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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



VIACOM INTERNATIONAL, INC., COMEDY PARTNERS, COUNTRY MUSIC
TELEVISION, INC., PARAMOUNT PICTURES CORPORATION,
BLACK ENTERTAINMENT TELEVISION, LLC,

Plaintiffs-Appellants,

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

(Additional Caption On the Reverse)

*On Appeal from the United States District Court
for the Southern District of New York (New York City)*

**BRIEF OF AMICUS CURIAE
AUDIBLE MAGIC CORPORATION
IN SUPPORT OF NEITHER PARTY**

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themselves and all others similarly situated, BOURNE Co.,
CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC.,
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN
ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC
COMPANY, d/b/a BIENSTOCK PUBLISHING COMPANY, ALLEY MUSIC CORPORATION,
X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS,
THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD.,
on behalf of themselves and all others similarly situated,
MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC.,
THE MUSIC FORCE LLC,

Plaintiffs-Appellants,

and

ROBERT TUR, dba LOS ANGELES NEWS SERVICE,
THE SCOTTISH PREMIER LEAGUE LIMITED,

Plaintiffs,

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), the undersigned counsel certifies that *amicus curiae* Audible Magic Corporation is a privately held California Corporation with no parent corporation. No publicly traded company owns 10% or more of the stock of Audible Magic Corporation.

s/ Jeremy H. Stern

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STATEMENT OF IDENTITY AND INTEREST¹

Audible Magic files its brief *amicus curiae* in support of neither party in this appeal, in order to provide the panel with information relevant to certain holdings contained in the opinion below concerning content filtering technology (Audible Magic's technology in particular) and that technology's role in the implementation of content management practices for content owners and websites in a manner consistent with the policy balance set forth in the Digital Millennium Copyright Act, 17 U.S.C. §§ 512 *et seq.* ("DMCA") of encouraging innovation in the Internet while protecting copyright owners.

Amicus curiae Audible Magic Corporation ("Audible Magic") is a privately held technology and services company founded in 1999 and provides content identification and management services ("Content ID Technology") to Internet and digital media companies, online service providers, entertainment companies, government agencies and academic institutions. Among other things, Content ID Technology is utilized to identify copyrighted content that may be contained in digital storage media. During the period at issue in the litigation, Viacom Inc.,

¹ As required by Second Circuit Local Rule 29.1, it is hereby confirmed that no party's counsel has authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief and no person or entity, other than Audible Magic Corporation as *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

MTV Networks (“MTVN”), Google Inc. and YouTube all became customers of Audible Magic.

The company’s core copyright-sensing technology, CopySense®, is based on its patented digital fingerprinting software and other proprietary content fingerprinting methods and its content reference database comprised of millions of music files, video soundtracks, and video image fingerprints and related business rules and metadata. This Content ID Technology has been available on the market since 2004 and has been integrated into many different media distribution platforms, including peer-to-peer (“P2P”) networks and over 60 campus and government networks. The Content ID Technology has also been deployed as a broadcast radio monitoring service for royalty tracking and used at CD Replication Plants. Beginning in 2006, Audible Magic began marketing its CopySense® product to Web 2.0 sites using user generated content. Since early 2007, this Content ID Technology has been integrated into over 30 Web 2.0 sites including YouTube and several sites owned by MTVN.

The issue of Content ID Technology is clearly relevant and important to the parties in this case below. The parties engaged in discovery about Audible Magic and other Content ID Technologies. Indeed, Audible Magic’s CEO was deposed and his testimony was part of the record below. Furthermore, Audible Magic’s Content ID Technology as well as Google’s technology were discussed by the

parties in their summary judgment papers before the District Court. Nevertheless, the District Court *sua sponte* and without discussion dismissed the effectiveness of Audible Magic's Content ID Technology in the opinion and order from which this appeal has been taken. Audible Magic's interests are to ensure that the Court is fully informed about these technologies before it renders a decision. In this way, Audible Magic's proposed brief *amicus curiae* serves all parties to this appeal.

The District Court took an overly expansive and incorrect legal view of the purpose and actual use of Audible Magic's Content ID Technology. Without analyzing the technology and the evidence in the record below of how it works and how it is used in the marketplace, the District Court merely quoted another district court case and concluded that the "automated Audible Magic filter 'does not meet the standard of reliability and verifiability required by the Ninth Circuit in order to justify terminating a user's account.'" *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 528 (S.D.N.Y. 2010) (quoting *UMG Recordings v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1116 (C.D. Cal. 2009)) ("*YouTube*").

Audible Magic strenuously disagrees with this public characterization of its technology in the lower court's opinion. This *amicus curiae* brief is submitted to help the panel understand that the District Court's view in this regard was incorrect. Audible Magic's Content ID Technology was not designed or marketed to make legal conclusions about copyright infringement. That is for the courts and

jury system. Rather, the technology is exceptionally accurate and reliable in identifying and flagging uploaded files that contain copyrighted materials such as music, films, or TV shows. This has proven to be an essential technological solution for content owners and websites to sift through and filter massive amounts of digital media content uploaded each day at scale and speeds that would be impracticable for human reviewers. Thus, although no party to this appeal may be directly affected by the lower court's holding with respect to Audible Magic, Audible Magic's own interests are clearly affected by the panel's considered view of that holding.

STATEMENT OF SOURCE OF AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a), leave to file this brief *amicus curiae* has been sought from the Court by motion submitted herewith.

Counsel for Plaintiffs-Appellants have consented to the filing of this brief.

Counsel for Defendants-Appellees have denied consent.

INTRODUCTION AND BACKGROUND

The landscape of the Internet and entertainment media worlds has changed exponentially since the passage of the DMCA in 1998. Both Internet usage and broadband capacity have increased at phenomenal rates over the ensuing decade while the costs of personal computers and digital media recorders have rapidly declined. These factors have combined to: 1) empower application and website

developers to deploy more advanced, content rich services, including video streaming sites and applications and 2) empower consumers to contribute upload media files to Internet websites that have created new business models that increasingly rely on User-Generated Content (“UGC”).

These social networking sites and video websites have revolutionized digital media enabling individuals to reach global audiences with their video clips. Given the massive amounts of video content uploaded to the Internet every day, these websites and content owners are unable, as a practical matter, to use human reviewers to screen each new media file in a timely manner. Such human review would be “a teaspoon solution to an ocean problem.” *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) (Posner, J.) (quoting Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 442 (2002)). The websites have therefore come to rely on Content ID Technologies to automate the review process and to rapidly, accurately and at massive scale screen uploaded media files to help prevent piracy and also facilitate the new business models and monetization opportunities arising from the UGC phenomenon.

Audible Magic has a history of providing its expertise to government in their decision-making process on issues related to content on the Internet. For example, in 2005, Audible Magic filed a neutral *amicus curiae* brief with the United States

Supreme Court in the landmark case of *Metro-Goldwyn-Mayer Inc. v. Grokster Ltd*, 545 U.S. 913 (2005) to help the Court understand how Content ID Technology is used to identify infringing content on P2P networks.² Audible Magic also testified before the House Committee on Science and Technology to explain how Content ID Technology is used to reduce copyright-infringing file-sharing using P2P protocols on campus networks.³ In addition, Audible Magic appeared before the Federal Communications Commission to help the agency understand how Content ID Technology could be beneficially used on broadband networks to prevent the transmission of illegal content over the Internet.⁴

Thus, Audible Magic's expertise as a neutral *amicus curiae* will be helpful to the Court in explaining how Content ID Technology works to very accurately identify content and how easily it can be deployed by service providers to prevent

² Brief of *Amici Curiae* Audible Magic Corporation, Digimarc Corporation and Gracenote In Support of Neither Party, *Metro-Goldwyn-Mayer Inc. v. Grokster Ltd*, 545 U.S. 913 (2005) (No. 04-480), *available at* <http://www.copyright.gov/docs/mgm/audible-magic.pdf>.

³ *The Role of Technology in Reducing Illegal Filesharing: A University Perspective: Hearing Before H. Comm. on Science and Technology.*, 110th Cong. (2007) (statement of Vance Ikezoye), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/full/05june/ikezoye_testimony.pdf.

⁴ In the context of the FCC's Network Management proceeding, "We explained [to the Commission] that the Audible Magic CopySense® Appliance uses patented digital fingerprint content recognition technology to monitor P2P networks at the file level to determine if a specific file transfer contained copyrighted material." Audible Magic Corporation's Notice of *Ex Parte* in Broadband Industry Practices, WC Docket No. 07-52 (June 11, 2008).

the uploading of infringing content. In addition, Audible Magic's knowledge can help the Court understand the robustness and scalability of this technology, its widespread acceptance in the marketplace and the important roles the technology now plays in the new and ever expanding Internet video environment.

SUMMARY OF ARGUMENT

Audible Magic is known as the leader in the Web 2.0 space for digital fingerprinting with dozens of major websites that have deployed the CopySense® Content ID Technology as part of their content workflow systems.⁵ Audible Magic's Content ID Technology uses a robust technological and algorithmically based means to identify copyrighted video and audio content uploaded and streamed over the Internet. Audible Magic's Content ID Technology is readily available in the marketplace, along with other vendors' technology, and is extremely accurate and scalable for its intended purpose – to help websites manage: 1) the vast amounts of copyrighted content uploaded to their sites; and 2) to help sites work with content owners and implement copyright licenses. With its easy integration into video websites and other digital platforms, Content ID Technology enables the rapid and accurate identification of copyrighted digital media content in all of its various formats and on various platforms, including on

⁵ See Audible Magic Content Identification Services Customers, <http://audiblemagic.com/clients-partners/contentsvcs.asp> (last visited Dec. 9, 2010).

Web 2.0 sites such as YouTube.com, MySpace.com, Addicting Clips, and Dailymotion.com. Not only does Content ID Technology help prevent copyright infringement, it also helps manage the massive amounts of copyrighted content that now flow over the Internet, thereby enabling both copyright owners and content distributors to track and monetize Internet video and empower new ecommerce opportunities and business models.

Contrary to the view of the District Court below about the “reliability and verifiability” of Audible Magic’s Content ID Technology, the marketplace adoption of this technology and its wide usage throughout the new Internet video ecosystem reveals the confidence that both content owners and web sites have in this technology and its important roles. *YouTube*, 718 F. Supp. 2d at 528.

ARGUMENT

I. Content Identification Technology Enables Copyright Owners And UGC Platforms To Accurately, Efficiently And Effectively Prevent Copyright Infringement

The District Court did not thoroughly or correctly analyze the role and importance of Content ID Technologies in its decision below. It merely excerpted from another case stating that Audible Magic’s Content ID Technology “does not meet the standard of reliability and verifiability required by the Ninth Circuit in order to justify terminating a user’s account.” *YouTube*, 718 F.Supp.2d at 528. *Amicus curiae* Audible Magic does not take a position on the District Court’s legal

conclusion, except to note that the District Court's conclusion that the technology is used for terminating repeat infringers under the DMCA is factually inaccurate and is based on an incorrect understanding of the purpose and implementation of the technology. Rather, this brief is submitted to more fully consider the correct and important function that Content ID Technology has come to play in the relationship between Internet video sites and content owners. In so doing, the Court will see that Content ID Technology is indeed highly accurate, robust and widely available and its broad acceptance reveals its reliability and verifiability in practice.

Amicus curiae Audible Magic is the leading provider of digital fingerprint-based Content ID Technology. Digital fingerprinting is the process of extracting a mathematical representation, or feature vector, of the content in an unknown media file, comparing this feature vector to millions of known reference fingerprints in a database, and returning an exact identification of the unknown media file. Its Content ID Technology is built around three essential elements: 1) its patented digital fingerprinting algorithm for audio and its proprietary video image fingerprinting software; 2) its extensive reference database of audio and video content; and 3) its methods and processes to integrate its fingerprinting system into many media distribution platforms.

In order to analyze the content of an unknown media file, Audible Magic's technology and software analyzes the data in the media file. In the case of an audio file or video soundtrack, the patented technology and software performs an analysis of audio data files based upon the content of the data files presented – independent of the format (*i.e.*, DVD, CD, MP3 .WAV, streaming video or other digital container). Like the audio fingerprint, the video-image fingerprint is independent of the format (*e.g.*, MPEG, MOV, H.264). The image stream of a video file is fingerprinted using a technology under license to Audible Magic from IBM.

In both the audio and video-image fingerprints the analysis produces a time sequenced set of numeric values (Feature Vectors) that can then be used to classify and rank the similarity between individual audio files or streams. The matching algorithms have been designed to be robust in the face of typical transformations (*e.g.*, digital compression rate, audio equalization, image re-sizing, image mirroring, etc). The matching process is highly accurate and it has been tuned to eliminate false positive matches for all practical purposes.⁶

⁶ As of 2006, “[t]he technology currently achieves above 99% correct identification rates; our false positive identification rate is better than 1 in 10,000. These rates are minimums as we have not performed tests that establish the upper bounds of our technical accuracy. Audible Magic’s goal, which we are continually working towards, is 100% correct identification.” (Decl. of V. Ikezoye at ¶ 21, Ex. 359 to Decl. of William M. Hohengarten in Support of Viacom’s Motion for Partial Summary Judgment (“Decl. of V. Ikezoye”).)

Once the digital fingerprint of the unknown media file has been extracted, it must be compared to a reference database containing fingerprints extracted from original copyrighted digital media sources. Audible Magic's Content ID Technology works so effectively because of the quality of this reference database.⁷ Over the years, Audible Magic has built its reference database using reliable sources of original media from the copyright owner or rights holder.⁸ For example, Audible Magic has created reference fingerprints from original music CDs provided by music labels and musicians and from original DVDs provided by motion picture studios and television networks.⁹ In addition, Audible Magic has created an automated system that enables content owners to embed Audible Magic's reference fingerprint generating software, "AMSigGen", inside their production environment. This enables the content owner to automate the process of fingerprint generation and submission as part of their normal video production

⁷ One of Audible Magic's key advantages is that "[e]very significant music distributor (and now film and video, too) sends its content to AM to be logged into the database. So AM's [reference] database is always up to date with millions and millions of files to compare." See Josh Bernoff, Forrester Research, Audible Magic copyright checking at YouTube -- what took so long? (Feb. 23, 2007), http://forrester.typepad.com/groundswell/2007/02/audible_magic_c.html (last visited Dec. 9, 2010).

⁸ In many cases, Audible Magic has written agreements in place with content owners requiring them to certify that they own the rights to the materials submitted for fingerprinting.

⁹ For a list of announced content partners, see Audible Magic Content Registration Customers, <http://audiblemagic.com/clients-partners/registration.asp> (last visited Dec. 9, 2010).

workflow. Along with the reference fingerprints, content owners submit the business rules¹⁰ and metadata¹¹ related to the fingerprint of each media file to be stored by Audible Magic in the reference database. Although Audible Magic does not charge a copyright owner to register their works, they still must put forth effort to process and submit their content, as well as continually update and maintain their submissions.

Audible Magic's Content ID Technology is deployed as a cloud-based software-as-a-service ("SaaS") solution. This enables the company to manage a centralized reference database and the necessary servers to enable the service to accommodate massive scale for the enormous volume of fingerprint "transactions" sent in by its website customers.¹² The CopySense® system includes a small software library or client that is easily integrated into a website's video production flow. Once integrated, the Audible Magic client enables the website to extract a

¹⁰ Business Rules, such as "block," "allow" ("or monetize"), or "Track," are the instructions the copyright owner provides to the site for the use of a particular piece of content. (Decl. of D. King in support of Defendants' Motion for Summary Judgment, ¶ 24.)

¹¹ Metadata refers to the information about a media file such as song title, artist, album, and label for a music file, and title, episode, movie studio, etc. for a video file.

¹² As far back as 2006, the Audible Magic Content ID Technology could "easily handle tens of millions of requests a day for identification against a reference database of millions of recordings," (Decl. of V. Ikezoye at ¶ 21) and this was before Audible Magic started processing the tens of millions of file identifications that it was doing for its Web 2.0 customers such as YouTube, MySpace, Dailymotion and Veoh. Indeed, in 2008 alone, Audible Magic processed about 1 billion identifications for its customers.

fingerprint from each video or music file uploaded by a user and submits it for identification. It is important to note that the system is not designed to make a legal or factual determination as to whether an uploaded file infringes a copyright. Rather, Audible Magic's Content ID Technology is an information service that returns data about whether an uploaded file contains copyrighted material. Nothing in Audible Magic's system automatically blocks the upload of a file containing copyrighted material. Instead, the system returns exceptionally accurate identification information about the content of the file and leaves to the website the decision about how to implement its content policies.

II. *The Internet Marketplace Has Evolved Rapidly Encouraging Copyright Owners And UGC Platforms To Use Content Id Technology Together To Prevent Copyright Infringement And Help Monetize Content On The Internet*

The District Court below noted that online service providers were protected by the DMCA's safe harbor provision of 17 U.S.C. §512(c) and had no duty to monitor under 17 U.S.C. §512(m) the massive amounts of content being uploaded to UGC YouTube. *YouTube*, 718 F.Supp.2d at 525. *Amicus curiae* Audible Magic takes no position with respect to the District Court's interpretation of the DMCA. However, the anarchic impacts of the explosive growth of UGC websites and the rampant piracy that user-generated content brought to the Internet are a matter of public record and common knowledge. Not surprisingly, this same phenomenon

brought great commercial opportunities¹³ and the market responded with its own rules, creating a new economic market to bring order to the chaos. Content ID Technologies were central to the creation of and operation of an efficient commercial market for Web 2.0 sites.¹⁴

Between the time that Audible Magic began offering its CopySense® Content ID Technology to websites in late 2006 and mid 2007, Audible Magic saw a change in the way its Web 2.0 customers were using its Content ID Technology. Initially, customers only ordered business rules services. This entry-level service enabled the site to know if a user upload was copyrighted or not. The CopySense® service returned a “block” rule if the file was indeed a copyrighted work registered in Audible Magic’s reference database and this allowed the site to prevent the publication of the unauthorized video. This business rules service did not give the site the name or title or other identifying information about the file.

¹³ See B. Stone and M. Helft, *New Weapon in Web War Over Piracy*, N.Y. TIMES, Feb. 19, 2007, at C1, available at <http://query.nytimes.com/gst/fullpage.html?res=9506E6D9153EF93AA25751C0A9619C8B63> (“To the extent you can readily and easily identify one film or TV show from the next, it enables different licensing models and the opportunity to protect your content,” said Dean Garfield, executive vice president of the Motion Picture Association of America.”).

¹⁴ *Id.* (“Some experts believe wide adoption of the [Content ID] technology is inevitable. ‘As technology companies [(web site)] mature, they are realizing that the rule of law is better than the anarchy in which they were formed,’ said Paul Kocher, chief executive of Cryptography Research, a company that has studied the security of digital fingerprinting technology.”).

By mid 2007, regardless of the DMCA’s limitations on website liability, this “compliance” mindset changed as Audible Magic’s customers predominantly wanted not only business rules services from Audible Magic but also valuable metadata services. With the business rule of “allow” for a particular copyrighted work returned to the website, the metadata provided information about the content itself that enabled the sites to effectively commercialize the content that they were licensed by content owners to upload and display. By having both the business rule and the content identifying information, sites are able to post approved videos with information about the content that would enhance the user experience. This information also enables sites to monetize these videos through advertising. Content ID Technology is essential to this monetization process because it permits sites to track the usage of specific works and facilitated the accounting and reporting of royalties and fees to copyright and content owners.

This market trend was “codified” in October 2007 in a set of voluntary guidelines created by several of the world’s leading Internet and media companies called the “Principles for User Generated Content Services.” (“UGC Principles”)¹⁵ The UGC Principles, “...even though they do not have the force of law behind

¹⁵ Principles for User Generated Content Services, <http://UGCprinciples.com> (last visited Dec. 9, 2010) (“UGC Principles”). Signatories to the UGC Principles included CBS Corp., Disney, Fox Entertainment Group, NBC Universal, Sony Pictures, Crackle.com, Dailymotion.com, Microsoft, MySpace.com, Sevenload.de and Veoh.com.

them, [] have served to create a different environment and a tangible example that technology platforms and content companies can work together to achieve a fair balance between their competing concerns.”¹⁶

The UGC Principles created “a set of collaborative principles to enable the continued growth and development of user-generated content online and respect the intellectual property rights of content owners.”¹⁷ Fundamental to the UGC principles was the parties’ recognition that the “development of new content identification and filtering technologies...will result in a more robust, content-rich online experience for all.”¹⁸ As a result, these content companies and Internet sites agreed that both groups should share the burden of monitoring UGC sites and policing against copyright infringement. The UGC sites “should use effective content Identification and filtering technologies (‘Identification Technology.’)...”¹⁹ In turn, the content owners had a duty to supply their content as “Reference Material” of their copyrighted works for Identification Technology

¹⁶ Alan N. Braverman and Terri Southwick, *The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned*, 32 COLUM. J.L. & ARTS 471 (2009).

¹⁷ Press Release, User Generated Content Principles, Internet and Media Industry Leaders Unveils Principles to Foster Online Innovation While Protecting Copyrights (Oct. 18, 2007), http://ugcprinciples.com/press_release.html (last visited Dec. 9, 2010).

¹⁸ UGC Principles, at preamble.

¹⁹ UGC Principles, at § 3.

services such as Audible Magic's, to keep their data current and to represent the accuracy of their ownership rights.²⁰

The creation of the UGC Principles by media companies and Internet sites reflects that Audible Magic's Content ID Technology is sufficiently accurate, reliable and highly scalable to support today's online video marketplace.

CONCLUSION

Amicus curiae Audible Magic does not advocate for a decision from this Court in favor of any party in this case. Rather, it files this brief to inform the Court: 1) of the proper purpose and use of Content ID Technology, a view the district court clearly misunderstood; and 2) that use of Audible Magic's Content ID Technology in the market is robust, scalable and accurate. Content ID Technology is easily integrated with the video workflow of a Web 2.0 video streaming site. Content ID Technology helps to prevent copyright infringement by helping sites automatically screen and filter massive amounts of video clips uploaded each day. Audible Magic's Content ID Technology has also provided a standardized platform for content owners and service providers to use to enable monetization of copyrighted content on UGC sites. The ability for Content ID Technology to scale with the massive amounts of content uploaded each day and to accurately identify copyright content has actually enabled new business models and innovation by

²⁰ See UGC Principles, at § 3(a)-(c), (e) and (g).

service providers. The DMCA was intended in part to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”²¹ The use of Audible Magic’s Content ID Technology by sites is consistent with this legislative objective and indeed has helped promote the growth, variety and quality of video content available on the Internet. Contrary to the District Court’s view below, Content ID Technology is indeed very reliable for its intended purpose and has been widely accepted in the marketplace.

Respectfully submitted,

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²¹ S. REP. NO. 105-190, at 19 (1998).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it was prepared in a proportionally spaced typeface, Times New Roman 14-point font, and according to the word count of the word processing system used to prepare this brief, Microsoft Word 2007, it contains no more than 4,224 words, excluding the items permitted to be excluded by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

s/ Jeremy H. Stern