

**GAUNTLETT & ASSOCIATES**

David A. Gauntlett (SBN 96399)

James A. Lowe (SBN 214383)

Brian S. Edwards (SBN 166258)

Christopher Lai (SBN 249425)

18400 Von Karman, Suite 300

Irvine, California 92612

Telephone: (949) 553-1010

Facsimile: (949) 553-2050

[info@gauntlettlaw.com](mailto:info@gauntlettlaw.com)[jal@gauntlettlaw.com](mailto:jal@gauntlettlaw.com)[bse@gauntlettlaw.com](mailto:bse@gauntlettlaw.com)

Attorneys for Defendants

Akanoc Solutions, Inc.,

Managed Solutions Group, Inc.

and Steve Chen

**UNITED STATES DISTRICT COURT****NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

LOUIS VUITTON MALLETTIER, S.A.,

Plaintiff,

vs.

AKANOC SOLUTIONS, INC., MANAGED  
SOLUTIONS GROUP, INC., STEVEN CHEN  
AND DOES 1 THROUGH 10, INCLUSIVE,

Defendants.

Case No.: C 07-3952 JW (HRL)

**SUPPLEMENTAL JURY  
INSTRUCTION NO. 9**

**JURY INSTRUCTION No. \_\_\_\_****DEFENSES TO CONTRIBUTORY COPYRIGHT INFRINGEMENT –  
DMCA SAFE HARBOR – REQUIREMENTS**

Federal law exempts Internet service providers such as MSG and Akanoc from contributory copyright infringement claims that result from the conduct of their customers when they meet certain criteria. To qualify for safe harbor protection regarding infringing material on websites stored on their servers, MSG and Akanoc must prove by a preponderance of the evidence that:

(1) they are providers of online services or network access, or are the operator of facilities therefore;

(2) they adopted and reasonably implemented a termination policy for subscribers and account holders who are repeat infringers;

(3) they accommodate and do not interfere with standard technical measures that copyright owners use to protect their works;

(4) any contributory infringement is by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider;

(5) they lacked actual knowledge of the infringing material or were not aware of facts or circumstances from which infringing activity was apparent on its system or network and/or acted expeditiously to remove or disable access to the material upon obtaining such knowledge or awareness;

(6) they did not receive a financial benefit directly attributable to the infringing activity, if they had the right and ability to control such activity. An ability of MSG and Akanoc to remove or block access to materials posted on websites or stored on their servers is not sufficient to demonstrate that they receive a direct financial benefit;

(7) they responded expeditiously to remove or disable access to infringing material upon notification from the copyright owner; and

(8) they properly designated an agent to receive such notification.

In determining whether the ISP defendants complied with (1) and (6) above, it is enough if the ISP defendants did what they could reasonably be asked to do to under the circumstances to prevent the use of their services by repeat infringers.

An ISP defendant's failure to comply with (7) above is excused if the plaintiff fails to provide adequate notice of claimed infringement in writing to the defendants' designated agent that

1 complies with the following:

- 2 1. A physical or electronic signature of a person authorized to act on  
3 its behalf;
- 4 2. Identification of the copyrighted work claimed to have been  
5 infringed, or, if multiple copyrighted works at a single online site are  
6 covered by a single notification, a representative list of such works at  
7 that site;
- 8 3. Identification of the material claimed to be infringing or to be the  
9 subject of infringing activity and that is to be removed or access to  
10 which is to be disabled, and information reasonably sufficient to  
11 permit the service provider to locate the material;
- 12 4. Information reasonably sufficient to permit the applicable service  
13 provider (MSG or Akanoc) to contact the complaining party, such as  
14 an address, telephone number, and, if available, an electronic mail  
15 address at which the complaining party may be contacted;
- 16 5. A statement that the complaining party has a good faith belief that  
17 use of the material in the manner complained of is not authorized by  
18 the copyright owner, its agent, or the law; and
- 19 6. A statement that the information in the notification is accurate, and  
20 under penalty of perjury, that the complaining party is authorized to  
21 act on behalf of the owner of an exclusive right that is allegedly  
22 infringed.

23 Any failure by the defendants to comply with any of the above safe harbor requirements is  
24 irrelevant to and should not be considered by you in determining the defendants liability for  
25 contributory copyright or trademark infringement.  
26  
27  
28

1 See 15 U.S.C. 512(k)(1)(B):

2 Definitions.--(1) Service provider

3 (B) As used in this section, other than subsection (a), the term “service  
4 provider” means a provider of online services or network access, or the  
5 operator of facilities therefor, and includes an entity described in  
subparagraph (A).

6 *Tur v. YouTube, Inc.*, 2007 WL 1893635 \*2-3 (C.D.Cal. June 20, 2007) (“To be eligible for any of  
7 the four safe harbors at §§ 512(a)-(d), a service provider must first meet the threshold conditions set  
out in § 512(i) ...”. Accordingly, YouTube must prove that:

8 (1) it has adopted and reasonably implemented a termination policy for  
9 subscribers and account holders who are repeat infringers, 17 U.S.C. §  
521(i)(1)(A)

10 (2) accommodates and does not interfere with “standard technical  
11 measures” that copyright owners use to protect their works, 17 U.S.C.  
§ 512(i)(1)(B)

12 (3) its infringement is “by reason of the storage at the direction of a  
13 user of material that resides on a system or network controlled or  
operated by or for the service provider,” 17 U.S.C. § 512(c)(1);

14 (4) it lacked actual knowledge of the infringing material or was not  
15 aware of facts or circumstances from which infringing activity was  
apparent on its system or network and/or acted expeditiously to  
16 remove or disable access to the material upon obtaining such  
knowledge or awareness, 17 U.S.C. § 512(c)(1)(A)(i)-(iii);

17 (5) it did “not receive a financial benefit directly attributable to the  
18 infringing activity,” if it had “the right and ability to control such  
activity,” 17 U.S.C. § 512(c)(1)(B);

19 (6) it responded expeditiously to remove or disable access to infringing  
20 material upon notification from the copyright owner, 17 U.S.C. §  
512(c)(1)(C); and

21 (7) it has properly designated an agent to receive such notification, 17  
22 U.S.C. § 512(c)(2).

23 *Tur v. YouTube, Inc.*, 2007 WL 1893635 \*3 (C.D.Cal. June 20, 2007) (“With regard to 17 U.S.C. §  
24 512(c)(1)(B), YouTube maintains it does not receive a financial benefit directly attributable to the  
allegedly infringing activity and that it does not have the right or ability to control said activity. As  
the statute makes clear, a provider's receipt of a financial benefit is only implicated where the  
25 provider also “has the right and ability to control the infringing activity.” 17 U.S.C. § 512(c)(1)(B),  
See *Perfect 10, Inc. v. CCBill LLC*, 2007 WL 1557475 at \*11. As such, if YouTube does not have  
26 the right and ability to control the alleged infringing activity, the Court need not engage in the  
“financial benefit analysis.”)

27 *Tur v. YouTube, Inc.*, 2007 WL 1893635 \*3 (C.D.Cal. June 20, 2007) (“The ‘right and ability to  
28 control’ infringing activity, as the concept is used in the DMCA, has been held to mean “something

1 more” than just the ability of a service provider to remove or block access to materials posted on its  
 2 website or stored in its system.” *Hendrickson v. Ebay, Inc.*, 165 F.Supp.2d 1082, 1093 (C.  
 3 D.Cal.2001); see also *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1183  
 4 (C.D.Cal.2002); see also *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090 (W.D.Wash.2004).  
 5 Rather, the requirement presupposes some antecedent ability to limit or filter copyrighted material.  
 6 Fonavisa at 263; see also *MGM, Inc. v. Grockster*, 545 U.S. 913, 926.”)

7 *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9<sup>th</sup> Cir.2004) (Section 512(i)(1)(A) requires service  
 8 providers to: (1) adopt a policy that provides for the termination of service access for repeat  
 9 copyright infringers in appropriate circumstances; (2) implement that policy in a reasonable manner;  
 10 and (3) inform its subscribers of the policy.”)

11 *In re Aimster Copyright Litigation*, 252 F.Supp.2d 634, 659 (N.D.Ill.2002), aff’d, 334 F.3d 643 (7<sup>th</sup>  
 12 Cir.2004) (repeat infringer policy communicated when users informed they “may have their access  
 13 to all services terminated” for repeated copyright violations) (emphasis added); *Perfect 10, Inc. v.*  
 14 *CCBill, LLC*, 340 F.Supp.2d 1077, 1088-89 (C.D.Cal.2004) (policy stating user’s access may be  
 15 terminated deemed sufficient communication).

16 *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112 (9<sup>th</sup> Cir. 2007) (“In order to substantially  
 17 comply with § 512(c)(3)’s requirements, a notification must do more than identify infringing files.  
 18 The DMCA requires a complainant to declare, under penalty of perjury, that he is authorized to  
 19 represent the copyright holder, and that he has a good-faith belief that the use is infringing. This  
 20 requirement is not superfluous. Accusations of alleged infringement have drastic consequences: A  
 21 user could have content removed, or may have his access terminated entirely. If the content  
 22 infringes, justice has been done. But if it does not, speech protected under the First Amendment  
 23 could be removed. We therefore do not require a service provider to start potentially invasive  
 24 proceedings if the complainant is unwilling to state under penalty of perjury that he is an authorized  
 25 representative of the copyright owner, and that he has a good-faith belief that the material is  
 26 unlicensed.”)

27 *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9<sup>th</sup> Cir.2007) (“The statute does not define  
 28 “reasonably implemented.” We hold that a service provider “implements” a policy if it has a  
 working notification system, a procedure for dealing with DMCA-compliant notifications, and if it  
 does not actively prevent copyright owners from collecting information needed to issue such  
 notifications. . . . An implementation is reasonable if, under “appropriate circumstances,” the service  
 provider terminates users who repeatedly or blatantly infringe copyright.”)

*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9<sup>th</sup> Cir.2007) (“In this case, Perfect 10 provides  
 almost no evidence about the alleged direct financial benefit to CWIE. Perfect 10 only alleges that  
 “CWIE ‘hosts’ websites for a fee.” This allegation is insufficient to show that the infringing activity  
 was “a draw” as required by *Ellison*. 357 F.3d at 1079. Furthermore, the legislative history expressly  
 states that “receiving a one-time set-up fee and flat, periodic payments for service from a person  
 engaging in infringing activities would not constitute receiving a ‘financial benefit directly  
 attributable to the infringing activity.’ ” H.R. Rep., at 54. Perfect 10 has not raised a genuine issue of  
 material fact that CWIE receives a direct financial benefit from infringing activity. Because CWIE  
 does not receive a direct financial benefit, CWIE meets the requirements of § 512(c).”)

*Rossi v. Motion Picture Ass’n of America Inc.*, 391 F.3d 1000, 1003 (9<sup>th</sup> Cir.2004) (“When a  
 copyright owner suspects his copyright is being infringed, he must follow the notice and takedown

provisions set forth in § 512(c)(3) of the DMCA, which provide in part:

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law. 17 U.S.C. § 512(c) (emphasis added)."

*Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 715, fn. 4 (9th Cir. 2007) ("The failure of a service provider's conduct to qualify for limitation of liability under [the DMCA] shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.")

*Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 552 (4th Cir. 2004) ("CoStar argues that because the DMCA supplanted *Netcom*, Loopnet must rely for its defense exclusively on the immunity conferred by the DMCA. This argument, however, is belied by the plain language of the DMCA itself: . . . Other defenses not affected: The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense. . . . Thus the statute specifically provides that despite a failure to meet the safe-harbor conditions in § 512(c) and (i), an ISP is still entitled to all other arguments under the law- whether by way of an affirmative defense or through an argument that conduct simply does not constitute a prima facie case of infringement under the copyright act."