
CASE NO. 10–1174

IN THE

Supreme Court of the United States

OCTOBER TERM, 2010

RUNAWAY SCRAPE, L.P.,
Petitioner,

v.

CHATNOIR, INC.,
Respondent.

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. Is Chatnoir, Inc. liable for contributory copyright infringement under the standard announced in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, where Chatnoir advertised its software as being capable of making MP3 recordings of VuToob videos, failed to implement filtering tools to prevent infringement, and gained customers from the release of its free software?

II. Is the domain name "www.aardvarks.com," registered by Runaway Scrape, L.P., sufficiently dissimilar from Chatnoir, Inc.'s trademarks, "Aardvark Media," "Aardvark Pro," and "Aardvark Lite," to make it unlikely that it will dilute Chatnoir's trademarks by blurring under the Trademark Dilution Revision Act, 15 U.S.C. § 1125(c) (2006), where Chatnoir's trademarks are not domain addresses; where they identify different types of products; and where only 2% of the public associate "www.aardvarks.com" with Chatnoir's software?

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OPINIONS BELOW

The decision of the Fourteenth Circuit Court of Appeals is unpublished and appears in the record at pages 3 through 20. The Order Granting Writ of Certiorari appears in the record at page 2.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article 1, Section 8, Clause 8 of the United States Constitution authorizes Congress: “[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.”

The relevant copyright statute included in this brief is 17 U.S.C. § 106 (2006), set forth in the Appendix at page A-1. The relevant trademark statute included in this brief is 15 U.S.C. § 1125 (2006), set forth in the Appendix at pages A-1 to A-2.

STATEMENT OF THE CASE

Petitioner Runaway Scrape, L.P. ("Runaway Scrape") is a musical group founded in 1999. R. 6. Its members formed a Limited Partnership, under which they record, license, and distribute their music. R. 6, n. 1. The band has enjoyed growing success since its formation, making a niche as an independent music band. R. 6. Respondent Chatnoir Inc. ("Chatnoir") is an electronics and communications company that specializes in videoconferencing software. R. 3. Chatnoir introduced internet-based videoconferencing software in 2003 with the federally registered trademark "Aardvark Media." R. 3. Aardvark Media streams live video and audio over the internet and allows users with a camera and microphone to communicate over the internet. R. 3.

Spurred by customer feedback, Chatnoir developed a new version of its software, Aardvark Pro ("Pro"), which allows users in low-bandwidth locations to strip a videoconference of the video while still streaming the audio. R. at 4. This software also allows users to record the audio only and store it as an MP3 file. R. 3.

Before launching Pro, Chatnoir tested the new features with software named Aardvark Lite ("Lite"), which allowed users to strip the video portion of an online video and store only the audio portion on their computers. R. 3. Chatnoir made Lite available on its website, chatnoir.com, where its products are offered for sale. R. 5. Users could download Lite for free on the website for a period of six months. R. 5.

The webpage where users could download Lite contained three statements: "(1) instructions for using the software, (2) a disclaimer stating 'please don't use our product for illegal or unethical purposes,' and (3) suggested uses of the software," which included making "audio recordings of . . . favorite VuToob videos." R. 5.

VuToob is a website where users upload videos that anyone on the internet can view. R. 5. Although VuToob tries to regulate uploaded material, many users still upload copyright-infringing material. R. 5. Specifically, VuToob users have uploaded pirated copies of copyright-protected Runaway Scrape music videos, concert videos and user-made videos that display images while a song plays. R. 6.

Chatnoir internal emails revealed that Chatnoir was aware of the potential for infringement with using Lite on VuToob, but did not act because Lite would cease to function after a limited time and VuToob policed its website for copyright infringement. R. 7.

Chatnoir advertised Lite in several ways. First, it notified existing customers that Lite "could be used to strip video and store sound from VuToob videos." R. 6. Additionally, Chatnoir purchased advertising through internet search engines, "whereby certain user searches resulted in an advertisement for Lite." R. 6. "VuToob," "downloads," and "music" were among the search terms Chatnoir purchased. R. 6.

In November 2006, Runaway Scrape learned of the Lite software. R. 6. Over the next three months, Runaway Scrape sent three letters to Chatnoir, asking it to police the use of Lite to prevent copyright

infringement. R. 6. Chatnoir did not respond to the letters. R. 6-7. In February and March 2007, Runaway Scrape sent Chatnoir cease and desist letters, notifying Chatnoir that its users were "overwhelmingly" using Lite for infringing purposes. R. 7. Again, Chatnoir failed to respond. R. 7.

One month later, Runaway Scrape launched www.aardvarks.com, a website to promote their song titled "Aardvarks." R. 7. There, viewers can download that song and access the band's website through a link that read "Get it the right way." R. 7. Chatnoir sent Runaway Scrape two letters demanding that the band either take down the website or transfer the domain name to Chatnoir. R. 7.

Subsequently, Runaway Scrape sued Chatnoir for contributory copyright infringement, alleging its promotion and distribution of Lite intentionally encouraged copyright infringement. R. 7-8. Chatnoir countersued, alleging "Runaway Scrape's use of the domain name www.aardvarks.com diluted Chatnoir's trademark by blurring." R. 8.

At trial, Runaway Scrape presented uncontested evidence that third parties were using Lite to make unauthorized copies of its music. R. 8. Experts from both sides testified that approximately seventy percent of Lite users were infringing. R. 8. Further, Chatnoir presented evidence of an uncontested survey in which two percent of the public stated that the domain name www.aardvarks.com brought to mind Chatnoir's Aardvark Media, Pro, and Lite. R. 8. Eight percent of Chatnoir's current customers responded similarly. R. 8.

Chatnoir's President and CEO Stanley Rocker testified that he "was surprised by the number of users downloading" Lite, which "far exceeded" the number of anticipated Pro users. R. 8. Mr. Rocker's Executive Secretary, Kasey Stinger, also testified. Before Ms. Stinger was terminated in 2005¹, she recorded a business meeting with Mr. Rocker. R. 9. In the conversation, which was played in court, Mr. Rocker commented on Runaway Scrape's cease and desist letters:

Ha! Those fools. A successful release of 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 the Aardvark products. . . . Lite is going to provide us with a demographic we never would have reached otherwise!

R. 9. The trial court ruled in favor of Chatnoir on the copyright infringement claim and the trademark dilution claim. R. 9. The Fourteenth Circuit affirmed the judgment of the trial court. R. 15. It held that under *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, Chatnoir did not intentionally induce or encourage copyright infringement. R. 12. The court further held, based on the Ninth Circuit's jurisprudence, that Runaway Scrape's domain name was likely to cause dilution by blurring. R. 15.

Runaway Scrape filed a petition for a writ of certiorari. This Court granted it. Petitioners now request that this Court reverse the decision of the Fourteenth Circuit Court of Appeals and remand for further proceedings.

¹ Ms. Stinger testified she was terminated after her romantic relationship with Mr. Rocker became known at the company.

SUMMARY OF THE ARGUMENT

I. The Fourteenth Circuit's judgment with respect to the contributory copyright infringement issue should be reversed for two reasons. First, the court should have applied the Ninth Circuit's test, set forth in *Perfect 10 v. Amazon.com*, whereby a defendant is contributorily liable if it has knowledge that infringing material is available using its system, can take simple measure to prevent further infringement, but continues to provide access to the material. This is the appropriate test to apply because the long-standing principle of imputed intent can be logically extended to copyright law and this test best protects the rights of copyright holders. Under this test, Chatnoir is liable because it was notified it of its users' infringement; it failed to implement any filtering tools to prevent infringement; and it continued to provide access to the software because it was beneficial to their business.

Second, the Fourteenth Circuit misapplied the test they did use, the test set forth in *Metro-Goldwyn-Mayer Studios v. Grokster*. Under *Grokster*, the defendant must have shown a clear expression or taken affirmative steps to foster infringement. In the instant case, Chatnoir has taken such affirmative steps. First, both its internal communications and advertisements show that they desired to attract customers with a mind to infringe. Second, Chatnoir failed to implement any filtering tools. Third, Chatnoir's business benefited as a result of the infringement.

Thus, this Court should adopt the test set forth in *Perfect 10*, but even if this Court declines to do so, Chatnoir is still liable for contributory copyright infringement under the standard announced in *Grokster*.

II. The Fourteenth Circuit's judgment regarding the trademark dilution issue should be reversed because the Court improperly applied relevant factors under the Trademark Dilution Revision Act (TDRA). For the first factor, not only did it use the wrong test, it misapplied that test in failing to consider contextual effects on the parties' trademarks properly. Second, it ignored Chatnoir's trademarks' low degree of distinctiveness, which helps determine the degree to which a trademark should be protected. In addition, although Chatnoir may use its marks exclusively, they have low degrees of recognition by the public, as demonstrated by empirical evidence and their short duration of use. Moreover, Runaway Scrape did not intend to associate with Chatnoir's marks because it did not intend to benefit commercially from any association with those marks. Chatnoir does not stand to lose profit by Runaway Scrape's trademark because it targets those who, by their motivations to pirate music, never intended to purchase Aardvark Pro. Finally, empirical evidence demonstrating low association between the marks favors Runaway Scrape, especially when TDRA is construed narrowly because of its special interest leanings.

ARGUMENT

I. THE FOURTEENTH CIRCUIT'S JUDGMENT SHOULD BE REVERSED BECAUSE CHATNOIR IS LIABLE FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT.

The desire to protect and reward creators of original works dates back to the Constitution. U.S. Const. Art. I, § 8, cl. 8 (empowering Congress to enact legislation to secure the exclusive rights of authors and inventors in their works.) Since the enactment of the first Copyright Act in 1790, the main goals of United States copyright law have been to reward creators for their labor and to serve the public good by encouraging the production of original work. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975).

In 1976, Congress enacted the most recent version of the Copyright Act, which grants the owner of an original work the sole right to use and authorize use of that work. 17 U.S.C. § 101 *et. seq.* (2006). Section 106 of the Copyright Act, set forth in its entirety in the Appendix, lists the actions which the owner of a copyright has the exclusive rights to do and to authorize, including reproducing, distributing and performing the copyrighted work. 17 U.S.C. § 106.

The Copyright Act holds accountable any person who infringes a copyright. *Gershwin Publ'g. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1161 (2d Cir. 1971). The Act has long been held to impose liability not only on the actual infringer, but also on one "who has promoted or induced the infringing acts." *Id.* at 1162. This "vicarious liability" was initially based on the agency doctrine of respondeat superior, but has since been expanded beyond the employer-employee relationship. *Id.* This Court held, in *Sony Corp. v. Universal City*

Studios, 464 U.S. 417, 486 (1984), and again in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, that secondary liability in the area of copyright is “well established in the law.” 545 U.S. 913, 930 (2005) (citing *Sony*, 464 U.S. at 486).

This Court in *Grokster* articulated an “inducement theory” of secondary copyright liability under which “one infringes contributorily by intentionally inducing or encouraging direct infringement.” 545 U.S. at 930. This Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936-37.

The Ninth Circuit interpreted the *Grokster* inducement theory of liability to include situations where an actor “knowingly takes steps that are substantially certain to result in direct infringement.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171 (9th Cir. 2007). In so doing, the court relied on this Court’s statement in *Grokster* which directed courts to analyze contributory liability in light of the “rules of fault-based-liability derived from the common law.” *Id.* at 1170 (citing *Grokster*, 545 U.S. at 934-45). The Ninth Circuit reasoned that under the common law intent may be imputed; thus, intent in contributory copyright liability may also be imputed. *Id.* at 1171.

1. This Court should adopt the standard for contributory copyright infringement announced in *Perfect 10 v. Amazon.com*.

Under the contributory liability test set forth in *Perfect 10*, the plaintiff must show that the defendant (1) had actual knowledge that specific infringing material was available using its system; (2) could have taken simple measures to prevent further damage to copyrighted works; and (3) continued to provide access to the infringing works. 508 F.3d at 1172.

This Court should adopt this test for several reasons. First, this Court stated in *Grokster* that it has never meant to “foreclose rules of fault-based liability derived from the common law.” 545 U.S. at 934-35. Under common law theories of tort liability, intent may be imputed. *Perfect 10*, 508 F.3d at 1146. If an actor knows that the consequences of his actions “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). This Court has long recognized the concept of imputed intent. See *U.S. v. Donruss Co.*, 393 U.S. 297, 311 (1969) (Harlan, J., concurring). In *Donruss*, Justice Harlan stated “in everyday speech, we commonly say that a person has a ‘purpose’ to do something when he acts with knowledge that the thing will inevitably result.” *Id.* He stated that there is ample legal authority “for the proposition that an actor will be deemed to have an intention to cause consequences of an act if the actor believes that the consequences are substantially certain to result from the act.” 393 U.S. at 311 (citing *Restatement (Second) of Torts* § 8(a)) (internal quotations omitted).

Thus, imputed intent is a long standing principle under the well-established common law theories of tort law, as recognized by this Court.

Second, lower courts have applied the theory of imputed intent beyond general tort liability to contributory copyright infringement. Just as the Ninth Circuit held that intent in contributory copyright infringement may be imputed in *Perfect 10*, so too did the Seventh Circuit in *In re Aimster Copy. Litig.*, 334 F.3d 643, 650 (7th Cir. 2003). The *Aimster* Court held that "willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement), as it is in the law generally." *Id.* (internal citations omitted). Similarly, the Second Circuit held that a defendant may be held liable for contributory copyright infringement if, "'with knowledge of infringing activity,'" it "'materially contributes to the infringing conduct of another.'" *Matthew Bender & Co. v. West Publg. Co.*, 158 F.3d 693, 706 (2d Cir. 1998) (quoting *Gershwin*, 443 F.2d at 1162).

Third, this test best protects the rights of copyright holders in an era of mass infringement on the internet. *Perfect 10*, 508 F.3d at 1172. This Court in *Grokster* even acknowledged that "the argument for imposing indirect liability . . . is a powerful one, given the number of infringing downloads that occur every day." 545 U.S. at 929. The *Perfect 10* Court emphasized that "copyright holders cannot protect their rights in a meaningful way unless they can hold providers of such services or products accountable for their actions." 508 F.3d at

1172. The court stated that the most effective way to accomplish this was pursuant to a test that held a computer system operator liable where the operator “learns of specific infringing material available on his system and fails to purge such materials from the system.” *Id.* at 1171 (citing *A & M Records, Inc. v. Napster*, 239 F.3d 1004, 1021 (9th Cir. 2001)). When a company knows of the availability of infringing music files, assists users in accessing such files, and fails to block access to such files, that company has materially contributed to infringement. *Id.* (citing *Napster*, 239 F.3d at 1022). Holding otherwise would allow companies to knowingly facilitate illegal copyright infringement with impunity simply because facilitating that infringement was not their main goal. *Id.* at 1172.

A. Under the *Perfect 10* test, Chatnoir is liable for contributory copyright infringement.

Under the *Perfect 10* test, the plaintiff must first establish that there has been direct infringement by third parties. 508 F.3d at 1169. In the instant case, Respondent concedes that this element has been established because third parties used Aardvark Lite (“Lite”) software to make unauthorized copies of Runaway Scrape’s music. R. 8.

Next, under the *Perfect 10* test, a defendant is liable if it (1) has actual knowledge that specific infringing material is available using its system; (2) can take simple measures to prevent further damage to copyright works; and (3) continues to provide access to the infringing works. 508 F.3d at 1172.

Under the first factor, it is clear that Chatnoir had actual knowledge of specific infringing material that was available using its

system. Courts have held that when a plaintiff notifies a defendant of third party infringement, that notification is probative of the defendant's knowledge of infringing activity. See *Hackett v. Feeny*, 2010 WL 1416870 at *4 (D. Nev. April 1, 2010); *IO Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008). From November 2006 to January 2007, Runaway Scrape sent three letters to Chatnoir regarding its concerns that Lite would be used to facilitate copyright infringement. R. 6. Chatnoir did not respond to these letters. R. 6-7. After the official launch of Lite, Runaway Scrape sent two cease and desist letters to Chatnoir in February and March, 2007, informing Chatnoir that its users were overwhelmingly using the software to make unauthorized MP3 copies of Runaway Scrape's material appearing on VuToob. R. 7. Again, Chatnoir did not respond to the letters. R. 7.

At trial, a former employee of Chatnoir, Kasey Stinger, testified that Stanley Rocker, the President and CEO of Chatnoir, had been aware of the cease and desist letters. R. 9. In response to the letters, Rocker brazenly stated that "a successful release of Lite will more than pay for a copyright infringement lawsuit." R. 9. He went on to say that "a lawsuit brought by a popular ban would be great publicity for the success of all the Aardvark products." R. 9. Therefore, it is clear that the first factor of the *Perfect 10* test is satisfied because Chatnoir had actual knowledge that its system was being used to infringe specific copyrighted material.

The second factor of the *Perfect 10* test, whether the defendant could have taken simple measures to prevent further damage to copyrighted works, is also satisfied. See 508 F.3d at 1172. Internal emails show that Chatnoir was aware that filtering tools would allow Lite to filter out potentially infringing material, but declined to use such tools. R. 11. Instead, Chatnoir chose to rely on VuToob's filtering tools. R. 11. This reliance was unfounded for two reasons. First, this Court in *Grokster* rejected the theory that software owners do not have a duty to monitor its own users' activity. 545 U.S. at 939. Second, although VuToob attempted to regulate uploaded material on its website, "many users also upload copyright-infringing material." R. 5 (emphasis added). Thus, Chatnoir cannot rely solely on VuToob's imperfect monitoring mechanisms and disclaim all liability for its users' infringement.

Although there were potentially many means for Chatnoir to install filtering mechanisms on their software², the clearest solution would have been to not allow Lite to be used with VuToob at all. Experts estimated that roughly seventy percent of Lite users were infringing. R. 8. By simply prohibiting users of Lite to access and strip videos from VuToob, Chatnoir would have prevented a substantial amount of copyright infringement. Chatnoir, however, chose not to take simple measures to prevent such infringement. R. 11.

² One such filtering mechanism is called "hash-based filtering," which identifies a digital file that contains copyrighted content, and blocks a user from downloading the file. *Arista Records LLC v. Lime Group LLC*, 2010 WL 2291485 at *19 (S.D.N.Y. May 25, 2010). Other such filtering mechanisms include acoustic finger-printing and filtering based on digital metadata. *Id.*

The third and final factor, that the defendant continued to provide access to the infringing works, has also been satisfied here. After receiving notice that people were using Lite for copyright infringement, Chatnoir continued to provide access to the software. R. 7. They did so because allowing users of Lite to strip videos from VuToob substantially increased Chatnoir's customer base. R. 8. Mr. Rocker testified at trial that the number of downloads of Lite "far exceeded the number of its anticipated future users of the full Aardvark Pro software package." R. 8. Thus, although Chatnoir knew of its users' infringement and could have taken simple measure to stop it, it chose to continue to offer Lite simply because it boosted its bottom line.

Therefore, under the test set forth in *Perfect 10*, Chatnoir is liable for contributory copyright infringement because (1) it had actual knowledge that specific infringing material was available using its system; (2) it could have taken simple measures to prevent further damage to copyrighted works; but instead, (3) it chose to continue to provide access to copyrighted works, knowing that doing so facilitated copyright infringement.

2. Even if this Court declines to adopt the *Perfect 10* test, Chatnoir is still liable under the *Grokster* test.

This Court in *Grokster* articulated an "inducement theory" of secondary copyright liability under which "one infringes contributorily by intentionally inducing or encouraging direct infringement." 545 U.S. at 930. In *Grokster*, copyright holders brought a copyright infringement action against distributors of peer-

to-peer file sharing software. *Id.* at 919. The distributors, Grokster, Ltd. and StreamCast Networks, Inc., distributed free software products that allowed computer users to share electronic files. *Id.* The networks could be used to share any type of digital files, but were predominantly used for sharing copyrighted music and video files without authorization. *Id.* at 920. A group of copyright holders, including motion picture studios and songwriters, sued Grokster and StreamCast for their users' copyright infringements. *Id.*

In assessing secondary liability for copyright infringement, this Court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 936-37.

This Court identified three types of evidence, considered in the context of the record as a whole, that support a finding that a defendant intended to induce infringement: (1) defendant's internal communications and advertising efforts; (2) defendant's failure to develop and implement filtering tools or other means of limiting infringement; and (3) defendant's reliance on infringing activity for the success of its business. *Id.* at 938-39.

A. Chatnoir's internal communications and advertisements show that it intended to induce infringement.

The first type of evidence that this Court found to be decisive in determining whether the defendant had an intention to induce infringement was evidence of defendant's internal communications and

advertising efforts. *Id.* at 939. In *Grokster*, this Court found it relevant that defendant StreamCast's internal communications revealed that it was attempting to attract users who had formally used another program, Napster, for copyright infringement. *Id.* Further, this Court noted that StreamCast advertised their program as an alternative to Napster. *Id.*

Other cases have elaborated on this first factor. See generally *Lime Group*, 2010 WL 2291485; *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009). The court in *Lime Group* found that LimeWire, the operator of a file-sharing program, had engaged in inducement of copyright infringement under *Grokster*. 2010 WL 2291485 at *21. In analyzing the "internal communications" prong of the first *Grokster* factor, the *Lime Group* Court noted that in internal memoranda, LimeWire employees discussed the fact that its users downloaded copyrighted material through its program. *Id.* at *16. Similarly, in the instant case, an internal communication between Mr. Rocker, and his Executive Secretary, Kasey Stinger, revealed that Mr. Rocker knew of infringing activity by Lite users. R. 9. He found that activity to be favorable for the company because a copyright infringement lawsuit "would be great publicity for the success of all the Aardvark products." R. 9.

In analyzing the "advertising" prong of the first *Grokster* factor, the *Lime Group* court found it relevant that LimeWire had conducted a marketing campaign through Google AdWords. 2010 WL 2291485 at *17. AdWords allows a company to purchase certain search terms, so

that when a person "Googles" that term, an advertisement for their company appears. *Id.* LimeWire purchased "napster mp3," "mp3 free download," and other similar phrases. *Id.* Chatnoir engaged in a similar marketing campaign to advertise Lite. R. 6. Chatnoir purchased advertising through internet search engines using the phrases "VuToob," "downloads" and "music," among others. R. 6. People searching for those words would be directed to an advertisement for Lite. R. 6. Chatnoir also advertised its new software by sending emails to its current customers, touting that they could use Lite to "strip video and store sound from VuToob videos." R. 6.

Thus, Chatnoir, through its advertising and marketing plan, made it clear to the public that its products could be used to make sound recordings from VuToob's videos. Moreover, Chatnoir's internal communications show that Chatnoir encouraged illegal copyright infringement because the resulting publicity would be good for Chatnoir's business.

B. Chatnoir's failure to develop and implement filtering tools show that it intended to induce infringement.

The second type of evidence that the *Grokster* Court found to be critical in the intentional inducement inquiry was evidence of defendant's use of filtering tools and other methods to reduce infringement. 545 U.S. at 939. This Court held that failure to utilize existing technology to create meaningful barriers against infringement is a strong indicator of intent to foster infringement. *Id.* This factor is nearly identical to the second factor in the *Perfect 10* test. See 508 F.3d at 1172. As noted in the previous analysis,

Chatnoir considered installing filtering tools on its software, but declined to do so, improperly relying on VuToob to filter for them. R. 11. In analyzing the second *Grokster* factor, the *Lime Group* Court held that considering, but ultimately failing to implement filtering mechanisms weighed against defendant LimeWire. 2010 WL 2291485 at *20.

The *Lime Group* Court further noted that the only step LimeWire had taken to address infringement was to post an electronic notice on its website. *Id.* The notice stated that the LimeWire programs were for sharing authorized files only and required a user to "agree" with a statement that said: "I will not use LimeWire for copyright infringement". *Id.* Similarly, the only step Chatnoir took to discourage illegal copyright infringement was a statement on the Lite webpage that said "please don't use our product for illegal or unethical purposes." R. 5. That statement, however, does not explain *which* illegal or unethical purposes the user should avoid. R. 5. Further, the statement is essentially counter-acted by the statement immediately proceeding that statement, which suggests that Lite users "make audio recordings of [their] favorite VuToob videos." R. 5.

"Although [defendant] is not required to prevent all the harm that is facilitated by the technology, it must at least make a good faith attempt to mitigate the massive infringement facilitated by its technology." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 989 (C.D. Cal. 2006). Chatnoir has made no effort at all, let alone a good faith attempt, to mitigate the infringement facilitated by Lite. As previously established, Chatnoir could have

used a number of simple filtering mechanisms, or simply disallowed access to VuToob. Instead, Chatnoir chose to allow its users to continue their illegal infringement.

C. Chatnoir's reliance on infringing activity for the success of its business shows that it intended to induce infringement.

The final type of evidence that the *Grokster* Court found to be important in determining whether the defendant had an intention to induce infringement was evidence of defendant's reliance on infringing activities for the success of its business. 545 U.S. at 939. In finding an unlawful objective on behalf of Grokster and StreamCast, this Court noted that both defendants made money by selling advertising space for ads that would be seen by people using their software. 545 U.S. at 939-40. Although Chatnoir did not financially benefit in the same manner as the defendants in *Grokster*, it benefited financially nonetheless. Chatnoir's marketing strategy was to offer Lite for free in order to promote the upcoming version of the software, Aardvark Pro ("Pro"). R. 4. Thus, the amount of money they made from the release and sale of Pro was at least in part based on getting users to try Lite. This strategy is not entirely different from how the peer-to-peer networks such as Kazaa, Morpheus and LimeWire work. See *Lime Group*, 2010 WL 2291485 at *2. LimeWire initially offered a free version of their software to users and later began selling LimeWire Pro, "an upgraded version of LimeWire" that was available for purchase. *Id.* at *19. The court in *Lime Group* found this evidence to "support a finding that [LimeWire] intended to induce infringement." *Id.*

Chatnoir's business success depended on Lite attracting "a massive user population generated by its infringement-enabling features." See *id.* Lite attracted a substantial number of users, seventy percent of whom were using the program for illegal copyright infringement. R. 8. Because Chatnoir's plan was to use Lite to promote the sale of Pro, Chatnoir clearly relied on the infringing activity of its users to promote its business.

Therefore, Runaway Scrape has demonstrated that all three types of evidence that support a finding that Chatnoir intended to induce infringement are present in the instant case. First Chatnoir's internal communications and advertising efforts show that it intended to induce infringement by attracting customers who wanted to make mp3 recordings from VuToob videos. Second, Chatnoir failed to develop and implement any filtering tools to limit infringement. Third, Chatnoir relied on the infringing activity for the success of its business - both in attracting customers to buy Pro and in generating publicity for the company.

Chatnoir should be held liable for contributory copyright infringement, either under the test set forth by the Ninth Circuit in *Perfect 10*, or under the standard articulated by this Court in *Grokster*. This Court should adopt the Ninth Circuit test because this Court has long recognized the theory of imputed intent in tort liability and should extend that liability in the context of contributory copyright infringement, as other courts have done. Additionally, the *Perfect 10* test best represents the interest of

copyright holders in this era of massive copyright infringement on the internet. However, even if this Court decides not to adopt the Ninth Circuit's test, Chatnoir is still liable under the test announced in *Grokster*. Thus, this Court should reverse the Fourteenth Circuit's decision on this issue and remand for further proceedings.

II. THE FOURTEENTH CIRCUIT'S JUDGMENT SHOULD ALSO BE REVERSED BECAUSE RUNAWAY SCRAPE'S TRADEMARK "AARDVARKS.COM" DOES NOT DILUTE BY BLURRING CHATNOIR'S TRADEMARKS.

This issue exemplifies the threat to marketplace competition by companies abusing the Trademark Dilution Revision Act's (TDRA) "blurring" cause of action. "Blurring" is a form of trademark dilution. 15 U.S.C. § 1125(c)(1) (2006). It occurs when the owner of a famous trademark³ (or "senior mark") demonstrates that a newer trademark's (or "junior mark") similarities to the senior mark are "likely" to "impair[] the distinctiveness of the [senior] mark" because consumers might associate one with the other. 15 U.S.C. § 1125(c)(2)(B).⁴ The purpose of blurring law is to preserve the uniqueness of an owner's mark in the marketplace, H.R. Rpt. 109-23 at 4 (Mar. 17, 2005), so that consumers will easily recognize the source of the mark, and the products it represents, see *Ty. Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002). But because TDRA protects private interests (companies' trademarks), this Court should construe it narrowly to prevent its abuse by companies seeking to stifle

³ Runaway Scrape concedes that Chatnoir's marks are famous and that its mark is used in commerce.

⁴ The TDRA overruled *Moseley v. V Secret Catalogue, Inc.*, which held that owners of senior marks had to prove "actual dilution" to prevail in a blurring cause of action under the Federal Trademark Dilution Act of 1995 (FTDA). 537 U.S. 418, 432 (2003).

competition, which ultimately harms the public welfare. See *United Air Lines v. Civ. Aeronautics Bd.*, 198 F.2d 100, 107 (7th Cir. 1952); H.R. Rpt. 109-23 at 25; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 499 (1989).

While similarity is crucial to blurring, whether there is impairment of a senior mark's distinctiveness requires courts to consider "all relevant factors." 15 U.S.C. § 1125(c)(2)(B). For guidance, § 1125(c)(2)(B) includes six factors: (1) the degree of similarity between the marks; (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 or exclusive use of the mark; (4) the degree of recognition of the famous mark; (5) whether the user of the mark or trade name intended to create an association with the famous mark; and (6) any actual association between the mark or trade name and the famous mark. *Id.* at (i)-(vi). These factors are "non-exhaustive." *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 105 (2d Cir. 2009). Depending on the facts of a case, some factors have great weight and others do not. *Louis Vuitton Malletier v. Haute Diggity Dogg, LLC*, 507 F.3d 252, 266 (4th Cir. 2007). In addition, one factor's strength or weakness affects considerations of other factors. *Perfumebay.com Inc. v. eBay Inc.*, 506 F.3d 1165, 1174 (9th Cir. 2007).

The Fourteenth Circuit erred when it failed to consider context properly. There are two relevant contexts here, the website context and the domain address context, because consumers view Runaway

Scrape's mark in these contexts only. But the Fourteenth Circuit focused only on the domain address context. R. 13-14. In addition, it misapplied a Ninth Circuit decision that relies on a test that is out of date. *Starbucks'* approach is more suitable because it reflects TDRA's language. Moreover, it ignored the second factor, which lowers the similarity between the marks because Chatnoir's marks have a low degree of distinctiveness. While the third factor might favor Chatnoir, the fourth, fifth and sixth factors favor Runaway Scrape. Therefore, any similarity between Runaway Scrape's and Chatnoir's marks is not likely to cause them to blur.

1. Under the first factor, Runaway Scrape's mark has a low degree of similarity with Chatnoir's marks.

The TDRA's plain meaning altered the blurring landscape significantly. Before TDRA, the appeals courts used tests requiring certain levels of similarity to show blurring. See e.g. *Playtex Prods., Inc. v. Georgia-Pac. Corp.*, 390 F.3d 158, 167 (2d Cir. 2004); *Thane Intl., Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 906-07 (9th Cir. 2002). These tests were used to find actual dilution, which this Court interpreted FTDA to require. *Moseley*, 537 U.S. at 432. But TDRA's plain meaning overruled *Moseley*, abrogating these tests. The Second Circuit in *Starbucks* changed its test to reflect TDRA's changes. The Ninth Circuit still clings to its pre-TDRA test that has no statutory support. Consequently, the Fourteenth Circuit erred when it followed a case applying that test.

While true to TDRA's plain meaning, *Starbucks* properly considered context for TDRA's first factor. The first-factor analysis is "fact-

intensive" and "media-specific." *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1036 (9th Cir. 2007). Context, therefore, is of the upmost importance. The relevant contexts for the first factor are those in which the junior and senior marks ("subject marks") appear in the marketplace. Runaway Scrape's mark appears as a website and a domain address. R. 7. To determine whether there is a likelihood of blurring, this Court should examine the junior mark within those contexts. When done so, Runaway Scrape's mark is minimally similar to Chatnoir's marks.

A. TDRA's plain meaning changed dilution law, which the Starbucks' test accounts for.

To discern a statute's plain meaning, courts look to its language and design. *Bethesda Hospital Assn. v. Bowen*, 485 U.S. 399, 405 (1988). In *Bethesda*, this Court held that an absence of statutory language about certain procedures meant that those procedures were not required for an administrative board to have jurisdiction. *Id.* at 404-05. Here, *Starbucks* made a similar interpretation. Before TDRA, *Moseley* addressed a circuit split over whether FTDA required a "likelihood of dilution" or "actual dilution." 537 U.S. at 428. *Moseley* resolved this by requiring actual dilution. *Id.* at 432. To show actual dilution by blurring, the Second Circuit required that the subject marks be "substantially similar." *Playtex Prods.*, 390 F.3d at 167. In *Starbucks*, however, the Second Circuit focused on the "degree" language of § 1125(c)(2)(B)'s first factor. As the *Bethesda* Court used an absence of language to discern a statute's plain meaning, the *Starbucks* Court reasoned that the first factor's absence of "'very'"

or “‘substantial’” indicated that its “substantial similarity” test did not have textual support. *Starbucks*, 588 F.3d at 108.

In addition, the *Starbucks* Court concluded that § 1125(c)(2)(B)’s design also supported abandoning the test. In *Bethesda*, this Court also looked at the statute’s design. 485 U.S. at 405-07. Similarly, the *Starbucks* Court looked at TDRA’s other factors. 588 F.3d at 108. Because of their existence, similarity is now one of many factors, and does not always weigh more than others do. *Id.* at 109. It observed that a standard requiring a certain level of similarity would render the other factors meaningless. *Id.* In light of the “degree” language and the existence of other factors, the Second Circuit modified its blurring test. *Id.*

The Fourteenth Circuit’s first mistake was following the Ninth Circuit because its approach is based on FTDA. See *Thane*, 305 F.3d at 906-07. It continues to apply the test without any support from TDRA’s plain meaning, *Perfumbay.com*, 506 F.3d at 1180-81, 1181 n. 9, causing confusion. See *Starbucks*, 588 F.3d at 109, n.4; *Visa Intl. Serv. Assn. v. JSL Corp.*, 590 F. Supp. 2d. 1306, 1316 (D. Nev. 2008) (observing that TDRA’s first factor “appear[s] to abrogate” the Ninth Circuit’s approach). This Court can alleviate this confusion by adopting *Starbucks*’ appropriate adherence to TDRA.

Following *Starbucks* will ensure TDRA, a special interest law, is narrowly construed. TDRA represents an expansion of private interests, see Lorie Graham & Stephen McJohn, *Indigenous People and Intellectual Property*, 19 Wash. U. J.L. & Policy 313, 315-16 (2005), seeking to

prevent any chance of “free rides” on senior marks, *Thane*, 305 F.3d at 904. TDRA’s likelihood standard reflects companies’ concern that if one similar mark is allowed, many others will follow, suffering a cumulative injury that “whittl[es] away” their marks’ distinctiveness. Jasmine Abdel-khalik, *Is a Rose By Any Other Image Still a Rose? Disconnecting Dilution’s Similarity Test from Traditional Trademark Concepts*, 39 U. Toledo L. Rev. 591, 592 (2008). Congressional deliberations described TDRA’s intent to protect only the “most famous” marks. H.R. Rpt. 129-23 at 25. Construing TDRA broadly permits companies with marks of low degrees of distinctiveness to squash new marks that are minimally similar. The case at bar is one in point. *Starbucks’* abandonment of a requisite level of similarity acknowledges that other factors are as important. Giving weight to them checks against companies abusing TDRA because courts have to look at the entire picture. By considering everything, only the most famous marks will be protected, and abusive claims, like *Chatnoir’s*, will fail.

B. Runaway Scrape’s mark has low degrees of similarity to Chatnoir’s marks in both contexts in which it appears.

Blurring concerns the distinctiveness marks have in the eyes of consumers. Consumers see marks only in contexts. Therefore, to determine the impairment of a mark’s distinctiveness, courts should focus on the contexts in which subject marks appear. *Perfumebay*, 506 F.3d at 1175. Different contexts affect marks’ characteristics differently, so that a junior mark can blur a senior mark in one context, but not in another. Ultimately, “it is the identity of the marks themselves that is germane.” *Savin Corp. v. Savin Group*, 391

F.3d 439, 454 (2d Cir. 2004). Using common words or images might not be enough in certain contexts, causing marks to blur. *Id.* In the case at bar, Runaway Scrape's mark, "www.aardvarks.com," appears in the website context, and the domain-address context. In the former, it has a low degree of similarity to Chatnoir's marks because it is juxtaposed to the products it identifies. In the domain-address context, it has no similarity because Chatnoir's marks are absent.

i. In the website context, Runaway Scrape's trademark has a low degree of similarity.

When examining a trademark as a website, a court should consider everything that a consumer would see on the website. See e.g. *Starbucks*, 588 F.3d at 106; *Savin*, 391 F.3d at 454; *Perfumbay.com*, 506 F.3d at 1177. In *Starbucks*, the court observed other marks and products on defendant's websites that were alongside the junior marks. *Id.* These other products were different from any that plaintiff sold, and clearly identified with defendant. *Id.* The juxtaposition of the junior mark with these products created a context that lessened the similarity between them. *Id.* In the case at bar, the website context similarly affects the subject marks. Consumers view "www.aardvarks.com" along with its website. On that website, consumers can download Runaway Scrape's song entitled "Aardvarks." R. 15. This product is different from that which Chatnoir's marks identify, R. 3, 7, and www.aardvarks.com is juxtaposed to it. In *Starbucks*, the juxtaposition of the junior mark to types of products different from plaintiff's products decreased their similarities, despite identifying the same type of product. *Starbucks*, 588 F.3d at 106. Here,

"www.aardvarks.com" identifies a different type product from Chatnoir's, and is juxtaposed to it. If subject marks that identify the same type of product are minimally similar when accompanied by other products, a *fortiori*, they are minimally similar when they identify different types of products, and the junior mark is juxtaposed to that different type of product.

ii. In the domain address context, there is no degree of similarity between the subject marks because Chatnoir's marks are absent there.

In this context, companies use marks to help consumers find where they can purchase products, not just products themselves. See *Visa Intl. Serv. Assn. v. JSL Corp.*, 610 F.3d 1088, 1091 (9th Cir. 2010); *Panavision Intl., LP v. Toeppen*, 141 F.3d 1316, 1327 (9th Cir. 1998). In *Visa*, defendant's mark, "evisa.com," blurred plaintiff's mark, "visa.com," partly because they both identified where consumers could find the respective parties' goods or services. 610 F.3d at 1091. Here, however, only Runaway Scrape's mark is used for that purpose. R. 7. Chatnoir uses "chatnoir.com" for such identification, and its Aardvark marks to represent products found there. R. 5. The Aardvark marks simply do not appear to consumers as domain addresses; therefore, there can be no degree of similarity in this context.

Assuming *arguendo* that both parties used their marks in this capacity, there is a low degree of similarity between them. Context strengthens or lessens marks' similarities. See *Visa*, 610 F.3d at 1090. In *Visa*, the court concluded that the prefix "e" strengthened the similarity to "visa.com" because the mark appeared on the internet. *Id.* Consumers would think that the "e" meant "electronic."

Id. Here, however, the electronic media does not affect “s” like what was seen in *Visa*. Instead, the “s” is unaffected by the electronic media, weakening any similarities between the subject marks. The Fourteenth Circuit erred when it failed to note this contextual effect.

But this “s” is just one of the mark’s parts. When analyzing marks’ similarities, every part is a “relevant factor[]” under 15 U.S.C. § 1125(c)(2)(B). *Starbucks*, 588 F.3d at 107. In *Starbucks*, the court concluded that common parts are as important as unique ones. *Id.* Indeed, consumers do not sever marks’ characteristics, so courts should not. In the case at bar, the Fourteenth Circuit erred when it severed the marks, refusing to include the “.com,” or Chatnoir’s “Media,” “Lite,” or “Pro.” When considering these components, along with the “s,” the marks have minimal similarity.

2. Under the second factor, Chatnoir’s marks do not have inherent distinctiveness, and have a low-degree of acquired distinctiveness, lessening any similarities between the subject marks.

In trademark law, “distinctiveness” is the ability of a mark to distinguish its products coming from one source from products coming from other sources. *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d at 225, 236 (5th Cir. 2010). The more distinct a mark, the more protection it deserves. *TCPIP Holding Co., Inc. v. Haar Communs. Inc.*, 244 F.3d 88, 93 (2d Cir. 2001), *overruled on other grounds*, 15 U.S.C. § 1125(c). There are four categories of distinctiveness, from unprotected to most protected: generic; descriptive; suggestive; and arbitrary or fanciful. *Id.* This analysis originated for trademark

infringement purposes, but courts use it for blurring analysis. See *id.* at 93-95. In doing so, the second factor requires focusing on the degree of distinctiveness. Other factors' strengths or weaknesses affect the degree of distinctiveness. See *Perfumebay*, 506 F.3d at 1165. Because the first factor favors Runaway Scrape, Chatnoir's marks would need to have high degrees of distinctiveness; however, they do not.

Chatnoir's marks are not arbitrary, fanciful or suggestive because they describe a quality or characteristic of their respective products. R. 3-4. Therefore, they are not inherently distinctive, and are at best descriptive. As descriptive marks, they have a low degree of acquired distinctiveness because they have a low degree of secondary meaning.

A. Chatnoir's marks are at best descriptive.

Arbitrary marks consist of common words, but when used in connection with the products neither suggest nor describe something about them. *King of the Mt. Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1093 (10th Cir. 1999). "Camel" cigarettes is an example. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210 (2000). Fanciful marks use words invented for the sole purpose of being a trademark. *Chrysler Corp.*, 185 F.3d at 1093. "Kodak" film is an example. *Samara Bros.*, 529 U.S. at 210.

Here, Chatnoir's marks contain a common word, "aardvark," that neither suggests nor describes something about its products. However, the marks also contain descriptive words of the products they

identify. Because all components of a mark are “relevant factors” within § 1125(c)(2)(B), *Starbucks*, 588 F.3d at 107, the marks’ parts that describe the products should be considered. Therefore, they are not arbitrary. In addition, these words are not fanciful because they were not “coined” or invented solely to be a trademark.

At most, they are descriptive. Descriptive marks “describe a product or its attributes.” *TCPIP*, 244 F.3d at 93. An example is “American Airlines.” *Id.* at 96. Here, Chatnoir’s marks are descriptive because of the words “Media,” “Pro,” and “Lite” in the respective marks. These parts are essential to identify each product. While Chatnoir argues that “aardvark” is arbitrary, that argument is incorrect because, for distinctiveness inquiries, marks are considered as a whole. *Advertise.com v. AOL Advertising, Inc.*, 616 F.3d 974, 978 (9th Cir. 2010). Moreover, trademarks identify products. Without the “Media,” “Pro” or “Lite,” these marks would not do so, and cease to be marks.

B. Chatnoir’s marks have a low degree of secondary meaning.

As descriptive marks, they have a low degree of distinctiveness. Descriptive marks acquire distinctiveness with “secondary meaning,” which occurs when a mark reminds consumers of a product’s source. *Samara Bros.*, 529 U.S. at 1343. Different circuits use different tests to assess secondary meaning, see e.g. *Sunbeam Prods., Inc. v. W. Bend Co.*, 123 F.2d 246, 253-54 (5th Cir. 1997); *St. Luke’s Cataract and Laser Inst., PA v. Sanderson*, 573 F.3d 1186, 1209 (11th Cir. 2009), but this Court has said that survey evidence gauging public association of a mark with its source is, by itself, enough. *Two*

Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 770-71 (1992) (Fifth Circuit's use of only survey evidence to find secondary meaning was "sound"). Indeed, if secondary meaning is public association of a mark with its source, survey evidence is the best evidence of that association. *Sno-Wizard Mfg., Inc. v. Eisemann Prods. Co.*, 791 F.2d 423, 427 (5th Cir. 1986). The *Sno-Wizard* Court held that secondary meaning was not established by a survey showing 16% of non-users of a dessert machine associated it with its source, even though as many as 84% of users did. *Id.*

Here, any such association is even less. Although Chatnoir's surveys focused on association between the subject marks instead of association of its marks with their sources, that latter association can be gleaned from them. When asked what came to mind upon hearing "aardvarks," only 2% of the public said Chatnoir. R. 15. This indicates that only 2% of people, which includes Aardvark Media users, associated Chatnoir with its marks' most distinct component. Given this low figure, Chatnoir's marks have acquired a low degree of secondary meaning, if any at all.

3. The Fourth, Fifth and Sixth Factors favor Runaway Scrape, outweighing the Third Factor, which favors Chatnoir.

The third factor is how exclusively the senior mark is being used. Although there was no evidence presented at trial to show that its marks' are used elsewhere, this factor does not outweigh the others. For instance, the fourth factor, the degree of recognition of the mark, favors Runaway Scrape. A mark's degree of recognition concerns the percentage of the public that knows of the senior mark,

Visa, 590 F.Supp. at 1318; *7-Eleven, Inc. v. Weschler*, 2007 WL 1431084 at *9, 17 (U.S. Trademark Tr. & App. Bd. May 15, 2007), and the duration and intensity of the mark's use, see *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 559 F. Supp. 2d 472, 477-78 (S.D.N.Y. 2008), vacated on other grounds, *Starbucks*, 588 F.3d at 109-10. In *Visa*, this factor favored plaintiff because surveys showed 99% of respondents were aware of the VISA brand, and 85% identified VISA when asked to think of companies offering credit card services. 590 F.Supp. 2d at 1318. In the *Starbucks* trial, this factor favored plaintiff because it had used its marks for over 30 years and in thousands of stores worldwide. 559 F. Supp. 2d at 477-78.

In the case at bar, surveys do not favor Chatnoir, nor has its marks been used for a lengthy time, or intensely. As previously established, only 2% of the public and 8% of Chatnoir users associated Runaway Scrape's marks with Chatnoir. R. 15. By simple deduction, if Chatnoir's marks had a high degree of recognition, such association would be more substantial. Moreover, duration does not favor Chatnoir. Aardvark Media was used for four years before the trial started, and the other marks for mere months. R. 3, 5. Also, there is no evidence that Chatnoir's products are sold outside of its website. Such evidence indicates a low degree of recognition under the fourth factor.

In addition, the fifth factor, whether defendant intended to associate with plaintiff's mark, favors Runaway Scrape. The Fourteenth Circuit concluded that it favored Chatnoir because of the song

"Aardvarks" and a link on aardvarks.com that read "Get it the right way," reading it as a reference to this lawsuit. R. at 15. But this factor focuses on "whether the junior user believes it can benefit commercially" from association with the senior mark. *Mead Data C., Inc. v. Toyota Motor Sales*, 875 F.2d 1026, 1037 (2d Cir. 1989) (Sweet, J., concurring). After all, one of trademark law's main concerns is to prevent the siphoning of profit from deserving companies. See *Ty*, 306 F.3d at 510. But Runaway Scrape launched aardvarks.com to combat music bootlegging, R. 7, not to siphon profit. Moreover, Chatnoir has not lost profit. At most, its lost users who downloaded its free software to obtain music illegally. But illegal music is appealing because it is free. This appeal is lost by having to buy Chatnoir's products.

Finally, the sixth factor, any actual association between the subject marks, also favors Runaway Scrape. Courts rely on survey evidence to find actual association, see e.g. *Starbucks*, 588 F.3d at 109; *Nike, Inc. v. Nikepal Intl., Inc.*, 2007 U.S. Dist. LEXIS 66686 *24 (E.D. Cal. Sept. 10, 2007). For instance, in *Jada Toys, Inc. v. Mattel, Inc.*, the Ninth Circuit concluded that this factor favored the plaintiff-appellee because one survey showed that 28% of respondents associated the defendant's toy cars with the plaintiff, and 7% in another associated the plaintiff with defendant's marks. 518 F.3d 628, 636 (9th Cir. 2007). However, there was a high degree of similarity between the subject marks because both used the word "hot," a flame, and similar colors. *Id.* at 635. In addition, these marks identified the same type of product. *Id.* at 631. Here, however, the subject marks

have a low degree of similarity and identify different types of products. Given these differences from the marks in *Jada Toys*, higher percentages should be required. The Fourteenth Circuit concluded that because a mere 8% of Chatnoir users and 2% of the general public thought "aardvarks" referred to Chatnoir, there was actual association. R. at 15. But this evidence is too slight, considering the relative dissimilarity between the subject marks.

To hold that this nominal showing of actual association favors Chatnoir, this Court would have to interpret the sixth factor broadly. But equipping powerful companies with a liberally-interpreted TDRA will prevent new marks from getting needed marketplace exposure. This will cause the public its own cumulative injury, akin to "'being stung by a hundred bees,'" Abdel-khalik, 89 U. Toledo L. Rev. at 592 (quoting J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 24:120 (4th ed. 1996)), where each sting will be a different case, based on this one, and where each whittles away a vibrant marketplace.

CONCLUSION

Wherefore, petitioner, Runaway Scrape, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit and remand for further proceedings.

Respectfully Submitted,

Team 75, Counsel for Petitioner

APPENDIX

1. 17 U.S.C. § 106 (2006), Exclusive rights in copyrighted works, provides:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

2. 17 U.S.C. § 1125 (2006), False designation of origin, false descriptions, and dilution forbidden, provides in pertinent part:

(a) Civil Action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . .

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(c) Dilution by Blurring

(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 . . . of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

(2) (B) Definitions. 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.