or unethical purposes;" and suggested uses of the software, which included "mak[ing] audio recordings of your favorite VuToob videos." Id. at 5.

Although VuToob attempts to regulate uploaded videos, it cannot filter all material that infringes copyright. Id. While VuToob uses software that searches for and disallows infringing material, Aardvark Lite does not make use of this or any other filtering software. Id. at 5, 7. Aardvark Lite can therefore be used to download, strip, and store audio from copyrighted videos off of VuToob. Id. at 8. Roughly

70% of Aardvark Lite's use is infringing, which includes unauthorized downloads of Runaway Scrape music. Id.

Runaway Scrape sent letters to Respondent on November 3, 2006; December 14, 2006; and January 3, 2006 expressing concern over the launch of Aardvark Lite. Id. at 6. The band also sent Respondent two cease and desist letters on February 24, 2007 and March 24, 2007 after the launch demanding the discontinuance of Aardvark Lite due to the fear that customers were using the program to create unauthorized MP3 copies of Runaway Scrape music. Id. Respondent did not reply to the letters. Id. at 6–7. In April and May of 2007, upon their discovery of "www.aardvarks.com," Respondent contacted Runaway Scrape and requested that it either shutdown the website or transfer the domain name. Id. This litigation ensued.

#### **B. Procedural History**

In May of 2007, Runaway Scrape brought suit against Respondent in the United States District Court for the Northern District of Texas for contributory copyright infringement in violation of The United States Copyright Act, 17 U.S.C. § 102 (2006). Id. at 7–8. Respondent countersued for trademark dilution by blurring in violation of the Trademark Dilution Revision Act ("TDRA"), 15 U.S.C. § 1125(c) (2006). Id. at 8.

The matter was tried without a jury. During the trial, Runaway Scrape presented uncontested evidence that third parties were exploiting Aardvark Lite to make unauthorized copies of its music. Id. Both parties' experts concluded that about 70% of Aardvark Lite's uses were infringing. Id. Another key witness for Runaway Scrape was Kasey Stinger, the executive secretary for Respondent's President and

CEO for five years and paramour for two, who testified that her affair with Mr. Stanley Rucker was clandestine until one month before Runaway Scrape filed the underlying lawsuit. Id. at 8. Ms. Stinger testified that their affair became public when a VuToob video was uploaded showing herself and Mr. Rucker "enjoying Christmas cheer under the mistletoe—for five minutes." Id. at 8–9. Runaway Scrape also played for the trial court an audio file of Mr. Rucker laughing and stating:

Ha! Those fools. A successful release of Aardvark Lite will more than pay for a copyright infringement lawsuit. Heck, a lawsuit brought by a popular band would be great publicity for the success of all Aardvark products. Aardvark Lite is going to provide us with a demographic we never would have reached otherwise!

Id. at 9.

Stanley Rucker also testified at the trial, explaining that his company was surprised by the number of downloads Aardvark Lite had received and conceding that the number of downloads exceeded the number of expected users of the Aardvark Pro software package. Id.

As for the trademark claim, Respondent presented uncontested evidence of a survey it conducted in which 2% of the general public claimed that "www.aardvarks.com" brought to mind Respondent's products. Id. at 8. In a survey of Respondent's current customers, that number rose to 8%. Id.

The district court ruled in favor of Respondent on both the contributory copyright infringement and the trademark dilution claims. Id. at 9. The court entered judgment for Respondent and enjoined Runaway Scrape from using its www.aardvarks.com domain name. Id. On October 1, 2010, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's decision.

Runaway Scrape filed a petition for a writ of certiorari, which was granted for the 2010 October Term and limited to: (1) whether Chatnoir, Inc. intentionally induced or encouraged the infringement of Runaway Scrape, L.P.'s copyright under the standard announced in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); and (2) whether the domain name "www.aardvarks.com" registered by Runaway Scrape, L.P., is likely to dilute Chatnoir, Inc.'s trademarks by blurring in violation of the Trademark Dilution Revision Act, 15 U.S.C. § 1125(c). R. at 2.

#### **SUMMARY OF THE ARGUMENT**

In affirming the District Court for the Northern District of Texas, the United States Court of Appeals for the Fourteenth Circuit failed to recognize that Chatnoir intentionally induced and encouraged the infringement of Runaway Scrape's copyright under the Metro-Goldwyn-Myer Studios, Inc. v. Grokster, Ltd standard. Furthermore, the circuit court erred when it enjoined Runaway Scrape from utilizing its domain name, "www.aardvarks.com," because the name is unlikely to dilute Chatnoir's trademarks by blurring and is therefore not in violation of the Trademark Dilution Revision Act. Thus, the decision of the circuit court must be reversed.

Respondent knowingly and intentionally encouraged the use of its product, Aardvark Lite, for copyright infringement. It thus satisfies the Grokster inducement test, which provides that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement

by third parties.” Grokster, Ltd, 545 U.S. at 936–37. Grokster and its progeny recognize three important factors in the inducement analysis: internal communication and advertising efforts; failure to implement a means to limit infringement; and reliance on the third party infringement for the success of defendant’s business model. Runaway Scrape has submitted extensive evidence of inducement capable of satisfying each of these factors.

Respondent advertised Aardvark Lite as a product that could be used to download and strip VuToob videos. Respondent declined to implement a means to reduce infringement and instead attempted to shift its legal responsibility onto VuToob. Respondent exploited the immense success to its business that the device provided. Beyond satisfaction of the Grokster test, holding Respondent liable for contributory infringement preserves the constitutional balance between motivating the creative efforts of artists and promoting technological innovation.

The circuit court also erred in its upholding of the injunction against Runaway Scrape’s use of the domain name “www.aardvarks.com.” The TDRA grants injunctive relief to owners of a famous mark when that mark is diluted by blurring. See 15 U.S.C. § 1125(c). Dilution by blurring is “an association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” Id. The TDRA outlines six non-exhaustive factors that courts “may consider” when determining whether dilution by blurring has occurred. Id. Here, Runaway Scrape has conceded that Respondent’s products are famous and distinct, and that Respondent is engaged in “substantially exclusive use of the mark.” Id. Therefore,

the only three TDRA factors for this court to weigh include: the degree of similarity between the mark or trade name and the famous mark; whether the user of the mark or trade name intended to create an association with the famous mark; and any actual association between the mark or trade name and the famous mark. Id.

The degree of similarity between the two marks is slight when all relevant facts are considered. The court was incorrect in asserting that plurality was the only substantive difference between the two marks because it failed to acknowledge the words "Media," "Pro," and "Lite." Furthermore, the court erred when it held that the existence of a public dispute between the two companies was indicative of a high degree of similarity, when the court should have been comparing the context of the Internet to Respondent's market.

Runaway Scrape chose its domain name to honor a band member's childhood pet and to call attention to an under-promoted song. The assumption made by the court below that the band intended to create an association with Respondent's products is unlikely and not supported by the Record. As to an actual association, Respondent's consumer evidence is wholly inadequate to weigh this factor in its favor because the consumer survey statistics of 2% and 8% are slight, at best, and unconvincing. Thus, with no evidence of dilution by blurring and therefore no trademark violation, the injunction must be vacated.

## ARGUMENT

### **I. CHATNOIR TOOK AFFIRMATIVE STEPS TO INDUCE AND ENCOURAGE COPYRIGHT INFRINGEMENT BECAUSE IT PROMOTED AND PROFITED FROM THE DISTRIBUTION OF AARDVARK LITE AND FAILED TO PREVENT THE PRODUCT'S UNLAWFUL USE.**

Runaway Scrape is entitled to a finding of contributory infringement under the inducement test announced in Metro-Goldwyn-Myer Studios, Inc. v. Grokster Ltd. because Respondent knowingly and intentionally encouraged the use of its product, Aardvark Lite, to infringe copyright. Upon *de novo* review, this Court should reverse the circuit court's conclusion that Respondent is not liable for the overwhelming copyright infringement made possible by its software. See Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (applying *de novo* review to conclusions of law for a copyright claim). The evidence demonstrates that Respondent advertised the device for an infringing use, declined to implement a means to reduce infringement, and exploited the immense success to its business that the device provided. It is sound policy to motivate the creative efforts of artists by protecting the product of this hard work from technologies that thwart the monopoly granted by the Constitution and Congress.

#### **A. Respondent Induced and Encouraged Copyright Infringement Under the Test Announced in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. Because It Advertised and Promoted Infringing Use of Its Product, Failed to Implement a Means to Mitigate Infringement, and Sought to Profit From Infringement.**

To establish a cause of action for contributory copyright infringement, a plaintiff must prove direct infringement by a third party and inducement, encouragement, or material contribution<sup>2</sup> to

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<sup>2</sup> Courts recognize two distinct contributory infringement actions: material contribution to copyright infringement, sometimes confusingly termed "contributory infringement;" and the inducement or



infringement. See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 795 (9th Cir. 2007). Under the inducement test announced in Grokster, Runaway Scrape has demonstrated that third parties are making unauthorized copies of Runaway Scrape music and that Respondent induced and encouraged users of its product to commit copyright infringement. It advertised this use, failed to implement means to restrict such use, and depended on the use for the success of its company.

The United States Constitution provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. It is "settled that the protection given to copyrights is wholly statutory." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984) (citing Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661–62 (1834)). The Copyright Act ("Act") states that one is entitled to copyright protection for "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102. The exclusive rights granted to a copyright holder, relevant here, consist of the right (1) to reproduce the copyrighted work; (2) to prepare

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encouragement of copyright infringement (the certified question here). See, e.g., Perfect 10, 494 F.3d at 794, 800; Arista Records LLC v. Lime Grp. LLC, 2010 U.S. Dist. LEXIS 46638, at \*52, 74 (S.D.N.Y. May 11, 2010). "[S]everal courts have recently expressed doubt as to whether inducement of infringement states a separate claim for relief." Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 150 n. 17 (S.D.N.Y. 2009). But "[i]t is immaterial whether the [inducement] theory of liability is a subspecies of contributory liability, or whether it is a wholly separate theory based on inducement. The question is whether it applies to defendants in this case." In re Napster, Inc. Copyright Litig., 2006 U.S. Dist. LEXIS 30338, at \*31 (N.D. Cal. May 17, 2006).

derivative works; (3) to distribute copies of the copyrighted work to the public; (4) to perform the copyrighted work publicly; (5) to display the copyrighted work publicly; and (6) to perform the copyrighted work publicly by means of a digital audio transmission. See id. § 106. Here, Runaway Scrape holds copyright to all relevant material, and the evidence of third party infringement is uncontested. R. at 6 n. 1, 8.

The Act provides a remedy against “[a]nyone who violates any of the exclusive rights of the copyright owner.” Id. § 501. Although the Act does not expressly grant a remedy against a defendant for the infringing acts of others, courts have long recognized this cause of action. See Sony Corp. of Am., 464 U.S. at 435. Secondary liability in copyright law is premised on traditional common law principles of fault-based liability. See Grokster, 545 U.S. at 934–35. “Tort law ordinarily imputes to an actor the intention to cause the natural and probable consequences of his conduct.” Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (quoting DeVoto v. Pac. Fid. Life Ins. Co., 618 F.2d 1340, 1347 (9th Cir. 1980)). The Restatement (Second) of Torts teaches that “[if] the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965). The Supreme Court has suggested that the same concept applies in copyright law, “grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of . . . a publication to the products or activities that make such duplication possible.” Sony Corp. of Am., 464 U.S. at 442.

The Supreme Court in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., in a unanimous decision, announced the test for determining whether a defendant induces or encourages copyright infringement: “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” 545 U.S. at 936–37. While knowledge is required, “mere knowledge of infringing potential or of actual infringing uses would not be enough.” Id. at 937. Further, a plaintiff must proffer “[e]vidence of active steps taken to encourage direct infringement,” and must “show an affirmative intent that the product be used to infringe.” Id. at 936.

The Grokster Court explained that the “classic case of direct evidence of unlawful purpose” occurs when the defendant persuades another through advertising. Id. at 935. The Court reasoned that intent can also be demonstrated by additional evidence of internal communication and advertising efforts, failure to implement a means to limit infringement, and reliance on the third party infringement for the success of defendant’s business model. See id. at 939–40. Under the Grokster inducement test, Runaway Scrape has demonstrated that Respondent knowingly designed, advertised, and profited from Aardvark Lite’s use to appropriate Runaway Scrape’s creative efforts.

**1. Respondent’s Internal Communications and Advertising Efforts Establish That It Intended Users to Download Aardvark Lite For the Purpose of Engaging in Copyright Infringement.**

Respondent actively sought to advertise Aardvark Lite’s infringing capability and to convince users to use the product in an infringing manner. The most direct evidence of an unlawful purpose

"occurs when one induces commission of infringement by another, or 'entic[es] or persuad[es] another' to infringe, as by advertising." Grokster, 545 U.S. at 935 (internal citations omitted). Advertising "shows affirmative intent that the product be used to infringe." Id. at 936. Respondent's internal communications demonstrate that it intended to persuade others to infringe by targeting those likely to do so and instructing customers to use its product for an unlawful purpose.

Intent is found where a defendant provides instruction to software users concerning infringement. On remand in Grokster, the district court found evidence of intent in the instruction "for playback of copyright content" that the defendant provided to users. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 986 (C.D. Cal. 2007) (reasoning that intent is readily inferred from instructions to customers as to how to infringe copyright). In In re Aimster Copyright Litigation, Judge Posner pointed out that the software at issue gave examples of file sharing, including copyrighted music, leading him to conclude defendant was "aiding and abetting" infringement. See 334 F.3d 643, 650, 651 (7th Cir. 2003); see also AMC Tech., LLC v. SAP AG, 2005 U.S. Dist. LEXIS 27095, at \*16 (E.D. Pa. Nov. 3 2005) (holding that providing instructions enabling copyright infringement constitutes inducement to infringe).

In this case, Respondent provided similar instruction. It offered directions for using the software, which included "mak[ing] audio recordings of your favorite VuToob videos." R. at 5. Company emails to current customers also suggested this use. Id. Indeed, illegal downloading is unquestionably the predominant use of the

software. Id. at 7. These affirmative steps of encouragement establish that Respondent intended that its product be used for copyright infringement.

Targeted advertising is also convincing evidence of intent to induce infringement. The Grokster Court found it extremely persuasive that the defendant directed its marketing efforts towards individuals it knew were looking for software to facilitate copyright infringement. See Grokster, 545 U.S. at 937–39. In Arista Records LLC, the district court found “significant evidence” of purposeful marketing to individuals known to infringe copyright in a campaign through Google “whereby Google users who entered certain search queries,” including the words “mp3 free download,” would see an ad directing them to the defendant’s website. Arista Records LLC, 2010 U.S. Dist. LEXIS 46638, at \*61.

Respondent launched a virtually identical marketing effort in this case. R. at 6. The corporation contracted with search engines whereby certain search queries, “VuToob,” “downloads,” and “music”—queries that have no relation to business videoconferencing—directed the user to Aardvark Lite advertisements. Id. The circuit court suggested that the warning against use for “illegal or unethical purposes” cures any suggestion of inducement. R. at 10. But the court in Arista Records found that a similar notice against unauthorized file-sharing did “not constitute meaningful effort[] to mitigate infringement.” Arista Records LLC, 2010 U.S. Dist. LEXIS 46638, at \*72. A warning to “users about [infringement] . . . does not prevent imposition of inducement-based liability where there is no evidence ‘that [defendant] made an effort to filter copyrighted

material . . . ." Id. (quoting Grokster, 545 U.S. at 962). The circuit court placed undue weight on Respondent's warning and failed to understand the trivial effort to prevent unlawful activity it represents.

A company's internal communications discussing infringement may also strongly suggest an intent to induce. In Arista Records, employees maintained a file labeled "Knowledge of Infringement." Arista Records LLC, 2010 U.S. Dist. LEXIS 46638, at \*59 (reasoning that knowledge of massive infringement is evidence of an intent to induce). The Supreme Court in Grokster likewise found "unequivocal indications of unlawful purpose in the internal communications." Grokster, 545 U.S. at 938. In that case, defendant's emails and office memoranda indicated an aim to "have a large number of copyrighted songs" to "attract users." Id. at 925–26. In fact, defendant's Chief Technology Officer boasted that "[t]he goal [was] to get in trouble with the law and get sued. It's the best way to get in the new[s]." Id. at 925. Flaunting illegal capability demonstrates a defendant's purpose to facilitate infringement. See id.

The present case is astoundingly similar to both Grokster and Arista Records. Soon after the release of Aardvark Lite, Respondent's internal communications acknowledged the potential for infringement. R. at 7. Chatnoir emails establish that it was aware of infringing capability. Id. After learning that Aardvark Lite consumers were using the software overwhelmingly to commit copyright infringement, CEO Rocker laughed:

Ha! Those fools. A successful release of Aardvark Lite will more than pay for a copyright infringement lawsuit. Heck, a lawsuit brought by

[Runaway Scrape] would be great publicity for the success of all the Aardvark products.

Id. at 9. Such a blatant disregard for the rights of Runaway Scrape demonstrates an unequivocal purpose to knowingly take advantage of the misuse of its product. Mr. Rocker's statements, direct evidence of intent that the court below completely ignored, also demonstrate that Respondent was well aware that Aardvark Lite was being used to commit copyright infringement, which Respondent encouraged for its own financial gain.

The circuit court below suggested that Aardvark Lite facilitates the downloading of VuToob videos that are not copyrighted. Id. at 10. An argument that Respondent's product is capable of a substantial non-infringing use does not prevent liability under the inducement test, however. See Grokster, 545 U.S. at 933. In Grokster, the Supreme Court stated that the Ninth Circuit misread "Sony's limitation to mean that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties' infringing use . . . ." Id. at 934. A defendant, regardless of the lawful use of a product, may still be held liable on independent grounds, including on the basis of evidence of affirmative steps taken to encourage direct infringement. See id. at 934, 936. Here, the court below plainly ignored the Supreme Court's instruction that nothing in its case law "requires courts to ignore evidence of intent." Grokster, 545 U.S. 934–39. Respondent's internal communications, directions to use Aardvark Lite on VuToob, and targeted advertising to copyright infringers more than satisfies the Grokster standard, they exceed it.

**2. Respondent Failed to Implement Means to Limit Infringement and Instead Sought to Impermissibly Shift Its Legal Responsibility onto VuToob.**

By refusing to implement filtering tools to minimize copyright infringement, Respondent intended Aardvark Lite be used for such purpose. Under the Grokster inducement standard, failure to "develop filtering tools or other mechanisms to diminish the infringing activity" adds significantly to the evidence of unlawful objective. Grokster, 545 U.S. at 939. The Grokster Court found that neither defendant in that case implemented tools, such as unlicensed music blockers or third party monitoring services, widely available and even marketed to defendants. See Grokster, 545 U.S. at 939. In Perfect 10, Inc. v. Amazon.com, Inc., the Ninth Circuit noted that a defendant's "knowing failure to prevent infringing actions could be the basis for imposing contributory liability." 508 F.3d at 1172. In Arista Records, the Southern District of New York found evidence of inducement in Lime Wire's failure to implement "technological barriers [or] design choices that [were] available to diminish infringement;" instead, Lime Wire impermissibly chose to shift its burden of filtration by requiring the user to turn on a file-sharing setting. Arista Records LLC, 2010 U.S. Dist. LEXIS 46638, at \*66-67. Other courts have likewise found unpersuasive an argument that a defendant may depend on a third party to prevent copyright infringement. See, e.g., Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1161, 1163 (2d Cir. 1971) (rejecting concert management's argument that it was not responsible for obtaining copyright clearance for performers). While a defendant cannot be expected to prevent all harm, reasoned the district court considering Grokster on remand, a



defendant "must at least make a good faith attempt to mitigate" infringement made easier by its technology. Grokster, 454 F. Supp. 2d at 989.

In this case, Respondent made the conscious decision not to implement a means to limit the rampant copyright infringement made possible by its product. The peer-to-peer file-sharing cases demonstrate the wide availability of filtering software; indeed, VuToob makes the implementation of filtering tools a priority. R. at 5. But VuToob's efforts are not enough to relieve Respondent of ensuring that its own product does not facilitate massive infringement. As the Arista Records and Gershwin courts noted, reliance on a third party to implement means to limit infringement is not sufficient. See Gershwin Publ'g Corp., 443 F.2d at 1163; Arista Records, 2010 U.S. Dist. LEXIS 46638, at 66–67. Respondent has made no good faith effort to mitigate the copyright infringement facilitated by Aardvark Lite and cannot shift the responsibility onto another entity. Thus, it has induced copyright infringement by ensuring that its product is free from any filtering tools.

**3. Respondent Profited From Infringing Activity Through Advertisement Revenue and By Increasing Its Customer Base in Preparation for the Launch of Aardvark Pro.**

Finally, Respondent relies on the infringement capability of the Aardvark Lite software to increase its customer base, to promote the Aardvark Pro launch, and to generate advertising revenue. In Grokster, the Supreme Court found evidence of intent in the fact that the defendant's commercial success was strengthened by infringement. See Grokster, 454 U.S. at 940. Inducement occurs when a defendant "is in a position" to prevent infringement, but instead chooses to "derive

substantial financial benefit from the actions of the primary infringers." Gershwin Publ'g Co., 443 F.2d at 1163. Here, Respondent's intent to induce is evident from the profit it received from the infringing use of Aardvark Lite and its admission that the product will bring about immense success to all Chatnoir products.

Evidence of unlawful purpose is apparent from a defendant's reliance on infringement to increase its customer base. In Grokster, the defendants had a strong incentive to increase the number of copyright infringers using their software. See Grokster, 545 U.S. at 940. The Supreme Court found an "unlawful objective [] unmistakable" in defendants' need for high-volume downloads. Id. Similarly, the defendant in Arista Records depended on a massive user-base to increase available infringing material. See Arista Records LLC, 2010 U.S. Dist. LEXIS 46638, at \*66. In this case, Respondent admitted that Aardvark Lite would provide it "with a demographic [it] never would have reached before" and that the copyright infringement and associated publicity would "increase success of all the Aardvark products." R. at 9. The more customers Respondent recruited, the more successful and profitable it became. Furthermore, like the defendant in Arista Records, Respondent was planning on launching an upgraded version of its product, Aardvark Pro. Id. at 4. Dependence on infringement for success is evident in a company's need to generate a customer base for future product lines. See Arista Records, 2010 U.S. Dist. LEXIS 46638, at \*65-66. The upgraded Chatnoir software, which incorporated the video-stripping and archiving function, had the potential to be wildly successful if Respondent increased its customer base beyond business-oriented companies. R. at 9. Thus, Respondent,

like the Grokster and Arista Records defendants, had a strong incentive to increase both the numbers and types of users and to encourage copyright infringement.

Generating advertising revenue that is related to an infringement-facilitating product demonstrates intent to induce. The defendants in Grokster relied on revenue generated by advertising. See Grokster, 454 F. Supp. 2d at 988. "The more the software is used, the more ads are sent out and, the greater the advertising revenue becomes." Id. Likewise, in Columbia Pictures Industries, Inc. v. Fung, the defendant businesses generated revenue by selling advertising space where "the revenue depends on users visiting [the] sites and viewing the advertising." 2009 U.S. Dist. LEXIS 122661, at \*54–55 (C.D. Cal. Dec. 21, 2009). Where "revenue increases along with the number of users," there is "evidence of Defendants' intent to assist infringing uses." Id. at 55. Here, Respondent also generated ad revenue. R. at 17 n. 5. Respondent's website contained advertising maintained by VuToob's parent company and Respondent received revenue each time a user clicked on the advertisement's link. Id. Respondent had an incentive to promote its product as one that should be used on VuToob, where an overwhelming amount of infringement was taking place. Thus, Respondent had a financial incentive to promote the product's use on VuToob, where it knew copyright infringement was occurring.

Upon application of the inducement test announced by the Supreme Court in Grokster, Respondent unmistakably distributed Aardvark Lite with the object of promoting its use to facilitate copyright infringement. Respondent took affirmative steps to foster

infringement, which are demonstrated by its marketing efforts directed towards infringing users, the failure to implement means to mitigate infringement, and its reliance on infringement to increase its customer base and revenue. This case is simply not one where a defendant had knowledge of an infringing use but was effectively powerless to prevent it. See Perfect 10, Inc., 494 F.3d 788, 800–02. Rather, there is sufficient evidence to demonstrate unlawful purpose far beyond the mere distribution of a product. Thus, this Court should reverse the judgment and find in favor of Runaway Scrape on the issue of contributory infringement.

**B. Holding Respondent Liable Achieves the Purpose of Copyright Law to Promote the Progress of Useful Arts and Prevents and Deters Copyright Piracy, Which Costs the United States Billions of Dollars Each Year.**

It is sound policy to protect the creative efforts of copyright holders from technologies that thwart the monopoly granted by the Constitution and Congress. The Supreme Court has consistently recognized that copyright law must strike “a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies.” Grokster, 545 U.S. at 928; see also Sony Corp. of Am., 464 U.S. at 431–32. Providing software companies with a “free pass” to develop infringement-facilitating technology strikes no such balance. Furthermore, encouraging technology like Aardvark Lite imposes significant costs on artists, consumers, and the Federal government. Therefore, this Court should reverse the judgment on grounds that to do so is consistent with the United States’ policy to promote the progress of useful arts.

The court below failed to preserve a balance between supporting the creative arts and promoting innovation. "Technological advances are not inherently antithetical to copyrights and their owners." A. Samuel Oddi, Contributory Copyright Infringement: The Tort and Technological Tensions, 64 NOTRE DAME L. REV. 47, 91 (1989). For example, there are technologies that enhance a copyright owner's ability to share his craft such as satellite radio services, iTunes, legitimate peer-to-peer services, social networking sites, and video-on-demand. See RECORDING INDUSTRY ASSOCIATION OF AMERICA, <http://www.riaa.com/faq.php> (last visited Nov. 14, 2010). But technologies that circumvent an artist's exclusive rights frustrate the fundamentals of copyright protection. See Jane C. Ginsburg, Copyright and Control over New Technologies of Dissemination, 101 COLUM. L. REV. 1613, 1613 (2001) [hereinafter Ginsburg].

The United States Constitution recognizes this important right, as did Congress in enacting the Copyright Act. See U.S. CONST. art. I, § 8, cl. 8. "The enactment of copyright legislation by Congress" is based "upon the [finding] that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings . . . ." H.R. REP. NO 60-222, at 7 (1909). Court decisions that "premise[] liability on purposeful, culpable expression and conduct" do not "compromise legitimate commerce or discourage legal innovation" and thus promote congressional intent and achieve a desired balance. Sue Ann Mota, Secondary Liability for Third Parties' Copyright Infringement Upheld by the Supreme Court: MGM Studios, Inc. v. Grokster, Ltd., 32 RUTGERS COMPUTER & TECH. L.J. 62, 76 (2005). Here,

Respondent's Aardvark Lite thwarts copyright protection because it facilitates unlawful downloading of artists' work. It therefore not only meets the Grokster test, it is also fundamentally inconsistent with constitutional and legislative protections.

Copyright piracy facilitated by Respondent's product engenders significant costs to artists, consumers, and government. An Institute for Policy Innovation report found that, each year, copyright infringement of movies, music, and other entertainment software costs the U.S. economy \$58 billion. See Stephen E. Siwek, The True Cost of Copyright Industry Piracy to the U.S. Economy 11 INST. FOR POL'Y INNOVATION (2007). In addition, piracy results in nearly 400,000 lost jobs and \$2.6 billion in lost tax revenue. Id. at 11, 13. Thus, copyright infringement affects a broad segment of the economy. Id. at 14. But "a decrease in copyright piracy expands production." Id. at 4. Expanding production "offer[s] the public an increased quantity and variety of works of authorship" thereby achieving the purpose of copyright protection. See Ginsburg, supra, at 1619. Holding Respondent liable because it intended to facilitate copyright infringement furthers the important goal of copyright protection and strikes a much-needed balance between supporting creative pursuits and promoting innovation. The lower court erred in failing to consider the far-reaching ramifications that its decision generates. Therefore, this Court should reverse.

**II. RUNAWAY SCRAPE'S REGISTERED DOMAIN NAME "WWW.AARDVARKS.COM" IS NOT LIKELY TO CAUSE DILUTION BY BLURRING TO CHATNOIR'S FAMOUS MARKS OF "AARDVARK MEDIA," "AARDVARK PRO," OR "AARDVARK LITE" UNDER THE TRADEMARK DILUTION REVISION ACT.**

Runaway Scrape's registered domain name "www.aardvarks.com" is not likely to cause dilution by blurring of Chatnoir's famous marks. After more than a decade of uncertainty in the courts<sup>3</sup> surrounding the appropriate standard to apply to dilution by blurring under the Federal Trademark Dilution Act ("FTDA"), Congress passed the TDRA in 2006. See 15 U.S.C. § 1125(c). The TDRA superseded the Supreme Court's decision in Moseley v. V Secret Catalogue, Inc. by statutorily mandating that in order for a party to receive injunctive relief against another owner's mark, it carries the burden of proving that the mark is "likely to cause dilution by blurring . . . regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury." Id.

The TDRA outlines six non-exhaustive factors that courts may consider "in determining whether a mark or trade name is likely to cause dilution by blurring:"

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

15 U.S.C. § 1125(c)(2)(B).

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<sup>3</sup> See Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003) (in which the United States Supreme Court held that that "[the FTDA] unambiguously requires a showing of actual dilution, rather than a likelihood of dilution.").

An analysis of these six factors leads to the conclusion that Runaway Scrape's domain name does not cause dilution by blurring of Respondent's products. Runaway Scrape concedes that Respondent's marks are both famous and distinctive and that "www.aardvarks.com" is the use of a mark in commerce. R. at 13. Therefore, the only factors the lower court considered in its decision were the similarity of the marks, the intent to associate, and an actual association between the two marks. Although this Court reviews the decision of the lower court as one of clear error with respect to the individual factors, the "balancing of the factors is treated as a matter of law subject to de novo review." Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 588 F.3d 97, 105 (2d Cir. 2009); Star Indus., Inc. v. Bacardi & Co., Ltd., 412 F.3d 373, 384 (2d Cir. 2005).

A proper balancing of the TDRA factors reveals that Runaway Scrape did not cause dilution by blurring of Respondent's famous marks. The court below erred in its determination that Runaway Scrape's domain name and Respondent's products possessed a high degree of similarity by ignoring key differences in the second words attached to Respondent's products, the vastly different contexts in which the domain name is found, and the market where Respondent sells its products. The court also committed clear error in its finding that Runaway Scrape intended to create an association with Respondent's products because it placed undue weight on the existence of an ambiguous link on Runaway Scrape's website that reads "Get It the Right Way" and a largely instrumental song entitled "Aardvarks." R. at 7. Additionally, the court had very little basis for its



determination that there is an actual association between the two marks because this decision was based on insufficient and inconclusive consumer statistics of a mere 2% and 8% association. Thus, a balancing of the factors reveals that Runaway Scrape's domain name did not cause dilution by blurring to Respondent's famous marks, and the judgment of the circuit court must be overturned.

**A. The Circuit Court Erred in Its Determination That There Is a High Degree of Similarity Between the Two Marks Because It Ignored Key Differences Between Runaway Scrape's Domain Name and Respondent's Products and Improperly Considered the Context as if This Were a Trademark Infringement Claim.**

The TDRA defines dilution by blurring as an "association rising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of a famous mark." 15 U.S.C. § 1125(c)(2)(B). As "similarity" is included in the definition of the offense, measuring the degree of such a resemblance is imperative. Id. In determining the degree of similarity required for a dilution by blurring claim, courts have stated that "substantial similarity is not necessarily required, and a lack of similarity is not necessarily dispositive." Miss Universe, L.P. v. Villegas, 672 F. Supp. 2d 575, 593 (2d Cir. 2009).

In the instant case, the circuit court erred in its determination that Runaway Scrape's domain name caused dilution by blurring to Respondent's products. The court not only placed undue weight on the similarity factor but also ignored key differences in the two marks. The court also failed to properly consider context because it did not compare the Internet to Respondent's product market.

**1. The Circuit Court Committed Clear Error By Placing Undue Weight on the Similarity Factor While Failing to Consider All Relevant Differences.**

The circuit court failed to undergo the extensive analysis required to determine the degree of similarity between two marks. See Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 266 (4th Cir. 2009) ("A trial court must offer a sufficient indication of which factors it has found persuasive and explain why they are persuasive so that the court's decision can be reviewed."). The court below relied heavily on the Ninth Circuit's decision in Visa International Service Association v. JSL Corp., which held that the defendant's domain name, "www.evisa.com," was "effectively identical" to Visa's famous and distinctive mark. Visa Int'l Serv. Ass'n v. JSL Corp., 610 F.3d 1088, 1090 (9th Cir. 2010). The Visa International court noted that the only difference between the two marks was the "e" before the word visa in the defendant's domain name, which was not enough to show dissimilarity since an "e" is "commonly used to refer to the electronic or online version of a brand." Id. at 1090. The Ninth Circuit was not convinced by defendant's argument that the word "visa" is used daily to refer to travel and passports, and therefore, a company should be able to employ its common English meaning. Id. at 1091–92. The court stated that "[d]espite widespread use of the word visa for its common English meaning, the introduction of the "evisa" mark to the marketplace means that there are now two products, and not just one, competing for association with that word." Id. at 1091.

This case is distinguishable from Visa International primarily because the parties' marks are not "effectively identical." Id. at 1090. Not only does the domain name "www.aardvarks.com" utilize the

plural form of the noun, but the word "aardvark" is never used to describe any of Respondent's products without a second word: Media, Pro, or Lite. R. at 18. The famous mark in Visa International was the company's very name and identity, which utilized the single word "visa." Such is not the case here and only would be if Runaway Scrape had created the domain name "www.chatnoirs.com." On the contrary, the band has created a domain name that coincidentally uses one of the words common to Respondent's media products. This comparison does not give rise to a degree of similarity so high as to yield a likelihood of dilution.

When properly considering the degree of similarity between the marks, this Court should look to the Second Circuit's decision of Starbucks Corp. v. Wolfe's Borough Coffee, Inc., which applied the TDRA retroactively to affirm a finding that Wolfe's "Charbucks" coffee blend marks were only minimally similar to Starbucks' famous mark. See 588 F.3d at 106; see also R. at 18 (Armitage, J., dissenting). The full names of the products in question, both dark coffee blends, were "Mister Charbucks" and "Charbucks Blend." See Starbucks Corp., F.3d at 103. The court acknowledged that the words "Charbucks" and "Starbucks" were "similar . . . in sound and spelling," but ultimately determined that "it was not clearly erroneous for the District Court to find that the 'Mister' prefix and 'Blend' suffix lessened the similarity between the Charbucks Marks and the Starbucks Marks in the court's overall assessment of similarity." Id. at 106, 107. Here, although the words "aardvark" and "aardvarks" are similar, the suffixes that lessen the similarity are the words "Media," "Pro," and "Lite." The importance of the suffixes Respondent uses when

describing its products cannot be disregarded because they serve the purpose of differentiating the products for consumers. However, the court below failed to aptly consider the effect of these suffixes, and instead simply stated that, "[t]he only differences between the two are that Runaway Scrape's use of the mark is the plural version of Chatnoir's Aardvark marks and that the domain name does not include "Media," "Pro," or "Lite." R. at 14. This is the only time suffixes are mentioned throughout the majority opinion, and the circuit court simply concludes that "[t]he simple addition of an 's' to the end of the word 'aardvark' is not enough to distinguish the marks." Id. The circuit court committed clear error when it determined that the plurality of the word was the only notable difference, and when it failed to consider the significance of the additional words used to describe Respondent's products.

**2. The Circuit Court Did Not Consider Context Properly When Determining the Similarity of the Marks.**

The circuit court committed clear error when it did not sufficiently consider the context of the marks in its decision. When analyzing a claim for dilution by blurring, "[s]ubstantial similarity is required . . . because the mark used by the alleged diluter and the protected mark must be similar enough that a significant segment of the target group of customers sees the two marks as essentially the same." Century 21 Real Estate LLC v. Century Ins. Grp., 2007 U.S. Dist. LEXIS 9720, at \*44 (D. Ariz. Feb. 9, 2007). In other words, a court must first find that a substantial population of customers will see the marks in tandem, and further that these consumers will view the marks as essentially the same. The Fourteenth Circuit did not

make either of these findings, and failed to recognize that the Internet and the media product market are vastly different contexts that do not give rise to consumers seeing the marks in question side by side.

In making its erroneous determination, the circuit court looked to the Second Circuit, which stated, "[i]n assessing similarity [in the infringement context], courts look to the overall impression created by the logos and the context in which they are found and consider the totality of factors that could cause confusion among prospective purchasers." Starbucks Corp., 588 F.3d at 106 (quoting Star Indus., 412 F.3d at 386). However, the Fourteenth Circuit seemed to have forgotten that "[i]t is well-settled that the 'similarity of marks' test for blurring is more stringent than the similarity of marks test for likelihood of confusion purposes." Century 21 Real Estate LLC, 2007 U.S. Dist. LEXIS 9720, at \*44; see also Thane Int'l v. Trek Bicycle Corp., 305 F.3d 894, 906 (9th Cir. 2002). Furthermore, the statute itself says that courts may grant injunctive relief "regardless of the presence or absence of actual or likely confusion." 15 U.S.C. § 1125(c). The fact that this notion was entirely overlooked by the Fourteenth Circuit was fatal to its analysis because it caused the court to erroneously rely on the likelihood of confusion test. The court should not have questioned whether or not the two marks might cause confusion for consumers, but rather whether "a significant segment of the target group of customers [would] see[] the two marks as essentially the same." Century 21 Real Estate LLC, 2007 U.S. Dist. LEXIS 9720, at \*44. If the lower court

had applied this proper standard, it would have realized that this is not the case here.

The Fourteenth Circuit was incorrect in asserting that the very existence of a “public dispute between Runaway Scrape and Chatnoir” was indicative of a “high degree of similarity.” R. at 14. Instead, the court should have looked to the context in which the marks are found—the media market where Respondent sells its products as compared to the Internet, where Runaway Scrape’s domain name is found. Such differing contexts do not lead to the conclusion that there is a high degree of similarity because the videoconferencing software market is in no way related to website domain registration. The circuit court committed clear error in determining that there is a high degree of similarity between the parties’ marks because they incorrectly applied the likelihood of confusion standard instead of the much more stringent standard required by the TDRA.

**B. The Link on Runaway Scrape’s Website That Reads “Get it the Right Way” and the Song Entitled “Aardvarks” Do Not Demonstrate an Intent to Create an Association With Chatnoir’s Marks.**

Runaway Scrape’s intent may not be ascertained by either an elusive link on its website nor a song that honors a band member’s childhood pet. The TDRA requires courts to consider “whether the user of the mark or trade name intended to create an association with the famous mark.” Id. § 1125(c)(2)(B)(v). This requirement “does not ask whether a defendant acted in bad faith; instead, it examines purely a defendant’s ‘intent to associate’ its own mark with the plaintiff’s.” See Starbucks Corp., 588 F.3d at 109 (“The determination of an ‘intent to associate,’ however, does not require the additional consideration of whether bad faith corresponded with that intent.”); Miss Universe,

L.P., 672 F. Supp. 2d at 594. Thus, all that is relevant to this inquiry is whether the defendant "intended to foster associations" with the plaintiff's famous, distinguished mark. Miss Universe, L.P., 672 F. Supp. 2d at 595.

Here, the circuit court was swayed by the link on Runaway Scrape's website that reads "Get it the Right Way" and directs visitors to an online store where they could purchase music and merchandise, as well as "Aardvarks," a Runaway Scrape song available for download on the "www.aardvarks.com" website. R. at 15. The court stated that the link "could be viewed as a reference to the band's dispute with Respondent related to copyright infringement" and the song "Aardvarks" "suggests the band intended to create an association between the marks." Id. at 15. But the court again committed clear error in not considering other facts undoubtedly relevant to determining Runaway Scrape's intent.

Runaway Scrape's song "Aardvarks" pre-existed "www.aardvarks.com." R. at 7 n. 3 ("Runaway Scrape insists that the song has been part of the band's performance line-up prior to the creation of www.aardvarks.com."). Although the song does not appear on any of Runaway Scrape's albums, the band performed the song in concerts prior to the lawsuit. Id. There is nothing in the Record suggesting a challenge by Respondent to this fact. Rather, "Chatnoir insists that the song was not *promoted* until the creation of www.aardvarks.com." Id. (emphasis added). Furthermore, the simple lyrics of the song describe hungry aardvarks hunting for ants, making

no mention of the pending lawsuit.<sup>4</sup> Id. at 19. Indeed, there is evidence that a member of the band had a pet aardvark as a child, which would explain both the song name and lyrics and negate any belief that they were intended to foster an association with Respondent's products. Id. at 19 n. 6.

As for the link "Get it the Right Way," Judge Armitage, in dissent, points out that "copyright infringement has been a growing problem for music artists in recent years[,] [so] it seems presumptuous to assert that this link must refer only to the well-publicized dispute between Runaway Scrape and Chatnoir." Id. at 19. The connection is attenuated, at best, and does not suggest an intent to associate with Chatnoir products. Rather, it merely acknowledges the industry-wide problem of music piracy on the Internet. Even the majority's suggestion that the link "*could* be viewed" to show such an intent to associate suggests that it is not enough to satisfy the fifth factor of the TDRA. Id. at 15 (emphasis added).

Even when combined with the song "Aardvarks," the link is not enough to suggest that Runaway Scrape "intended to create an association with the famous mark." 15 U.S.C. § 1125(c)(2)(B)(v). The circuit court stated that they "*could* be viewed" to demonstrate such an intent, but such skepticism does not lend to the conclusion that Runaway Scrape demonstrated the requisite intent required by the TDRA. Thus, the circuit court erred in its analysis of this factor.

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<sup>4</sup> Specifically, the 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.



**C. There Is No Actual Association Between Runaway Scrape and Chatnoir's Marks.**

In determining whether "any actual association between the mark or trade name and the famous mark" exists, courts consistently look to survey and poll results offered by the parties. Id. § 1125(c)(2)(B)(vi). In Starbucks Corp. v. Wolfe's Borough Coffee, Inc., Starbucks submitted the results of a telephone survey of their consumers which revealed that 3.1% of consumers believed that Starbucks was the possible source of the name "Charbucks," and 30.5% of consumers responded "Starbucks" when asked for the first thing that came to mind upon hearing the name "Charbucks." See 588 F.3d at 109. When a plaintiff fails to bring forth such compelling data, however, courts are hesitant to find an actual association. In Miss Universe, L.P. v. Villegas, for example, Miss Universe, L.P. only brought forth "several emails asking whether Miss Universe and the Miss USA pageant [were] in any way affiliated." 672 F. Supp 2d at 594. The court stated that the lack of "survey results or poll numbers" made it impossible to find an actual association. Id.

In the instant case, Respondent presented data that showed that 2% of the general public and 8% of its customers thought of Respondent's media products upon hearing the word "Aardvarks." R. at 15. The circuit court believed that these findings showed that "people did associate the two marks." Id. This conclusion is simply illogical. Even amongst Respondent's own customers, the percentages are so drastically low as to suggest no actual association. Respondent's statistics are more analogous to the "several emails" seen in Miss Universe than the 30.5% association that Starbucks

presented in support of its claim. See Starbucks Corp., 588 F.3d at 109; Miss Universe, L.P., 672 F. Supp. 2d at 594. "The actual association factor invites courts to weigh data-on-the-ground evidence of association between marks[,] and when they do not, as here, the actual association factor is not satisfied for a dilution by blurring claim. Miss Universe, L.P., 672 F. Supp. 2d at 594. This Court should treat Respondent's survey results in the same way the court treated Miss Universe's poor evidentiary showing. Here, Respondent fell "far short of evidence that consumers will associate" the marks because so few connected Respondent's products with "www.aardvarks.com." Id. at 594. The court committed clear error when it placed undue weight on Respondent's insignificant consumer statistics.

This factor, especially when balanced against the others, does not present a likelihood of dilution. The "balancing of the factors is treated as a matter of law subject to de novo review." Starbucks Corp., 588 F.3d at 105. When Respondent's dubious evidentiary showings under each relevant factor are balanced against each other, it is apparent that they have failed to prove, by a preponderance of the evidence, a TDRA dilution by blurring claim.<sup>5</sup> Therefore, this Court should reverse the circuit court and vacate the injunction against Runaway Scrape.

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<sup>5</sup> Even if this Court finds, in the alternative, that "the scales are evenly balanced, [then] the party with the burden of proof loses." Miss Universe, L.P., 672 F. Supp. 2d at 591. Here, the burden of proof was with Respondent, as it brought forth the trademark dilution by blurring claim.

### **CONCLUSION**

For the aforementioned reasons, Petitioner, Runaway Scrape, L.P. respectfully requests this Court reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

/s/ Team 62\_\_\_\_\_

*Attorneys for Petitioner,*

*Runaway Scrape, L.P.*