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 OF THE PLAINTIFF-APPELLEE, FLAVA WORKS, INC.

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Appellate Court No: 11-3190

Short Caption: Flava Works, Inc. v. Marques Rondale Gunter, et al.

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The Huon Law Firm

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I) Identify all its parent corporations, if any; and

None

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None
Attorney's Signature: /s/ Meanith Huon
Date: March 28, 2012

Attorney's Printed Name: Meanith Huon

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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STATEMENT OF JURISDICTION

The jurisdictional statement of the Defendants-Appellants is complete and correct.

STATEMENT OF THE ISSUES

I. Whether the District Court correctly held that Plaintiff, Flava Works, Inc., has shown some likelihood of success in proving contributory copyright infringement, when uncontroverted evidence was presented that the myVidster.com Defendants knew that its users were posting, sharing, and copying copyrighted videos on its website.

II. Whether the District Court correctly held that myVidster.com's "repeat infringer" policy was no policy at all, because the myVidster.com Defendants conducted no investigation.

III. Whether the District Court correctly relied on the 7th Circuit decision in Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F. 2d 607, 620 (7th Cir. 1982) that irreparable harm can be presumed in a copyright infringement case and on the testimonies of Phillip Bleicher, Flava Works, Inc.'s CEO and Defendant, Marques Gunter.

IV. Whether the language in the District Court's order requiring myVidster.com to filter out Flava Works, Inc. trademarks and implement a repeat infringer policy was an appropriate relief.

STATEMENT OF THE CASE

Plaintiff-Appellee, Flava Works, Inc. ("Flava Works"), filed its complaint against Defendant Marques Gunter d/b/a myVidster.com and SalsaIndy, LLC (the "myVidster.com Defendants") and other defendants for copyright and trademark infringement. Flava Works moved for a preliminary injunction. On May16, 2011 and June 9, 2011, the District Court heard testimony by the Phillip Bleicher, CEO of Flava Works, and Mr. Gunter. Documentary evidence was submitted to the District Court. On July 27, 2011, the District Court granted Flava Works' Motion for Preliminary Injunction.

The myVidster.com Defendants filed a Motion to Reconsider on August 15, 2011. Stating that it would address the argument on its merits despite the fact that it could and should have been presented to the District Court at the time of the hearings, the District Court took the matter under advisement and, on September 1, 2011, denied the Motion to Reconsider.

STATEMENT OF FACTS

Plaintiff-Appellee, Flava Works, Inc. will cite to each document in the original record by citing the Document No. and PageID number of the U.S. District Court electronic civil docket as Doc No.___, PageID ___. Plaintiff will cite to each document in the Defendants-Appellants' Separate Index by using the same abbreviation used by the Defendants-Appellants: SA___.

Flava Works is a gay ethnic adult company that produces magazines, DVDs, videos online, video on demand online, and pictures (Doc. 78, PageID 1430). Phillip Bleicher is the CEO of Flava Works His duties include programming, serving as webmaster, and monitoring copyrights use and violations (Doc. 78, PageID 1430).

Mr. Bleicher received complaints from his customers that they were paying for videos that

were available for "free" on myVidster.com (Doc. 78, PageID 1430). Mr. Bleicher did a search for Flava Works' trademarks on myVidster.com and found hundreds of Flava Works, Inc.' videos on myVidster.com (Doc. 78, PageID 1430). The search produced thumbnail images of Flava Works' copyrighted images that had been posted without Flava Works' permission. By clicking on the thumbnail images, Mr. Bleicher was redirected to the Flava Works' videos that were posted on myVidtser.com (Doc. 78, PageID 1431). Comments were posted by myVidster.com users next to the videos seeking more content belonging to Flava Works (Doc. 78, PageID 1431). Mr. Bleicher identified screenshots of Flava Works' videos that he downloaded from the myVidster.com website. He also identified a screenshot of the button on myVidster.com that states "download" (Doc. 78, PageID 1433; Doc. 109).

Mr. Bleicher testified that the Flava Works' videos state that the videos are copyrighted or that Flava Works' videos contain a watermark indicating that the videos are copyrighted (Doc. 78, PageID 1435). Flava Works' videos contain the "FBI" copyright warning that the videos are copyrighted (Doc. 78, PageID 1436).

Mr. Bleicher identified as Plaintiff's Group Exhibit No. 2 as being screenshots of videos posted on myVidster.com by repeat infringers (Doc. 78, PageID 1437; Doc. 109). The repeat infringers were the same users that Flava Works had notified myVidster.com about months prior to the hearing on Flava Works' motion for a preliminary injunction. The repeat infringers continue to post Flava Works' videos on myVidster.com (Doc. 78, PageID 1437-1438). Mr. Bleicher testified that hundreds of myVidster.com users were or are posting Flava Works' videos on myVidster.com without permission. However, Flava Works decided only to sue the repeat infringers who were repeatedly posting Flava Works's videos on myVidster.com and not every

infringer (Doc. 78, PageID 1438). Mr. Bleicher testified that the myVidster.com Defendants did not remove all of the Flava Works' videos identified in the DMCA take down notices, pursuant to § 512 of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512. He testified that the myVidster.com Defendants allow repeat infringers to continue posting Flava Works, Inc.' videos on the myVidster.com website (Doc. 78, PageID 1438).

Mr. Bleicher testified that Exhibits A, B, C, and D of the complaint are copyright registrations for some of the Flava Works' videos that have been posted on the myVidster.com website without permission (Doc. 78, PageID 1440). He testified that exhibits H, I, J, K, L, and M are the DMCA takedown notices that Flava Works sent to myVidster.com (Doc. 78, PageID 1442). Mr. Bleicher testified to DMCA takedown notices that were recently sent to myVidster.com (Doc. 78, PageID 1446). Mr. Bleicher testified that when he sent the DMCA notices to myVidster.com, Mr. Gunter either did not remove the content or all of the content. Often, Mr. Gunter never removed the copyrighted thumbnail images (Doc. 78, PageID 1442).

Mr. Bleicher testified that, as part of his investigation, he found that the source link for many of Flava Works' videos posted on myVidster.com was myVidster.com and not a third-party website (Doc. 78, PageID 1443). The "source link" is server or website from which the video file is hosted. Mr. Bleicher testified that Plaintiff's Exhibit No. 7 is a search result showing that 79,000 video files on myVidster.com identified myVidster.com as the source link (Doc. 78, PageID 1452; Doc. 109). Mr. Bleicher testified that Plaintiff's Exhibit No. 9 was Marques Gunter's Favorite Page on myVidster.com. On that Favorite Page, Mr. Gunter posted full-length movies of Star Trek, Hancock and Crank II and music videos copyrighted by Warner Brothers and Sony (Doc. 78, PageID 1453-1454; Doc. 109).

Mr. Bleicher testified he spent a significant amount of time policing the myVidster.com

website for copyrighted videos. He testified that after a particular Flava Works video was removed, another post for the same video would resurface. He explained how easy it would be for Mr. Gunter to install a filter to prevent the same videos from being uploaded (Doc. 78, PageID 1455).

Flava Works contends that videos that were the subject of DMCA takedown notices sent to myVidster.com continued to remain on myVidster.com's website, after Mr. Gunter claims that the videos had been removed. Flava Works produced screenshots of those videos as Plaintiff's Group Exhibit No. 2. (Doc. 106, PageID 2140; Doc. 109).

Mr. Bleicher testified that myVidster.com does not follow the industry standards set in place by websites like YouTube.com. According to Mr. Bleicher, unlike myVidster.com, YouTube.com does not allow the uploading of the same video twice, does not allow users to bypass private directories, and has filters to block hotlinking (Doc. 78, PageID 1450). Mr. Bleicher testified that Mr. Gunter discusses on his blog that myVidster.com can bypass sites that blocks hotlinking. Mr. Bleicher testified that hotlinking allows a user to link his post on myVidster.com to the actual image or video found on the server of another website. Mr. Bleicher testified that based on industry standards, webmasters view hotlinking as stealing bandwith from the server that acts as the original source of the video (Doc. 78, PageID 1448). Mr. Bleicher testified that myVidster.com is more like Piratebay.se, which maintains an index of mostly stolen copyrighted content (Doc. 78, PageID 1451).

Mr. Bleicher testified that myVidster.com provides more features than just bookmarking or posting of videos. myVidster.com allows users to make backup copies of the videos. myVidster.com also allows users to comment on and discuss videos. Users can ask other users to post or repost copyrighted videos. myVidster.com creates thumbnail images of the videos,

allowing for search capability by images or videos. Users can also post detailed description of the videos that can later by searched by other users (Doc. 78, PageID 1459).

Mr. Bleicher testified that he has been monitoring the myVidster.com website for some time. He has observed a correlation between the declining sales of Flava Works' videos and the growing popularity of myVidtser.com. He testified that shortly after a Flava Works' video has been edited and posted on its paid members' website, the video is posted without permission and made available for free by users on myVidster.com (Doc. 78, PageID 1461). Flava Works is losing customers who can get the same video for free on myVidster.com. People are also being conditioned to believe that they can get Flava Works, Inc. videos for free (Doc. 78, PageID 1462). New released videos produced by Flava Works have been posted on myVidster.com without permission (Doc. 78, PageID 1462).

The District Court correctly found that:

> 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 (SA24).

Marques Gunter is the owner and sole-programmer of myVidster.com (Doc. 78, PageID 1518). Mr. Gunter's view on copyright is that he is not in a position to judge whether a full-length movie or video posted on myVidster.com–like Star Trek-- is copyrighted content (Doc. 78, PageID 1523). Mr. Gunter has a full-length Star Trek movie on his myVidster.com Favorite Page (Doc. 78, PageID 1523). Mr. Gunter's view is that if a video is publicly available on the Internet, he will not make an assessment as to whether or not that video is copyrighted (Doc. 78, PageID 1527).

The District Court keenly observed that:

> 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 (SA23).

More than 50% of the videos posted on myVidster are porn, gay adult videos, ethnic gay adult videos, or adult videos (Doc. 78, PageID 1524). The gay community is the biggest community on myVidster.com (Doc. 78, PageID 1524).

myVidster.com allows users to surf the Internet for videos and to display videos by embedding the code and to posting the code on myVidster.com (Doc. 78, PageID 1537). The user can share the embedded video with others and link the embedded videos to other websites (Doc. 78, PageID 1538). Mr. Gunter created a "download" button on myVidster.com that allows users to download the videos if the links are active to the source of the video (Doc. 78, PageID 1524).

A premium user of myVidster.com can also make a backup copy of the embedded video (Doc. 78, PageID 1538). The backup copy is stored on the myVidster.com website. A premium user has to pay a monthly fee of $3 a month, $5 a month or $12 a year (Doc. 78, PageID 1538). During the beta testing period of myVidster.com, Mr. Gunter gave his users 500 megabytes of storage space to back up videos for free more (Doc. 78, PageID 1555). Any videos backed up during that period of time remain on myVidster.com's servers more (Doc. 78, PageID 1555). A screenshot produced by myVidster.com indicates that this free backup service was available for several months (Doc. 106, PageID 2143-2144).

The user can tag the videos with keywords or trademarks like "Flava Works" or "CocoDorm" (Doc. 78, PageID 1538). myVidster.com indexes these tag words and make them

searchable by users looking for videos with the key words like “Flava Works” (Doc. 78, PageID 1538).

The District Court found that myVidster.com 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, the thumbnail image is hosted on myVidster's servers (SA19). When a visitor to myVidster.com clicks on a video that is posted there, the video plays directly on myVidster.com, and the visitor remains on the myVidster.com site; he or she is not taken to the site that hosts the video file (SA20).

The myVidster.com Defendants produced a chart at the hearing. The District Court doubted the reliability of the chart:

> 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 (SA23).

The chart actually proves that myVidster.com continues to host videos that Mr. Gunter had represented to Flava Works, Inc. as having been removed (Doc. 106, PageID 2129). The chart conflicted with another Defense exhibit produced by myVidster.com as to which videos had been removed, after being served with a DMCA takedown notice from Flava Works (Doc. 106, PageID 2132-2133). The chart also identified myVidster.com as the source link for some videos—that is, the videos reside on myVidster.com’s servers (Doc. 106, PageID 2133). Another

problem with the chart is that it does not identify the users who posted the videos. Thus, the chart provides no way of identifying who are the repeat infringers (Doc. 106, PageID 2133-2134).

Mr. Gunter's repeat infringer policy is on a case by case basis regarding how many times a user can post a copyrighted video before that user is viewed as a repeat infringer (Doc. 78, PageID 1527). More importantly, when it comes to myVidster.com's repeat infringer policy, Mr. Gunter refuses to assess whether a video is copyrighted, if the video is found on a publicly accessible site:

> 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 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 infringer investigation would end, isn't that correct? (Doc. 78, PageID 1528).
>
> 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 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 my video and you looked into that, because the video was originally found on a publicly accessible video, you wouldn't consider that repeat infringer?
>
> A. Correct. (Doc. 78, PageID 1529).

Mr. Gunter's policy is that if the video is publicly accessible on the Internet, he does not investigate a potential infringer at all (Doc. 106, PageID 2137-2138). Thus, myVidster.com, for all practical

purposes, has no repeat infringer policy.

However, Mr. Gunter admits that he does not know what the agreement is in place between websites like Hulu.com and owners of copyrighted works that are posted on those websites. He does not know if the agreement between the websites and the owners of the content that he claims are publicly available involves a revenue fee sharing agreement (Doc. 106, PageID 2139).

The myVidster.com Defendants contend that in the entire life of the website, it has identified only one repeat infringer. Mr. Gunter sent that repeat infringer a warning but did not disable the repeat infringer's account (Doc. 78, PageID 1532). Out of 1.3 million videos posted on myVidster.com's servers, Mr. Gunter claims he only found one repeat infringer (Doc. 106, PageID 2135). But Mr. Gunter concedes that certain users continue to post videos of Flava Works, Inc. (Doc. 78, PageID 1536). The chart produced by the myVidster.com Defendants actually prove that there was at least one other repeat infringer who was not investigated (Doc. 106, PageID 2137).

myVidster.com allows users to flag a video. The most common flag is that a link is broken and a video cannot be downloaded or played (Doc. 78, PageID 1533). Mr. Gunter filters the flags: two users have to flag the same video before the flags come to Mr. Gunter's attention (Doc. 78, PageID 1534). When a user flags a video for copyright violation, the user gets instructions on how to send a DMCA takedown notice (Doc. 78, PageID 1536).

myVidster.com has filters for adult and non-adult content (Doc. 78, PageID 1578). But myVidster.com does not filter out videos with the tag "child porn" (Doc. 78, Page ID 1579). It would not be difficult for Marques Gunter, a self-taught programmer, to write a program to filter out videos with the tag "child porn" (Doc. 78, Page ID 1579). Mr. Gunter can easily filter out videos with tag words containing the trademarks of Flava Works, Inc., such as "CocoDorms" or

"Raw Rods" (Doc. 78, Page ID 1579). That would prevent users from posting videos with trademarks such as Flava Works.

Mr. Gunter posted a blog on top reasons to use myVidster.com. No. 1 was that myVidster.com allowed users to bypass YouTube videos that are private or that have been disabled from viewing (Doc. 78, PageID 1539). No. 2 was that myVidster.com allows users to make copies or duplicate of videos on sites that block hotlinking of the videos (Doc. 78, PageID 1540-1541). No. 4 was that myVidster.com users can create a backup copy if the video were to be removed by the host of the original source of the video (Doc. 78, PageID 1540). Mr. Gunter posted a blog entry seeking beta testers to test a plug-in for the Fire Fox web browser that would enabled users to access and post videos that were private and protected (Doc. 106, PageID 2150-2151).

The same video can be posted on myVidster.com hundreds of time or more (Doc. 78, PageID 1547). Unlike YouTube.com, myVidster.com does not have a function that prevents the posting of the same video more than once more (Doc. 78, PageID 1548). However, it would not be difficult to add a function on myVidster.com to prevent the same video from being posted more than once more (Doc. 78, PageID 1548).

myVidster.com has received DMCA takedown notices from other film companies, including Pitbull and Black Rain more (Doc. 78, PageID 1550).

myVidster.com generates advertising dollars through Juicy Ads, ad expansion, XNO Clip (Doc. 78, PageID 1552, 1554). myVidster.com also generates advertising from pay per click ads (Doc. 78, PageID 1553-1554). From its creation in 2009 to a year later, myVidster.com went from 67,000 hits a month to almost half a million hits a month in 2010 (Doc. 78, PageID 1543). There are more than 70,000 users of myVidster.com (Doc. 78, PageID 1543).

SUMMMARY OF ARGUMENT

The District Court correctly held that Plaintiff, Flava Works, Inc. has shown a likelihood of success on the merits. There was uncontroverted evidence presented by both sides that myVidster.com users posted infringing materials on the website. Evidence was presented that the myVidster.com Defendants knew or should have known of the copyright infringement, because multiple DMCA takedown notices were sent by Plaintiff, Flava Works, Inc. and the myVidster.com Defendants responded to the DMCA notices.

The case of In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) is on point and controlling. Like the file-sharing platform in Aimster, myVidster.com provides a video-sharing platform for users to post, share, and comment on copyrighted videos. Defendants' argument that Aimster implicitly adopted a "server test" is not supported by the facts of Aimster. The Aimster platform did not make copies of the swapped files themselves. Aimster essentially told a user where he can go to get a copy a music file he was looking for. The transaction did not take place on the Aimster server. Aimster implicitly rejected any notion of a server test."

The Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160-61 (9th Cir. 2007) does not apply. Unlike Google in Perfect 10, myVidster.com has created a platform that encourages users to troll the Internet for copyrighted videos and private protected videos, make backup copies, and display them. Google does not pick and choose which copyrighted videos to post and display. Google just simply provide an automated response. The Defendants in this litigation actively seek out copyrighted content, develop plug-ins or software that bypasses private encryptions, offers a backup service if the video is removed from the original source, and provides a forum for users to ask for more stolen content. Worse, the myVidster.com Defendants indexes the tag names of these videos and allow the copyrighted videos to be searchable, making

myVidster.com an online repository for displaying copyrighted works.

The District Court correctly held that the myVidster.com Defendants' "repeat infringer" policy is no policy at all, because Marques Gunter does not investigate potential infringers who post videos from publicly accessible websites. As the District Court keenly observed, " 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" (SA23).

The District Court correctly held that irreparable injury may normally be presumed from a showing of copyright infringement, relying on 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. Euroguilt, Inc., 772 F.2d 1423 (7th Cir. 1985) . In addition, there was evidence presented by Phillip Bleicher, CEO of Flava Works, Inc., that Flava Works, Inc.'s loss of customers and 30% drop in sales correlated with the sharp increase in traffic to myVidster.com where new releases of videos from Flava Works, Inc. were posted without permission. Mr. Gunter confirmed the sharp rise in traffic on myVidster.com.

The language in the District Court's injunction is reasonable and just, in an effort to reduce the rampant piracy on myVidster.com. Short of shutting down myVidster.com, the District Court ordered the myVidster.com Defendants to take reasonable steps to comply with the law. The order essentially requires myVidster.com to implement filters to block Flava Works, Inc.'s trademark names and to implement a repeat infringer policy. Having proposed no alternative injunction order in this appeal, the myVidster.com Defendants have waived this issue.

ARGUMENT

I. FLAVA WORKS HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

The District Court correctly held that Plaintiff, Flava Works, Inc. has shown a likelihood of success on the merits of its claim against the myVidster.com Defendants for contributory copyright infringement.[1] After almost two days of hearing testimony, the District Court correctly found that "There is uncontradicted evidence that myVidster.com users have created backup copies of Flava's works, which are stored on myVidster's servers" and that ". . . defendants' own evidence demonstrates) that myVidster users have caused Flava's works to be displayed on myVidster without Flava's permission" (SA30). Relying on the 7th Circuit's decision in In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003), the District Court correctly found held that there was "no doubt that defendants knew or should have known of the infringement occurring on myVidster" (SA31). 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, Defendants received these notices and responded to them (SA31).

The District Court correctly found that Mr. Gunter's "repeat infringer" policy is in fact no policy with respect to copyright infringement (SA33). Mr. Gunter's "willful blindness" is knowledge in copyright law, where he should have known of the direct infringement. The District Court, who had the opportunity to observe Mr. Gunter's demeanor and credibility at the hearing, found that Mr. Gunter's "cavalier attitude had not changed. His definition of 'repeat

[1]The District Court held that "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" (SA30).

infringer' does not encompass copyright law" (SA33). The District Court found "ample evidence that after having received the DMCA notices from plaintiff, defendants failed to act to prevent future similar infringing conduct" (SA33-34).

The District Court further found evidence that Defendants materially contributed to infringement (SA34). Defendants created the myVidster.com platform, which enables the display of embedded videos and thus the infringement. Defendants makes video storage (which involves making a copy of a video) available for a fee. In 2009, Defendants provided the backup storage free of charge for a limited time (SA34).

The District Court found that Mr. Gunter encouraged copyright infringement by posting full length motion pictures on his Favorite Page (SA34). The District Court cited to even more evidence that Mr. Gunter materially contributed to users' infringement. Mr. Gunter admitted that he did not 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" (SA35-36). As the District Court correctly noted, " 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" (SA23).

A. THE PERFECT 10 CASE DOES NOT APPLY.

The District Court correctly held that the 9th Circuit's decision in Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1160-61 (9th Cir. 2007), is not binding on this Court and is specific to the facts of that case. As the District Court explained:

> 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, 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. Both cases may involve inline linking, 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 (SA50).

The District Court further correctly held that myVidster.com users cause a video to be "displayed" by posting the videos on myVidster.com:

> 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 caus1ng 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 (SA50-51).

Defendants displayed Flava Works work without permission and made that display available to the public. The Copyright Act defines "display" as showing a copy of a work. 17 U.S.C. §§ 101. The Act defines a copy as a material object in which a work is fixed, including the material object in which the work is first fixed. The legislative history of the Act makes clear that "since 'copies' are defined as including the material object 'in which the work is first fixed,' the right of public display applies to original works of art as well as to reproductions of them." 17 U.S.C. §§ 101; H.R. Rep. No. 94-1476, at 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5677. By inline linking Flava Works, Inc.'s images, the myVidster.com Defendants are showing Flava Works, Inc.'s original works without permission. The legislative history goes on to state that

"'display' would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." Id. This language indicates that showing Flava Works's images on a computer screen would constitute a display.

The Act's definition of the term" publicly" encompasses a transmission of a display of a work 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. A display is public even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. H.R. Rep. No. 94-1476, at 64-65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678. By making Flava Works' images available on its web site, Defendants are allowing public access to those images. The ability to view those images is unrestricted to anyone with a computer and internet access.

The legislative history emphasizes the broad nature of the display right, stating that "each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in [any] form, the case comes within the scope of [the public performance and display rights] of section 106." Id. at 64. Looking strictly at the language of the Act and its legislative history, when the myVidster.com Defendants import Flava Works' images into myVidster.com's web page, Defendants are infringing upon Flava Works' public display right.

In Playboy Enterprises, Inc. v. Webbworld, Inc.,991 F. Supp. 543 (N.D. Tex. 1997), the court found that the owner of an internet site infringed a magazine publisher's copyrights by

displaying copyrighted images on its web site. The defendant, Webbworld, downloaded material from certain newsgroups, discarded the text and retained the images, and made those images available to its internet subscribers. Playboy owned copyrights to many of the images Webbworld retained and displayed. The court found that Webbworld violated Playboy's exclusive right to display its copyrighted works, noting that allowing subscribers to view copyrighted works on their computer monitors while online was a display. The court also discounted the fact that no image existed until the subscriber downloaded it. The image existed in digital form, which made it available for decoding as an image file by the subscriber, who could view the images merely by visiting the Webbworld site. Interestingly, the images were retained as both full-sized images and thumbnails. A subscriber could view several thumbnails on one page and then view a full-sized image by clicking on the thumbnail. The situation is analogous to myVidster.com. By allowing the public to view Flava Works' copyrighted works while visiting myVidster.com's web site, Defendants created a public display of Flava Works, Inc.' works.

This case highlighted the fact that the defendants took an active role in creating the display of the copyrighted images. The reason for this emphasis is that Perfect 10 held that Google did not take any affirmative action that resulted in copying copyrighted works. Google didn't crawl the Internet to bypass privately protected full length copyrighted videos and post the videos to its site for users to share, comment, and make backup copies. myVidster.com encouraged users to post copyrighted videos and images and generate advertising revenue from the increase in web traffic to its site from users seeking Flava Works' videos. myVidster.com is liable for contributory copyright infringement. Defendants actively participated in displaying Flava Works' images by encouraging users to troll the web and find Flava Works' videos and images. myVidster.com's program inline linked, displayed, and/or copied those images and videos within its own web site.

Without this program, users would not have been able to view the images within the context of the myVidster.com site. myVidtser.com acted as more than a passive conduit of the images by establishing a direct link to the copyrighted images. myVidster.com allowed users to tag the videos and the tags and keywords were indexed by myVidster.com. Therefore, Defendants are liable for publicly displaying Flava Works, Inc.'s copyrighted images without its permission.

A U.S. District in Nevada has also noted that the inline linking in Perfect 10 refers to the automated response of Google's search engine and did not involve any volitional act on the part of the users. Righthaven LLC v. Choudhry, 2011 U.S. Dist. LEXIS 48290 (D. Nev. May 3, 2011).

As the Defendants concede, under the Copyright Act ("the 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 is granted 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.

The Internet and World Wide Web is a public place. myVidster.com provides free access to anyone who registers and signs up. Mr. Gunter cannot argue that these videos are publicly available on the Internet but not concede that the Internet is a public place.

Unlike myVidster.com, in Perfect 10, Google's search engine tells a user's browser where to find the image in a passive manner. Google does not actively crawl the Internet to collect

copyrighted videos and post and distribute them on Google's "Favorite Page":

> Google's search engine communicates HTML instructions that tell 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. It is the website publisher's computer that distributes copies of the images by transmitting the photographic image electronically to the user's computer. As in Tasini, the user can then obtain copies by downloading the photo or printing it. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1162 (9th Cir. Cal. 2007).

In this case, myVidster.com' users collects copyrighted videos and posts them to a page to be shared, transmitted, discussed, commented on, and copied. myVidster.com encourages the infringement.

The 9th Circuit explained in Perfect 10 that Google does display the work itself but merely sends an address to the browser of the user:

> Perfect 10 also argues that Google violates Perfect 10's right to display full-size images because Google's in-line linking meets the Copyright Act's definition of "to perform or display a work 'publicly.' " 17 U.S.C. § 101. This phrase means "to transmit or otherwise communicate a performance or display of the work 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." Id. Perfect 10 is mistaken. Google's activities do not meet this definition 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. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1161 (9th Cir. Cal. 2007)

In this case, myVidster.com not only finds the address, but displays the copyrighted image or videos for the user. Google tells the user where he can steal the copyrighted video. myVidster.com brings the stolen copyrighted video to the user.

The Ninth Circuit did not adopt or advocate a "server test" but merely acknowledge that the District Court in Perfect 10 used a "server test". A search of Lexis Nexis for "server test" produces four cases that refer to it--three of the four cases relate to the Perfect 10 litigation: Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006); Louis Vuitton Malletier, S.A. v. Akanoc

Solutions, Inc., 2010 U.S. Dist. LEXIS 85266 (N.D. Cal. Mar. 19, 2010); Perfect 10, Inc. v. Google, Inc., 2008 U.S. Dist. LEXIS 79200 (C.D. Cal. July 16, 2008); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. Cal. 2007). Defendants cite no other cases that adopted the "server test", which is inadequate to deal with the changing technologies of today. Defendants' proposed "server test" would allow an infringer to circumvent the law which is written broadly. Nothing in the Act discusses a "server test." The Act broadly states "by means of other device or process." myVidster.com shows a copy of Flava Works, Inc.'s images and videos by means of other device or process.

Defendants' reliance on In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. Ill. 2003), to support its argument is flawed. Users of myVidster.com are like users of Aimster who directly infringed on copyrights. The comparison should be between users of the websites, not between myVidster.com and users of Aimster. The District Court correctly found that Plaintiff would likely establish contributory copyright infringement by Defendants. myVidster.com like Aimster provides a platform for users to share and trade copyrighted works, even though the files may not reside on the Aimster's servers. Aimster is directly on point. The 7th Circuit described the Aimster platform as:

> The Aimster system has the following essential components: proprietary software that can be downloaded free of charge from Aimster's Web site; Aimster's server (a server is a computer that provides services to other computers, in this case personal computers owned or accessed by Aimster's users, over a network), which hosts the Web site and collects and organizes information obtained from the users but does not make copies of the swapped files themselves and that also provides the matching service described below; computerized tutorials instructing users of the software on how to use it for swapping computer files; and "Club Aimster," a related Internet service owned by Deep that users of Aimster's software can join for a fee and use to download the "top 40" popular-music files more easily than by using the basic, free service. In re Aimster Copyright Litig., 334 F.3d 643, 646 (7th Cir. Ill. 2003)

In Aimster, the 7th Circuit concluded that the copyright owners were likely to prevail on

their claim of contributory infringement. The provider's software that allowed for the sharing of music files, along with a tutorial on how to share files, was an invitation to infringement. Further, the fact that the service was capable noninfringing uses was not enough. The provider failed to produce any evidence that its service had ever been used for a noninfringing use. The provider also argued that it did not have actual knowledge of infringing uses because all of the files were encrypted. The appellate court noted that by eliminating the encryption feature and monitoring the use being made of its system, the provider could have limited the amount of infringement. Instead, it did nothing to discourage repeat infringers. As such, the provider did not fall within the safe harbor of 17 U.S.C.S. § 512(i)(1)(A). Finally, the copyright owners' harm was irreparable and outweighed any harm to the provider because their damages could not be reliably estimated and the provider was unlikely ever to have the resources to pay them while the provider was protected by an injunction bond. In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. Ill. 2003).

In this case, myVidster.com is the video pirating equivalent of swapping copyrighted music files. myVidster.com provides a platform for users to swap and share full length copyrighted videos by posting it to a page. The District Court noted that by adding filters and other measures--which Mr. Gunter admitted is relatively easy--copyrighted videos can be prevented from being posted but Defendants have refused to implement these measures. myVidster.com encouraged users to infringe by posting instructions on a blog on how to access private videos and gave copyrighted full length motion pictures as examples of videos to post on the Favorite Page of Mr. Gunter. Defendants argue without merit that linking or posting somehow makes it less copyright infringement than downloading in Aimster.

The myVidster.com Defendants admit that it provides an address for the location of a copyrighted videos. Like Aimster, myVidster.com tells a user searching for a video where to go to

find a copyrighted video. If that copyrighted video is private or protected, myVidster.com provides a plug-in for Fire Fox browser that bypasses the private encryption or hotlinking. Like Aimster, myVidster.com provides a marketplace for infringers or pirates to meet and trade copyrighted works. myVidster.com does this by tagging and indexing the videos and making the tag words searchable. A discussion forum or comment section is provided for users to post comments seeking more copyrighted content. A backup service is provided for users to make backup files if the video is removed from the original source.

B. UNCONTRADICTED EVIDENCE WAS PRESENTED BY BOTH PARTIES TO THE DISTRICT COURT THAT THE MYVIDSTER.COM DEFENDANTS KNEW ITS USERS WERE INFRINGING.

Defendants argue in bad faith that no evidence was presented of contributory infringement by users of myVidster.com. The District Court found that "There is uncontradicted evidence that myVidster users have created backup copies of Flava's works, which are stored on myVidster's servers" and that ". . . defendants' own evidence demonstrates) that myVidster users have caused Flava's works to be displayed on myVidster without Flava's permission" (SA30).

Relying on the Seventh Circuit's decision in In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003), the District Court correctly found held that there was "no doubt that defendants knew or should have known of the infringement occurring on myVidster" (SA31). 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, Defendants received these notices and responded to them (SA31).

C. MYVIDSTER.COM HAS NO REPEAT INFRINGER POLICY.

The District Court correctly found that myVidster.com's "repeat infringer" policy is in fact no policy at all:

> 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 (SA33).

Interestingly, Defendants cannot even articulate what the repeat infringer policy is.

As the District Court correctly noted, " 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" (SA23). Defendants continue to rely on the meritless argument and troubling attitude toward copyright infringement that Defendants willful blindness is a defense.

The District Court correctly found that Defendants do not qualify for the safe harbor

provision of the DMCA, because of Mr. Gunter's views on copyright law:

> 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 (SA37).

myVidster.com has no repeat infringer policy because the repeat infringers post copyrighted videos of Flava Works' that attracts a following of users. This generates more traffic to the myVidster.com. Without the repeat infringers, myVidster.com would not have a following because full length Flava Works' copyrighted videos would not be available for free.

III. THE DISTRICT COURT CAN PRESUME IRREPARABLE HARM.

The District Court correctly held that "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) (SA29). Defendants cite to case law outside the 7th Circuit that are not binding on this Circuit. We are not in the 9th Circuit.

Moreover, Mr. Bleicher testified that myVidster.com was conditioning people to believe that everything is free on the Internet, including copyrighted videos. In fact, counsel for Defendants' incorrect statement in the Statement of Facts on page 5 of Defendants' Appellate Brief that Flava Works, Inc. has videos for free on the Internet supports this contention that Defendants and even its attorneys seem to view everything on the Internet as free. Mr. Bleicher testified that there were free trailers or teasers of Flava Works' videos. The trailers redirect the user to a paid membership where the user must pay for the full length movie. In contrast to sites like

Youtube.com, myVidster.com allows users to post full length movies. Defendants have provided no evidence that everything is free on the Internet. Defendants and its attorneys just simply assume that nearly everything publicly accessible on the Internet is free. Only Mr. Bleicher has testified to industry standards and practices by websites like Youtube.com. This conditioning is not redressable by money damages. This mistaken view of copyright law can potentially put Flava Works out of business. It discourages free enterprise and creative individuals from investing or engaging in any endeavor, only to have it stolen and given away for free on the Internet.

Mr. Gunter's myVidster.com platform and his refusal to implement filters that YouTube.com and other sites have reasonably adopted seems to be a personal crusade to advocate his view that anything that is publicly available is not copyrighted. In fact, this litigation seems to be an effort to change the status quo and the law of copyright by asking the 7th Circuit to adopt the unreasonable view that making a display of a copyrighted work is not an infringement simply because of an overly a technical argument that the video was embedded or posted. Aimster did not split hairs as to whether a file resided on a server of the Aimster site.

In addition, Mr. Bleicher testified that the sudden growth in traffic on myVidster.com correlated with the significant loss of his business's revenue. The District Court noted that Flava Works' sales are down thirty percent from last year, which equates to an estimated loss of between $100,000 and $200,000, while the number of myVidster.com users has grown to over 70,000 since the site was created a few years ago. In addition, myVidster.com grew from 67,000 visits per month from October 2009 to about 460,000 visits in April 2010. Mr. Gunter did not dispute this exponential growth. Mr. Bleicher attributes at least some of Flava's lost sales to myVidster.com because hundreds of Flava Works' videos have appeared (and still appear) on myVidster (SA24). Irreparable injury may normally be presumed from a showing of copyright infringement.

Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 620 (7th Cir. Ill. 1982). Graham v. Medical Mut., 130 F.3d 293 (7th Cir. Ill. 1997), and E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700 (7th Cir. Ill. 2005) are not copyright cases where damages are presumed when there is an infringement.

In Aimster, the 7th Circuit held the recording industry's harm should the preliminary injunction be dissolved would undoubtedly be irreparable. The industry's damages from Aimster's contributory infringement could not be reliably estimated and Aimster would in any event be unlikely ever to have the resources to pay them. In re Aimster Copyright Litig., 334 F.3d 643, 655-656 (7th Cir. Ill. 2003). In this case, Defendants argue that Plaintiff's damages cannot be reasonably estimated and that Defendants generated little revenue from the site. Thus, Defendants have made Plaintiff's arguments.

IV. THE DISTRICT COURT'S ORDER WAS APPROPRIATE.

The 7th Circuit held in Aimster that "Aimster objects to the injunction's breadth. But having failed to suggest alternative language either in the district court or in this court, it has waived the objection." In re Aimster Copyright Litig., 334 F.3d 643, 656 (7th Cir. Ill. 2003). For the same reasons, myVidster.com, having failed to suggest alternative language and having taken a hard and obstinate stance on its distorted view of copyright law, has waived the objection.

The language in the injunction in Aimster was much broader than the injunction entered by the District Court in this case ordering myVidster.com to, among other things, filter out Flava Works' trademark names, implement a repeat infringer policy, and comply with the DMCA (SA52). In re Aimster Copyright Litig., 2002 U.S. Dist. LEXIS 21453, 1-4 (N.D. Ill. Oct. 30, 2002). In this case, the District Court attempted to find a just, reasonable and fair remedy to reduce

the blatant copyright infringement on myVidster.com--short of shutting down the entire website.

The myVidster.com Defendants do not define the "status quo" but seem to argue that the "status quo" is the period of time during which myVidster.com was allowed to infringe on Flava Works' copyrights. On the contrary, the "status quo" is during the period of time when Flava Works' copyrights were not being infringed. Defendants created a platform that invited users to troll the Internet posting and infringing Flava Works' works. Short of shutting down the website, the District Court provided a reasonable steps that myVidster.com can take to limit the infringement, to preserve the "status quo" when the infringement had not taken place. Defendants seem to argue that the order prevents Defendants' users from infringing on Flava Works' copyrighted works. That's the point of the preliminary injunction.

Mr. Gunter testified that he has software that filters out adult and non-adult content and that filtering out Flava Works, Inc.'s trademarks would be relatively easy. The District Court--who heard the testimony of the parties and assessed their credibility--found that there was uncontroverted evidence that Defendants knew or should have known of rampant copyright infringement. Defendants argue that complying with the District Court's order "would cause myVidster to terminate a substantial number of users, who would likely never return . . ." Defendants miss the point: a substantial number of users are engaging in copyright infringement. These repeat infringers create web traffic from other users seeking full length copyrighted Flava Works' videos. The mass number of copyright infringements taking place on the myVidster.com platform is all the more reason why their accounts should be disabled. Should Defendants prevail on the merits, nothing would stop them from attracting the same users who were probably drawn to the site in the first place to view, shared, and download copyrighted films for free. There is always a market for free pirated or copyrighted films or videos and images. Defendants argued

that myVidster.com generated little or no revenue from the website. Defendants cannot show that it would face difficulties rolling back to the situation at the present in which Defendants provide a platform for copyright infringement and free videos for downloading if Defendants prevail at trial.

The preliminary injunction order is more specific than the language in Aimster directing Defendants to filter out Flava Works, Inc.'s trade names. myVidster.com is fairly apprised of the prohibited or required conduct, because it just argued that complying with the order would prevent its users from posting or downloading copyrighted videos.

The language to adopt and reasonably implement a repeat infringer policy with respect to the infringement of copyright and to implement measures designed to prevent repeat infringement is reasonable and specific. Defendants are being ordered to comply with the copyright law and the DMCA. Defendants can decide for themselves that a user who posts more than two or three or four copyrighted videos is a repeat infringer. Defendants do not define its repeat infringer policy, because it has none. As the District Court observed, myVidster.com has no repeat infringer policy, because its obstinate views on copyright law is distorted and plain wrong.

Finally, there is no restrain on free speech. Defendants do not even identify the speech that is being restrained. The District Court did not enter an order restraining Defendants from making disparaging comments on the Internet. The order states nothing with respect to the comments or discussion section on the pages where the videos are posted. The Court simply ordered myVidster.com to comply with the copyright laws and not infringe on copyrights. As the District Court aptly noted, how often does "Flava Works" or "Raw Rods" or "Coco Dorm" come up in a conversation (Doc 78, PageID 1549). The District Court is not ordering that users cannot post these words. The Court is ordering that Defendants implement filters so that Defendants cannot tag and index these words to become a repository of copyrighted videos for

users to search and download. Defendants would argue that the First Amendment bars the filtering of tag words like “child porn” or “rape”. That is not the case. Defendants cannot even demonstrate how many false positives would occur for the word “Flava” or that “Flava” is somehow used in common speech. This argument is meritless.

The cases cited by Defendants are not applicable, because they involve screening comments or postings by users, not filtering tags or key words in a search index. Wolk v. Kodak Imaging Network, Inc., cited by Defendants, do not apply. There, there was “no evidence that Photobucket had actual or constructive knowledge of the copyright infringement Wolk alleges”. Summary judgment was granted in favor of the defendants against the *pro se* plaintiff. Wolk v. Kodak Imaging Network, Inc., 2011 U.S. Dist. LEXIS 150114 (S.D.N.Y. Dec. 21, 2011). The issue of the appropriate language in an injunction order or the issue of a preliminary injunction did not even come up.

CONCLUSION

For the foregoing reasons, the District Court's opinions of July 27, 2011 and September 1, 2011 should be affirmed and the Preliminary Injunction be affirmed.

Respectfully submitted,

Date: March 28, 2012

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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 approximately 10,735 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 12 point font in the footnotes.

Dated: March 28, 2012

/s/ Meanith Huon
Meanith Huon

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2012, 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.

I hereby certify that on March 28, 2012, I serve 2 copies on all on counsel for each separately represented party pursuant to Fed. R. App. P. 31, by regular mail, postage prepaid, by depositing same in a U.S. Post Office Box located in Chicago, Illinois.

Dated: March 28, 2012

/s/Meanith Huon
Meanith Huon