

No. 11-3190

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

FLAVA WORKS, INC.,

Plaintiff-Appellee,

v.

**MARQUES RONDALE GUNTER d/b/a
myVIDSTER.com. and SalsaIndy, LLC,**

Defendants-Appellants.

**Appeal From The United States District Court For
The Northern District of Illinois, Eastern Division
Case No. 1:10-cv-06517**

The Honorable Judge John F. Grady

**BRIEF AND SHORT APPENDIX OF
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STATEMENT OF JURISDICTION

This appeal is taken from the grant of a preliminary injunction by the U.S. District Court for the Northern District of Illinois, Eastern Division, entered on September 1, 2011, by the Honorable John F. Grady. The Notice of Appeal was timely filed with the district court on September 26, 2011. Flava Works, Inc., asserts claims for copyright infringement pursuant to 17 U.S.C. §§ 501 *et seq.* and trademark infringement pursuant to 15 U.S.C. §§ 1114 and/or 1125. Accordingly, the district court has jurisdiction over this case as a civil action arising under the laws of the United States pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to decide this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Whether the lower court erred in concluding that Flava Works has shown a likelihood of success on the merits of its contributory copyright infringement claim by holding that myVidster users who create links on the myVidster website to videos residing on third-party websites are direct infringers, and that myVidster's "repeat infringer policy" under the Digital Millennium Copyright Act is unreasonable.

II. Whether the lower court erred in presuming, without requiring any factual evidence, that Flava Works is being irreparably harmed as a result of myVidster's alleged contributory infringement of Flava Works' copyrighted content.

III. Whether the lower court erred in entering a preliminary injunction that displaces the status quo, is improperly vague and overly-broad, and constitutes an unconstitutional prior restraint of speech.

STATEMENT OF THE CASE

Flava Works filed its Complaint on October 12, 2010. The Complaint, as amended, includes, *inter alia*, claims of contributory and vicarious copyright infringement against Marques Gunter d/b/a myVidster.com and SalsaIndy, LLC (the “myVidster Defendants”) and others.

On March 12, 2011, Flava Works filed a Motion for Preliminary Injunction. The Motion was directed solely to the myVidster Defendants and, as properly interpreted by the lower court, was based solely on Flava Works’ claims of contributory and vicarious copyright infringement. At the presentment hearing on March 16, 2011, the lower court eschewed briefing and instead scheduled an evidentiary hearing. The evidentiary hearing occurred on May 18, 2011 and June 9, 2011.

The lower court issued an opinion on July 27, 2011 granting Flava Works’ Motion for Preliminary Injunction. The myVidster Defendants promptly filed a Motion to Reconsider on August 15, 2011, which was denied in a second written opinion on September 1, 2011 and followed by the lower court’s entry of the Preliminary Injunction on the same day.

The myVidster Defendants then filed a motion to stay the injunction pending appeal, which was granted on September 21, 2011.

The myVidster Defendants timely filed their Notice of Appeal on September 26, 2011.

STATEMENT OF FACTS

Marques Gunter is the sole owner and proprietor of SalsaIndy, LLC, a Latin dance company. (SA65:18 – 67:14). SalsaIndy, LLC is the owner of the myVidster.com website, which is operated solely by Mr. Gunter. (SA65:18 – 67:14).¹ For the sake of simplicity,

¹ Citations to the record on appeal will be in the form of (SA[Page]) or (SA[Page]:[Line]) with “SA” referring to the Separate Appendix of Defendants-Appellants filed herewith.

SalsaIndy, LLC and the myVidster.com website will hereinafter be referred to collectively as “myVidster.”

myVidster’s Creation

The myVidster.com website is a by-product of Mr. Gunter’s efforts to market and promote his Latin dance studio, SalsaIndy, LLC. In addition to being a Latin dance instructor, Mr. Gunter is a computer programmer and website developer with ten years of experience working with an array of programming languages and websites. (SA64:15 – 65:25). Approximately three years ago, Mr. Gunter designed and developed what would eventually become the myVidster.com website as a way to facilitate sharing videos of Latin dance with the community in and around Indianapolis. (SA66:8 – 67:14). After some initial success, Mr. Gunter expanded the functionality to encompass all types of videos available on the Internet and adopted the domain name myVidster.com. (SA67:2 – 14).

myVidster’s Linking Functionality

myVidster is a “social bookmarking site” for videos. (SA67:23 – 68:23). This means that users of myVidster can create links, called “bookmarks,” to their favorite videos around the Internet on a profile page located at myVidster. (SA67:23 – 68:23). Users create a link to a video on their myVidster profile by submitting the URL of the video to myVidster. (SA71:24 – 72:11). myVidster’s computers then use the URL to obtain from the third-party website hosting the video an embed code as well as certain ancillary information about the video, including its title, any associated keywords, and a thumbnail (*i.e.*, a reduced size, single frame from the video). (SA71:24 – 72:11). All of this ancillary information is used by myVidster to create a myVidster webpage about the video that can be associated with the user’s profile. (SA94).

The embed code is a type of link that myVidster incorporates into the webpage. When a viewer activates the embed code by clicking on the video thumbnail, it directs the viewer's browser to the third-party website hosting the video so that the third-party website can show the video to the viewer. (SA76:18 – 21). An embed code is a special type of link, however, because when the video is displayed by the third-party website, it is framed by the myVidster webpage for that video. (SA76:18 – 77:1, SA94). Thus, to the viewer it may appear that the video is being shown by myVidster. (SA94). However, the video is never actually copied to, or delivered from, myVidster's servers – it remains at, and is delivered from, the third-party website and server where it resided when the myVidster user found it.² (SA72:12 – 15, SA76:18 – 77:15).

myVidster's DMCA Policy

myVidster has developed and implemented a policy to comply with the safe harbor provisions of the Digital Millennium Copyright Act (“DMCA”) 17 U.S.C. § 512. (SA97 – 98). Pursuant to this policy, myVidster enables rights owners, such as Flava Works, to submit notices identifying links to infringing content. (SA98). Once a notice is received, myVidster expeditiously removes the offending links unless a counter-notice is received. (SA81:16 – 20; SA98). Furthermore, myVidster has a policy to terminate access to account holders who are determined to be repeat infringers. (SA98 (“[m]yVidster will terminate access for subscribers and account holders who are repeat infringers.”)). myVidster does not pre-screen or otherwise review the content posted to myVidster by its users. (SA78:20 – 79:6). myVidster does not

² myVidster previously offered a video backup functionality whereby for a subscription fee, users could create backup copies of videos and store those copies on myVidster's servers. However, prior to the entry of the Preliminary Injunction, myVidster voluntarily suspended this functionality such that no additional videos are being copied to myVidster servers.

generate revenue from any specific content posted to myVidster or any category thereof. (SA70:19 – 71:23, SA92:22 – 93:11).

myVidster's Interactions With Flava Works

Beginning in approximately March 2010, myVidster began receiving DMCA takedown notices from Flava Works. (SA81:9 – 15). These notices identified links to content that Flava Works believed to be infringing. (SA150 – 156). Each time myVidster received a notice from Flava Works, it expeditiously removed all links identified therein. (SA81:16 – 20, SA83:24 – 85:13; SA100 – 149). Some of Flava Works' notices also requested that the myVidster users who had created the links identified in the notice be removed from myVidster as repeat infringers. (SA150 – 156). However, it is undisputed that there are both authorized and unauthorized versions of Plaintiff's copyrighted videos widely available on the Internet. (SA59:20 – 60:5). As a result, myVidster did not remove these users because it could not determine, from the information contained in the Flava Works notices or otherwise, whether the users were knowingly linking to infringing content. (SA87:6 – 89:5).

Unsatisfied, Flava Works filed the instant lawsuit in October 2010 accusing myVidster of, *inter alia*, contributory copyright infringement. Five months later, in March 2011, Flava Works moved the lower court for a preliminary injunction. Although Flava Works claims it has suffered and will continue to suffer irreparable harm as a result of myVidster, the only harm it has been able to articulate is a purported loss of revenue. (SA58:17 – 18). After a two day evidentiary hearing, the lower court issued an opinion on July 27, 2011 granting Flava Works' Motion for Preliminary Injunction. The lower court entered the Preliminary Injunction on September 1, 2011 after denying myVidster's subsequent Motion to Reconsider, but agreed to

stay the injunction pending this appeal. myVidster filed its Notice of Appeal on September 26, 2011.

SUMMARY OF ARGUMENT

The lower court erred in concluding that Flava Works has shown a likelihood of success in establishing that myVidster is liable for contributory copyright infringement. A claim of contributory copyright infringement requires, as a predicate, an underlying act of copyright infringement by a third party. The lower court erred in concluding that Flava Works demonstrated a likelihood of establishing such underlying copyright infringement on the part of myVidster users who create links on myVidster to videos residing on third-party websites.

Specifically, the error stemmed from a single legal premise – that these myVidster users who merely create links to third-party videos can be deemed direct infringers, rather than as, at most, contributory infringers. This is contrary to the plain language of the Copyright Act, which requires that a direct infringer “transmit or otherwise communicate” a display of a copyrighted work – something that the process of creating a link simply does not do. This issue was squarely addressed by the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160-61 (9th Cir. 2007), and this Court should adopt its reasoning because it is in accord with the plain language of the Copyright Act.

Once it is understood that the myVidster users who merely create links cannot be direct infringers as a matter of law, and can, at most, be contributory infringers, it becomes clear that Flava Works has failed to demonstrate a likelihood of success. Flava Works presented no evidence whatsoever that these users have the requisite knowledge to be contributory infringers. Thus, Flava Works has not demonstrated underlying copyright infringement on the part of myVidster users to which myVidster can be deemed to have contributed. Accordingly, Flava

Works failed to demonstrate a likelihood of success on this predicate element of its case. This alone requires that the lower court's decision be reversed and the Preliminary Injunction vacated.

While the Court need not even reach this issue, the same erroneous legal premise infected the lower court's analysis of myVidster's defenses under the Digital Millennium Copyright Act. Once it is understood that myVidster's users can, at most, be contributory infringers, it becomes apparent that myVidster's "repeat infringer policy" under the DMCA is reasonable. Thus, the lower court also erred in denying myVidster DMCA safe harbor protection.

The lower court further erred by merely presuming, without requiring any showing whatsoever, that Flava Works was being irreparably harmed. This is in direct conflict with both Supreme Court precedent and the law of numerous other circuits.

Finally, the lower court erred by entering an injunction whose language destroys (rather than preserves) the status quo, is overly broad and unduly vague, and constitutes an unconstitutional prior restraint of speech.

For each of these independent reasons, the lower court should be reversed and the Preliminary Injunction vacated.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing the grant of a preliminary injunction, this Court reviews the lower court's "findings of fact for clear error, its balancing of factors for an abuse of discretion, and its legal conclusions *de novo*." *American Soc'y of Plumbing Eng'rs v. TMB Publ'g, Inc.*, 109 Fed. App'x. 781, 784 (7th Cir. 2004) (internal citations omitted).

In order to obtain a preliminary injunction, the moving party has the burden of demonstrating two threshold elements: (1) some likelihood of succeeding on the merits; and (2) that it has no adequate remedy at law and will suffer irreparable harm if the injunction is not

granted. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). The lower court erred with respect to both of these elements.

II. THE LOWER COURT ERRED IN CONCLUDING FLAVA WORKS HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

The lower court erred in concluding that Flava Works has shown a likelihood of success in establishing that myVidster has committed contributory copyright infringement.³ As the lower court correctly acknowledged, to establish contributory copyright infringement, a plaintiff must demonstrate that: (1) a third party directly infringed its work; (2) the defendant knew of the infringement; and (3) the defendant materially contributed to the infringement. *Monotype Imaging, Inc. v. Bitstream, Inc.*, 376 F. Supp. 2d 877, 883 (N.D. Ill. 2005).

The lower court's error began with the very first element – direct infringement by a third party. With respect to this element, the lower court focused on myVidster users who create links on the myVidster website to videos residing on third-party websites. (SA20, SA46). The lower court quickly found that these “myVidster users have caused Flava’s works to be displayed on myVidster without Flava’s permission” and thus “it cannot be seriously disputed that third parties have directly infringed Flava’s works.” (SA30 – 31).⁴ Accordingly, the lower court

³ The Court’s analysis for purposes of this appeal can be confined to Flava Works’ contributory copyright infringement claim. The lower court did not address Flava Works’ vicarious infringement claim. (SA30 n.8). In any event, Flava Works presented no evidence that myVidster has a right and ability to control its users or that it receives a direct financial benefit from infringing materials in order to establish a likelihood of success on a claim of vicarious copyright infringement. *See QSRSoft, Inc. v. Restaurant Tech., Inc.*, No. 06-C-2734, 2006 WL 3196928, at *4 (N.D. Ill. Nov. 2, 2006) (citing *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003)). Indeed, the record is solely to the contrary. (SA78:20 – 79:6, SA70:19 – 71:23, SA92:22 – 93:11).

⁴ The lower court also referenced myVidster’s video backup service, which was suspended prior to the entry of the Preliminary Injunction. *See* discussion *supra* n. 1. While myVidster’s past conduct with respect to the service may still be at issue in this case, this preliminary injunction analysis is focused on future conduct during the pendency of the litigation. *See Chicago Blackhawks Hockey Team v. Madsen*, No. 90-C-5833, 1991 U.S. Dist. LEXIS 1720 (N.D. Ill. Feb. 7, 1991) (citing *Jordan v. Wolke*, 593 F. 2d 772, 774 (7th Cir. 1978) (purpose of a preliminary injunction is to maintain the status quo pending the resolution of the merits on a case)). Given that myVidster has voluntarily

based its analysis on the assertion that myVidster's users directly infringe Flava Works' copyrights by creating links to Flava Works' videos. (SA50 – 51).

The lower court's underlying premise, however – that creating a link to a video residing on a third-party website can constitute direct copyright infringement – is contrary to the plain language of the Copyright Act. myVidster users who create links to Flava Works' content cannot be direct infringers as a matter of law because the act of creating a link to a video does not “transmit or otherwise communicate” a display of that video as required by the Copyright Act. At most, they can be contributory infringers, but only if it is established that they have the requisite knowledge of direct infringement with respect to the underlying work to which they are linking. This is precisely the standard applied by the Ninth Circuit in *Perfect 10*, 508 F.3d at 1160-61, and, as set forth below, that standard should be adopted by this Court.

The lower court's erroneous application of a direct infringement analysis to the creation of links infected the entirety of its analysis. Once it is understood that creating a link to third-party content cannot constitute direct infringement, it becomes clear that Flava Works has no likelihood of succeeding on its contributory infringement claim against myVidster. In addition to the fact that myVidster users cannot be direct infringers as a matter of law, there was no evidence presented that such users had the requisite knowledge even to be deemed contributory infringers. Thus, Flava Works identified no infringement by myVidster users to which myVidster could have contributed.

The lower court's error also led to the improper conclusion that myVidster's DMCA “repeat infringer policy” is unreasonable. It is axiomatic that if there is no evidence of contributory infringement by myVidster users, there is no evidence of “repeat” contributory

agreed to disable all such video back up services for at least the duration of this case, only myVidster's linking functionality remains at issue for purposes of this appeal concerning the Preliminary Injunction.

infringement by myVidster users. Indeed, Flava Works did not identify a single myVidster user who should have been, but was not, terminated by myVidster for repeat infringement. By incorrectly applying a direct infringement standard to myVidster users, the lower court fundamentally misunderstood myVidster’s repeat infringer policy, which itself is aligned with the prevailing *Perfect 10* legal standard. In doing so, the lower court erroneously concluded that myVidster was not entitled to the protections afforded by one or more of the DMCA safe harbors set forth in 17 U.S.C. §§ 512(c)-(d).

A. myVidster Users Who Create Links To Videos Residing on Third-Party Websites Cannot Be Direct Infringers As A Matter Of Law

Because copyright law is, first and foremost, a creature of statute, *see Sony Corp. v. Universal City Studios*, 464 U.S. 417, 431 (1984) (“[T]he protection given to copyrights is wholly statutory.”), any infringement analysis must begin with the statutory language. “[T]he statute is cast in terms of *activities* which are reserved to the copyright owner. 17 U.S.C. § 106. It follows that an infringer must *actually engage in* one of those activities in order to directly violate the statute.” *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512 (N.D. Ohio 1997) (emphasis in original). Specifically, the activities reserved to the copyright owner are the right to reproduce the work, to prepare derivative works, to distribute copies of the work, to publicly perform the work and to publicly display the work. *See* 17 U.S.C. § 106. The lower court held that myVidster users that created links violated the public display right: “myVidster users have caused Flava’s works to be displayed on myVidster.” (SA31).⁵

⁵ The lower court also briefly mentions that the works have been “copied and distributed” by myVidster users. That appears to be a reference to the “back up” functionality of myVidster that has been discontinued and thus no longer at issue for purposes of this analysis. To the extent, however, it is meant to apply to the creation of links by myVidster users, the analysis is the same as for the display right. *See Perfect 10*, 508 F.3d at 1162 (“distribution requires an ‘actual dissemination’ of a copy. . . . Because Google did not communicate the full-size images to the user’s computer, Google did not distribute these images. . . . Google’s search engine communicates HTML instructions that tell

According to the Copyright Act, to “display” a work is “to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process.” 17 U.S.C. § 101. A copyright owner, however, is not entitled to control all displays, but rather is granted only exclusive rights “to display the copyrighted work publicly.” 17 U.S.C. § 106(5). “Publicly” is defined to mean:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or separate places and at the same time or at different times.

17 U.S.C. § 101 (emphasis added). Courts have referred to the two parts of the definition as “the public place clause” and “the transmit clause.” See *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 280-81 (9th Cir. 1989). Because there is no allegation or evidence in the record that myVidster or its users are displaying myVidster videos in public places, only the “transmit clause” could potentially be implicated in this case.

As set forth below, the act of creating a link to a work hosted by a third party does not “transmit or otherwise communicate” that work as a matter of law. *Perfect 10*, 508 F.3d at 1160-61 n. 7. As further discussed below, this Court should adopt and follow the Ninth Circuit’s *Perfect 10* reasoning because it is consistent with the plain language of and policy behind the Copyright Act.

a user’s browser where to find full-size images on a website publisher’s computer, but Google does not itself distribute copies of the infringing photographs.” (internal citations omitted)). Flava Works has failed to demonstrate a likelihood of success under a “copied and distributed” theory for precisely the same reasons as it has failed to demonstrate a likelihood of success under a “display right” theory. See discussion *infra* pp. 11-17.

1. The Ninth Circuit’s *Perfect 10* Decision Is Directly Applicable To This Case.

In *Perfect 10*, the plaintiff sued Google for copyright infringement based on the fact that Google created and hosted “in-line links” to unauthorized copies of plaintiff’s copyrighted images. *Id.* at 1154. Acknowledging that the case presented novel questions, the Ninth Circuit began by performing a detailed examination of the linking technology at issue. The court recognized that while the images were hosted on third-party websites, the user viewed the videos as if they were on the Google website:

When a user clicks on the thumbnail image returned by Google’s search engine, the user’s browser accesses the third-party webpage and in-line links to the full-sized infringing image stored on the website publisher’s computer. This image appears, in its original context, on the lower portion of the window on the user’s computer screen framed by information from Google’s webpage.

Id. at 1157. The court concluded that while Google provided “instructions” directing the user’s browser to obtain the images from the host computer and ultimately “frame[d]” the images within information provided by Google, Google did not “store the images” or “communicate the images to the user”:

The HTML instructions also give the user’s browser the address of the website publisher’s computer that stores the full-size version of the thumbnail. By following the HTML instructions to access the third-party webpage, the user’s browser connects to the website publisher’s computer, downloads the full-size image, and makes the image appear at the bottom of the window on the user’s screen. Google does not store the images that fill this lower part of the window and does not communicate the images to the user; Google simply provides HTML instructions directing a user’s browser to access a third-party website.

Id. at 1155-56.

Having carefully examined the technology, the Ninth Circuit affirmed the district court’s denial of a preliminary injunction on the grounds that plaintiff was unlikely to succeed in establishing that linking to third-party materials in this way could constitute direct copyright infringement. *Id.* at 1159-60 (internal citations omitted). Specifically, the court held that the

linking functionality never caused Google to store a copy of the infringing material for purposes of the Copyright Act:

Google does not, however, display a copy of full-size infringing photographic images for purposes of the Copyright Act when Google frames in-line linked images that appear on a user's computer screen. Because Google's computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act. In other words, Google does not have any "material objects . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated" and thus cannot communicate a copy. 17 U.S.C. § 101.

Id. at 1160-61. The court further held that providing HTML instructions to a user's computer to obtain a copy is not equivalent to displaying a copy for purposes of the Copyright Act:

Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen.

Id. at 1161. Both the Ninth Circuit and the district court coined the term "Server Test" to summarize the reasoning above: only a server or computer that actually has an infringing copy of a work stored on it can be a direct infringer of the copyright holder's display right. *Id.* at 1159-60. Applying the "Server Test," the Ninth Circuit held that Google's acts of creating and hosting in-line links to third-party materials could not constitute direct infringement as a matter of law. *See id.* at 1159-61. Those acts could, at most, "raise[] only contributory liability issues." *See id.* at 1161.

The present case requires application of copyright law to essentially the same technology that the Ninth Circuit addressed in *Perfect 10*. According to the "Server Test," the critical factual inquiry is the location of the infringing image. *Id.* at 1159-60. Just as in *Perfect 10*, the

lower court in this case correctly acknowledged that the links at issue in this appeal are to videos “hosted on third-party websites.” (SA20). Because the Flava Works videos in question are stored at, and served from, third-party servers, merely creating a link to those videos cannot constitute direct infringement under the “Server Test.” *See Perfect 10*, 508 F.3d at 1159-61.

In addition to the fact that videos linked-to on myVidster are hosted on third-party servers, the record establishes that the manner in which the videos are linked and displayed is the same as Google’s inline linking technology described in *Perfect 10*. What myVidster calls “bookmarks” are merely links of the type addressed in *Perfect 10*. (SA68:17 – 69:4 (“[A] bookmark is a link. A link is a pointer to a webpage or a file ... on a website.”)). They are HTML instructions that direct a viewer’s browser to access a particular file at a particular location. (SA68:17 – 69:4, SA76:4 – 77:1). In the case of myVidster, they direct the viewer’s browser to obtain a video from a third-party server. (SA68:17 – 69:4, SA76:4 – 77:1 (“...so basically those bookmarks are links, in myVidster’s case, pointing to other websites around the web.”)). These links are sometimes referred to as “embeds” because the video will be shown to the viewer as if it is part of the myVidster site, even though the video is hosted and displayed by the third-party server. (SA76:4 – 77:1 (“Embed is the link to the video. Basically it’s a way for you to display a video that is not hosted on your website.... It is ... a link to a video from another website that is playable.”)). This is the same thing that the *Perfect 10* court described as “framing.” *See Perfect 10*, 508 F.3d at 1156.

Despite these clear parallels, the lower court declined to apply *Perfect 10*, saying that it is “highly fact-specific and distinguishable.”⁶ (SA50). The court, however, only identified a single

⁶ The lower court suggested that the record was unclear on exactly how the technology behind myVidster works. (SA50 n.4). myVidster respectfully disagrees. However, to the extent the lower court resolved any doubt or lack of understanding against myVidster, it has erroneously shifted the burden of proof from Flava Works to myVidster. As the movant seeking a preliminary injunction,

factual distinction – that whereas Google runs software that automatically identifies and creates links to third-party websites, myVidster users identify and create links to third-party websites through volitional conduct. (SA50). But the lower court provided no explanation as to how this factual distinction could possibly make any difference under the reasoning of *Perfect 10*. As an initial matter, whether a link was created automatically by software or volitionally by a person can have no impact on the “Server Test,” which focuses on the location of the underlying work in question. *See Perfect 10*, 508 F.3d at 1159-61.

Moreover, in determining whether the creation of a link could constitute direct infringement, the *Perfect 10* court focused on whether a link “transmits or otherwise communicates” a display of the work in question, as required by the Copyright Act. *Id.* at 1161, n. 7. Whether a link is created automatically by software or volitionally by a person has no impact whatsoever on how the link functions, including whether it “transmits or otherwise communicates” a display of the underlying work. In either case, a link is a series of HTML instructions that merely direct the viewer’s browser to the third-party computer so that the third-party computer can “transmit or otherwise communicate” the work to the viewer’s browser. *See id.* (Google’s activities did not meet definition of “display a work ‘publicly’” because “Google transmits or communicates only an address which directs a user’s browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself.”). Thus, the lower court’s focus on whether the link was created by software or a person fails to distinguish *Perfect 10* in any meaningful way.

Flava Works had the burden to show that myVidster operates in such a way that it has a likelihood of success. *Choiceparts, LLC v. General Motors Corp.*, 203 F. Supp. 2d 905, 907 (N.D. Ill. 2002); *Boucher v. School Bd. Of the School Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998) (preliminary injunction should not be granted unless movant, by a clear showing, carries the burden of persuasion). This necessarily required proving underlying infringement by myVidster’s users as well as the other elements of its contributory copyright infringement claim.

The lower court went on to state that it simply disagrees with *Perfect 10* to the extent it stands for the proposition “that inline linking can never cause a display of images or videos that would give rise to a claim of direct copyright infringement....” (SA50). In doing so, the lower court also appears to have rejected the “Server Test,” stating that “[i]n our view, a website’s servers need not actually store a copy of a work in order to ‘display’ it.” (SA50). Once again, the lower court provides virtually nothing in the way of authority, reasoning or analysis to support these conclusions. Rather, the lower court seems to premise its view on the simple fact that “the display of a video on myVidster can be initiated by going to a myVidster URL and clicking ‘play’....” (SA51). Notably missing, however, is any suggestion that the display was actually “transmitted or otherwise communicated” by the process of the myVidster user creating the link. This highlights a logical gap in the court’s conclusions on this issue: the fact that a display ultimately follows after link is “clicked” does not establish that the link itself or the creation thereof “transmits or otherwise communicates” the display as required for direct infringement under the Copyright Act. As the *Perfect 10* court reasoned, the link does not transmit the display, the third-party server does. 508 F.3d at 1160-61, n. 7. At most, a link can be used to facilitate the transmission of the display by the third-party host (and, thus, the linking party can, at most, be a contributory infringer, but only where he has the requisite knowledge). *Id.* at 1161. In short, the lower court failed even to analyze whether the links in question “transmit or otherwise communicate” the display of the work in question, much less refute that of the Ninth Circuit’s analysis of this issue.

2. This Court Should Adopt The *Perfect 10* Standard And The “Server Test”

This Court should adopt the Ninth Circuit’s legal standard that creating a link to a video residing on a third-party website cannot constitute direct copyright infringement as a matter of

law and can, at most, constitute contributory copyright infringement. As set forth above, this standard is based on sound technical and legal analysis and grounded in the fact that the Copyright Act requires an actual “transmission or other communication” by the accused party in order to justify a finding of direct infringement. *See id.*, 508 F.3d at 1159-61. Moreover, neither Flava Works nor the lower court have offered a reasonable alternative that is grounded in terms of the Copyright Act.

This Court should also adopt *Perfect 10's* “Server Test,” which provides that only a server or computer that actually has an infringing copy of a work stored on it can be a direct infringer of the copyright holder’s display right. This test is consistent with both the language of the Copyright Act and this Court’s previous copyright decisions in the online context. *See In re Aimster*, 334 F.3d at 646-47 (implicitly adopting the “Server Test” by holding that because copies of the music files at issue resided on users’ computers and not Aimster’s server, Aimster could not be a direct infringer, and at most could be liable for contributory infringement).

Moreover, the imposition of direct infringement liability on myVidster users for creating links to videos would yield harsh results and threaten the activities of millions of Internet users. By ignoring the requirement that direct liability can only be imposed only on those that actually “transmit or otherwise communicate” a display of the work, and imposing direct liability on those that – at most – facilitate others in such transmission or communication, the lower court erased the line between direct and contributory infringement. In doing so, the lower court radically expanded the universe of parties subject to strict liability for copyright infringement.

For example, under the direct infringement theory adopted by the lower court, anyone surfing the Internet who finds a piece of content they like and sends a friend an email containing a link to that content would be strictly liable for copyright infringement if the content turns out to

be infringing. This is a harsh result because people who surf the Internet watching and linking to videos or other content typically do not even know where or by whom the videos are hosted, much less whether or not a given copy is authorized by the copyright owner. Indeed, the Internet is rife with copies of movies, television shows, and other video files – many of which are authorized, and many of which are not. It is nearly impossible for the average Internet user to know the difference because they are not privy to the agreements and relationships between the host and the copyright holder. Therefore, imposing strict liability on these millions of people for simply sharing information with one another by linking, one of the fundamental and basic functions of the Internet, would be abjectly unreasonable and at odds with established principles of copyright jurisprudence. *See Playboy*, 982 F. Supp. at 513 (“There would be no reason to bifurcate copyright liability into the separate categories of direct and contributory if any remote causal connection to copyright infringement could be analyzed under theories of direct infringement.”).

Further, the lower court’s view of direct infringement would also inflict “a tremendous chilling effect on this core functionality of the web – its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable.” *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 840 (C.D. Cal. 2006), *rev’d in part on other grounds*, 508 F.3d 1146 (9th Cir. 2007). No principled distinction separates myVidster’s links to Flava Works’ videos from the millions of links transmitted by web publishers, libraries, bloggers, and regular Internet users every day. A rule that threatens strict liability for any video displayed as a result of the transmission of a URL (whether expressed as a link, in-line link, embed, or frame) would radically change linking practices, and thereby harm the functionality of the Internet as we know

it. Accordingly, this Court should avoid these potential pitfalls by following the reasoning of *Perfect 10* and adopting the “Server Test” as the law of this Circuit.

B. Not Only Are myVidster Users Not Direct Infringers, No Evidence Was Presented That They Are Contributory Infringers

Because the lower court erroneously viewed myVidster’s users under a direct infringement (*i.e.*, strict liability) analysis, the court simply assumed that if the underlying works were unauthorized, the users who created links to those works were infringing. However, under the proper standard, it must be determined whether myVidster users had, in each case of linking, the requisite knowledge to be deemed contributory infringers.

Flava Works offered no evidence whatsoever that any myVidster user knew that a specific source video he was linking to was infringing. There is no evidence that Flava Works ever put a myVidster user on notice that a given source video was infringing. And there is no evidence that any myVidster user continued to link to a given source video after having been put on notice that it was infringing.

Moreover, it cannot merely be “assumed,” as the lower court did, that myVidster users had the requisite knowledge that the underlying works were unauthorized. As outlined above, people who surf the Internet watching and linking to videos typically do not even know where or by whom the videos are hosted, much less whether or not a given copy is authorized by the copyright owner. *See* discussion *supra* p. 17. Flava Works’ videos are no different. Flava Works has conceded that there are both authorized and unauthorized versions of Flava Works’ copyrighted videos widely available on the Internet. (SA59:20 – 60:5). Thus, it cannot merely be assumed that a given myVidster user knows that a specific source video he links to is unauthorized.

As discussed above, the first element of Flava Works' contributory infringement claim against myVidster is to establish infringement by myVidster's users. *See* discussion *supra* p. 9. However, as demonstrated, myVidster users cannot be direct infringers as a matter of law and Flava Works has presented no evidence that they could even be deemed contributory infringers. *See* discussion *supra* pp. 10-19. As a result, Flava Works has failed to make any showing on this essential element of its case and thus has failed to demonstrate a likelihood of success of establishing contributory infringement by myVidster. This alone is dispositive of this appeal and, by itself, requires that the lower court's decision be reversed.⁷

C. myVidster's Repeat Infringer Policy Is More Than Reasonable Given That myVidster Users Can, At Most, Be Contributory Infringers

As set forth above, Flava Works has failed to demonstrate any likelihood of success in establishing contributory infringement on the part of myVidster. However, with the backdrop that myVidster users can, at most, be contributory infringers, it becomes clear that myVidster is also protected by certain safe harbors afforded by Section 512 of the DMCA. The lower court denied myVidster safe harbor protection for failing to adopt and reasonably implement a repeat infringer policy. (SA37 – 38). Indeed, the lower court asserted that myVidster's repeat infringer

⁷ While the Court need not go further, it is worth noting that in addition to establishing infringement by myVidster users, Flava Works would also have to establish that myVidster had the requisite knowledge that its users were infringing in order for myVidster to be deemed a contributory infringer. *See Monotype*, 376 F. Supp. 2d at 883 (defendant must have knowledge of the infringement). Thus, in the context of a claim that myVidster is contributing to the contributory infringement by its users, Flava Works would have to establish myVidster knew that a given user knew that a specific source video the user was linking to was infringing. Flava Works came nowhere near making such a showing.

Moreover, the lower court's reliance on the concept of "willful blindness" as articulated in *In re Aimster* to impute constructive knowledge to myVidster is misplaced for two reasons. First, as outlined above, there was no evidence that any given myVidster user had the requisite knowledge to be a contributory infringer. Thus, Flava Works identified nothing actionable on the part of myVidster users with respect to which myVidster could be "willfully blind." Second, the facts in *Aimster* that led to the court's finding of "willful blindness" are nowhere to be found in the present case. Among other things, *Aimster* was a downloading case – not a linking case – and thus *Aimster* users could be analyzed as direct infringers rather than contributory infringers. *Aimster*, 334 F.3d 643.

policy relies on a definition of “infringer” that “does not encompass the law of copyright.” (SA37). This is incorrect. Instead, myVidster’s repeat infringer policy is perfectly aligned with the prevailing *Perfect 10* legal standard, which the lower court merely chose not to follow. In fact, when viewed in light of the legal standard provided by *Perfect 10*, it becomes clear that myVidster’s repeat infringer policy is more than reasonable, and the lower court erred in denying safe harbor protection based on that policy.

Under the DMCA, a “repeat infringer” is someone who has been legally proven an infringer. 3-12B Nimmer on Copyright § 12B.10[B][3][b] (“When Congress wished to refer to individuals who were proven infringers, it knew how to do so. It routinely prefaced references to others as ‘alleged infringers’ or ‘claimed infringers.’ In the current context, by contrast, Congress used the term ‘repeat infringers’ without any such qualification. The meaning unmistakably denoted is those against whom infringement has been established, not against whom it is merely alleged.”) As set forth above, a myVidster user can only be an infringer if it knows that a specific source video it is linking to is infringing. Flava Works has offered no evidence that any myVidster user has had the requisite knowledge with respect to any specific video, much less that they have done so a sufficient number of times to be deemed a repeat infringer. As discussed above, there is no evidence that Flava Works ever put a myVidster user on notice that a given source video is infringing, and the DMCA notices sent by Flava Works to myVidster do nothing to establish the requisite knowledge of infringement on the part of the myVidster user. Having identified no myVidster users who are infringers, much less repeat infringers, Flava Works cannot possibly have demonstrated that myVidster has failed to reasonably implement a repeat infringer policy. *See Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1104 (W.D.Wa. 2004) (“Because it does not have an affirmative duty to police its

users, failure to properly implement an infringement policy requires a showing of instances where a service provider fails to terminate a user even though it has sufficient evidence to create actual knowledge of that user's blatant, repeat infringement of a willful and commercial nature.”).

Furthermore, the DMCA puts the burden of policing copyright infringement and providing notice of copyright infringement on the copyright owner. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007), *cert. denied*, 552 U.S. 1062 (2007) (the court “decline[d] to shift [the] substantial burden [of policing for infringement] from the copyright owner to the provider.”); *see also Wolk v. Kodak Imaging Network, Inc.*, No. 10-Civ-413(RWS), 2011 WL 940056, at *5 (S.D.N.Y. March 17, 2011); and *UMG Recordings, Inc. v. Veoh Networks, Inc.* 665 F. Supp. 2d 1099, 1110 (C.D. Cal. 2009). Thus, contrary to the lower court's assertion that myVidster is “required to investigate ... notices of infringement – with respect to content *and* repeat infringers,” (SA38), myVidster need only appropriately respond to DMCA notices it receives. House Committee on Commerce Report, H.R. Rep. No. 105-551 (Part 2), 105th Cong., 2d Sess., at 61 (July 22, 1998) (“[T]he Committee does not intend this provision to undermine the principles of new subsection (1) or the knowledge standard of new subsection (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.”).

In the event that myVidster gains knowledge (through DMCA notices or otherwise), that one of its users is linking to source videos despite having knowledge (through DMCA notices or otherwise) that the source video is infringing, myVidster would treat that user as an infringer. If such infringement continues repeatedly, myVidster would disable that user's myVidster account

pursuant to its repeat infringer policy. (SA98 – 99). This is all that is required to obtain safe harbor protection under the DMCA.⁸

Once the reasonableness of myVidster’s repeat infringer policy is acknowledged, this Court should readily conclude that myVidster’s linking functionality is protected by the safe harbors contained in 17 U.S.C. §§ 512(c)-(d). Specifically, myVidster meets the following requirements for safe harbor protection through uncontroverted evidence in the record or because they are uncontested:

- myVidster meets the definition of ISP for purposes of the DMCA;
- myVidster complies with standard technical measures (SA81:2 – 8);
- myVidster has a DMCA notice and takedown policy (SA97 – 98);
- myVidster expeditiously removes links that are the subject of DMCA notices (SA81:16 – 20, SA100 – 149);
- the content at issue is links that reside on myVidster at the direction of its users (SA67:23 – 69:4);

⁸ Courts and commentators alike have recognized the need for judicial restraint in analyzing repeat infringer policies such that DMCA safe harbor protection is afforded whenever possible. For example, as one court noted:

The language of § 512(i) and the overall structure of the DMCA indicate that the user policy need not be as specific as [plaintiff] suggests. The language of § 512(i) is telling in this regard. The key term, “repeat infringer,” is not defined and the subsection never elaborates on what circumstances merit terminating a repeat infringer’s access. This open-ended language contrasts markedly with the specific requirements for infringement notices and take-down procedures set forth in § 512(c). The notice and take-down provisions demonstrate that Congress infused the statute with specific detail when it so chose. The fact that Congress chose not to adopt such specific provisions when defining a user policy indicates its intent to leave the policy requirements, and the subsequent obligations of the service providers, loosely defined.

Corbis Corp., 351 F. Supp. 2d at 1100-1101; *see also* 3-12B Nimmer on Copyright § 12B.10[E][3] (“Manifestly, it is impossible for a provider to have any confidence in its policy to terminate repeat infringers if every district and circuit court across the country can conjure up new and unanticipated (not to mention potentially conflicting) standards that those providers must have met, at the risk of losing any protection under the statute.”).

- myVidster does not have the right and ability to control its users (SA78:20 – 79:6), and does not receive a direct financial benefit from any infringing content (SA92:22 – 93:11); and
- myVidster has reasonably implemented a repeat infringer policy (SA90:6 – 20; SA97 – 98).

A simple comparison of the facts above with the plain language of 17 U.S.C. § 512 shows that myVidster falls squarely within both the user generated content safe harbor of Section 512(c) and the linking safe harbor of Section 512(d). Eligibility for either is sufficient to defeat Flava Works’ claims in this case. Accordingly, myVidster’s linking functionality is subject to the protections of 17 U.S.C. § 512(c)-(d), Flava Works has no likelihood of success on the merits of its case for this additional reason, and the Preliminary Injunction should be vacated.

III. THE LOWER COURT ERRED BY PRESUMING IRREPARABLE HARM

The lower court misapplied the standard for the irreparable harm element of a preliminary injunction, as required by the Supreme Court in *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) and *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). Specifically, the lower court presumed Flava Works’ irreparable injury and impermissibly collapsed its analysis into whether Flava Works had shown a likelihood of success on its copyright infringement claim. (SA29 – 30) (“Thus, as a practical matter, the analysis boils down to a single factor – the plaintiff’s likelihood of success.”). However, as recognized by the Second, Ninth and Fourth Circuit Courts of Appeal, in light of the Supreme Court’s rulings, “courts must not simply presume irreparable harm. Rather, a plaintiff must show that, on the facts of their case, the failure to issue an injunction would actually cause irreparable harm.” *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010); *see also Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995-96 (9th Cir. 2011) (holding that “in a copyright infringement case, the plaintiff must demonstrate a likelihood of irreparable harm as a

prerequisite for injunctive relief, whether preliminary or permanent”); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011) (concluding that the presumption of irreparable harm arising from showing of likelihood of success on the merits in copyright infringement claim has been “effectively overruled” by *eBay*); and *Christopher Phelps & Assoc. v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (rejecting that plaintiff was entitled to an injunction following showing of copyright infringement and requiring affirmative showing of all four *eBay* factors).

The Ninth Circuit recently addressed this issue in *Flexible Lifeline Systems*, emphasizing that a plaintiff in a copyright infringement case must demonstrate a likelihood of irreparable harm to obtain injunctive relief, and that reliance on a presumption of irreparable harm constitutes reversible error. 654 F.3d at 998-1000. In doing so, the court concluded that the Supreme Court’s opinions in *eBay* and *Winter* have overruled previous longstanding precedent that permitted such a presumption. *Id.* at 997-98. The court held that plaintiffs must now affirmatively demonstrate a likelihood of irreparable harm to obtain injunctive relief. *Id.* Thus, because the district court relied solely on the presumption of irreparable harm, the court vacated the injunction and remanded the case for further consideration. *Id.* at 1000.

Similarly, in *Salinger*, the Second Circuit expressly held that *eBay* applies to preliminary injunctions issued for alleged copyright infringement, and vacated the preliminary injunction issued by the district court for failure to consider all four equitable factors set forth by the Supreme Court in *eBay* and *Winter*. 607 F.3d at 79-83. The court rejected the automatic presumption that a plaintiff will suffer irreparable harm upon a showing of likelihood of success on the merits, requiring instead the plaintiff to demonstrate it is likely to suffer irreparable injury. *Id.* at 80. The court further instructed that the analysis “must actually consider the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the

merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury.” *Id.* (quotations omitted).

Here, the lower court did not consider whether Flava Works demonstrated a likelihood of irreparable harm, but merely stated: “Irreparable injury may normally be presumed from a showing of copyright infringement.” (SA29) (relying on pre-*eBay* decisions.). This is insufficient. Moreover, this automatic application of the presumption of irreparable harm is particularly unwarranted in this case given the only purported harm to Flava Works is an purported loss of revenue, as testified to by Flava Works’ principal. (SA59:9 – 19) (“I don’t think it’s up in that number [\$200,000], but I know it’s more than [\$]100,000). Yet, Flava Works’ only purported harm, lost revenue, is redressable with monetary damages and, thus, not irreparable harm. *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997); *see also East St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703-04 (7th Cir. 2005). Consequently, the Preliminary Injunction should, at a minimum, be vacated for proper consideration of this equitable principle.

IV. THE LOWER COURT ERRED BY GRANTING AN AFFIRMATIVE, VAGUE AND UNCONSTITUTIONAL PRELIMINARY INJUNCTION

For the reasons discussed, the lower court erred in granting any preliminary injunction whatsoever in this case. Additionally, however, the specific terms of the injunction ordered by the lower court are improper for reasons outlined below.

First, the Preliminary Injunction not only requires myVidster to take affirmative action beyond maintaining the status quo, it goes so far as to effectuate “the very change in the parties’ relationship that was the object of the lawsuit itself.” *Harlem Algonquin LLC v. Canadian Funding Corp.*, 742 F. Supp. 2d 957, 960 (N.D. Ill. 2010) (quoting *Graham*, 130 F.3d at 295 (affirmative injunctions are an extraordinary remedy, which must be “cautiously viewed and

sparingly issued, such that only the clearest equitable grounds will justify the remedy”)); *see also* *W.A. Mack, Inc. v. General Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958); *United Asset Coverage, Inc. v. Avaya*, 409 F. Supp. 2d 1008,1050 (N.D. Ill. 2006), (purpose of preliminary injunction is simply to “maintain” status quo pending resolution of the merits on the case); *Chicago Blackhawks Hockey Team*, U.S. Dist. LEXIS 1720, at *21 (mandatory injunction that grants full relief requested is viewed with greater disfavor); and *Ohio-Sealy Mattress Manufacturing Co. v. Duncan*, 548 F. Supp. 75, 77 (N.D. Ill. 1982), *appeal dismissed*, 714 F.2d 740 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984) (preliminary injunction improper where it places one party in a new position it is seeking to make permanent through the litigation).

Here, the entirety of the Preliminary Injunction requires myVidster to take affirmative actions that would disrupt the status quo. Particularly troubling is the requirement that myVidster develop, implement and monitor new software on the website that will “filter[]” all submitted content for 23 keywords related to Flava Works’ business (as well as “intentional or inadvertent misspellings” of those 23 keywords) and immediately remove any links to content containing those keywords. (SA52 – 53). This not only requires myVidster to take extraordinary affirmative action (*i.e.*, develop custom software), it has nothing whatsoever to do with maintaining the status quo because this software has never previously existed and this pre-screening has never previously occurred in the history of the myVidster website.

Also of particular note is the requirement that myVidster disable the accounts of all users – even where there has been no showing that they had the requisite knowledge to be deemed contributory copyright infringers – if they have on more than one occasion created a link to content that myVidster later learned was infringing. (SA53). This would cause myVidster to terminate a substantial number of users, who would likely never return even if myVidster were

ultimately to prevail at trial. Thus, the injunction does not freeze the status quo; rather, it effectively grants Flava Works permanent relief it should only be able to obtain if it succeeds on the merits. *See Choiceparts*, 203 F. Supp. 2d at 925 (court denied mandatory preliminary injunction where defendants would face difficulties “roll[ing] back to the situation at the present *status quo* if defendants prevail at trial”).

Second, the Preliminary Injunction is not “specific in terms” and does not “describe in reasonable detail . . . the act or acts sought to be restrained” in violation of Federal Rule of Civil Procedure 65(d). Fed. R. Civ. P. 65(d). Accordingly, it does not “fairly apprise [myVidster] of the prohibited [or required] conduct.” *American Can Co. v. Mansukhani*, 742 F.2d 314, 332 (7th Cir. 1984) (internal citations omitted); *see also Brumby Metals, Inc. v. Borgen*, 275 F.2d 46, 49 (7th Cir. 1960). Instead, the language of the Preliminary Injunction amounts to a series of broad directives that do not provide myVidster with specific notice of what exactly it must do to comply and that are not “tailored to eliminate only the specific harm alleged.” *Quiksilver, Inc. v. Kymsta Corp.*, 360 Fed. App’x 886, 889 (9th Cir. 2009) (internal citations omitted). For example, paragraph 2 of the Preliminary Injunction requires that myVidster “[a]dopt and reasonably implement a repeat-infringer policy with respect to the infringement of copyright,” and paragraph 3 requires that it “[i]mplement measures designed to prevent repeat infringement.” (SA53). First, these vague directives reach far beyond the specific harm alleged – infringement of Flava Work’s content. Second, myVidster currently has a repeat infringer policy that it believes is perfectly reasonable under current copyright law. It is entirely unclear to myVidster what more these paragraphs require it to do.

Finally, the broad pre-screening requirements of the Preliminary Injunction, which limit speech that does not infringe copyrights, constitute an unconstitutional prior restraint on speech.

U.S. Const. amend. I; *see Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (an injunction enjoining speech is an example of a prior restraint); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (applying the First Amendment to speech on the Internet). Courts presume that prior restraints on speech are unconstitutional, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and the most serious and least tolerable infringement on First Amendment rights. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see also Allen v. Ghoulish Gallery*, No. 06-cv-371, 2007 U.S. Dist. LEXIS 37514 (S.D. Cal. May 23, 2007) (denying unconstitutional preliminary injunction that would enjoin plaintiff from posting disparaging comments on Internet). Even in light of technological advancements such as the Internet, courts have “steadfastly held that the First Amendment does not permit the prior restraint of speech by way of injunction, even in circumstances where the disclosure threatens vital economic interests.” *Ford Motor Company v. Lane*, 67 F. Supp. 2d 745, 753 (E.D. Mich. 1999).

Here, the lower court’s demand that myVidster adopt a filtering functionality forces myVidster to pre-screen its users’ speech and will ultimately restrain speech that does not constitute copyright infringement. *See Religious Tech. Ctr. v. Netcom*, 907 F. Supp. 1361, 1383 (N.D. Cal. 1995) (court denied preliminary injunction that required Internet Service Provider to pre-screen its users’ postings for possible infringement, holding that defendant played vital role in users’ speech and order would “chill” speech). The filtering functionality will inevitably prevent users from posting content unrelated to Flava Works as a result of “false positive” keyword hits. *See Wolk*, 2011 WL 940056 (Internet Service Provider not required to execute or implement searches that filter by “keyword,” such as the artist’s name, and could produce “false positives”). Consequently, the lower court has enjoined speech that is wholly unrelated to the

alleged copyright infringement in this case, and thus constitutes an unconstitutional prior restraint.

In sum, the lower court has issued an injunction that is impermissibly affirmative and would displace the status quo. Moreover, it is in no way narrowly tailored to eliminate the specific harm alleged in this case, and its overbroad, over-reaching language is an unconstitutional prior restraint on speech. For these additional reasons, the Preliminary Injunction should be vacated.

CONCLUSION

For the foregoing reasons, the lower court's opinions of July 27, 2011 and September 1, 2011 should be reversed and the Preliminary Injunction should be vacated.

Respectfully submitted,

Date: November 23, 2011

/s/William J. Lenz
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,403 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 12 point font in the body of the brief and 11 point font in the footnotes.

Dated: November 23, 2011

/s/William J. Lenz
William J. Lenz

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 23, 2011

/s/William J. Lenz _____
William J. Lenz

CIRCUIT RULE 30(d) STATEMENT

Appellant submits the attached required Short Appendix containing the following documents, which are all of the materials required pursuant to Circuit Rule 30(a) and (b):

(1) Docket Entry Text [Document No. 76] granting Plaintiff's Motion For Preliminary Injunction dated July 27, 2011;

(2) Memorandum Opinion [Document No. 77] discussing grant of Plaintiff's Motion For Preliminary Injunction dated July 27, 2011;

(3) Notification of Docket Entry [Document No. 88] denying Defendants' Motion to Reconsider the Issuance of a Preliminary Injunction dated September 1, 2011;

(4) Memorandum Opinion [Document No. 89] discussing denial of Defendants' Motion to Reconsider the Issuance of a Preliminary Injunction dated September 1, 2011; and

(5) Order [Document No. 90] regarding preliminary injunction dated September 1, 2011.

Dated: November 23, 2011

/s/William J. Lenz
William J. Lenz

No. 11-3190

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

FLAVA WORKS, INC.,

Plaintiff-Appellee,

v.

**MARQUES RONDALE GUNTER d/b/a
myVIDSTER.com. and SalsaIndy, LLC,**

Defendants-Appellants.

**Appeal From The United States District Court For
The Northern District of Illinois, Eastern Division
Case No. 1:10-cv-06517**

The Honorable Judge John F. Grady

**SHORT APPENDIX OF
DEFENDANTS-APPELLANTS**

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John F. Grady	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 6517	DATE	July 27, 2011
CASE TITLE	Flava Works, Inc. v. Marques Rondale Gunter d/b/a myVidster.com, et al.		

DOCKET ENTRY TEXT

Plaintiff's motion for a preliminary injunction [20] is granted. Plaintiff is directed to prepare a proposed preliminary injunction order in accordance with this opinion and submit it to defendants by August 5, 2011. Thereafter, the parties shall confer and attempt to agree on the language of the proposed injunction order. Plaintiff shall submit the final proposed injunction order to the court by August 15, 2011; if there are any outstanding disputes with respect to its language, the plaintiff shall submit, along with the proposed order, a brief statement describing the disputes. ENTER MEMORANDUM OPINION.

See ATTACHED Memorandum Opinion.

Docketing to mail notices.

STATEMENT

Courtroom Deputy
Initials:

KMH

10-6517.112-JCD

July 27, 2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FLAVA WORKS, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 10 C 6517
)	
MARQUES RONDALE GUNTER d/b/a)	
myVidster.com; SALSAINDY, LLC;)	
VOXEL DOT NET, INC., and)	
JOHN DOES 1-26,)	
)	
Defendants.)	

MEMORANDUM OPINION

Plaintiff, Flava Works, Inc. ("Flava"), is a company that produces and distributes adult entertainment products, including DVDs and streaming video. Flava brought this action against defendant Marques Rondale Gunter, who created, owns, and operates a website called myVidster.com ("myVidster"), and defendant SalsaIndy, LLC, an entity controlled by Gunter that funded the start-up of myVidster.¹ (We will refer to Gunter and SalsaIndy collectively as "defendants.") Flava alleges that myVidster infringes its registered copyrights and trademarks. The Third

^{1/} Flava also sued Voxel Dot Net, Inc. ("Voxel"), a company that is alleged to have provided web-hosting services to myVidster, and John Does 1-26, who are registered users of myVidster. Voxel has provided plaintiff with a sworn declaration that it no longer hosts myVidster, and plaintiff has withdrawn its motion for a preliminary injunction as to Voxel.

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Amended Complaint contains several claims for copyright and trademark infringement.

Before the court is plaintiff's motion for a preliminary injunction "to prevent defendants from enabling," through myVidster, the infringement of plaintiff's works. (Pl.'s Mem. at 1.)² In its motion, Flava contends that it has a likelihood of succeeding on its contributory and vicarious copyright infringement claims.³ On May 18 and June 9, 2011, we conducted a hearing on plaintiff's motion. The court heard testimony from two witnesses--Gunter and Philip Bleicher, plaintiff's CEO. We have considered the materials and evidence submitted by the parties⁴ and conclude that this is a proper case for issuance of a preliminary injunction pursuant to Federal Rule of Civil Procedure 65.

^{2/} The specific relief sought by plaintiff is discussed at the end of this opinion.

^{3/} In conclusory fashion, plaintiff asserts in its memorandum in support of its motion that it is likely to succeed on its trademark infringement claims. The trademark-infringement argument is waived because it is undeveloped. At the injunction hearing, plaintiff briefly mentioned its trademark claims in closing argument, and we indicated that we understand the motion to be limited to the issue of copyright infringement. Plaintiff also referred in closing argument to its claims of direct copyright infringement and inducement of copyright infringement, but its motion is not based on those claims. Rather, plaintiff states that its motion is "made on the grounds that Plaintiff is likely to succeed on the merits of its claims for contributory and vicarious copyright infringement." (Pl.'s Mot. at 2.)

^{4/} We have not, however, considered Phillip Bleicher's affidavit. Defendants previously sought to have portions of the affidavit stricken. We denied the motion, explaining that it was unnecessary; plaintiff did not need to use the affidavit because it was anticipated that Mr. Bleicher would testify at the injunction hearing. He did testify at the hearing, so we have considered his testimony instead of his affidavit.

Facts

Gunter owns and operates myVidster, which he calls a "social video bookmarking" website. MyVidster is Gunter's solo project; he is its only programmer. (Tr. of June 9, 2011 Hr'g (June Tr.) 7.) On myVidster, users can "bookmark" video files. (The parties also refer to this action as "posting.") There are two types of myVidster users: (1) general users, whose memberships are free; and (2) "pro" users, who pay a small monthly (\$3 or \$5) or yearly (\$40) fee for the additional benefit of being able to create and save backup copies of the videos that they post to myVidster. MyVidster has about 80,000 general users and 25 to 30 pro users. Its primary source of revenue is advertising fees; advertisers pay for the number of "impressions" and/or "clicks" that their advertisements receive.

When a user bookmarks or posts a video on myVidster, he essentially directs myVidster to "embed" a video clip on its site. When a user submits a video to be posted on myVidster, myVidster "crawls" the website that hosts the video, gets information about that video file, and creates a thumbnail image of the video if one is not already available.⁵ MyVidster then "embeds" the video on its site, allowing it to be displayed there. MyVidster does not simply link to video files displayed on another site; it embeds the files on its own site at the direction of users. In other words,

^{5/} The thumbnail image is hosted on myVidster's servers. (June Tr. 66.)

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when a visitor to myVidster clicks on a video that is posted there, the video plays directly on myVidster, and the visitor remains on the myVidster site; he or she is not taken to the site that hosts the video file.

Some of the videos that appear on myVidster are hosted on myVidster's own servers--the "backup copy" videos--but the vast majority of them are hosted on third-party websites. MyVidster displays information about its embedded videos, such as the username of the user who posted the video, the date the user posted the video, the "source link," and the "embed" code. The "source link" displays the URL (uniform resource locator, a unique address for a file accessible on the internet) where the user bookmarked the video. In cases where a myVidster user bookmarks another user's bookmark, the "source code" will be a myVidster URL even though the original file of the video may be hosted elsewhere. As for the "embed" code, it enables the display of the video and signifies its "true source"--the site where the video is hosted. (June Tr. 16.) Some videos that appear on myVidster have an associated "download" button; by clicking the button, users can download a copy of the video to their own computer or storage device.

When a user posts a video, he can "tag" the video with keywords. MyVidster indexes those tags, enabling users to find videos through a keyword search. MyVidster filters videos into two

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categories--adult and non-adult. (More than half of the videos that appear on myVidster contain adult pornography.) In order to view adult videos, a website visitor must turn off the "family filter." Besides the adult/non-adult filter, myVidster does not have other filters in place for content posted on the site.

Phillip Bleicher is Flava's owner, CEO, and webmaster. He describes Flava as a "gay ethnic adult company" that produces internet website content, streaming video, DVDs, magazines, and photographs. (Tr. of May 18, 2011 Hr'g ("May Tr.") 13.) He first became aware of myVidster when some of Flava's customers complained about having to pay for its videos when they could get them for free on myVidster. Bleicher then visited myVidster, used its search function to search for Flava's trademarks, such as "Flavamen" and "CocoDorm," and found hundreds of Flava's copyrighted videos displayed on myVidster (without Flava's permission). Bleicher noted that myVidster provides space for comments on videos and that in some of those comments, myVidster users inquired about obtaining more of Flava's content and requested that other users post more Flava videos. Bleicher could see which users had posted Flava's videos and could also see that for some of the videos, the "source link" and/or "embed code" was myVidster itself. Bleicher and his staff took screenshots of many different copyrighted Flava videos as they were displayed on

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myVidster at various times in 2010 and 2011, and plaintiff has submitted copies of several of those screenshots.

On May 12, 2010, Flava sent Gunter a "takedown notice" pursuant to § 512 of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512. Flava sent Gunter additional DMCA notices on July 20, August 21, September 22, December 2, December 5, and December 9, 2010.⁶ The notices listed specific files and thumbnail images that Flava contended were infringing its copyrights and demanded immediate removal from myVidster. Most of the DMCA notices also specified myVidster users whom Bleicher had identified as "repeat infringers"--i.e., users who have repeatedly posted videos that infringe Flava's copyrights.

Bleicher testified that after he sent Gunter the DMCA notices, Gunter "[s]ometimes would act upon them and remove the content, some of it; sometimes he would remove just the links but not the videos or the embedded thumbnails; and sometimes he leaves some of the content up." (May Tr. 25.) Bleicher elaborated:

For the most part, [Gunter] left the thumbnails up quite often. I kept having to remind him that all of the content that I had identified needs to be removed. Sometimes he removes the thumbnails still, sometimes he doesn't. Sometimes he removes the links we identify, sometimes he doesn't. Sometimes, you know, he leaves--he keeps pointing out that these files are elsewhere, but they are clearly on myVidster.

^{6/} In addition to these notices that are referred to in the complaint and were sent via U.S. mail and e-mail, there was at least one additional DMCA notice that was sent by e-mail (and perhaps U.S. mail as well; it is unclear) on October 18, 2010. In 2011, plaintiff also sent defendants a number of DMCA notices.

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. . .
Q. Has he ever removed any of the thumbnails?

A. He has removed some of them, but it's a painstaking process that we keep identifying when we give him links to remove and then he doesn't remove all of the links or doesn't remove all of the thumbnails or the videos.

Q. So some of the thumbnails are still up [on myVidster]?

A. Yes, they are.

(May Tr. 26-27.) The amount of time it took for Gunter to remove the infringing content varied, but it was "more than a few days," according to Bleicher. (May Tr. 25-26.) (Gunter, on the other hand, testified that he removed material identified in the notices within twenty-four hours of receipt of the notice.)⁷ Moreover, although Gunter was in frequent contact with Bleicher regarding the repeat infringers that Flava identified, he did not disable any of those users' accounts:

Q. Has [Gunter] ever called you and explained to you the results of his investigation?

^{7/} Defendants' Hearing Exhibit 4 is a chart that Gunter created that purports to show every embedded video containing plaintiff's content that Gunter has removed from myVidster since plaintiff began sending DMCA notices. The chart includes the date that the DMCA notice for the particular video was received as well as the date Gunter removed the video. (June Tr. 21-25.) We noted during the hearing that plaintiff's counsel could not possibly conduct effective cross-examination regarding the chart because defendants' counsel refused to tender it to him until the moment it was given to Gunter on the stand. Moreover, we have doubts about the reliability of the chart. Although Gunter testified that he created it from a "data dump from myVidster's database," he did not provide any more detail about how it was prepared or explain how the information he "dumped" was originally recorded. Moreover, the e-mail exchanges between Flava and Gunter show that Gunter did not always fully comply with the DMCA notices; even when he represented that certain content had been removed, it was not always fully removed, and Flava was forced to follow up with Gunter in an effort to have the entire content related to a particular file removed. In any event, although it does appear that it was sometimes like pulling teeth to obtain full compliance from Gunter, as discussed *infra*, the crux of the problem here is not so much the removal of the infringing videos; it is Gunter's attitude toward copyright protection and his related refusal to adopt measures to prevent or reduce copyright infringement on myVidster as well as to adopt and implement an appropriate policy regarding repeat infringers.

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A. Yes, he has. He's contacted me by email or phone and explained on numerous occasions that he's just a pass-through and that he has no, he has no part into [sic] this copyright infringement, and tries to wiggle his way out and tell us where to go to remove the content. But we continuously find that the content is still hosted on myVidster.

Q. Has he ever explained to you why he has not removed repeat infringers?

A. I don't believe that he has. This, just beyond the fact that he thinks that he doesn't have to remove the repeat infringers because he doesn't believe that they are repeat infringers, I guess.

(May Tr. 38.) Bleicher also testified that even after Gunter removed some of Flava's videos from myVidster, those videos resurfaced there because they were re-posted by another user.

According to Bleicher, the availability of Flava's videos on myVidster is causing Flava to lose sales. Flava's sales are down thirty percent from last year, which equates to a estimated loss of between \$100,000 and \$200,000, while the number of myVidster users has grown to over 70,000 since the site was created a few years ago. In addition, myVidster grew from 67,000 visits per month from October 2009 to about 460,000 visits in April 2010. Bleicher attributes at least some of Flava's lost sales to myVidster because hundreds of Flava's videos have appeared (and still appear) on myVidster.

Gunter testified that he has designed myVidster to filter videos only for adult content (and not to block adult videos, just to classify them). He is capable of designing myVidster so that it would block the posting of videos with certain associated tag

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words, such as plaintiff's trademarks, but claims that he has not implemented such filters because of a "false positives" problem. He explained his position as follows:

Q. [Y]ou could filter out words like Raw Rods or CocoDorm, correct?

A. Correct.

Q. And that would prevent a user from posting any videos with the tag names Flava Works or any other trademark[ed] names on myVidster, correct?

A. I could design myVidster to block the bookmarking based on tag words, yes.

Q. Is there any reason why you haven't done that?

A. The main reason is it's called false positives where if you just try to block a bookmark--when somebody is linking a video from another web site and you have an arbitrary set of key words to block, let's just say CocoDorm, one example that would come to mind to be a false flag is let's just say an actor from CocoDorm was interviewed, and the video was posted on YouTube, and that key word was CocoDorm because that person is an actor of CocoDorm, and that interview video would not be posted, it would be blocked.

So you have an issue of false positives, where okay, if it is material owned by Flava Works, it would block it in that case, but it would also block other videos that would not be owned by the owner.

(May Tr. 103-04.) When asked how difficult it would be to create code or find a script for myVidster filters that would minimize the number of false positives, Gunter stated that he did not know of any code available on the internet for free that would minimize false positives, but acknowledged that he has not searched for code available for purchase or tried to write such a code himself.

When asked by plaintiff's counsel about myVidster's repeat-infringer policy, Gunter testified as follows:

Q. Let's go to your repeat infringer policy. I asked you one time how many times somebody would have to post

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copyrighted materials before you considered them a repeat infringer, and you would take it on a case-by-case basis, correct?

A. Correct.

Q. And it would probably be two. If they, if somebody posted copyright materials at least two times, you would consider them a repeat infringer?

A. What is your definition of post?

Q. Bookmark, post.

A. When it comes to myVidster's repeat infringer policy, I cannot, I cannot determine whether or not the user who links bookmarks of video from a third party web site to myVidster, I have no idea if they know that them linking that video or submitting that link to myVidster, if they have knowledge of the copyright status I guess whether or not it's infringing or not. So when it comes to the subject of them posting links to other web sites to myVidster, I do not, I would not, I cannot determine whether or not they are an infringer. I do not know what's in their head, I don't know whether or not, if they see a video and they say, okay, I'm going to save this, I'm going to link this link to myVidster, whether or not that link is infringing or not.

Q. So if a person who has been accused of repeat infringing reposts a video from a site that's publicly accessible to members of the public, you wouldn't consider that person a repeat infringer, that's where your repeat infringer investigation would end, isn't that correct?

A. Correct. When a user goes to a publicly available--web site, are they supposed to know whether or not that is infringing material? And in my humble opinion, it would be the video--the person who uploaded and the video host that is [sic] the ones that are the gatekeepers and the determination on whether or not that video, that material is infringement or not.

Q. So if I--If a user, if a user were to find a full-length film of Star Trek, which is copyrighted, on pornhub and which is accessible to everybody of the members of the public, if that user were to repost it on [myVidster] and you looked into that, because the video was originally found on a publicly-accessible [site], you wouldn't consider that [a] repeat infringer?

A. Correct.

. . .

A. . . . [M]y repeat infringer policy is I'm looking for users that are trying to use myVidster as a ways and

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means to distribute content that may not be publicly available.

. . .

Q. So if somebody alerts you that there's a repeat infringer and they ask you to investigate and your investigation does not lead to a password-protected web site or a single link that is private, your investigation ends there?

A. Yes.

Q. But isn't most of the internet public?

A. A lot of the internet is public, yes.

Q. Wouldn't you say like just about more than 90 percent is public?

A. Possibly.

Q. How could you ever have a situation where you would have a repeat infringer if you just limit it to a password-protected site?

A. I came across one that I sent a warning to.

Q. And I think you've told me that in the time that you've had myVidster, you've only had one repeat infringer that you investigated?

A. Correct.

Q. And what happened to the other 28 or 27 or 29 [repeat infringers] that Mr. Bleicher informed you of?

A. I did not consider them repeat infringers.

Q. And your reasoning was?

A. As I stated before, they were not using myVidster as a ways and means to distribute content that is not publicly available. They did not fall under my definition of repeat infringers, so I did not, I did not pursue them.

Q. What about the fact that the videos are copyrighted and have been on myVidster before?

A. All links reported on the Flava Works DMCA notices have been removed expeditiously.

. . .

Q. Why don't you consider someone a repeat infringer when they continue to post copyrighted materials on your web site?

A. They do not fall under my definition as repeat infringers. They may fall under yours or Phillip's, but they do not fall under mine.

Q. What is your definition, what is your understanding of the law in terms of a repeat infringer?

A. Should I repeat? Repeat infringers, my policy on repeat infringers are those who are using myVidster as a ways and means to distribute content that is not publicly available.

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(May Tr. 111-12, 114-116, 119-20.)

Gunter has not implemented any mechanism on myVidster that would prevent a particular video from being posted on the site more than once, although he conceded that it would not be difficult to do so. (May Tr. 131.) Gunter also has not implemented any mechanism on the myVidster site for users to report videos that violate copyright; the option to "flag" a video for "copyright complaint" merely refers users to the myVidster "copyright" page, which requires a complainant to send a written DMCA notice to Gunter. (May Tr. 120.)

Preliminary Injunction Standards

The Copyright Act authorizes injunctive relief on such terms as the court deems reasonable "to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). To determine whether a preliminary injunction is warranted, we engage in a two-phase analysis:

As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has "no adequate remedy at law" and will suffer "irreparable harm" if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court's inquiry is over and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.

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Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992) (citing Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429 (7th Cir. 1986) and Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984)). "Irreparable injury may normally be presumed from a showing of copyright infringement." Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 620 (7th Cir. 1982), superseded by statute on other grounds as recognized in Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423 (7th Cir. 1985). As for the third factor, "courts typically fail to invoke this standard in copyright cases" because if it were applicable, "a knowing infringer would be permitted to construct its business around its infringement." 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.06[A][2][c], at 14-138 (2009) (quoting Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d Cir. 1983) and citing, inter alia, Horn Abbot Ltd. v. Sarsaparilla Ltd., 601 F. Supp. 360, 369-70 (N.D. Ill. 1984)). Similarly, the fourth factor requires little discussion because there is a strong public policy interest in protecting copyrights. See Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1066 (7th Cir. 1994) (quoting Apple Computer, 714 F.2d at 1255 ("It is virtually axiomatic that the public interest can only be served by upholding copyright protections")). Thus, as a practical matter, the analysis boils down to a single factor--the plaintiff's likelihood

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of success. Flava has demonstrated a likelihood of success on its claim for contributory copyright infringement.⁸

Contributory Copyright Infringement

"[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005). To establish contributory copyright infringement, plaintiff must show: (1) a third party directly infringed its work; (2) the defendant knew of the infringement; and (3) the defendant materially contributed to the infringement. Monotype Imaging, Inc. v. Bitstream Inc., 376 F. Supp. 2d 877, 883 (N.D. Ill. 2005).

Although defendants do not concede the first element, it cannot be seriously disputed that third parties have directly infringed Flava's works by posting its videos on myVidster. Plaintiff has submitted evidence that it owns the copyrights for works that have been copied and distributed by myVidster users, without plaintiff's authorization. There is uncontradicted evidence that myVidster users have created backup copies of Flava's works, which are stored on myVidster's servers. There is also

^{8/} Because plaintiff has satisfied the standard for a preliminary injunction with regard to its claim for contributory copyright infringement, we need not address its claim for vicarious copyright infringement.

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uncontradicted evidence (actually, defendants' own evidence demonstrates) that myVidster users have caused Flava's works to be displayed on myVidster without Flava's permission.

We also have no doubt that defendants knew or should have known of the infringement occurring on myVidster. As noted in our previous opinion, knowledge, for purposes of contributory copyright infringement, encompasses both actual and constructive knowledge. In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) ("Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement)"). "The knowledge element for contributory copyright infringement is met in those cases where a party has been notified of specific infringing uses of its technology and fails to act to prevent future such infringing uses, or willfully blinds itself to such infringing uses." Monotype, 376 F. Supp. 2d at 886 (citing Aimster, 334 F.3d at 650, and Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996)). It is undisputed that over a period of several months, plaintiff sent defendants at least seven DMCA notices that identified specific infringing files and users as well as specific repeat infringers. Furthermore, Gunter received these notices and responded to them. Gunter and Bleicher spoke on the telephone and exchanged several e-mails in which Bleicher informed Gunter of ongoing problems with plaintiff's works being posted on myVidster.

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The e-mail exchanges (several of which were submitted by *defendants*) show that Gunter, upon receiving Flava's DMCA notices, was not wholly cooperative. In a May 2010 exchange between Gunter and Jesse Lanshe (a representative of the plaintiff) that began with a DMCA notice, Gunter's initial response was to evade responsibility. Instead of addressing whether he would take down the videos appearing on myVidster, Gunter told Lanshe: "I . . . would like to inform you that the videos listed are not hosted by myVidster. What you are seeing are video embeds. . . . I would recommend you contact the video host that is rehosting your content. When they remove the content from their servers the video embeds will no longer work. If i [sic] removed the embeds from user's [sic] collection they can easily revised [sic] the source site and embed the video again."⁹ Only later in the e-mail exchange did Gunter inform Lanshe that he did "not have an issue removing the video embeds/links." (Defs.' Hr'g Ex. 10.) Bleicher also testified, and some of the e-mail exchanges show, that when notified of infringing material, Gunter sometimes removed only part of the infringing material. He removed the remaining material (for example, infringing thumbnail images, or various stray files) only when prompted a second or third time to remove it.

Moreover, Gunter has failed to implement filters or identifiers to prevent repeated infringing conduct and failed to

^{9/} This statement also demonstrates Gunter's failure to act to prevent future infringement on myVidster.

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take action against, or properly investigate and/or disable the accounts of, myVidster users whom plaintiff identified as repeat infringers. Gunter's "repeat infringer" policy is in fact no policy at all, at least with respect to copyright infringement. In an e-mail to Bleicher on October 19, 2010 that is part of an exchange concerning repeat infringement, Gunter stated:

Here is the policy that I use when addressing [repeat infringers]:

A user who uses myVidster to publish links/embeds of videos that would otherwise not be accessible by the public. For example if a user is uploading videos to file server and using myVidster as a way and means to distribute the content.

If a user is found in violation of this, the links/embeds will be removed and a warning email is sent to the user. If the user repeats this violation then their account will be deleted.

Being that most of the content are embeds which are hosted on external websites, I would suggest contacting the websites that are hosting your content to help stop the future bookmarking of it on myVidster.

(Defs.' Hr'g Ex. 9.) This perspective is the epitome of "willful blindness." Gunter is not concerned about *copyright* infringement; he simply examines whether the material posted by the user is "otherwise not [] accessible by the public," i.e., behind a paywall or otherwise private website. In the e-mail, he again pointed a finger at other websites while failing to acknowledge that his own website is perpetuating copyright infringement. When Gunter testified in the preliminary injunction hearing, his cavalier attitude had not changed. His definition of "repeat infringer" does not encompass copyright law. There is ample evidence that

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after having received the DMCA notices from plaintiff, defendants failed to act to prevent future similar infringing conduct.

There is also evidence that defendants materially contributed to the infringing activity of myVidster's users. Gunter provides the myVidster site, which enables the display of embedded videos and thus the infringement. Gunter also makes video storage (which involves making a copy of a video) available for a fee. When Gunter first introduced the "video backup" service in 2009, he provided it free of charge for a limited time, and he discussed it on his myVidster blog and listed reasons for using the service. One of the reasons, he stated, is "[n]ever fearing that your online videos will get removed by the video host." (Pl.'s Hr'g Ex. 6.)¹⁰ Videos are often removed by hosts because the copyright owner asserts a copyright claim and requests takedown. The backup function enables users to keep an infringing copy of a video that

^{10/} Gunter attempted to explain away this subtle encouragement of copyright infringement by stating that it is "two years old" and that myVidster has "evolved." (May Tr. 124-25.) The promotional commentary, however, still appears on his myVidster blog as a reason for using the backup service.

Another way in which Gunter subtly encourages copyright infringement relates to the videos that he marked as his "favorites" on myVidster. Plaintiff's Hearing Exhibit 8 is a screenshot of three videos that Gunter has labeled on myVidster as "Marques' Favorites >> Full Movies." The three videos are labeled "Star Trek," "Crank 2," and "Hancock," which are all titles of major motion pictures. Gunter was asked about the embedded "Star Trek" video at the preliminary injunction hearing. He admitted that he had not considered whether he had been given permission by the copyright owner to post that video on myVidster. (May Tr. 107-09.) Gunter also conceded at the hearing that he could "make an assumption that" a "feature, full-length film" would be copyrighted, but acknowledged that at his deposition, he had refused to admit that he was able to make such an assumption and had instead suggested that only a copyright owner could assess whether a film was copyrighted. (May Tr. 105-06.) When asked by his own counsel on June 9, however, whether he "could tell" at the time he posted the videos "whether or not the videos . . . were infringing someone else's copyrights," Gunter replied, "I would not have an idea." (June Tr. 17.)

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has become otherwise unavailable on the original host site due to a copyright claim. In addition, the "download" button, where available on myVidster, enables a user to download from the source site a copy of an embedded video.

MyVidster also explicitly encourages sharing but fails to include any warnings about copyright infringement. Under the myVidster tab marked "invite," the question "Why should I invite my friends?" appears with the following answer: "While bookmarking videos can be a fun and addictive activity, it is more enjoyable in the company of like minded friends. The form below will send invites to your friends telling them about myVidster and you will be given the option to provide a link to your video collection." (Third Am. Compl. Ex. E.) MyVidster does not warn its users to avoid posting videos that infringe copyright. In fact, its very brief terms of service page does not mention copyright at all. Rather, the terms reflect Gunter's indifference to copyright protection:

Do not bookmark any video content that contains child pornography, promotes racism/hate or in violation of US law. Do not bookmarking [sic] videos that are not accessible by the public. For example videos hosted on password protect [sic] websites or private file servers. Failing to do so will result in the deletion of your account without notice. All adult related video content must be flagged as either "adult" or "private".

(Pl.'s Hr'g Ex. 16.)

There is still more evidence that Gunter materially contributed to users' infringement. Gunter acknowledged that he

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did not consider or investigate whether the users identified by plaintiff as repeat infringers were infringing copyright; he merely investigated whether the users were posting videos containing "content that is not publicly available." (May Tr. 114-15.) He has not implemented any filters or identifiers to prevent repeat infringers.¹¹ He has not implemented any mechanism to prevent the same infringing video from being re-posted to myVidster, even though he acknowledged that implementation would not be difficult. (May Tr. 130-31.) Furthermore, Gunter took virtually no action to stop or ban the repeat infringers who posted plaintiff's copyrighted works on myVidster (except for warning one of those users to stop posting videos hosted on password-protected web sites, Defs.' Hr'g Ex. 6).¹²

"Safe Harbor" Defense

Defendants contend that they qualify for one of the four "safe harbors" from liability set forth in the DMCA. Section 512, also known as the Online Copyright Infringement Liability Limitation Act (OCILLA), creates limitations on liability for network service providers who meet all of the conditions for a particular safe-

^{11/} When the court asked Gunter about the likelihood of false positives with respect to keywords connected with plaintiff's content, Gunter conceded that "false positives" would not occur very often. (May Tr. 132-33.)

^{12/} Contrary to defendants' argument, there is evidence in the record--namely, screenshots of videos posted to myVidster that identify the user who posted the video--that at least some of the users identified by plaintiff as repeat infringers, such as "fifthcharactermuppet" and "Damon1420," did in fact post videos containing plaintiff's copyrighted content on two or more occasions.

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harbor exemption. Defendants assert that they qualify for the safe harbor for information "residing on systems or networks at [the] direction of users," 17 U.S.C. § 512(c).

We need not discuss each of the requirements of § 512(c) because it is clear that defendants do not satisfy one of the threshold requirements. Section 512 provides in pertinent part:

The limitations on liability established by this section shall apply to a service provider only if the service provider--
has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers

17 U.S.C. § 512(i)(1)(A).

It is difficult for us to understand how defendants can argue with a straight face that they have adopted and reasonably implemented a "repeat infringer" policy. Gunter determines the policies for, and controls, myVidster. His understanding of the term "infringer" does not encompass the law of copyright; he operates his site under the mistaken view that an "infringer" is limited to a person who posts content that is hosted on a password-protected or private website. The statute does not define the term "repeat infringer," but it is an obvious conclusion that "infringer" refers at the very least to someone who *infringes copyright*. See 3 Nimmer, *supra*, § 12B.10[B][1], at 12B-103 (2009) ("[I]n the context of the placement of Section 512 into the

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Copyright Act, an 'infringer' most naturally refers to someone who infringes another's copyright."). Gunter does not warn his users about copyright infringement (coyly instructing them not to violate "US law" does not cut it). He removes videos from myVidster that are listed in DMCA notices, but goes no further. Beyond his mechanical response to the notices, Gunter refuses to concern himself with copyright protection. It is true that service providers are not required to police their sites for infringement, but they are required to investigate and respond to notices of infringement--with respect to content *and* repeat infringers. See Aimster, 334 F.3d at 655 ("The [DMCA] does not abolish contributory infringement. The common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by 'repeat infringers.'"). Gunter's attitude is similar to that of Aimster, which the Seventh Circuit deemed an "ostrich-like refusal to discover the extent to which its system was being used to infringe copyright," noting that it was "another piece of evidence" of contributory infringement. Id. It would be very easy for Gunter to determine whether a particular myVidster user had posted, on two or more occasions, a video that infringes one of plaintiff's copyrights. He refuses to do so, and he refuses to acknowledge his duty to terminate the accounts of such users.

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Defendants are not eligible for the user-generated-content safe harbor. Plaintiff has shown that it is likely to succeed on its claim for contributory copyright infringement. Defendants have failed to rebut the presumption of irreparable harm that arises from a showing of copyright infringement. Their assertion that plaintiff waited too long to bring suit and to bring its motion is rejected. Before filing suit, plaintiff made several attempts to seek Gunter's full compliance with the numerous DMCA notices that it sent. That compliance never came; plaintiff should not be penalized for initially trying to avoid litigation. We also reject defendants' contention that the existence on other websites of material that infringes plaintiff's copyright somehow suggests that plaintiff is not suffering irreparable harm from defendants' activities.

This is a proper case for issuance of a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 and the Copyright Act because (1) plaintiff is likely to succeed on the merits of its contributory infringement claim; (2) unless a preliminary injunction issues, plaintiff will suffer irreparable harm to its business; (3) the balance of harms favors plaintiff; and (4) the public interest favors granting a preliminary injunction.

Appropriate Relief

Plaintiff has submitted a proposed injunctive order. Our views on the proposed provisions are as follows:

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¶ 1: This paragraph is unnecessary. An order that defendants "comply with U.S. copyright law" is not appropriately tailored relief. Moreover, the second sentence is unnecessary because it should be understood from this opinion that, in plaintiff's words, the "fact that a video is available publicly on the [i]nternet shall not be reason for [Gunter's] abdication of [his] responsibility to make a determination as to whether or not a video is copyrighted."

¶ 2: Plaintiff presented no evidence on what constitutes "digital fingerprinting" or whether its implementation would be reasonably feasible or affordable. We decline to order that defendants implement this technology.

¶ 3: This relief is appropriate.

¶ 4: Should be modified to read: "Filter the following keywords and tags to prevent the upload or download of, posting of links to videos, and the posting of embedded videos containing plaintiff's copyrighted content, including intentional or inadvertent misspellings of keywords and tags . . . "

¶ 5: Should be modified to read: "Adopt and reasonably implement a repeat-infringer policy with respect to the infringement of copyright."

¶ 6: We will not require defendants to implement "flag" buttons that work in the particular way described by plaintiff.

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However, we will more generally require defendants to implement measures designed to prevent repeat infringement.

¶ 7: This relief is appropriate.

¶ 8: More broadly, we will require defendants to disable the accounts of users who on two or more occasions have posted content that infringes on one or more of plaintiff's copyrights.

¶ 9: This relief is appropriate.

¶ 10: Plaintiff has included a paragraph ordering defendants to pay its attorney's fees and costs associated with the bringing of the motion. Plaintiff did not include a request for this relief in its motion or memorandum, nor did it develop this argument. Therefore, this provision will not be included in the order.

¶ 11: Ordering the shutdown of myVidster.com would not be appropriately tailored relief. This paragraph should be stricken.

We believe that the order should also direct defendants to file with the court and serve plaintiff with a report or series of reports of compliance that identify all steps defendants have taken to comply with the injunction order. The parties should confer in an attempt to agree on a schedule for the provision of the report or reports.

The injunction order should also include a provision stating that it shall become effective upon the plaintiff's posting of a \$20,000 bond.

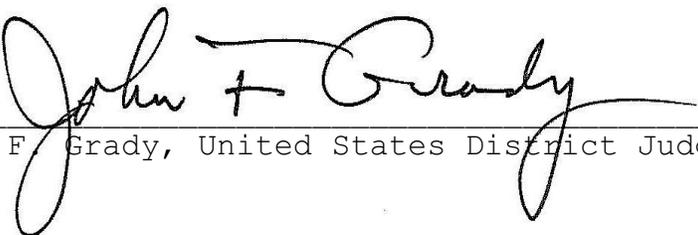
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CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction [20] is granted. Plaintiff is directed to prepare a proposed preliminary injunction order in accordance with this opinion and submit it to defendants by August 5, 2011. Thereafter, the parties shall confer and attempt to agree on the language of the proposed injunction order. Plaintiff shall submit the final proposed injunction order to the court by August 15, 2011; if there are any outstanding disputes with respect to its language, the plaintiff shall submit, along with the proposed order, a brief statement describing the disputes.

DATE: July 27, 2011

ENTER:



John F. Grady, United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2
Eastern Division**

Flava Works, Inc.

Plaintiff,

v.

Case No.: 1:10-cv-06517

Honorable John F. Grady

Marques Rondale Gunter, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, September 1, 2011:

MINUTE entry before Honorable John F. Grady: Defendants' motion to reconsider the issuance of a preliminary injunction [84] is denied. [For further detail see Memorandum Opinion.]Mailed notice(cdh,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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10-6517.113-JCD

September 1, 2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FLAVA WORKS, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 10 C 6517
)	
MARQUES RONDALE GUNTER d/b/a)	
myVidster.com; SALSAINDY, LLC;)	
VOXEL DOT NET, INC., and)	
JOHN DOES 1-26,)	
)	
Defendants.)	

MEMORANDUM OPINION

Flava Works, Inc. ("Flava"), is a company that produces and distributes adult entertainment products, including DVDs and streaming video. Flava brought this copyright and trademark infringement action against Marques Rondale Gunter, who created, owns, and operates a website called myVidster.com ("myVidster"); SalsaIndy, LLC ("SalsaIndy"), an entity controlled by Gunter that funded the start-up of myVidster; and Voxel Dot Net, Inc., a company that previously provided web-hosting services to myVidster.

Earlier this year, Flava moved for a preliminary injunction prohibiting Gunter and SalsaIndy from infringing on its copyrights, and we conducted a hearing on the motion in May and June. In late July, we issued a memorandum opinion granting the motion on the basis that Flava is likely to succeed on the merits of its

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contributory infringement claim. Flava Works, Inc. v. Gunter, No. 10 C 6517, 2011 WL 3205399 (N.D. Ill. July 27, 2011).¹ Gunter and SalsaIndy have filed a motion for reconsideration of our decision. The motion will be denied for the reasons explained below.

"Rule 59(e) allows a party to direct the district court's attention to newly discovered material evidence or a manifest error of law or fact, and enables the court to correct its own errors and thus avoid unnecessary appellate procedures. The rule does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996) (citation omitted). Although defendants do not set out the basis for their motion, they contend that our holding that Flava is likely to succeed on the first prong of its contributory infringement claim (direct infringement by a third party) is "directly contrary to the Ninth Circuit's seminal decision in Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160-61 (9th Cir. 2007)" and thus appear to contend that the court made a manifest error of law. (Defs.' Br. at 1.) We will address the argument on its merits despite the fact that it could and

^{1/} The injunction is being issued today. We asked the parties to confer and attempt to agree on the language of a proposed injunction order. They recently submitted their separate proposals, and a number of their suggestions are included in the order we are entering.

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should have been presented to us at the time of the hearings. Defendants did previously cite to Perfect 10, but only briefly, in conjunction with an argument that displaying thumbnail images of videos is fair use. They argued in perfunctory fashion that myVidster users did not directly infringe Flava's works, but did not develop that argument or cite Perfect 10 in support.

To establish contributory copyright infringement, the first element that a plaintiff must prove is that a third party directly infringed its copyrighted work. We held that Flava demonstrated a likelihood of success on this element by submitting uncontradicted evidence that it owns the copyrights for works that myVidster users have, without authorization, copied and/or posted on myVidster. The vast majority of myVidster users have not created backup copies of videos on the site, but have directed myVidster to "embed" video clips on the site through the posting/bookmarking process.² It is this action, to which defendants also refer as "inline linking," that is the focus of the instant motion to reconsider. Defendants contend that Perfect 10 is the "prevailing legal standard for analyzing copyright infringement in the [i]nline linking context" and that it stands for the proposition that a party who "links to third-party materials cannot be a direct infringer, but at most can be a contributory infringer." (Defs.' Br. at 2-3.)

^{2/} The parties use the terms "posting" and "bookmarking" interchangeably.

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In Perfect 10, the plaintiff, Perfect 10, Inc., sued Google and Amazon.com for infringing its copyrighted photographs of nude models. The technology at issue in the appeal pertained to Google's Image Search, the search engine that identifies text in its database that is responsive to a search query and then "communicates to users the images associated with the relevant text." 508 F.3d at 1155. The Ninth Circuit described Google Image Search's inline linking process as follows:

Google's software cannot recognize and index the images themselves. Google Image Search provides search results as a webpage of small images called "thumbnails," which are stored in Google's servers. The thumbnail images are reduced, lower-resolution versions of full-sized images stored on third-party computers.

When a user clicks on a thumbnail image, the user's browser program interprets HTML instructions on Google's webpage. These HTML instructions direct the user's browser to cause a rectangular area (a "window") to appear on the user's computer screen. The window has two separate areas of information. The browser fills the top section of the screen with information from the Google webpage, including the thumbnail image and text. The HTML instructions also give the user's browser the address of the website publisher's computer that stores the full-size version of the thumbnail. By following the HTML instructions to access the third-party webpage, the user's browser connects to the website publisher's computer, downloads the full-size image, and makes the image appear at the bottom of the window on the user's screen. Google does not store the images that fill this lower part of the window and does not communicate the images to the user; Google simply provides HTML instructions directing a user's browser to access a third-party website. However, the top part of the window (containing the information from the Google webpage) appears to frame and comment on the bottom part of the window. Thus, the user's window appears to be filled with a single integrated presentation of the full-size image, but it is actually an image from a third-party

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website framed by information from Google's website. The process by which the webpage directs a user's browser to incorporate content from different computers into a single window is referred to as "in-line linking." The term "framing" refers to the process by which information from one computer appears to frame and annotate the in-line linked content from another computer.

508 F.3d at 1155-56 (citation and footnote omitted). Perfect 10 argued that Google's thumbnail images (stored on Google's servers) and inline links to the full-size images (stored on third parties' servers) infringed Perfect 10's copyrights. The Ninth Circuit held that Perfect 10 made a prima facie case that Google's communication of its stored thumbnail images directly infringed Perfect 10's right to display its copyrighted works,³ but rejected the contention that Google directly infringed by "displaying" a copy of the full-size images stored on third-party computers. Id. at 1160-61. The Court explained:

Because Google's computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act. In other words, Google does not have any "material objects . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated" and thus cannot communicate a copy. 17 U.S.C. § 101.

Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser to a website publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the

^{3/} The Court went on, however, to hold that Google's use of the thumbnail images is "highly transformative" and therefore that Google was likely to succeed on its fair-use defense regarding the thumbnails. Id. at 1165-68.

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user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen. Google may facilitate the user's access to infringing images. However, such assistance raises only contributory liability issues and does not constitute direct infringement of the copyright owner's display rights.

Perfect 10 argues that Google displays a copy of the full-size images by framing the full-size images, which gives the impression that Google is showing the image within a single Google webpage. While in-line linking and framing may cause some computer users to believe they are viewing a single Google webpage, the Copyright Act, unlike the Trademark Act, does not protect a copyright holder against acts that cause consumer confusion.

Id. at 1160-61 (citations omitted). The Court applied the same reasoning to conclude that Perfect 10 was not likely to prevail on its claim that Google directly infringed its right to distribute its full-sized images. Id. at 1162-63.

According to defendants, Perfect 10 instructs that "the critical factual inquiry is the location of the infringing image." Defendants argue that the videos posted to myVidster are hosted on third-party servers, as were the full-size images in Perfect 10, and "the way the videos are linked and displayed is the same as in Perfect 10." (Defs.' Br. at 5.) The video links, or "embeds," that appear on myVidster are shown to the viewer as if they are part of the myVidster site, even though the videos are hosted by (stored on) a third-party server.

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We decline to apply Perfect 10 to this case. The Ninth Circuit's decision is not binding on this court; moreover, it is highly fact-specific and distinguishable. Defendants assert that the cases involve "essentially the same technology." Both cases may involve inline linking,⁴ but the processes are quite different. The relevant comparison is between the conduct of Google and the conduct of myVidster's users, not between Google and myVidster. In response to a search query, Google's image search engine uses an automated process to display search results through inline linking. In contrast, myVidster's users do not employ any sort of automation to determine which videos they bookmark; rather, they personally select and submit videos for inline linking/embedding on myVidster. (And many of those hand-picked videos are infringing.) Google's use of inline linking is neutral to the content of the images; that of myVidster's users is not.

To the extent that Perfect 10 can be read to stand for the proposition that inline linking can never cause a display of images or videos that would give rise to a claim of direct copyright infringement, we respectfully disagree. In our view, a website's servers need not actually store a copy of a work in order to "display" it. The fact that the majority of the videos displayed

^{4/} We say "may" because while it does appear that myVidster uses inline links (or "embeds") of videos, defendants provided little to no detailed evidence about exactly how myVidster works. We are unable to provide the kind of lengthy and technical description of the kind provided by the Ninth Circuit regarding Google's process.

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on myVidster reside on a third-party server does not mean that myVidster users are not causing a "display" to be made by bookmarking those videos. The display of a video on myVidster can be initiated by going to a myVidster URL and clicking "play"; that is the point of bookmarking videos on myVidster--a user can navigate to a collection of myVidster videos and does not have to go to each separate source site to view them.

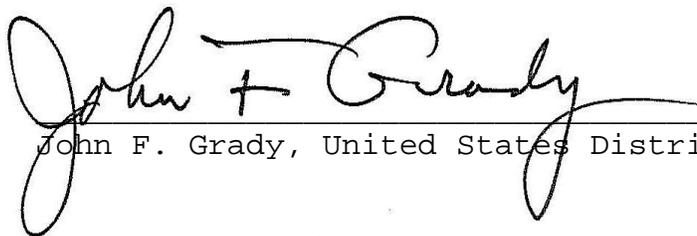
Because we find that Perfect 10 is inapplicable to the instant case, defendants' motion will be denied.

CONCLUSION

For the foregoing reasons, defendants' motion to reconsider the issuance of a preliminary injunction [84] is denied.

DATE: September 1, 2011

ENTER:



John F. Grady, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FLAVA WORKS, INC.,)
)
 Plaintiff,)
)
 v.) No. 10 C 6517
)
 MARQUES RONDALE GUNTER d/b/a)
 myVidster.com; SALSAINDY, LLC;)
 VOXEL DOT NET, INC., and)
 JOHN DOES 1-26,)
)
 Defendants.)

ORDER

This cause coming before the court on the motion of plaintiff Flava Works, Inc. for a preliminary injunction, due notice being given, the court having heard the evidence and testimony of the parties;

It is hereby ordered that defendants Marques Rondale Gunter d/b/a myVidster.com; myVidster.com; and SalsaIndy, LLC shall:

1) Implement filtering of keywords and tags of trademarks owned by plaintiff Flava Works, Inc. to prevent the upload and/or download of, and the posting of embedded videos containing, plaintiff's copyrighted content. The following keywords and tags shall be filtered (and shall include intentional or inadvertent misspellings that have been used by myVidster users in the past):

Flava
Flava Works, Inc.
Flava Works
FlavaMen
CocoDorm
CocoBoy
Thugboy
PapiCock
Raw Rods
Mix It Up Boy
Arquez

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Baby Star
Cayden Cooper
Cody Kyler
DeAngelo Jackson
Romeo Storm
Usher Richbanks
Malo
Flamez
Golden Secret
Domino Star
Romeo St. James
Breion Diamond

2) Adopt and reasonably implement a repeat-infringer policy with respect to the infringement of copyright.

3) Implement measures designed to prevent repeat infringement.

4) Expeditiously remove, or disable access to, infringing material when a DMCA notice is received from plaintiff by taking the following steps:

- a. Deleting the copyrighted video; and
- b. Deleting the thumbnails of the video and all images associated and/or hyperlinked with the video.

5) Suspend the accounts of users who on two or more occasions have posted content that infringes on one or more of plaintiff's copyrights, including John Does 1-26.

6) Store, archive, and protect any information regarding John Does 1-26, including, but not limited to, username, e-mail address, IP address, and any other information or data.

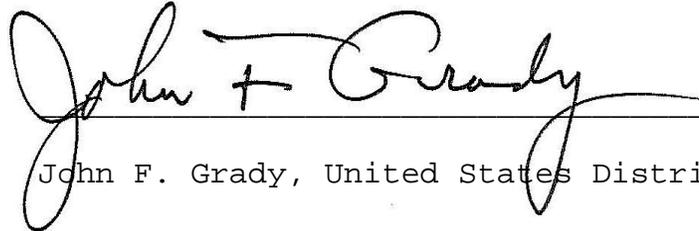
7) On the 15th of every month beginning with September 15, 2011, file with the court and serve plaintiff with a report on compliance that identifies all steps defendants have taken to comply with this injunction order.

8) This injunction shall become effective upon the plaintiff's posting of a \$20,000 bond.

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DATE: September 1, 2011

ENTER:



John F. Grady, United States District Judge