No. C10-0116-1

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

Team # 15
Attorneys for Petitioner
December 6, 2010

QUESTIONS PRESENTED

I. Did Chatnoir’s active promotion and distribution of Aardvark Lite to reproduce copyrighted VuToob videos render it contributorily liable for the resulting third party infringement?

II. Is Runaway Scrape's domain name, aardvarks.com, subject to a claim for trademark dilution by blurring where it is artistic expression based on the title of a song?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES DISTRICT COURTS

UNITED STATES CONSTITUTION

UNITED STATES STATUTES

SECONDARY SOURCES

Congressional Record

Restatement

Law Review Articles

No. C10-0116-1

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 PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at Runaway Scrape, L.P. v. Chatnoir, Inc., No. 10-1174, slip op. at 3-20 (14th Cir. Oct. 1, 2010) (hereinafter "O.B.").

STANDARD OF REVIEW

This case involves resolving mixed questions of law and fact, and warrants de novo review by this Court. Pierce v. Underwood, 487 U.S. 552, 558 (1984).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the First Amendment of the United States Constitution, which is reproduced in Appendix A. This case also involves sections of the Copyright Act, 17 U.S.C. §§ 101-1332,

addressing exclusive rights (§ 106), fair use (§ 107), and infringement (§ 501), which are reproduced in Appendix B. Finally, this case entails the Trademark Dilution and Revision Act section addressing trademark dilution through blurring, which is reproduced in Appendix C. 15 U.S.C. § 1125(c).

STATEMENT OF THE CASE

Preliminary Statement

On May 2, 2007, Runaway Scrape filed a claim for contributory copyright infringement against Chatnoir, Inc. (O.B. 7.) The claim arose from Chatnoir's inducement of third parties to use its software to infringe Runaway Scrape's copyrights. (O.B. 7.) Chatnoir filed a counterclaim against Runaway Scrape for trademark dilution through blurring. (O.B. 8.) The subsequent claim derived from Runaway Scrape's use of the domain name "aardvarks.com" to promote its song. After a bench trial, the district court found Chatnoir's activities did not constitute contributory infringement of Runaway Scrape's copyrights. (O.B. 3.) The district court also found Runaway Scrape's website diluted Chatnoir's trademark through blurring. (O.B. 3.)

Following the decision, Runaway Scrape appealed the judgment to the Fourteenth Circuit Court of Appeals. (O.B. 3.) The Fourteenth Circuit affirmed the decision of the district court, agreeing Runaway Scrape engaged in trademark dilution, and Chatnoir did not contributorily infringe. (O.B. 15.)

Runaway Scrape filed a petition for writ of certiorari, which this Court granted on October 15, 2010. (O.B. 2.)

Statement of Facts

Runaway Scrape is a resourceful, independent band with a history

of using social media and technology to advertise and distribute its music. (O.B. 6.) Started by four college roommates and an art student, the band eschewed the typical path of the major record label and chose instead to record, license, and merchandise itself. (O.B. 6.) The band holds the copyrights to its products and selectively licenses songs and videos in order to promote its music and art. (O.B. 6.) It also maintains websites in order to further publicize its music, which has allowed it to be successful at developing an audience despite lacking attachment to a major label. (O.B. 6.)

Runaway Scrape licenses some of its songs and videos to VuToob, a website which allows users to upload and share videos. (O.B. 5, 6.) Because of its immense popularity, VuToob attracts artists like Runaway Scrape who share videos on the website to promote their products. (O.B. 5.) The band only licenses some of its songs for display on VuToob, however, and in doing so extends the license only to VuToob. (O.B. 6.) Nevertheless, despite VuToob's best attempts at filtering, users still manage to upload pirated songs and videos, including songs by Runaway Scrape. (O.B. 5, 6.) The band expressed its concerns about this type of infringing practice by imploring its listeners to "[g]et it the right way" on its website, aardvarks.com. (O.B. 7.)

Chatnoir produces a line of communications products, including video conferencing software. (O.B. 3.) Its flagship product, Aardvark Media, allows users to communicate via live audio and video streams over the Internet. (O.B. 3.) In response to customer concerns about accessing these streams in areas with limited bandwidth, Chatnoir developed Aardvark Pro. (O.B. 4.) Aardvark Pro

provided users with the ability to strip video from the streams to access only the audio in low bandwidth areas, while other users could still use both features. (O.B. 4.) With Aardvark Pro, users could also archive a videoconference or a stripped audio recording as an MP3 file. (O.B. 4.)

Chatnoir lured users to Aardvark Pro by providing a free version known as Aardvark Lite. (O.B. 5.) Despite purporting to seek businesses as clients, Chatnoir offered Aardvark Lite on its website to the general public. (O.B. 5.) Aardvark Lite's particular attraction was the feature allowing users to strip VuToob videos and create and archive MP3s of their favorite songs for free. (O.B. 5.) In fact, Chatnoir encouraged and even provided instructions to users to "make audio recordings of [their] favorite VuToob videos" on the Aardvark Lite webpage. (O.B. 5.) Despite adding a disclaimer stating "please don't use [Aardvark Lite] for illegal or unethical purposes," Chatnoir placed no filters on Aardvark Lite to prevent infringement. (O.B. 5.) Furthermore, Chatnoir had no intent to continue offering this feature for Aardvark Pro. (O.B. 5.) After downloading Aardvark Lite for free from Chatnoir's site, users could continue reproducing songs from VuToob for six months. (O.B. 5.) After six months, Chatnoir required users to purchase Aardvark Pro to use the stripping and archiving features. (O.B. 4.)

Runaway Scrape's concerns with infringing practices motivated the band to notify Chatnoir about the high probability Aardvark Lite would be used for infringement. With its video-stripping abilities, Aardvark Lite allowed users to access the band's licensed and unlicensed videos on VuToob, remove the video feature, and archive the

songs as MP3 files. (O.B. 5.) While technologically distinct from peer-to-peer sharing sites, Aardvark Lite facilitated the same result: users could download Runaway Scrape's music for free and without a license. (O.B. 8.)

Chatnoir highlighted Aardvark Lite's infringing capabilities to all potential users. (O.B. 5-6.) Chatnoir noted the feature in emails to its current clients. (O.B. 5.) It also bought Internet advertising space on searches including the terms "VuToob," "downloads," and "music." (O.B. 6.) In addition, the Aardvark Lite webpage included advertisements from Poodle Corporation (VuToob's parent company), and Chatnoir received compensation for every user who clicked on the advertisements. (O.B. 17 n.5.)

Runaway Scrape sent Chatnoir letters on three separate occasions before the release of Aardvark Lite requesting it police the VuToob application for infringement. (O.B. 6.) Chatnoir ignored the band's warnings and put no filters on Aardvark Lite, instead relying on VuToob's filters to protect copyright owners from users who might use Aardvark Lite to infringe protected works on VuToob. (O.B. 7.) Chatnoir's CEO, Stanley Rocker ("Rocker"), in fact responded to the band's letters with enthusiasm, stating not only would an infringement suit be beneficial but "Aardvark Lite is going to provide [Chatnoir] with a demographic [it] never would have reached otherwise." (O.B. 9.)

After Chatnoir released Aardvark Lite in February 2007, Runaway Scrape sent two cease-and-desist letters because of numerous infringements of its copyrights by users of Aardvark Lite. (O.B. 7.) In fact, about seventy percent of Aardvark Lite uses were infringing.

(O.B. 8.) According to Rocker, the overall number of Aardvark Lite users was much greater than Chatnoir anticipated would purchase Aardvark Pro. (O.B. 8.)

Runaway Scrape subsequently started the webpage aardvarks.com to promote its song titled "Aardvarks." (O.B. 7.) Drawn from one member's experience of having an aardvark as a pet, the song, consisting of four lines, analogizes love to an aardvark "huntin' for an ant." (O.B. 19.) The song was part of the band's repertoire prior to the release of Aardvark Lite and in fact mentions neither Chatnoir nor the program. (O.B. 7, 19.) On the site, users could download the song and access a link to the band's official website where they were encouraged to purchase other songs and merchandise. (O.B. 7.)

Chatnoir issued two cease-and-desist letters regarding the website. (O.B. 7.) Chatnoir points to surveys showing two percent of the general public and eight percent of Chatnoir's customers associate Runaway Scrape's domain name with Chatnoir's product. (O.B. 8.) Runaway Scrape initiated this action in response. (O.B. 7.)

SUMMARY OF ARGUMENT

This Court should reverse the Fourteenth Circuit's decision because Chatnoir intentionally induced infringement by third parties, and Runaway Scrape's domain name does not constitute trademark dilution by blurring.

Chatnoir took "affirmative steps" and made "clear expressions" to induce copyright infringement. Third parties directly infringed copyrights by using Chatnoir's program, Aardvark Lite, to reproduce copyrighted work, and those reproductions were not fair use. Chatnoir had both actual and constructive knowledge of the infringement through

letters it received from Runaway Scrape both before and after Aardvark Lite's release. Indeed, Chatnoir's advertisements, internal communications, and business plan evidenced intent to induce third party infringement. In addition, Chatnoir's knowledge of specific instances of infringement and its subsequent failure to place simple filters on its product allow this Court, under the Ninth Circuit's Amazon.com test, to impute its intent to induce copyright infringement. Moreover, Chatnoir is also liable for contributory infringement under the Sony staple article doctrine because the seventy-percent infringing use demonstrates Aardvark Lite is incapable of "substantial noninfringing use."

Furthermore, Chatnoir cannot maintain a cause of action for trademark dilution by blurring because the Trademark Dilution Revision Act ("TDRA") is inapplicable to Runaway Scrape's domain name, aardvarks.com. As the Ninth Circuit held in Mattel, titles of songs, like Runaway Scrape's domain name, are not purely commercial speech, and thus qualify for the "noncommercial use" exception to the TDRA. To ensure First Amendment protection of artistic expression, this Court should adapt the trademark infringement Rogers test to balance freedom of expression and trademark holder's rights in the dilution context. Because Runaway Scrape's domain name is artistically related to its song and Runaway Scrape did not maliciously intend to dilute Chatnoir's trademarks, the First Amendment protection of Runaway Scrape's speech outweighs Chatnoir's interest in its marks.

Moreover, Runaway Scrape's domain name does not dilute Chatnoir's Aardvark Pro, Media, and Lite marks. Chatnoir's marks and Runaway Scrape's mark are not sufficiently similar, especially in the context

in which aardvarks.com appeared, which the Fourteenth Circuit failed to consider. Moreover, Runaway Scrape had no intent to associate the marks; the band merely continued to rely on electronic media to advertise and distribute its music. In fact, any association by the general public of the two marks was minimal and not indicative of a likelihood of blurring. Indeed, an association between the two marks reinforces the connection between Chatnoir's marks and its source. Accordingly, this Court should REVERSE the Fourteenth Circuit.

ARGUMENT

I. CHATNOIR CONTRIBUTORILY INFRINGED RUNAWAY SCRAPE'S COPYRIGHT BY INDUCING THIRD PARTIES TO INFRINGE AND BY PROVIDING SOFTWARE INCAPABLE OF COMMERCIALLY SIGNIFICANT NONINFRINGING USE.

Distributors of a widely shared service or product may be held contributorily liable for copyright infringement when a third party uses the product or service to infringe copyright.[1] See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 929-30 (2005); In re Aimster Copyright Litig., 334 F.3d 643, 645-46 (7th Cir. 2003). Distributors become liable if they either: (1) actively induce or encourage infringement through specific acts or (2) distribute a product not capable of "commercially significant noninfringing uses." Grokster, 545 U.S. at 930; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984). Under the inducement rule, the intent to induce infringement may be imputed in certain circumstances. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007).

Chatnoir actively induced and encouraged users of Aardvark Lite to infringe Runaway Scrape's and others' copyrights. In addition,

[1] Seeking recovery under a theory of vicarious liability is beyond the scope of this brief.

Chatnoir's failure to use filters after receiving specific knowledge of infringement allows this Court to impute its intent to induce. Moreover, because Aardvark Lite is incapable of substantial commercial non-infringing uses, Chatnoir is also contributorily liable for the distribution of Aardvark Lite.

A. Chatnoir Took "Affirmative Steps" and Made "Clear Expressions" Intentionally Inducing and Encouraging Copyright Infringement.

In Grokster, this Court formally adopted the "inducement rule," holding a distributor of a device who promotes uses that infringe copyright, as shown by "clear expression" or "other affirmative steps," is liable for the resulting acts of infringement by third parties. 545 U.S. at 936-37. The steps Chatnoir took in promoting and releasing Aardvark Lite constitute inducement and encouragement of third parties to infringe copyrighted works.

1. Third parties actually used Aardvark Lite to infringe copyright, and such infringement was not fair use.

Contributory infringement, including the inducement rule, requires evidence of actual infringement by recipients of the distributor's device. Grokster, 545 U.S. at 940. The owner of a copyright under § 106 of the Copyright Act "has the exclusive rights to . . . reproduce [] copyrighted works." 17 U.S.C. § 106(1) "Anyone who violates any of the exclusive rights of the copyright owner" infringes the copyright. 17 U.S.C. § 501. The "fair use" of a copyrighted work is not an infringement of copyright. 17 U.S.C § 107.

Digitally reproducing music for the purpose of avoiding purchase, however, is not fair use. A&M Records v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001). In Napster, the defendants created a

peer-to-peer file-sharing network, Napster, which allowed users to freely share copyrighted music files. Napster, 239 F.3d at 1011. The Ninth Circuit held that the third parties' downloads of "full, free and permanent cop[ies]" of songs were not fair use. Id. at 1017. First, the "repeated and exploitative copying" of songs for the purpose of avoiding purchase was a commercial use which affected the plaintiff's ability to sell its copyrighted works. Id. at 1015-18. Second, simply changing the medium of the shared songs was not transformative, as required by fair use. Id. at 1015.

As Runaway Scrape's uncontested evidence reflects, Aardvark Lite users unquestionably used Chatnoir's product to copy Runaway Scrape's music without authorization. (O.B. 8.) Experts from both parties agreed roughly seventy percent of Aardvark Lite's uses were infringing. (O.B. 8.)

These reproductions did not constitute fair use. As in Napster, Aardvark Lite users downloaded "full, free, and permanent" copies of Runaway Scrapes' songs to avoid purchasing the songs, harming Runaway Scrape's ability to sell its music. (O.B. 8.) As an independent band, Runaway Scrape relies on electronic marketing and digital downloads of its songs. (O.B. 6, 7.) The availability of free downloading of its songs impacts the band's ability to sell its copyrighted materials. Moreover, as in Napster, the stripping and archiving of the videos was not sufficiently transformative, as users merely changed the songs' medium.

Aardvark Lite users built libraries of songs without having to purchase the creative, copyrighted works. (O.B. 8.) The reproduction

of Runaway Scrape's and others' copyrighted works were direct infringement of copyright and do not constitute fair use.

2. Chatnoir knew or should have known third parties used its device to infringe copyright.

Contributory liability requires that the secondary infringer know or have reason to know of the direct infringement. Napster, 239 F.3d at 1020. Mere awareness of the potential for infringing use does not constitute actual or constructive knowledge. Sony, 464 U.S. at 436; Napster, 239 F.3d at 1020-21. However, "[w]illful blindness," or an otherwise "deliberate effort to avoid guilty knowledge," fulfills the knowledge requirement. In re Aimster, 334 F.3d at 650.

The Seventh Circuit held the operator of a peer-to-peer music sharing service could not deny knowledge of infringement where he took active steps to ensure he did not acquire such knowledge. Id. at 650. In Aimster, the defendant advised users how to download copyrighted work with his music-file sharing service, but also created an encryption feature, which he claimed prevented him from having actual knowledge of infringement. Id. The court held taking those affirmative steps to encourage infringement and then masking knowledge behind an encryption feature amounted to "willful blindness." Id. at 650. The defendant "*should* have known" of the direct infringement. Id. (emphasis in original).

Moreover, receipt of cease and desist letters sufficiently informs an infringer his conduct may be actionable. See, e.g., Golight, Inc. v. Wal-Mart Stores, Inc., 355 F.3d 1327, 1339 (Fed. Cir. 2004) (holding defendant's sales of infringing product after receiving cease-and-desist letter amounted to willful infringement because defendant had notice); ALS Scan, Inc. v. RemarQ Cmtys., Inc., 239 F.3d

619, 624 (4th Cir. 2001) (finding cease-and-desist letter provided sufficient notice).

Chatnoir satisfies the knowledge requirement for contributory infringement. As in Aimster, Chatnoir should have known third parties would use its product to infringe. Chatnoir advertised on its webpage and suggested in emails to its current customers that Aardvark Lite could be used to download and strip VuToob videos, an act of infringement. (O.B. 5.) Moreover, Runaway Scrape sent three letters before Aardvark Lite's release, warning Chatnoir of potential infringing uses and requesting Chatnoir employ filters. (O.B. 6.) In fact, Chatnoir's CEO, Rocker, admitted his knowledge of the potential infringing uses in a conversation with a Chatnoir employee after receiving the letters. (O.B. 9.) Runaway Scrape also sent two cease-and-desist letters to Chatnoir informing it that users were overwhelmingly employing Aardvark Lite to infringe copyright, including Runaway Scrape's. (O.B. 7.) Based on these letters and Chatnoir's steps before Aardvark Lite's release, Chatnoir had the requisite knowledge of the direct copyright infringement.

3. Chatnoir's actions are inducement and encouragement as defined by the Grokster standard.

As this Court held in Grokster, "affirmative steps" or "clear expressions" promoting infringement demonstrate an intent to induce such infringement. 545 U.S. at 919. There, this Court broadly examined various factors to evaluate a claim of inducement. Id. at 937-41. The factors the Fourteenth Circuit used are relevant in identifying Chatnoir's "affirmative steps" and "clear expressions" of inducement, but the Fourteenth Circuit's limited consideration of the

three factors contradicts this Court's holding in Grokster.[2] Under a correct application of the Grokster factors, Chatnoir induced infringement.

i. Grokster requires courts to consider all relevant evidence of "affirmative steps" and "clear expressions" of inducement or encouragement.

Any "purposeful, culpable expression and conduct" showing intent to induce infringement generates liability for contributory infringement. See Grokster, 545 U.S. at 937. In Grokster, this Court evaluated multiple factors to determine whether inducement occurred. 545 U.S. at 937-40. The Court considered the defendants' advertisements, noting that "broadcast[ing] a message designed to stimulate others" to infringe was the "classic instance of inducement." Id. The defendants' internal communications and advertising designs targeted a pre-existing community of infringers. Id. at 938. This Court also noted instructions on "how to engage in an infringing use" indicated an intent to induce infringement. Id. at 936. Finally, the defendants' outright failure to develop filtering tools and their business models' dependence on direct infringement warranted contributory infringement liability. Id. at 938.

In interpreting Grokster, courts have correctly evaluated these factors broadly and non-exhaustively. For example, in the Grokster remand, the trial court addressed the 87.33% of infringing files on the defendant's servers, stating the "staggering scale of infringement makes it more likely that" the defendant condoned illegal use. Metro-

[2] Sony's safe-harbor defense does not apply to inducement actions. Grokster, 545 U.S. at 933-35. While Sony's rule limits imputing culpable intent as a matter of law from the characteristics of a distributed product, nothing in Sony requires courts to ignore evidence of intent to induce infringement. Id. at 934-35.

Goldwyn-Mayer, Inc. v. Groskter, Ltd., 454 F. Supp. 2d 966, 985 (C.D. Cal. 2006). Furthermore, the defendant's "courting of the Napster community, which was notorious for copyright infringement," and the defendant's steps to ensure its technology had infringing capabilities allowed the court to infer an intent to induce. Id. at 985, 987. Finally, the defendant never made a "good faith attempt" to mitigate the massive infringement facilitated by its technology. Id. at 989.

In Arista Records LLC v. Usenet.com, Inc., the district court found that the defendant pursued infringement-minded users based on its use of "meta tags" in the source code of its website. 633 F. Supp. 2d 124, 152 (S.D.N.Y. 2009). The defendant embedded into its site words such as "warez," computer slang for pirated content, and "Kazaa," a site for pirated videos. Id. at 152. Embedding these terms ensured a search for infringing content on a search-engine returned the defendant's website as a result. Id. The district court also considered the defendant's employees acknowledging the site's infringing purpose, and the defendant's substantial income from advertising. Id. at 151. Furthermore, in replying to the defendant's argument that it had required its subscribers to "comply with copyright laws," the district court found the "lip service to [defendant's] obligations under the copyright law" insufficient because its "actions speak louder than words." Id. at 153, n.20.

This Court's holding in Grokster and the lower courts' subsequent interpretations of the holding make clear that any evidence suggesting inducement is relevant. Unlike the Fourteenth Circuit's restricted approach, a court must broadly consider all of the facts in context to determine inducement. In failing to consider a number of Chatnoir's

"clear expressions" and "affirmative steps" promoting infringement, the Fourteenth Circuit incorrectly applied the Grokster holding.

ii. Under a correct application of Grokster, Chatnoir induced third parties to infringe copyright.

Before and after the release of Aardvark Lite, Chatnoir took "affirmative steps" and "clear[ly] express[ed]" its intention to induce third parties to infringe copyrights through the reproduction of VuToob videos.

First, Chatnoir engaged in the "classic instance of inducement" by prominently advertising Aardvark Lite's infringing capabilities. Chatnoir sent promotional emails specifically suggesting users employ Aardvark Lite to strip VuToob videos. (O.B. 5.) In addition, on its webpage, Chatnoir invited users to "make audio recordings of [users'] favorite VuToob videos" with Aardvark Lite. (O.B. 5.) As previously noted, reproductions of the copyrighted songs in VuToob videos constitute infringements of the copyright holders' exclusive right to reproduce. See supra Part I.A.1. With these advertisements, Chatnoir broadcasted a message designed to encourage others to commit infringement.

Second, as in Grokster, internal communications reveal Chatnoir developed and released Aardvark Lite with intent to induce infringement. Chatnoir used the meta tags "VuToob," "downloads," and "music" to ensure third parties searching for a method to download music or VuToob videos would see advertising for Aardvark Lite. (O.B. 6.) Users searching with these terms and arriving at Chatnoir's site discovered Aardvark Lite's ability to create and archive MP3 music files from VuToob videos. Use of these tags reflects Chatnoir's attempt to target a demographic known for infringement.

Moreover, Rocker's comments subsequent to receiving Runaway Scrape's letters requesting policing of Aardvark Lite further indicate Chatnoir's exploitation of an infringing demographic. (O.B. 9.) Rocker celebrated Runaway Scrape's letters, saying a suit would "provide [Chatnoir] with a demographic [Chatnoir] never would have reached otherwise." (O.B. 9.) Rocker's statements reveal Chatnoir's strategy of using Aardvark Lite's infringing capabilities to draw customers to the entire line of Aardvark products.

In fact, Chatnoir designed its business model to depend on Aardvark Lite's infringing capacity. As Rocker's comments indicate, Chatnoir used Aardvark Lite to attract a new demographic to its Aardvark line of products. (O.B. 9.) In addition, Chatnoir generated revenue each time a user clicked advertisements on its webpage, and Aardvark Lite's infringing ability drew users to Chatnoir's site. (O.B. 17, n.5.) Chatnoir advertised Aardvark Lite's infringing capability as a lure not only for use of Aardvark Lite in an infringing manner but also for introducing Chatnoir's more expensive products.

In light of its "affirmative steps" and "clear expressions" of intent to induce, Chatnoir's warning against using Aardvark Lite for "illegal or unethical purposes" amounts to no more than "lip service" to the protection of copyrights. (O.B. 5, 7.) Finally, Chatnoir's failure to add filters to Aardvark Lite, in context of its many steps to encourage infringement, amounts to one more "clear expression" of an intent to induce. (O.B. 7.) Chatnoir's actions reflect intent to induce third parties to use Aardvark Lite for infringement.

B. Chatnoir's Intent to Induce Can Be Imputed from Its Failure to Address Known, Specific Infringement by Third Parties.

Under the common law rule of contributory infringement, intent to induce can also be imputed. Amazon.com, 508 F.3d at 1170-71. Within the context of cyberspace, for example, a computer system operator can be contributorily liable for copyright infringement if it has actual knowledge that specific infringing material is available using its system, it is able to take simple measures to prevent further infringement, and yet continues to provide access to infringing works. Id. at 1172. The continuation of the service without filtering is an "affirmative step" and a "clear expression" of the operator's intent to induce third parties to infringe. Id. at 1172. This Court should impute to Chatnoir the intent to induce infringement because Chatnoir, aware of third-party infringement, refused to take simple steps to police its copyright-infringing forum.

The Ninth Circuit's reasoning is consistent with this Court's holding in Sony. While Sony bars imputing intent to infringe solely "from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement," Grokster, 545 U.S. at 933, a case is distinguishable when the distributor of the product has an "'ongoing relation' with the product or its end-user." Arista, 633 F. Supp. 2d at 156 (citing Sony, 464 U.S. at 438). While in Sony, the distributors' last meaningful contact with the product or the purchaser was at the point of purchase, in Arista, the defendants maintained an ongoing relationship with their users. 633 F. Supp. 2d at 156. An ongoing relationship implies the contributory infringer has control over the uses of its services. Amazon.com, 508 F.3d at 1171. Failure to

filter or remove infringing materials of which the contributory infringer has actual knowledge is encouragement and inducement for the users to infringe. Amazon.com, 508 F.3d at 1171; Arista, 633 F. Supp. 2d at 155.

First, as established above, Chatnoir has actual knowledge that third parties use Aardvark Lite to infringe copyright. See supra Part I.A.2. Second, Chatnoir has not taken simple measures, such has hash-based filters, acoustic fingerprinting, and keyword-based filters, to prevent the infringement.[3] Finally, Chatnoir has continued to provide Aardvark Lite to third parties, thereby satisfying the Amazon.com test.

As in Amazon.com and Arista, Chatnoir maintains an ongoing relationship with an Aardvark Lite user. Chatnoir's relationship does not end at the moment of downloading Aardvark Lite. (O.B. 4.) Chatnoir memos and emails indicated that Aardvark Lite would be available for a limited time until the company was ready to launch Aardvark Pro. (O.B. 5.) Furthermore, Aardvark Lite only functions for a six-month time period, indicating Chatnoir exercises control over the manner in which the product may be used. (O.B. 4.)

Because Chatnoir had actual knowledge of specific infringement of Runaway Scrape's copyright, it had an obligation to take steps to prevent further infringement. Failing to take those simple steps

[3] Hash-based filters identify a digital file that contains copyright content, and blocks a user from downloading the file. Arista Records, LLC v. Lime Group, LLC, No. 06 CV 5936 (KMW), 2010 U.S. Dist. LEXIS 46638 (S.D.N.Y. May 11, 2010). An acoustic fingerprinting filter identifies two audio files that sound the same, and if a music file matches the acoustic fingerprint of a copyright-protected file, the transfer of that file may be blocked. Id.

amount to an encouragement of infringers to continue violating Runaway Scrape's exclusive rights.

C. Chatnoir Contributorily Infringed Because Aardvark Lite Is Not Capable of Substantial or Commercially Significant Noninfringing Uses.

Under Sony, a distributor is liable for third parties' infringement if the product is incapable of "substantial noninfringing uses." 464 U.S. at 442. Aardvark Lite is incapable of "substantially noninfringing use," preventing Chatnoir's recourse to the Sony safe harbor defense.

In Sony, this Court determined Sony's Betamax was "capable of commercially significant noninfringing uses." Id. Having determined at least ninety percent of the Betamax uses were noninfringing or fair use, this Court determined the Betamax was qualified for the safe harbor it created. Id. at 443. This Court did not, however, define the outer limits of "commercially significant noninfringing" use. See Id. at 442 (holding defense to contributory infringement applicable if product is "merely [] capable of substantial noninfringing use"); see also Grokster, 545 U.S. at 943-44 (concurring, Ginsburg, J.) ("There was no need in Sony to 'give precise content to the question of how much [actual or potential] use is commercially significant.'"). But, as Justice Ginsburg noted in her Grokster concurrence, a large number of noninfringing uses of the peer-to-peer network at issue did not necessarily reflect "substantial noninfringing use" if "dwarfed by" the total uses of the product. 545 U.S. at 948 (Ginsburg, J., concurring). Thus, the mere potential for a product to have

noninfringing uses is insufficient to warrant application of the Sony safe harbor.[4]

This Court should adopt Justice Ginsburg's relational approach to determine Aardvark Lite could not be put to "substantial noninfringing use." While the Sony decision and Justice Breyer's Grokster concurrence address the legitimate concerns of obstacles to innovation, Justice Ginsburg's approach more adequately balances the competing interests of innovators and copyright holders. A relational test provides notice to innovators to develop technology with an eye to preventing infringement. Developers can install simple filters or actively encourage noninfringing uses to ensure contributory liability does not attach. Most importantly, a relational approach protects independent artists like Runaway Scrape for whom rampant copyright infringement threatens their ability to continue providing artistic expression. Under a relational test, the mere thirty-percent noninfringing use of Aardvark Lite does not constitute a "substantial noninfringing use."

Chatnoir contributorily infringed Runaway Scrape's copyrighted works by providing a product incapable of "substantial noninfringing use" and, more critically, by inducing third parties to infringe. Thus, Chatnoir is liable for contributory infringement of Runaway Scrape's copyrighted works, and this Court should reverse the Fourteenth Circuit.

[4] In contrast, Justice Breyer endorsed a different interpretation. Grokster, 545 U.S. at 954 (Breyer, J., concurring). Justice Breyer found if a product is "capable" of or has "potential future uses" that are noninfringing, application of the safe harbor is appropriate.

II. RUNAWAY SCRAPE'S DOMAIN NAME "AARDVARKS.COM" IS A NON-COMMERCIAL USE OF A MARK, IS ARTISTIC SPEECH PROTECTED BY THE FIRST AMENDMENT, AND IS NOT LIKELY TO DILUTE CHATNOIR'S TRADEMARKS BY BLURRING.

According to the Trademark Dilution Revision Act ("TDRA"), 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."[5] 15 U.S.C. § 1125(c)(2)(B). The owner of a famous and distinctive mark may seek an injunction against the use of a mark or trade name likely to cause dilution of the senior mark by blurring. 15 U.S.C. § 1125(c)(1). Though the statute lists six exemplary factors to aid in determining whether dilution is likely, courts must consider all relevant factors. 15 U.S.C. § 1125 (c)(2)(B)(i-vi).

Chatnoir's dilution claim against Runaway Scrape fails for three reasons. First, aardvarks.com falls under the "any non-commercial use" exclusion to the TDRA. 15 U.S.C. § 1125(c)(3)(C) Second, the First Amendment protects the domain name as Runaway Scrape's artistic expression. Third, aardvarks.com is not likely to dilute Chatnoir's trademarks because it is not substantially similar and there is neither an intent to associate nor actual association.

A. Runaway Scrape's Usage of the Domain Name "aardvarks.com" Is Protected as a Non-Commercial Use Under 15 U.S.C. § 1125(c)(3)(C).

The TDRA excludes "any non-commercial use of a mark" from a dilution by blurring claim. 15 U.S.C. § 1125(c)(3)(C). Aardvarks.com qualifies for that exclusion because, in referring to the title of a

[5] Confusion of the marks, which is dispositive in traditional trademark infringement, is irrelevant to the dilution analysis. 15 U.S.C. § 1125(c)(1). For example, the sale of Kodak pianos dilutes Kodak's trademark regardless of whether consumers would be confused about the source of the pianos.

song, the use is non-commercial.

In interpreting the Federal Trademark Dilution Act ("FTDA")[6] to avoid conflict with First Amendment rights, the Ninth Circuit held the "non-commercial use" exclusion shields all but marks used in a purely commercial way. Mattel, Inc. v. MCA Records, 296 F.3d 894, 906 (9th Cir. 2004). In Mattel, MCA Records distributed a song titled "Barbie Girl," which parodied the famous doll produced and trademarked by Mattel. Id. at 899. Mattel claimed MCA Records' use of the trademark "Barbie" was dilution by blurring. Id. at 902-03. The court held MCA Records' use of the mark, as a parody and as artistic expression, was not purely commercial. Id. at 907. Congress's 2006 amendment of the FTDA to the TDRA minimally altered the relevant provisions[7], and the Ninth Circuit's interpretation remains persuasive.

Likewise, Runaway Scrape is using its mark in both the lyrics and title of a song and in the domain name for a website exhibiting the song. Runaway Scrape's song is artistic expression, and the website promotes that expression. Moreover, the Fourteenth Circuit found Runaway Scrape intended to use "Aardvarks" and the website "aardvarks.com" to criticize Chatnoir. Assuming, arguendo, the Fourteenth Circuit was correct in its determination, Runaway Scrape's use of the mark as commentary or criticism also meets the criteria for

[6] The TDRA is the 2006 amended version of the FTDA. The purpose of the TDRA was to overrule the Supreme Court's decision in Moseley v. Victoria's Secret Catalogue, Inc., 537 U.S. 418 (2003). See 152 Cong. Rec. H6963-01 (daily ed. Sept. 25, 2006) (statement of Rep. Sensenbrenner). In Moseley, the Supreme Court interpreted the FTDA to require a showing of actual dilution to recover. 537 U.S. at 434. As amended, the TDRA allows recovery for the likelihood of dilution. 15 U.S.C. § 1125(c)(1).

[7] The relevant language was either trivially altered ("commercial use in commerce" became "use of a mark or trade name in commerce") or remained unchanged (the statute still excludes "any non-commercial use").

non-commercial use. See Mattel, 296 F.3d at 907. Thus, Runaway Scrape's use of the mark in the domain name is not purely commercial. Because of this non-commercial use, the TDRA's exclusion applies to the domain name. Regardless of whether Runaway Scrape's domain name likely dilutes Chatnoir's marks, "aardvarks.com" is a protected non-commercial use of a mark and the dilution by blurring cause of action is barred.

B. The First Amendment Protects Runaway Scrape's Artistic Expression Because the Value of Runaway Scrape's Speech Outweighs the Potential Harm to Chatnoir's Marks.

The First Amendment protection for speech limits the rights of trademark holders. See Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987); see also U.S. Const. amend. I. In Rogers, the Second Circuit held First Amendment protection of expression through a mark must be balanced against the public's interest in avoiding consumer confusion. 875 F.2d at 1000. This Court should adopt a variation of the Rogers test, adapted for the dilution context, to ensure Runaway Scrape's First Amendment rights are not encroached by Chatnoir's dilution claim.

In Rogers, the court evaluated the movie title "Fred and Ginger." The plaintiff alleged the title impermissibly confused consumers that Fred Astaire and Ginger Rogers, a famous dancing duo, had endorsed or were associated with the film. Id. at 1001. The court adopted a two-part test to balance the First Amendment value of a title of an artistic work against potential consumer confusion. Id. at 1000. A title must have "at least some artistic relevance" to the underlying work and must not be "explicitly misleading as to the

content of the work." Rogers, 875 F.2d at 1000. The court held the First Amendment value of the defendants' artistic expression in the title outweighed the minimal potential for consumer confusion about Astaire's and Rogers' involvement with the film. Id. at 1001.

The Sixth Circuit, Ninth Circuit, and Fifth Circuit adopted this test in the trademark infringement area. Parks v. Laface, 329 F.3d 437, 451-52 (6th Cir. 2003); Mattel, 296 F.3d at 901-02; Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 664-65 (5th Cir. 2000). In contrast, the Eighth Circuit employs the "sufficient alternative avenues" approach, allowing liability if an artist has alternative methods for expression. Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir. 1989). In Parks, the Second Circuit noted the "sufficient alternative avenues" method fails to adequately protect First Amendment rights for artists. 329 F.3d at 449-50. Artistic speech is not equivalent to commercial speech and deserves greater First Amendment protection. Id.

In L.L. Bean, the First Circuit applied a similar balancing test to evaluate a claim under Maine's anti-dilution statute. 811 F.2d at 32. Noting this Court's definition of commercial speech as "expression related solely to the economic interests of the speaker and its audience," the court found the defendant's parodying work to be sufficiently non-commercial. Id. The court held the First Amendment does not "permit the range of the anti-dilution statute to encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context." Id. at 32. Therefore, "[F]irst [A]mendment freedoms should be balanced against the need to fulfill the legitimate purpose" of protecting a trademark

holder's rights to the distinctiveness of the mark. L.L. Bean, 811 F.2d at 31.

Applying the Rogers test, the balance weighs strongly in favor of Runaway Scrape's artistic expression. The domain name, like the title of the songs in Mattel and Parks and the title of the movie in Rogers, is artistically relevant to the underlying work. The title of Runaway Scrape's song is "Aardvarks" and the website contained a downloadable version of the song. (O.B. 7.) The domain name is merely an extension of the artistic expression of the underlying song.

Even assuming, arguendo, Runaway Scrape intended an association with Chatnoir's marks, the domain name remains artistically relevant to the underlying content. Under the Fourteenth Circuit's reasoning, the website was criticism of Chatnoir's product. (O.B. 15.) If Runaway Scrape's website is critical, it parallels the song in Mattel and the movie in Rogers. Employing aardvarks.com as a domain name was an artistically relevant title for the website. The basis of the dispute between Chatnoir and Runaway Scrape was the use of the Internet and software to illegally infringe copyrights. If Runaway Scrape created the website to criticize Chatnoir's actions, the domain name was an artistic way to highlight the role of technology in facilitating infringement.

Since the Rogers test applies to the infringement context, this Court should adapt the second prong to the dilution context by requiring a showing of malicious intent to dilute on the part of the defendant. There has been no such showing here. If Runaway Scrape had the intent to associate aardvarks.com with Aardvark Pro, Media, and Lite, their intent was purely for the purpose of criticism of or

commentary on Chatnoir's products, rather than malicious dilution of Chatnoir's marks. Moreover, the harm to Chatnoir's marks is minimal. Thus, this Court should adopt the modified Rogers test to ensure the appropriate balance between competing rights under the First Amendment and the TDRA, and should recognize the First Amendment protects Runaway Scrape's speech from Chatnoir's claims.

C. Contrary to the Fourteenth Circuit's Conclusion, "aardvarks.com" Is Not Likely To Dilute Chatnoir's Trademarks by Blurring.

The TDRA lists six non-exhaustive factors to guide courts in their determination of the likelihood of dilution by blurring. 15 U.S.C. § 1125(c)(2)(B). While a court's determination must be based upon all relevant factors, courts focus on these six statutory factors as the primary bases for their decisions. See, e.g., Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 588 F.3d 97, 106 (2d Cir. 2009); Louis Vuitton Malletier S.A. v. Haute Diggity Dog, 507 F.3d 252, 267-68 (4th Cir. 2007). The factors at issue here are: (1) the degree of similarity between the marks, (2) whether the user of the mark or trade name intended an association with the famous mark, and (3) any actual association between the mark or trade name and the famous mark.[8] 15 U.S.C. § 1125(c)(2)(B)(i, v, vi).

The Fourteenth Circuit incorrectly evaluated these factors. First, aardvarks.com and Chatnoir's marks are not sufficiently similar to warrant a claim for dilution. Second, Runaway Scrape did not intend an association between aardvarks.com and Aardvark Pro, Aardvark

[8] The TDRA includes three other factors: the degree of distinctiveness of the famous mark; the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; and the degree of recognition of the famous mark. 15 U.S.C. § 1125(c)(2)(B)(ii, iii, iv). These factors are not at issue here.

Media, or Aardvark Lite. Third, no significant actual association exists between the marks. (O.B. 13-15.)

1. Aardvarks.com is not sufficiently similar to Aardvark Pro, Media, and Lite to create a likelihood of dilution by blurring.

The first factor under the TDRA directs courts to evaluate the "degree of similarity between the marks." 15 U.S.C. § 1125(c)(2)(B)(i). The Fourteenth Circuit failed to take account of the mark's context in considering the similarity to Chatnoir's marks. Furthermore, the Fourteenth Circuit erroneously employed a "likelihood of confusion" standard, rather than a "substantially similar" standard to the determination of similarity.

In citing to Star Industries, Inc. v. Bacardi & Co., the Fourteenth Circuit erroneously imported a "likelihood of confusion" standard. (O.B. 14.) Looking "to the overall impression created by the marks" is relevant in an analysis of trademark infringement, which was the underlying claim in Star Industries. 412 F.3d 373, 381 (2d Cir. 2005). The focus of a dilution claim, however, is not whether the marks confuse consumers. Instead, a dilution claim protects the holder of a distinctive mark from the loss of that distinction through parallel uses by others. See Moseley, 537 U.S. at 429 (noting dilution protection is not aimed at consumers but at "preservation of the uniqueness of a trademark") (quoting Schechter, Rational Basis of Trademark Protection, 40 Harv. L.Rev. 813, 831 (1927)). Thus, a dilution claim requires the marks to be nearly identical. See Restatement (Third) of Unfair Competition § 25 cmt. F (1995) ("[T]he resemblance between the two [marks] must be sufficiently close that the subsequent use evokes the requisite mental connection with the

prior user's mark."). A vague "overall impression" of similarity is inappropriate in the context of a dilution claim.

The Ninth Circuit held that dilution claims require the two marks to be "identical, or nearly identical to the protected mark." Visa Int'l Servs. Ass'n v. JSL Corp. 610 F.3d 1088, 1090 (9th Cir. 2010); Perfumebay.com Inc. v. eBay, Inc., 506 F.3d 1165, 1180 (9th Cir. 2007); Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1011 (9th Cir. 2004); but see Starbucks Corp., 588 F.3d at 108 (abandoning the "substantially similar" standard for dilution claims under the TDRA in the Second Circuit). In Perfumebay, the Ninth Circuit noted the passage of the TDRA "bolstered" the court's emphasis on the similarity of the marks in making a determination of dilution. 506 F.3d at 1181 n.9. In Visa, the Ninth Circuit held the mark "eVisa" was substantially identical to the famous mark "Visa" in an online context because the prefix "e-" commonly refers to the online version of a brand. 610 F.3d at 1090. The court found the prefix "e-" did no more to distinguish between two marks than the words "Corp." or "Inc." Id.

The Second Circuit held consideration of the context of the diluting mark is necessary in evaluating the marks' degree of similarity. Starbucks, 588 F.3d at 106. The Second Circuit held the use of the word "Charbucks," evaluated in context, was only minimally similar to Starbucks's trademark. Id. The court pointed to the fact that the local brewer only used the word "Charbucks" in the names "Mister Charbucks" and "Charbucks Blend," and to the fact the products appeared on the local brewer's website. Id. The website, bearing the local brewer's name, sold the Charbucks-labeled coffee along with

other products. Starbucks, 588 F.3d at 106. The court declined to ignore the use of the words "Mister" and "Blend," which distinguished Charbucks from Starbucks. Id. at 107. Based on this context, the court held the marks were not significantly similar to support a likelihood of dilution of Starbucks' mark. Id. at 106-07.

Here, Runaway Scrape's domain name "aardvarks.com," evaluated in context, is clearly dissimilar from Chatnoir's famous marks Aardvark Media, Aardvark Pro, and Aardvark Lite. Just as the addition of the words "Mister" and "Blend" substantially distinguished Charbucks from Starbucks in Starbucks, the subtraction of the words "Pro," "Media," or "Lite" substantially distinguish Runaway Scrape's use of the dictionary word "aardvarks" from Chatnoir's marks.

Further, Runaway Scrape used "aardvarks.com" to promote their song. A link on the site sent users to a website which allowed them to download Runaway Scrape's song and included a link to the band's official website. (O.B. 7.) This context parallels the facts in Starbucks. Like the defendant in Starbucks, Runaway Scrape's website is unassociated with Chatnoir's product and the website further distinguishes the two marks.

Runaway Scrape's domain name is not sufficiently similar to Chatnoir's marks to warrant a dilution by blurring claim. Both the context of the domain name and the inherent differences between the marks reveal Runaway Scrape's mark is only minimally similar to Chatnoir's mark, and is not likely to dilute it.

2. Runaway Scrape did not intend to associate "aardvarks.com" with Aardvark Pro, Media, and Lite.

The TDRA instructs courts to consider whether the defendant

intended to create an association with the famous mark. 15 U.S.C. § 1125(c)(2)(B)(v). An intent to associate need not be in bad faith to support a dilution claim. Starbucks, 588 F.3d at 109. However, an intent to associate, especially for purposes of criticism or parody, may show the junior mark does not dilute the distinctiveness of the senior mark, thus defeating the claim. Louis Vuitton, 507 F.3d at 267-68.

Here, Chatnoir points to the phrase "Get it the right way" and the title of the song "Aardvarks" as evidence Runaway Scrape intended to associate aardvarks.com with Chatnoir's famous mark. (O.B. 15.) The Fourteenth Circuit agreed, pointing to the band's intent as support for the finding of a likelihood of dilution. Runaway Scrape's use of the phrase, "Get it the right way," however, merely refers to its ongoing concern with infringement of its copyrights on the Internet. Runaway Scrape's copyrights have been infringed not only by users of Chatnoir's software, but also by users posting unlicensed songs and videos on VuToob and elsewhere on the Internet. (O.B. 6, 7.)

In fact, the domain name and the underlying website reveal no indication of any intent by Runaway Scrape to associate its marks with Chatnoir's. The domain name refers to Runaway Scrape's metaphorical use of aardvarks, as animals, in the lyrics and title of the song "Aardvarks" on the website. (O.B. 19.) Neither the song nor the website contain references to Chatnoir, to its dispute with Runaway Scrape, or to its products. The evidence upon which the Fourteenth Circuit relies cannot sustain a finding of intent on the part of Runaway Scrape.

Even assuming, arguendo, that Runaway Scrape's use of the phrase, "Get it the right way," indicates an intent to associate its website with Chatnoir's marks, the purpose of that association was to "comment" upon or "criticize" those marks. Like the parody in Louis Vuitton, Runaway Scrape's criticism, and the resulting association, reinforces the distinctiveness of Chatnoir's marks with its products, and leads to a reduced, rather than increased, likelihood of dilution.

3. The degree of actual association between the marks does not support a likelihood of dilution.

The final factor courts must consider for a dilution claim is whether "[a]ny actual association between the mark or trade name and the famous mark" exists. 15 U.S.C. § 1125(c)(2)(B)(vi). An association between the marks may indicate either the marks are substantially identical, or may point to the junior mark's reinforcement of the distinctiveness of the senior mark. Compare Starbucks, 588 F.3d at 109 (finding telephone survey showing association between the marks sufficient to warrant remand to determine dilution), with Louis Vuitton, 507 F.3d at 268 (holding association as part of parody did not indicate dilution of the senior mark). There is no evidence of Runaway Scrape's domain name having a sufficient association with Chatnoir's product to create a likelihood of dilution. Any association that might exist, however, reinforces the distinctiveness of Chatnoir's mark. Aardvarks.com does not blur or dilute the meaning of Aardvark Media, Aardvark Pro, or Aardvark Lite.

The Fourteenth Circuit erred in relying on Chatnoir's proffered surveys to determine there was an association between Runaway Scrape's website and Chatnoir's marks. In Jada Toys, Inc. v. Mattel, Inc., the

Ninth Circuit used two surveys showing association to reverse a summary judgment for the plaintiff. 518 F.3d 628, 636 (9th Cir. 2007). The first survey indicated twenty-eight percent of the public associated the plaintiff's mark with the defendant's mark. Id. The second survey indicated seven percent of the public associated plaintiff's product packaging with defendant's mark. Jada Toys, 518 F.3d at 636. In Visa, the district court relied on a survey indicating seventy-three percent of the general public thought of the plaintiff's mark when the defendant's mark was mentioned. 590 F. Supp. 2d 1306, 1319 (D. Nev. 2008), aff'd in Visa Int'l Serv. Ass'n v. JSL, Corp., 610 F.3d 1088 (9th Cir. 2010). In reversing a summary judgment order for the defendants, the Second Circuit relied on a survey indicating 30.5% of the respondents to a telephone survey associated its mark with the defendant's mark. See Starbucks, 588 F.3d at 109.[9]

The surveys on which the Fourteenth Circuit relied, in contrast, did not indicate the same degree of association. The surveys indicate that for two percent of the general public and for eight percent of Chatnoir's customers the domain name brought Chatnoir's marks to mind. Initially, the Fourteenth Circuit should only have considered the survey of the general public. The harm at the root of the dilution cause of action is dilution in the mind of the general public, not among a limited subset thereof, and therefore this survey is irrelevant. Further, the Fourteenth Circuit relied on a proportion of

[9] The Second Circuit also relied on a survey indicating 3.1% of respondents thought the plaintiff was the source of the defendant's mark. Starbucks, 588 F.3d at 109. This survey reflects confusion between the mark and the source, rather than an association between the two marks. The second survey, therefore, is irrelevant to the analysis here.

the general public too insignificant to indicate association between the marks. The Ninth Circuit and Second Circuit relied on surveys showing at least a quarter of respondents in each associated the marks at issue. The Fourteenth Circuit's use of a survey indicating only two percent of the general public associates the marks was inconsistent with these cases from other circuits. Such insignificant evidence of association does not support Chatnoir's claim of dilution by blurring.

CONCLUSION

This Court should reverse the decision below. As indicated by Chatnoir's internal communications, advertisements, and business model, Chatnoir deliberately induced third parties to infringe the copyrights of Runaway Scrape and others by stripping VuToob videos. Further, Chatnoir's failure to take simple steps to address known infringement allows this Court to impute Chatnoir's intent to induce. Finally, Chatnoir's product, Aardvark Lite, is not capable of commercially significant non-infringing uses. Therefore, Chatnoir is contributorily liable for the use of its product to infringe Runaway Scrape's copyrights.

In addition, Runaway Scrape's domain name aardvarks.com is not subject to Chatnoir's trademark dilution by blurring claim. The domain name falls into the non-commercial use exclusion of the TDRA. Further, it is protected by the First Amendment under the modified Rogers test. Finally, it is not likely to dilute Chatnoir's trademarks by blurring under the three factors at issue. For these reasons, Runaway Scrape respectfully requests that this Court REVERSE

the decision of the Fourteenth Circuit Court of Appeals as to both the copyright and trademark issues.

Dated: December 6, 2010

Respectfully Submitted,

/s/ Team # 15

Team # 15
Counsel for Petitioner

APPENDIX A

U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

APPENDIX B

Copyright Act, 17 U.S.C. § 106(1):

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

Copyright Act, 17 U.S.C. § 107:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Copyright Act, 17 U.S.C. § 501:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright or right of the author, as the case may be.

APPENDIX C

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

(c) Dilution by blurring; dilution by tarnishment

(1) Injunctive relief

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

[. . .]

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

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

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

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

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

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

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

[. . .]

(3) Exclusions

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

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

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

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

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

(C) Any noncommercial use of a mark.