

**No. 09-56777**

Opinion Filed March 14, 2013

Before: Harry Pregerson, Raymond C. Fisher and Marsha S. Berzon,  
Circuit Judges

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**UMG RECORDINGS, INC.; UNIVERSAL MUSIC CORP.; SONGS OF  
UNIVERSAL, INC.; UNIVERSAL-POLYGRAM INTERNATIONAL  
PUBLISHING, INC.; RONDOR MUSIC INTERNATIONAL, INC.;  
UNIVERSAL MUSIC—MGB NA LLC; UNIVERSAL MUSIC—Z  
TUNES LLC; UNIVERSAL MUSIC—MBG MUSIC PUBLISHING  
LTD.,**

**Plaintiffs-Appellants**

v.

**SHELTER CAPITAL PARTNERS LLC, SHELTER VENTURE FUND  
LP, SPARK CAPITAL LLC, SPARK CAPITAL, L.P., TORNANTE  
COMPANY, LLC, AND VEOH NETWORKS, INC.,  
Defendants-Appellees.**

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**On Appeal from the United States District Court  
for the Central District of California, Western Division—Los Angeles  
Honorable A. Howard Matz, District Judge**

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**PETITION FOR REHEARING AND REHEARING *EN BANC***

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Appellants UMG Recordings, Inc.; et al., (collectively “UMG”) respectfully seek rehearing and suggest rehearing *en banc* of the panel decision (“Opinion”) in UMG Recordings, Inc., et al. v. Veoh Networks, Inc. (“Veoh”), et al., No. 09-56777.

This has been one of the most closely watched and anticipated copyright cases in years. For good reason. The appeal raises important questions of first impression concerning the protection and enforcement of copyrights on the internet. It is vital that these issues be correctly resolved and that the Court provide guidance on the scope of the “safe harbors” to copyright liability created in the Digital Millennium Copyright Act (“DMCA”). The panel’s new decision – which replaces the panel’s original December 2011 decision – accomplishes neither goal.

The new opinion effectively rewrites the DMCA to provide different rules for copyright infringement on the internet. It improperly shifts the burden of online copyright enforcement to content owners whose businesses depend on payment for the use of their works, while broadly shielding internet service providers (“ISPs”) who use and reap financial benefits from those works (without compensating their owners) even when they have the right and ability to police their sites. The Opinion upends the carefully-crafted balance

embodied in Section 512 of the Copyright Act. And, as explained below, the Opinion fails to clarify the limits or scope of the DMCA's "safe harbors."

The flaws in the Opinion include: *first*, the holding that section 512(c)'s safe harbor for infringement "by reason of the storage at the direction of a user" actually encompasses all "access-facilitating processes that automatically occur when a user" uploads, streams or downloads infringing material eviscerates both the language and structure of the DMCA. Congress created four discrete safe harbors, each addressing different activities. After the Opinion, Section 512(c), now applicable to "access-facilitating processes," swallows several of the other supposedly different and discrete safe harbors whole.

*Second*, the Opinion ignores longstanding copyright law to hold that an ISP does not have either actual or red flag knowledge of infringement unless it has received information identifying "*specific instances of infringement.*" Section 512(c)(1)(A) requires no such thing. As a result, content owners must now incur the expense of continuously scouring hundreds of thousands (or indeed millions) of constantly changing internet websites, to attempt to locate copies of their works and then send take-down notices or otherwise advise ISPs

of these “specific instances of infringement” on their sites.<sup>1</sup> The Opinion requires a world wide web game of “Whack-A-Mole” to police infringement.

**Third**, as a consequence of the Opinion’s interpretation of Section 512(c)(1)(B), websites like Veoh, which (a) copy, perform, and distribute (by offering digital downloads), tens of thousands of infringing works, (b) receive a direct financial benefit from the infringement in the form of advertising revenues that directly increase with each view of an infringing video by a user, and (c) have the “right and ability to control” the infringement as those terms have historically been understood in copyright law, nevertheless get a free pass under the DMCA unless they also engage in an undefined “something more” -- which apparently must be akin to inducing infringement. If the Opinion is left standing, ISPs like Veoh will have no obligation either to affirmatively police their site (indeed, they are disincentivized from doing so lest they find an infringing file which would give them “actual” or red flag knowledge), to adopt readily available technical solutions to mitigate infringement, or to obtain authorization from content owners.

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<sup>1</sup> As discussed below, the Opinion arrived at this incorrect conclusion largely by misapplying language from the ‘Court’s decision in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9<sup>th</sup> Cir. 2007) to fashion a rule that ISPs are not obliged, even in the face of red flag knowledge, to investigate infringement.

Simply, the Opinion improperly and improvidently rewrote the DMCA, and the Petition for Rehearing or Rehearing En Banc should be granted.

### **BACKGROUND**

Veoh operated an internet service designed to derive advertising revenue from video content. Veoh encouraged millions of users to upload videos, and then distributed those videos to the entire world – for free. Among them were thousands of copyrighted works of UMG. Veoh did this by copying videos uploaded by its users into different formats and then making them available for unlimited, on-demand viewing through Veoh’s internet site, and also by consciously including a “download button” (YouTube, for example, had no such feature) which allowed anyone to make a perfect, permanent, digital copy – just like the legal copy consumers can purchase of a copyrighted video through Apple’s iTunes store. Veoh monetized these videos for itself, not content owners. Veoh sold advertising to accompany the videos. The more viewers the content attracted, the more ads Veoh displayed and the more money it made. And Veoh knew that professionally-produced copyrighted videos, like UMG’s, drew viewers to its site. Veoh did not pay for the content it distributed, and made no effort to obtain permission from the creators of that content. For years, until after it was sued and the case was on the eve of trial, Veoh consciously eschewed readily-available technology to limit its



widespread copyright infringement. Knowing filtering would harm its business by eliminating the copyrighted files that drew users to its site, Veoh delayed licensing and applying effective filtering technology (offered by Audible Magic) that would have permitted Veoh to identify popular copyrighted material on its servers, and then remove it.<sup>2</sup>

### **ARGUMENT**

**A. The Opinion renders the limiting language of the 512(c) safe harbor -- “infringement of copyright by reason of the storage at the direction of a user. . .” -- meaningless.**

Congress enacted the DMCA, including Section 512 in 1998. Section 512 created an exception to the general principles of the Copyright Act for certain ISPs. It created four “safe harbors” for discrete activities. Section 512(c) limits liability for “infringement of copyright 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.” Supreme Court precedent holds that exceptions (like Section 512(c)) to laws of general applicability must be construed narrowly.<sup>3</sup> In derogation of this principle, the

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<sup>2</sup> In contrast, Veoh vigorously screened for pornography, since those videos, unlike copyrighted content, were antithetical to its business plan. *See, e.g.*, RE 924-25, 1233-35, 2011-13.

<sup>3</sup> *See Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) (“In construing provisions . . . , in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.”); *A.H. Phillips, Inc. v.*

language of the statute, its legislative history, and other principles of statutory interpretation, the Opinion interpreted this provision broadly to encompass “the access-facilitating processes that automatically occur when a user uploads a video to Veoh.”<sup>4</sup> The Opinion does not clearly demarcate what web activity, if any, would go beyond its broad definition of “by reason of the storage” and its articulated standard incorrectly expands the scope of the exception far beyond what Congress intended.

In Section 512(c), Congress employed language with a particular meaning. Federal statutes use the phrase “by reason of” to connote narrow, proximate causation.<sup>5</sup> Infringement “by reason of the storage” means what it says – the *storage* must be the proximate cause of the infringement. The Opinion rejects this straightforward interpretation and expands the statutory language to include infringement resulting from many activities separate from storage, including Veoh’s infringement by reason of *distributing* copies (*i.e.*, digital downloads) of stored material. Nothing in the statutory language or its legislative history supports this expansive interpretation.

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*Walling*, 324 U.S. 490, 493 (1945) (“To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.”).

<sup>4</sup> Opinion at 19-20.

The Opinion unduly relies on Section 512(k)'s broad definition of "service provider" to support its interpretation of "by reason of the storage." This definition merely identifies entities that might qualify for a "safe harbor" for particular activities. It says nothing about the definition of "storage." To the contrary, had Congress intended all "access-facilitating" activities of qualifying ISPs to be protected, it would not have defined precise "safe harbors" in Sections 512(a)-(d).

The Opinion's interpretation wreaks havoc on the structure of the statute. It expands the narrow Section 512(c) "safe harbor" to encompass activities specifically addressed by the other, inapplicable "safe harbors." For example, the Opinion's interpretation would encompass *transmission* of stored material within Section 512(c), even though Congress created a separate "safe harbor" with separate requirements for transmission in Section 512(a) and made clear that the "safe harbors" were to be understood as separate in Section 512(n).<sup>6</sup> If Veoh seeks protection for transmission activities, it should prove that those activities meet the Section 512(a) standard, not sweep them in through some "by reason of the storage" catch-all.

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<sup>5</sup> See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992) (Clayton Act and RICO statute); *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 130 S. Ct. 983, 989 (2010) (RICO statute).

<sup>6</sup> See, e.g., S. Rep. No. 105-190, 1998 WL 239623, \*51 (1998).

**B. The Opinion eviscerates the “red flag” knowledge standard of Section 512(c)(1)(A).**

In Section 512(c)(1)(A), Congress differentiated between two discrete circumstances in which an ISP would lose immunity. To invoke immunity from damages, an ISP must prove that it: (i) “does not have actual knowledge that the material or an activity using the material on the system or network is infringing”, *or* (ii) “in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent[.]”

The Opinion construed these provisions as follows: “The DMCA recognizes that service providers who do not locate and remove infringing materials *they do not specifically know of* should not suffer the loss of safe harbor protection.”<sup>7</sup> Likewise, the Opinion approvingly quoted the Second Circuit’s conclusion in *Viacom Int’l v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (“*Viacom*”) that: “both [512(c)(1)(A)(i) and (A)(ii)] . . . apply only to specific instances of infringement.”<sup>8</sup> The Opinion’s holding that both the actual *and* the red flag knowledge provisions require knowledge of specific instances of infringement is wrong. Imposing this requirement on the “red flag” test of Section 512(c)(1)(A)(ii) contradicts its clear statutory language

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<sup>7</sup> Opinion at 34 (emphasis added).

<sup>8</sup> Opinion at 39, quoting *Viacom*, 676 F.3d at 31.

and guts the provision. This conclusion (stated in both the original and new Opinion) has rightly been criticized by leading commentators.<sup>9</sup>

The language and structure of the statute belie the conclusion that Congress mandated that an ISP must have knowledge of *specific* instances of infringement. Congress intended that the “red flag” knowledge section would *not* require knowledge of infringement of specific copyrighted works. Section 512(c)(1)(A)(i) requires actual knowledge “that **the material** or an activity using **the material** on the system or network **is infringing**.” (emphasis added). But the red flag knowledge provision, Section 512(c)(1)(A)(ii), eschews references to “the material” in favor of far broader language – “aware[ness] of facts or circumstances from which **infringing activity** is apparent” – that is irreconcilable with a requirement of knowledge of “specific instances of infringement.” (emphasis added).

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<sup>9</sup> See, e.g., 3 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 12B.04[A][1][b] (Rev. Ed., 2012) (“In short, the ‘actual knowledge’ prong is reasonably construed to refer to *specifics*, whereas the ‘red flag’ prong deals with *generalities*.”) (emphasis in original); Menell, Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of *Viacom v. YouTube* and *UMG Recordings v. Shelter Capital Partners*, UC Berkeley Public Law Research Paper No. 2049445 (May 1, 2012). Available at SSRN: <http://ssrn.com/abstract=2049445>. In addition to his position at UCLA School of Law, Professor Nimmer is “Of Counsel” to Irell & Manella, UMG’s counsel in this case. The views articulated by Professor Nimmer in his treatise are his own, and not a result of his association with Irell & Manella.

The use of “infringing activity” in the “red flag” provision instead of “the material” clearly shows that Congress intended a different meaning – one that encompassed more than just knowledge of infringement of a specific copyrighted work.<sup>10</sup> The Opinion ignores this clear distinction and instead endorses the Second Circuit’s view in *Viacom* that the “red flag” standard requires subjective awareness of facts that would have made the specific infringement objectively obvious to a reasonable person.<sup>11</sup> But the Second Circuit’s “subjective/objective” formulation was fashioned largely from thin air<sup>12</sup> and is refuted by the DMCA’s legislative history. As Professor Nimmer commented:

There are several problems with that resolution, posting [sic] that “actual knowledge” is *subjective* and “red flag” is *objective*. First, the panel reached this conclusion not through

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<sup>10</sup> See, e.g., *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (“It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”).

<sup>11</sup> Opinion at 39-40; see also *Viacom*, 676 F.3d at 31.

<sup>12</sup> Ironically, to support its adoption of the “specificity” requirement for red flag knowledge, the *Viacom* court relied on and cited extensively to the *now withdrawn* original opinion in this case. See, e.g., *Viacom*, 676 F.3d at 32. This circular reinforcement has led both circuits to reach the same erroneous interpretations of an important statutory provision, each relying on the other. Accordingly, the fact that the Opinion has now more aligned this circuit with

canons of statutory interpretation or adverting to other language used by the legislature, but instead by analyzing how “*courts* often invoke language.” n.104. Plainly, a missing step would be required to prove the point that *Congress* used the subject language in that same sense. Second, nothing in the statutory language draws the distinction that [the *Viacom*] opinion derives. In fact, one could, with equal if not more plausibility, posit the opposite--that “actual knowledge that the material ... is infringing” denotes *objective* facts in the world whereas “aware[ness] of facts” that make infringement “apparent” connotes a *subjective* perception!<sup>13</sup>

The DMCA’s legislative history underscores the point. There, when discussing Section 512 (including the provision that later became Section 512(m)), Congress gave content to the “red flag” provision by noting that an ISP was not, in the first instance, required to search out “suspicious information.”<sup>14</sup> Congress did not describe “red flag” knowledge as knowledge about a specific infringement. Rather, it described it as “suspicious

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the Second Circuit’s decision in *Viacom* provides even more urgency to grant rehearing.

<sup>13</sup> 3 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 12B.04[A][1][b] (Rev. Ed., 2012)

information.”<sup>15</sup> This is a generalized standard. Moreover, far from suggesting, as the Opinion held, that an ISP would never have an obligation to investigate infringement, Congress confirmed that while a provider might not have an obligation to seek out “red flags” in the first instance, once it acquired such “suspicious information,” it then had an obligation to investigate,<sup>16</sup> stating that “[o]nce one becomes aware of such information, however, one may have an obligation to check further.”<sup>17</sup>

Articulating the wrong standard in the Opinion led to the wrong result. When the District Court record is reviewed, unencumbered by the unduly restrictive view that Section 512(c)(1)(A)(ii) is limited to awareness of “specific instances of infringement,” it easily suffices to create a genuine issue

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<sup>14</sup> H.R. Rep. No. 105-551(I), 1998 WL 261605 at \*26 (1998).

<sup>15</sup> *Id.*

<sup>16</sup> This Court’s prior decision in *CCBill*, on which the Opinion heavily relied, neither compels nor justifies the Opinion’s departure from the DMCA’s statutory language and structure. *CCBill* considered whether a copyright owner’s alleged notice of infringement created knowledge on the part of an ISP where the copyright owner failed to comply with the requirements of Section 512(c)(3). *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113-14 (9th Cir. 2007). This Court’s discussion of burdens on the copyright owner in *CCBill* was in the context of preparing a notice that complied with Section 512(c)(3). This Court never even hinted that an ISP need not further investigate once aware of suspicious information. That issue was never before the Court in *CCBill*, and the Opinion has simply ripped this conclusion from its proper context in *CCBill* in order to reach a result here contrary to clear legislative intent.

<sup>17</sup> H.R. Rep. No. 105-551(I), 1998 WL 261605 at \*26 (1998).



of fact as to Veoh's "red flag" knowledge. Infringement on Veoh was so obvious, even the *New York Times* was aware of it, as reflected in an article (circulated among Veoh executives) identifying Veoh as "host to a wide range of unauthorized and full-length copies of popular programs."<sup>18</sup> UMG also presented evidence that Veoh personnel reviewed the service on a daily basis, revealing videos that were clearly identified with specific copyright information, but turned a willfully blind eye to such infringements.<sup>19</sup> And there was more -- the Opinion simply ignores the following exhibit in the record where a Veoh employee (charged with reviewing the Veoh service to find unauthorized material) wrote to his superior:

"isn't [infringing content] a majority of Veoh content? . . . And what should I do, for example, with music videos which are all copyrighted."

His superior responded:

"You are correct, we have many unauthorized content, and we should use 'unauthorized' to describe them in any

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<sup>18</sup> RE 1226-28.

<sup>19</sup> *See, e.g.*, RE 951.

email or skype exchange. I will explain you later on the phone, why and what to do with it.”<sup>20</sup>

Thus, the evidence showed that Veoh was the type of site Congress described as a “pirate” site “where sound recordings, software, movies, or books were available for unauthorized downloading, public performance, or public display” and which required further investigation.<sup>21</sup> But, because the Opinion, incorrectly extending *CCBill*, held that “red flag” knowledge demands proof of knowledge of specific instances of infringement, the Opinion treated all this evidence as irrelevant.<sup>22</sup> Nothing in the DMCA or its legislative history supports such a counter-intuitive result.

Contrasting the Opinion’s conclusions in this case with the analysis in *Columbia Pictures Indus. v. Fung*, \_\_\_ F.3d \_\_\_ (Case No. 10-55946) (9<sup>th</sup> Cir. March 21, 2013) (“*Fung*”) (argued to the same panel on the same day) reveals the incoherence of the Opinion’s construction of the DMCA. Purporting to apply the same standards articulated in this case, the *Fung* Court ruled that

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<sup>20</sup> RE 1233-34.

<sup>21</sup> H.R. Rep. No. 105-551(II), 1998 WL 414916, at \*57 (1998).

<sup>22</sup> At a minimum, Veoh’s failure to act in the face of this knowledge constitutes willful blindness. Even under its incorrect standard, the Opinion acknowledges that “a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge.” Opinion at 34. Here, Veoh undisputedly did nothing even when it admitted knowledge that a majority of its content was infringing.

Fung’s hosting of indices of downloadable files, including infringing motion pictures, gave him “red flag” knowledge because “[t]he material in question was sufficiently current and well-known that it would have been objectively obvious to a reasonable person that the material solicited and assisted was both copyrighted and not licensed to random members of the public, and that the induced use was therefore infringing.”<sup>23</sup> Here, UMG presented evidence that Veoh knowingly hosted and solicited music videos that were also well-known. Veoh’s own emails confirmed that it was objectively obvious to a reasonable person that such materials were copyrighted. Moreover, the evidence showed that Veoh would have known it lacked a license to host such material because it had no license from *any* record company.<sup>24</sup> The Opinion held this evidence did not confer “red flag” knowledge on Veoh, even though the same panel held that similar evidence conferred such knowledge in *Fung*.

**C. The Opinion misinterprets Section 512(c)(1)(B).**

The Opinion also erred when construing Section 512(c)(1)(B). The Opinion took a straightforward provision that Congress explicitly drafted to

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<sup>23</sup> *Fung*, slip. op. at 46.

<sup>24</sup> The Opinion repeats an error of the District Court in stating that Veoh had permission to host content from Sony Music. Opinion at 30. While Veoh had permission to **link** to Sony content on Sony’s own service, it had no license to actually host any such material on Veoh’s own computers. See RE

mirror the common-law standard for vicarious liability and twisted it into something entirely different in order to reach a particular result. In Section 512(c)(1)(B), Congress deliberately copied the common-law standard for vicarious liability. Any possible doubt about Congress's intent is eliminated by the legislative history where Congress explicitly stated it was adopting the standard for vicarious liability: “[t]he financial benefit standard in subparagraph (B) is intended to codify and clarify the direct financial benefit element of vicarious liability . . . .”<sup>25</sup> It also stated that “[t]he ‘right and ability to control’ language in Subparagraph (B) codifies the second element of vicarious liability.”<sup>26</sup>

When Congress adopts the language of a common-law standard, the Supreme Court holds that it intended to employ the meaning of that standard.<sup>27</sup>

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979-83. For a discussion of the difference between linking and hosting on one's own servers, *see Fung*, slip. op. at 5-9.

<sup>25</sup> H.R. Rep. No. 105-551(I), at \*25 (1998).

<sup>26</sup> *Id.*, at \*26. The Opinion discounts these clear statements because they were not repeated with later versions of the bill that the panel asserts were different from the original. Opinion at 44. The language that became Section 512(c)(1)(B), however, did *not* change in those later versions, and thus it is unsurprising that Congress did not repeat these statements in later reports. Moreover, *CCBill*, which the Opinion embraces on other points, unhesitatingly concludes that the DMCA *did* adopt the vicarious liability standard with respect to the “direct financial benefit” prong of 512(c)(1)(B). *See CCBill*, 488 F.3d at 1117.

<sup>27</sup> *See, e.g., Needer v. United States*, 527 U.S. 1, 21 (1999).

But, rather than adopting this obvious interpretation of Section 512(c)(1)(B), the Opinion holds that the “right and ability to control” requires a right and ability to control, **plus something more**. But “something more” is nowhere to be found in the statutory language or legislative history, and was adopted from a totally separate standard for induced infringement. The Opinion attempts to justify this addition of a new element by pointing to statements in the legislative history that Section 512 was, in a general sense, intended to protect against liability for both direct and secondary infringement in narrow circumstances.<sup>28</sup> But this language in the legislative history was not even directed to Section 512(c) specifically, but to the DMCA more generally. The Opinion incorrectly relies on a generalized legislative goal to override the specific language actually enacted and the clear explanation of its meaning.

The Opinion also justifies its added element by reasoning that Congress could not have possibly meant what it said because that would somehow swallow up the entire “safe harbor.”<sup>29</sup> This concern is misplaced and, again, the Opinion’s reasoning fundamentally flawed. An ISP that is not deriving a direct financial benefit from infringing activity would not lose protection from the “safe harbor.” But, when an ISP monetizes the infringing activity, as Veoh

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<sup>28</sup> Opinion at 44.

<sup>29</sup> *See, e.g.*, Opinion at 43.

did, Congress intended to hold them responsible for their infringement. The Opinion never substantively discusses the direct financial benefit prong.<sup>30</sup>

The error of the Opinion's statutory interpretation again becomes clear when contrasted with *Fung*. There, the defendant maintained a "torrent site" containing "torrent files" that provide the instructions for obtaining files available on a BitTorrent system.<sup>31</sup> Sites like Fung's contain only torrent files, "no copyrighted material resides on these sites."<sup>32</sup> Neither Fung (nor computers or sites operated by Fung) performed the infringing copying and distribution of copyrighted works. Those acts were conducted by users of Fung's sites.<sup>33</sup> Nevertheless, this Court concluded that Fung had a right and ability to control infringing activity because he had engaged in conduct that induced other, unnamed third parties, to engage in direct infringement.

Here, Veoh did the direct infringement itself. Unlike Fung, Veoh made unauthorized reproductions of copyrighted works; Veoh took possession of those unauthorized reproductions and kept them on computers owned and

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<sup>30</sup> In *Fung*, the Court held that "the structure of § 512(c)(1)(B) indicates that the lack of direct financial benefit prong of the safe harbor requirement is central rather than peripheral . . . . The grammatical emphasis, then, is on the lack of direct financial benefit requirement, with the right to control prong secondary." *Fung*, slip. op. at 49-50.

<sup>31</sup> See generally *Fung*, slip. op. at 9-14.

<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.* at 9-14.

controlled by Veoh; and Veoh engaged in the direct unauthorized display, performance and distribution of those copyrighted works by transmitting them either as streams, or as permanent downloads. Nonetheless, the Opinion held that Veoh – despite its undeniably greater exercise of control over every aspect of infringement than Fung – lacked the right and ability to control its own infringing activity. This inconsistency illustrates the fundamental flaw in the Opinion’s attempt to graft an inducement standard onto the “right and ability to control.”

Dated: April 4, 2013

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**CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing and for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 4,149 words.

By: /s/ Brian D. Ledahl  
Brian D. Ledahl



**CERTIFICATE OF SERVICE**

I hereby certify that on April 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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By: /s/ Brian D. Ledahl  
Brian D. Ledahl