

No. 11-3190

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

FLAVA WORKS, INC.,

Plaintiff-Appellee,

v.

MARQUES RONDALE GUNTER, DOING BUSINESS AS MYVIDSTER.COM

AND

SALSAINDY, LLC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
The Honorable Judge John F. Grady, presiding

**BRIEF OF AMICI CURIAE
GOOGLE INC. AND FACEBOOK, INC.
IN SUPPORT OF NEITHER PARTY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for *amici curiae* certifies the following information:

Google Inc. has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Facebook, Inc. has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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IDENTITY AND INTEREST OF AMICI CURIAE¹

Amicus Google Inc., founded in 1998, is a diversified technology company headquartered in California's Silicon Valley. Google's mission is to organize the world's information and make it universally accessible and useful. Google's history has coincided with, and contributed to, a vast expansion of the internet and computer technologies that have profoundly influenced human society.

Amicus Facebook is a social utility that helps people communicate more efficiently with their friends, family and coworkers. The company develops technologies that facilitate the sharing of information through the social graph, the digital mapping of people's real-world social connections. Facebook currently has more than 800 million active users.

Proper legal treatment of web technology is important to *amici*. The continued development and progress of web technology depends on legal certainty, particularly with respect to liability for the misuse by third party users of Internet services for the purpose of infringing copyright. Lack of certainty not only harms established businesses like Google and Facebook, but may prevent investment in and development of the *next* Google or the *next* Facebook. A recent Booz & Co. study found that imposing greater liability on Internet intermediaries for the

¹ No person other than *amici* and their counsel, including parties to this action and their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief.

actions of their users would have a devastating effect on investment in early-stage Internet companies.²

Amici host an enormous quantity of content on behalf of their users, and that content is frequently linked to, embedded, and displayed on other web sites. For example, every YouTube video displayed on a website other than YouTube is the result of video transmitted by YouTube's servers (YouTube is owned by *amicus* Google). See, e.g., <http://www.whitehouse.gov/state-of-the-union-2011> (embedding a YouTube video of the State of the Union Address on the whitehouse.gov web site). Every "Like" button and every Facebook "Recommend" button shows content transmitted by Facebook's servers. See, e.g., <http://www.chicagotribune.com/> (featuring an embedded Facebook "Recommend" button next to each article). *Amici* are deeply familiar with the ways that websites show material from other websites along with their own material, because, very often, it is material hosted by *amici* that is being linked to in that way by other sites.

The sites operated by *amici* also link to content hosted on millions of other people's sites. Some of these are simple blue hypertext links that send those who click on them to another web page. But sometimes the link appears as something other than clickable blue text. For example, Google Images presents images that operate as links to particular images that users are searching for. See

² BOOZ & CO., THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY-STAGE INVESTMENT: A QUANTITATIVE STUDY 5 (2011), available at <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

<http://images.google.com>. And every game on Facebook is hosted by the game developer, not by Facebook. Many of those games, including popular ones such as *CityVille*, *Gardens of Time*, and *The Sims Social*, are integrated into the user's experience via inline framing—one of the types of linking discussed in this brief.³

Amici are concerned that the court below rendered its opinion without the benefit of “detailed evidence about exactly how myVidster works.” SA50 n.4. In our view, a detailed understanding of how myVidster works is critical to drawing the line between direct infringement and indirect or secondary infringement—one of the key tasks facing this Court. *Amici* have special expertise which may assist the Court in understanding the technical context of the acts at issue and how those technical facts fit into the framework established by the Copyright Act.

SUMMARY OF ARGUMENT

Amici submit this brief primarily out of concern over the following passage in the opinion below:

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 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

³ See <http://developers.facebook.com/docs/guides/canvas/> (providing a technical explanation of the integration of Facebook games into the Facebook site using inline framing).

user can navigate to a collection of myVidster videos and does not have to go to each separate source site to view them.

SA50-51. In this way the opinion below contravened the “server test” established by *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161 (9th Cir. 2007). See SA50 (“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.”). This Court should make clear that, as the Copyright Act states, to perform a video publicly on the Internet means “to transmit or otherwise communicate a performance . . . of the work . . . to the public,” 17 U.S.C. § 101, and the server transmitting the video—not the server merely linking to that video—is thus the one involved in its “performance.”

The court below blurred the lines between direct and secondary liability on the web. This Court should make clear that the server transmitting a video, not a server which merely provides a link to that video, is the server involved in the performance of that video. Continued innovation on the Internet depends on clear rules like those established in *Perfect 10*, and this Court should join the Ninth Circuit in drawing a clear distinction between direct and secondary liability.

To explain why this is so, *amici* begin with the statutory definition of public performance, and the way that courts have interpreted that definition. Next, *amici*, who have special expertise with respect to the technology at issue, provide a detailed explanation in response to the statement of the court below that its

analysis was hampered by the lack of “detailed evidence about exactly how myVidster works.” SA50 n.4. Finally, *amici* discuss the ramifications of these technological facts for the legal analysis of who is a direct infringer versus a contributory or vicarious infringer.

THE STATUTORY FRAMEWORK

Flava Works alleges that its exclusive right of public performance has been infringed.⁴ Not every “performance,” or playback, of a video is a copyright infringement; the question is whether the work is performed “publicly.” 17 U.S.C. § 106(4). To perform a work “publicly” means to perform it in a public place, such as an auditorium or a nightclub (which has not been alleged here), or “to transmit or otherwise communicate a performance or display of the work to a [public place] 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 in separate places and at the same time or at different times.” 17 U.S.C. § 101. Thus, in order to directly infringe the public performance right with respect to a motion picture on the Internet, one must “transmit or otherwise communicate” that work.

Both “transmit” and “otherwise communicate” have well-established definitions. To “transmit” is defined in the Copyright Act: “To ‘transmit’ a

⁴ The opinion below couched the question in terms of “display,” SA19, but this is, as a technical matter, incorrect. To “perform” a work means “in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101. To “display” a work, by contrast, means “in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.” *Id.* Thus, the right implicated by the playback of a video is the right of performance, not that of display.

performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. § 101. The meaning of “otherwise communicate” was analyzed in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989). In that case, the plaintiff argued that a hotel that rented out videodisc copies of movies to its guests was “otherwise communicat[ing]” those movies, by providing all of the means for in-room playback of those movies. After considering the statutory context, the court of appeals held that mere “facilitation” of a performance does not “otherwise communicate” the work. *Id.* “In sum,” the court held, “when one adds up the various segments of clause (2), one must conclude that under the transmit clause a public performance at least involves sending out some sort of signal via a device or process to be received by the public at a place beyond the place from which it is sent.” *Id.* Accordingly, the court of appeals held that the hotel “does not ‘communicate’ the in-room performances at all.” *Id.* at 281.

This statutory framework shows that whether myVidster, by the operation of its web site, itself transmits or sends copyrighted works by signals to the public is a central question. To answer that question, we must look to the technical details of how websites like myVidster work.

TECHNICAL BACKGROUND

The proper application of copyright law to this case depends on an accurate understanding of how the World Wide Web works—specifically, who transmits, and what is transmitted, as a user interacts with a site like myVidster and the webpages to which it links. This focus on the technological details reveals two

things: first, that myVidster does not transmit the videos at issue and, second, that both “embedding” and “hypertext linking” are fundamentally methods of pointing to an address where content may be found.

I. The Web

At its core, the Web consists of a set of technologies that act as a global file retrieval system, allowing users connected to the internet to retrieve content stored on remote servers anywhere in the world:

The Web is data: a vast collection of documents containing text, visual images, audio clips and other information media that is accessed through the Internet. Computers known as “servers” store these documents and make them available over the Internet.... Users access documents by sending request messages to the servers that store the documents. When a server receives a user’s request..., it prepares the document and then transmits the information back to the user.

In re DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 501 (S.D.N.Y. 2001).

Computer users generally interact with web sites through a browser, a computer program running on the user’s own computer that sends the requests for content to web servers, receives the transmission of that content from the server, and renders that transmitted content on the screen for the user to see.

II. The HTML “Recipe”

When a user types the address of a webpage she wants to visit into her browser (or clicks a link, which essentially automatically enters the address of the page for her), the browser sends a request to the server at that address for the

appropriate webpage. The server responds by transmitting a file back to her browser. The file that is transmitted is typically a text document written in HyperText Markup Language (HTML) that contains (1) the textual content of the requested page, (2) Uniform Resource Locators (URLs)⁵ that point to additional content to be incorporated into the web page, and (3) “tags” that specify how the content should be laid out. In essence, the HTML file acts like a recipe for the webpage requested, describing what ingredients are needed, where those ingredients may be found, and how those ingredients should be combined in order to generate the webpage in question.

III. Links: Identifying the “Ingredients” in the Recipe





After receiving this HTML “recipe” file, the browser makes a series of requests for the other “ingredients” it needs in order to render the webpage. Depending on where that other content is located, it may be transmitted either from the same server as the initial webpage request, or from other servers. For example, when a user submits a search query (e.g., “marques salsaindy”) to myVidster’s search box, myVidster’s servers respond by transmitting an HTML file that, when rendered by the user’s browser, displays a series of thumbnail images and information about the videos in question:

⁵ A URL is a string of characters conforming to a standardized format, which refers to a resource on the internet (such as a document or an image) by its location.

Search results for **marques salsaindy**

Sort by: **relevance** | [recent](#)

Results from (10 out of 67)

	Marques and Jennifer Luna of Salsalndy Posted by cantara_pearl_luna 212 weeks ago Performance at Vitos
	Marques and Jennifer Luna of Salsalndy Jazz Kitchen Posted by cantara_pearl_luna 206 weeks ago Performance @ the Jazz Kitchen...
	Marques and Tara Performance J Gumbos Posted by marques 138 weeks ago collected by 1 other user Marques Gunter and Tara Travis performing at J Gumbo's.
	Salsa Tag Team 2 Posted by marques 225 weeks ago collected by 1 other user Chimere takes on both Ryan and Marques during a public salsa performance.

See <http://www.myvidster.com/search/?q=marques+salsaindy>. The content making up this “results page,” comprising text, images, and links, happens to be transmitted from myVidster’s own servers. For example, the HTML code⁶ which causes the browser to show the first thumbnail on the page, pertaining to the video titled “Marques and Jennifer Luna of SalsaIndy,” is as follows:

```

```

⁶ One may view the HTML code underlying any web page by using the “View Source” function in one’s web browser. That is the method by which the information in this example was ascertained.

This tag tells the browser to fetch an image (“img”) and then tells the browser the source from which to obtain that image (“src=”). Here, the source is a particular file, separate from the HTML file for the web page, that resides in a particular directory on the myVidster images server

(“http://images.myvidster.com/user/images/youtube/31/1050712428_1.jpg”).⁷ The tag then tells the browser at what size to display the image (“height=” and “width=”), and indicates the thickness of the border to place around the image (“border=”). This tag results in the display of the image on the page:



IV. Some Links Embed Videos

When the user clicks on the top-most search result on the “marques salsaindy” results page, the following page is displayed:

⁷ The term “youtube” appears in the URL not to identify the server on which the image is hosted, but instead to identify a particular location on that server, which myVidster has chosen to identify as “/user/images/youtube/31/.”

Marques and Jennifer Luna @ Vitos Salsa Night

Pop Up | Full Screen | Stealth | Email Video | Flag / Broken

Share Tweet tumblr +1 0
Add to Queue login to enable video tracking

Video Information

Posted by: cantara_pearl_luna

Bookmark Date: November 2, 2007
Source Link: www.youtube.com
Permission: Public
Description: Performance at Vitos (more)

Embed: `<iframe width="640" height="385" src="http://www.youtube.com/embed/8Ecv86o6kLM?wmode=opaque&theme=light" frameborder="0" allowfullscreen></iframe>`

See http://www.myvidster.com/video/2931/Marques_and_Jennifer_Luna_of_SalsaIndy.

Some of the elements of this page (for example, the myVidster logo and the text on the page) are transmitted from myVidster's own servers. But critically, the video itself is not transmitted by myVidster's servers, but instead by YouTube's servers. We can determine this by looking at the HTML instruction which tells the browser to show the video itself:

```
<iframe width="640" height="385" src="http://www.youtube.com/embed/8Ecv86o6kLM?wmode=opaque&theme=light" frameborder="0" allowfullscreen></iframe>
```

This HTML tag tells the browser to create an inline frame ("iframe") in which content from another web page is to appear. It tells the browser how big to make

that frame (“width=” and “height=”) and then tells the browser the source from which to obtain that other web page (“src=”). Here, that source is a particular location not on myVidster’s servers, but on YouTube’s servers (“http://www.youtube.com/embed/8Ecv86o6kLM?wmode=opaque&theme=light”). If a user decides to watch the video, myVidster’s servers do not transmit it; YouTube’s servers do. Because the YouTube video is transmitted by YouTube’s servers for display by the user’s browser in the context of the myVidster web page, it is said to be “embedded” in the layout of the myVidster web page.⁸ If the user’s browser is able to reach myVidster’s servers but unable to reach YouTube’s servers, the video cannot be displayed:

⁸ The pornographic videos at issue in this case were not posted on YouTube (which does not allow pornographic videos), but instead on other video hosting websites, such as redtube.com, which do allow such videos. See SA100-49 (identifying, in the column “EMBEDED [sic] URL,” the source URLs for the videos in question). Some of the listed videos appear to have been hosted by myVidster itself, but we understand those videos not to be at issue in this appeal. See *Gunter Br.*, ECF No. 11, at 4 n.2 & 8 n.4.

V. Other Links Are Hypertext References

The myVidster web page for this video also includes a link to the YouTube page about this video in the lower right of the screen. This link appears as follows in the user's browser:

Source Link: www.youtube.com

This appears as the result of the following HTML tags:

```
<B>Source Link:</B>  
  
<a href="http://www.youtube.com/watch?v=8Ecv86o6kLM"  
target="_blank">www.youtube.com</a>
```

This HTML code instructs the browser to display the text “Source Link:” in boldface type (“” and “”). It then indicates that the text “www.youtube.com” should be presented as a link (a “hypertext reference” or “href”) which refers to the web

address <http://www.youtube.com/watch?v=8Ecv86o6kLM>, which is the YouTube page for the video. Instead of instructing the browser to show the video, as with the “iframe” link, this code instructs the browser to show a clickable link to that same video.

VI. Salient Conclusions to be Drawn

The above example underscores two salient facts.

First, myVidster never transmits the underlying videos at issue here; those are transmitted directly from the server of the third-party website, such as YouTube (or RedTube) on which they appear. What one who posts a link on myVidster provides, and what myVidster transmits, is **the address of the third-party server** (“`<iframe . . . src="http://www.youtube.com/embed/8Ecv86o6kLM . . .`”) where the video in question may be found, much as *TV Guide* provides the time and channel where a TV program may be found.

Second, there is no fundamental difference between the “iframe” instruction which results in the video appearing in the context of the myVidster web page and the “href” instruction which results in the appearance of a hypertext link. In both cases, the user’s browser receives a URL pointing to content stored on a server, accompanied by instructions that suggest how the content should be formatted in the browser window. While “iframe” embedding and “href” hypertext linking may result in different user experiences, they are both fundamentally just “links”—pointers to addresses where content may be found. In both cases, it is the server specified in the URL that transmits the content itself. The link is

simply a pointer to the server from which the content may be requested by the user's browser.

ARGUMENT

I. Linking is not direct copyright infringement.

As noted above, in order to be liable as a direct infringer of the exclusive right of public performance, one must transmit or otherwise communicate the copyrighted work in question. With respect to "embedded" videos, myVidster does not transmit or otherwise communicate the copyrighted video; a third-party site does. MyVidster, as shown above, transmits only the URL identifying the location of that video on a third party's web server. Transmitting the URL is not the same thing as transmitting the video, as the URL is not itself a copyrighted work. As the *Perfect 10* court put it (in the context of linking to images rather than videos):

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. Google may facilitate the user's access to infringing images. However, such assistance raises only contributory

liability issues, *see Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30, 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005), *Napster*, 239 F.3d at 1019, and does not constitute direct infringement of the copyright owner’s display rights.

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d at 1161.

II. Linking can potentially be contributory or vicarious copyright infringement under some circumstances.

To say that linking can never be *direct* copyright infringement is not to say that linking can never lead to copyright liability of any sort. Copyright law has well-developed doctrines of secondary liability—contributory infringement and vicarious infringement—which can hold liable a culpable party when that party has not, himself, done an act which directly infringes one of the exclusive rights. The specific requirements of these doctrines may be inquired into in the context of linking in the same way that they are applied to any other activity. “To support a claim for contributory copyright infringement, a plaintiff must demonstrate (1) direct infringement by a primary infringer, (2) the defendant’s knowledge of the infringement, and (3) the defendant’s material contribution to the infringement.”

Monotype Imaging, Inc. v. Bitstream, Inc., 376 F. Supp. 2d 877, 883 (N.D. Ill. 2005) (citations omitted). “[A] defendant is vicariously liable for copyright infringement if it has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1150 (7th Cir. 1992) (internal quotation marks omitted).

Thus, holding that myVidster is not a direct infringer—or that its users are not direct infringers—will not leave Flava Works without a path to a possible remedy. If Flava Works can show that myVidster or its users had knowledge of infringement and that their activities were intended to materially contribute to that infringement, myVidster or its users could potentially be liable as contributory infringers. If Flava Works can show that myVidster or its users had the right and ability to supervise the particular infringing performances and also had a direct financial interest in those performances, myVidster or its users could potentially be liable as vicarious infringers. But one cannot simply say, as the court below did, that myVidster must be enjoined because there has been infringement by someone, somewhere, that was facilitated by the operation of the myVidster website.

By rejecting the “server test” established in *Perfect 10 v. Amazon.com*, the district court has imperiled the investment decisions and licensing arrangements that have been made in reliance on that well-founded approach. For example, YouTube has licensed millions of audio and video works for public performance on its service. The videos that have been licensed on YouTube are, in turn, embedded on innumerable third-party webpages, blogs, and social networking services (including Facebook). If each embed link were to create direct infringement liability for those who want to incorporate a YouTube video into their own sites, this would sow chaos by potentially requiring each site to get its own public performance license for each video. This disruption in settled legal expectations would create

complexity and deter innovation, without delivering any commensurate benefit to copyright owners or Internet users.

III. MyVidster is not liable as a tertiary copyright infringer, because there is no such thing as tertiary copyright infringement.

Every claim of secondary copyright infringement must derive from a claim of direct copyright infringement. *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 644 (7th Cir. 2003) (“since there would thus be no direct infringement, neither would there be contributory infringement”). A claim of secondary infringement cannot, however, derive from another claim of secondary infringement. One cannot be liable for contributing to contributory infringement; one must contribute to direct infringement in order to be liable. One cannot be liable for failing to exercise one’s right to control a vicarious infringer; one must have the right and ability to supervise a direct infringer in order to be liable. *See, e.g., Perfect 10, Inc. v. VISA Int’l Serv. Ass’n*, 494 F.3d 788, 804 (9th Cir. 2007) (declining to impose liability on credit card networks who materially contributed to the activities of merchant banks who in turn provided services to infringers); *UMG Recordings, Inc. v. Veoh Networks Inc.*, No. 07-5744 AHM, 2009 WL 334022 (C.D. Cal. Feb. 2, 2009) (dismissing copyright claims against investors who provided capital to a company alleged to have engaged in contributory and vicarious copyright infringement); *Katz v. Napster, Inc.*, No. 11 Civ. 4725-MHP (N.D. Cal. July 9, 2001) (“Under this formulation, Napster users are the direct infringers, Napster is the secondary infringer and the individual [investors in Napster] are tertiary infringers. The court finds no support for this proposition. Rather, courts

have consistently held that liability for contributory infringement requires substantial participation in a specific act of direct infringement.”).

Thus, in order to show that myVidster may be a contributory or vicarious infringer, Flava Works must show, among other things, that some myVidster user is a *direct* infringer, not merely a contributory or vicarious infringer.⁹ Flava Works would then need to prove the other elements of contributory or vicarious infringement before secondary liability could attach.

CONCLUSION

A link is simply a pointer, whether it results in a file from another server being displayed in the context of the same web page or results in a hypertext link to another web page. As such, linking in and of itself cannot be direct copyright infringement. In order to hold a defendant liable for linking, a plaintiff must show that the defendant meets all of the elements of one of the well-developed secondary copyright liability doctrines. And a plaintiff must show contribution to or right and ability to control **direct** infringement, not merely facilitation of infringement through some other indirect infringer. This distinction between direct and secondary liability, established in *Perfect 10*, is critical to the continued vitality of innovation on the Internet.

⁹ *Amici* take no position on the question whether myVidster fulfilled the prerequisites for the application of any of the 17 U.S.C. § 512 safe harbors. *Amici* argue only that to the extent the question at bar is whether myVidster is a contributory or vicarious infringer, plaintiffs must show, among other elements, that a myVidster user has engaged in direct infringement to which myVidster has materially contributed or which myVidster had the right and ability to control.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), because it is written in 12-pt Century Schoolbook font, and with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 4,325 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii). This count is based on the word-count feature of Microsoft Word.

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Google Inc. and Facebook, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 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 30, 2011

/s/ Joseph C. Gratz
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