

**United States Court of Appeals
for the Ninth Circuit**

VHT, INC., a Delaware corporation,

Plaintiff-Appellee/Cross-Appellant,

– v. –

ZILLOW GROUP, INC., a Washington corporation;
ZILLOW, INC., a Washington corporation,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR WESTERN WASHINGTON, SEATTLE
JAMES L. ROBART, SENIOR DISTRICT JUDGE

**BRIEF FOR *AMICUS CURIAE* COPYRIGHT
ALLIANCE IN SUPPORT OF PLAINTIFF-
APPELLEE/CROSS-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Copyright Alliance states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of *amicus*'s stock.

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Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* the Copyright Alliance respectfully submits this brief in support of plaintiff-appellee/cross-appellant VHT, Inc. (“VHT”). This brief is submitted with consent by the parties.¹

INTEREST OF AMICUS CURIAE

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from a diverse range of creative industries – including, for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers and software developers – and the small businesses that are affected by the unauthorized use of their works. The Copyright Alliance’s membership encompasses these individual creators and innovators, creative union workers, and small businesses in the creative industry, as well as the organizations and corporations that support and invest in them. Moreover,

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Some Copyright Alliance members may join other *amicus* briefs in support of VHT.

members of *amicus* are among the even larger and even more diverse array of citizens and companies that owe their livelihoods to the Copyright Act.

The concept of innovation is of fundamental importance to the Copyright Alliance. The copyright laws spur the development and distribution of new creative works and innovations for the benefit of public consumption by ensuring that those who contribute to these works and innovations are entitled to determine how their efforts will be used and modified. Accordingly, the Copyright Alliance encourages partnerships between creators and technology companies to develop and take advantage of new technologies that create new audiences in new and legal ways, and in ways that will provide meaningful protections to authors whose works may be reproduced, distributed, publicly performed or displayed, or otherwise disseminated, and to those investments made to commercialize those works. The Copyright Alliance submits this brief to help the Court appreciate how the decision of the court below is inconsistent with those goals and directions, and how the ruling may negatively impact creators of all types.

SUMMARY OF THE ARGUMENT

The decision of the court below fails to recognize the importance of copyright law, the balance that the Copyright Act strikes, and the danger inherent in setting a precedent under which a provider can avoid secondary liability for copyright infringement by avoiding taking steps to curtail such infringement. This was error. In setting aside the jury's finding of contributory, inducement, and vicarious liability, the District Court left a roadmap for infringing online platforms to follow in the future: design an online system where even the most rudimentary and commonplace measures to prevent or rectify piracy are arguably difficult to execute, and resist adopting such simple measures, citing those manufactured "technical" challenges. This is a dangerous precedent to leave and will have serious and unprecedented consequences for *amicus* and its members if left unchanged.

While the issuance of this Court's *Giganews* decision at the start of trial may have made waves, it did not merit overturning the boat. The District Court misinterpreted the scope and meaning of this Court's ruling in multiple ways. First, it collapsed the concept of "material contribution" into a single test of whether "simple measures" were available to the platform to remove the infringing material. Second, it restricted the inducement test to the question of whether the platform "specifically promoted" the use of its site to

view infringing material. Third, the District Court erroneously narrowed its inquiry to whether Zillow had the ability to prevent its users from posting infringing photos, rather than undertaking the broader inquiry into whether Zillow could stop or limit the infringing conduct, as this Circuit’s vicarious liability law provides.

As a matter of general application of the copyright laws, the District Court’s holding also marks a sharp turn away from the history of balance and collaboration in protecting copyrighted works and curtailing infringement. It disregards the concept of using technical measures to prevent infringement as set out in the Digital Millennium Copyright Act (“DMCA”), effectively encouraging service providers to avoid the DMCA’s so-called “safe harbor” because the steps to avoid liability at common law under the District Court’s formulation – essentially sustained and deliberate programmer negligence — require less effort. The District Court’s decision also strikes a blow to copyright owners of all types, who not only must police for infringements across vast platforms, but now prove that the platform had access to “simple measures” and did not use them. This outcome does not incentivize copyright protection at all. It incentivizes malingering and bad faith, and the District Court’s decision should be vacated accordingly.

ARGUMENT

I. THE COURT SHOULD CONSTRUE THE LAW IN A WAY THAT RESPECTS AND INCENTIVIZES COPYRIGHT PROTECTION

A. The Law Recognizes That Copyright Helps to Promote and Protect a Vital American Industry.

The section of the Constitution known as the “Copyright Clause” gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (the purpose of copyright is “to secure a fair return for an ‘author’s’ creative labor” with “the ultimate aim . . . , by this incentive, to stimulate artistic creativity for the general public good.”). In furtherance of this goal of incentivizing the creation and dissemination of new works, the current Copyright Act provides for a bundle of exclusive rights, including the reproduction, distribution, and display rights at issue in the present case. *See* 17 U.S.C. § 106. While those who infringe are directly liable, courts have a longstanding practice of holding secondarily liable those who aid in and profit from direct infringement by others. *See* cases cited *infra* at 16-21.

At the time that the Internet became viable as a means for dissemination of copyright-protected works, protection of intellectual property rights was a

primary concern of stakeholders around the world. In 1998, Congress enacted the DMCA to implement two World Intellectual Property Organization treaties, which aimed to ensure global standards for intellectual property protection in the digital era. S. REP. NO. 105-190, at 4-5 (1998). At that time, Congress recognized the novel and formidable challenges facing copyright owners as piracy moved from street corners to the World Wide Web, observing that “[t]he digital environment now allows users of electronic media to send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world.” H.R. REP. NO. 105-551, pt. 1 (1998). *See also* 144 CONG. REC. 18770-71 (1998) (Rep. Coble) (“While digital dissemination of copies will benefit owners and consumers, it will unfortunately also facilitate pirates who aim to destroy the value of American intellectual property.”); 144 CONG. REC. 9242 (1998) (Sen. Thompson) (“Unscrupulous copyright violators can use the Internet to more widely distribute copyrighted material without permission.”). Congress recognized that, “[w]ith this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.” H.R. REP. NO. 105-551, pt. 1 (1998).

Cooperation from providers of digital networks was considered integral to fight widespread digital piracy. Accordingly, Congress drafted the new

statute in order to reach a balance that “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. REP. NO. 105-190 at 20; H.R. REP. NO. 105-551, pt. 2, at 49 (1998). As part of finding the right balance, the DMCA focused in part on “the ‘controversial [and] complex’ issue of securing safeguards to online service providers complementary to the protection afforded to copyright owners.” See David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 917 (Feb. 2002) (quoting Report of the House Commerce Comm., H.R. REP. NO. 105-551, pt. 2, at 49). In particular, given the strict liability nature of copyright infringement, service providers were concerned about the possibility that they could be exposed to liability over isolated acts of infringement even if they were otherwise cooperative in remedying the infringement as soon as they were put on notice. See S. REP. NO. 105-190, at 2. In exchange for the service providers’ cooperation, Congress took steps to minimize the possibility that fear of liability would arrest technological innovation on the Internet by creating “safe harbors” in the bill. S. REP. NO. 105-190, at 20; H.R. REP. NO. 105-551, pt. 2, at 49-50. However, the DMCA also included 17 U.S.C. § 512(i), which directs copyright holders and Internet service providers to work together and

agree on “standard technical measures” to “identify or protect copyrighted works.”

A proper interpretation of the DMCA recognizes that multiple parties have a stake in encouraging a safe and vibrant Internet ecosystem and that the burden of ensuring such an environment is not to be borne solely by one set of stakeholders. *See ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (opining that “the requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works”); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1180 (C.D. Cal. 2002) (rejecting the notion that Congress apportioned the entire burden between the copyright holder and service provider to the copyright holder). Nowhere in the legislative history is there any notion that the safe harbors allowed online service providers to engage in willful, reckless or otherwise inappropriate disregard for copyright law.²

The need for balance is no less present in cases where a provider fails to meet or cannot avail itself of the DMCA. The statute itself purposefully left principles of contributory liability in the digital environment untouched.

² It is telling here that had the limitations on liability been so broad, the DMCA never would have received the “virtually unanimous support” that copyright and technology industries gave to the final bill. *See Nimmer, Appreciating Legislative History*, 23 CARDOZO L. REV. at 927.

See S. Rep. No. 105-90, at 19 (“Rather than embarking on a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state”); *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1039-40 (9th Cir. 2013) (noting that “the DMCA’s legislative history confirms” that Congress intended to provide protection for some, but not all, vicarious and contributory infringement and explaining that the inquiries into contributory copyright infringement and the prerequisites for DMCA safe harbors should be conducted independently).³

Moreover, as the DMCA’s structure reflects, the same types of themes of burden-sharing are, and remain, pervasive throughout the law. *See, e.g., Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (“When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials – even in the

³ This principle has been reaffirmed since the passage of the DMCA. *See, e.g.,* 150 CONG. REC. S. 7178-01 (2004) (Sen. Hatch) (“Though secondary liability is nearly ubiquitous, it has almost always remained as a judge-made, common-law doctrine-and for a good reason. Secondary liability prevents the use of indirect means to achieve illegal ends. Consequently, the scope of secondary liability must be flexible – otherwise, it would just instruct wrong-doers on how to legally encourage or manipulate others into breaking the law. The common-law judicial process is ideally suited to evolve flexible secondary-liability rules from the results of many individual cases.”) (emphases added); *see also id.* (“Congress rarely codifies secondary liability. . . . In the Digital Millennium Copyright Act, Congress codified a complex balance between opposed interests that expanded one type of secondary liability and narrowed another.”).

absence of actual knowledge that the copyright monopoly is being impaired . . . – the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.”). There is no stated reason why the law should impose little to no obligation on a provider, particularly where the provider is better-suited to addressing the problem. See Sam Castree, *Cyber-Plagiarism for Sale! The Growing Problem of Blatant Copyright Infringement in Online Digital Media Stores*, 14 TEX. REV. ENT. & SPORTS L.J. 25, 41 (Fall 2012) (“[S]tore operators are able to ‘perform more cost-effectively the activities that are currently performed by multiple [authors]’”) (citation omitted). Furthermore, the law has historically prohibited a scenario such as one where a party is aware of infringement on its site but will not use filters for fear of what they might find: that party is willfully blind. See *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 515 (S.D.N.Y. 2008), *aff’d in part, rev’d in part on other grounds*, 600 F.3d 93 (2d Cir. 2010) (“Willful blindness requires ‘more than mere negligence or mistake’ and does not lie unless the defendant knew of a high probability of illegal conduct and purposefully contrived to avoid learning of it, for example, by failing to inquire further out of fear of the result of the inquiry.”). These principles should have been considered by the District

Court. Had they been, the District Court would not have vacated the jury's finding of secondary liability.

The District Court's decision runs afoul of the balance struck in the DMCA, which does not permit a service provider to deflect their obligations, and it ignores the strong history of secondary liability at common law. Indeed, the lower court's ruling turns the DMCA's structure on its head by allowing the "simple measures" and "practical ability" tests for contributory and vicarious common law infringement to merge into a single backstop for companies who cannot be bothered to comply with the DMCA's rather low bar. This presents grave risks for copyright owners. If a defendant abandons its DMCA defense, as Zillow has, it can only be assumed that the defendant did not follow the statute's mandates. *VHT, Inc. v. Zillow Grp., Inc.*, No. 15 Civ. 1096 (JLR), 2017 WL 253073, at *6 (W.D. Wash. Jan. 19, 2017) ("At the pretrial conference, Zillow conceded that its DMCA safe harbor defense does not extend to Digs images"). In such a case, the common law cannot provide comfort or the DMCA itself would quickly become superfluous. Moreover, online companies like Zillow would be incentivized to ignore the law – as long as they could argue that it would have taken too many hours to develop technical measures to stop or limit infringement.

Such light treatment would have the perverse effect of discouraging both technical measures and DMCA compliance. Just as the Court would not adopt a new rule that rewarded real estate developers for failing to build homes with smoke detectors or sprinkler systems, it should not reward companies like Zillow for doing nothing to prevent, limit or stop infringement when it designs its systems so that it can later claim there are no “simple measures” and “practical abilities” tests available to it. Such a reading of the law would swallow the DMCA whole.

B. The Court Should Interpret the Law in a Way That Does Not Promote Evasion of Copyright Law.

The District Court’s interpretation of secondary liability threatens to promote the circumvention of copyright law by setting forth a new loophole out of secondary liability: the refusal to adopt even simple technical measures to guard against infringement. Loopholes of this nature are dangerous, and when appellate courts find them, they close them. This Court should do the same.

For example, when LimeWire and MP3tunes tried to hide their own desire not to pay for content behind engineered evasion of secondary liability, the courts shut them down. *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 439 (S.D.N.Y. 2011); *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016), *cert. denied sub nom. Robertson*

v. EMI Christian Music Grp., Inc., 137 S. Ct. 2269 (2017). In *Capitol Records, LLC v. Escape Media Grp., Inc.*, No. 12 Civ. 6646 (AJN), 2015 WL 1402049, at *7 (S.D.N.Y. Mar. 25, 2015), a company claimed that it was too difficult to prevent infringement, despite that the company had created the very technology that fostered it. The court properly rejected that position and found the company secondarily liable for copyright infringement. *Id.* at 12-13.

The District Court’s ruling departs from this precedent by creating an escape hatch out of secondary liability. Failing a remedy from this Court, other actors are likely to design their systems in such a way that will allow them to take advantage of their own lack of investment in copyright protection. Indeed, prior to the Supreme Court’s reversal in *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), which involved a television retransmission technology that was expressly designed to exploit a perceived loophole in the copyright laws, scholars noted the negative effect of erroneous interpretations of copyright law on the development of technology. *See, e.g.*, Dennis S. Karjala, “Copying” and “Piracy” in the Digital Age, 52 WASHBURN L. J. 245, 263 (2013) (“Instead of the law adapting itself to meet the needs of society under conditions of new technology, these judicial interpretations [merely] push technology in odd directions as systems

engineers seek to avoid falling on the wrong side of what is essentially an arbitrary line.”). Such a result is unacceptable as a matter of policy, and even more so as a matter of law.

In creating a standard under which no secondary liability is found if the defendant has declined to adopt even simple measures to remove infringing material, the District Court has created a threshold that is impossible for a copyright owner to meet. All that a platform needs to do in order to avoid liability is to decline to adopt measures that would identify and remove infringing material. This turns upside-down the concept of encouraging Internet service providers to develop “standard technical measures” under Section 512(i) of the DMCA and runs counter to corresponding principles in common law. As a matter of logic, if the courts will not require cooperation in measures to protect copyrighted works, there is no incentive for any platform to invest in it.

II. THE COURT SHOULD NOT AFFIRM THE DISTRICT COURT’S RULING AND NARROW THE STANDARD FOR SECONDARY LIABILITY

In part due to the number of creative and technological industries that are centered within the Ninth Circuit, this Court has had many occasions to address the balance of the rights of copyright owners and technology companies. It has thus long been recognized as one of the indispensable

protectors and sustainers of copyright law. Relevant to the case at bar, this Court has decided almost as many appeals involving secondary liability as the other federal Circuits combined. Moreover, what the Ninth Circuit decides influences courts nationwide. Therefore, it is of utmost importance that this Court put the law right when of its District Court errs and overturns years of Ninth Circuit precedent.

Most recently, in its *Giganews* decision, this Court applied and restated the relevant branches of its own and the Supreme Court's secondary liability doctrine. *See Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 670 (9th Cir. 2017), *cert. denied*, No. 17-320, 2017 WL 3782333 (U.S. Dec. 4, 2017). As judicial modesty dictates, the Court's opinion explicitly restrained itself from becoming a primer on all forms of secondary liability, but only applied the portions of the doctrine relevant to the case before it. *See, e.g., id.* (declining to reach question of actual knowledge).⁴

However, the District Court misconstrued *Giganews* and incorrectly assumed that the Court's analysis of limited portions of the secondary liability doctrine in the case occupied the entire field, subsuming Ninth Circuit precedents that came before it. Because those precedents are widely cited and

⁴ *Amici*, of course, are bound by no such sense of decorum, but merely by a page limit.

followed, the Court should correct the District Court, and reassert the vitality of its own leading cases.

A. Contributory Liability.

Under traditional common law, and in copyright law, “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Id.* at 1019 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)). In light of the connection between the two bodies of law, the facts surrounding contributory liability for copyright infringement must be analyzed in light of “rules of fault-based liability derived from the common law.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007) (citing *Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.*, 545 U.S. 913, 930, 934-53). In its seminal *Napster* decision, this Court summarized these rules by stating that secondary liability exists when the defendant engages in “personal conduct that encourages or assists the infringement.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff’d sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002), and *aff’d sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

1. Material Contribution.

Relevant to the case at bar, the *Napster* court reiterated the now-famous “site and facilities” test for the material contribution prong of the second element of contributory infringement. *Id.* at 1022 (citing *Fonovisa*, 76 F.3d at 264 and *Religious Tech. Ctr. v. Netcom On-Line Commc’ns Servs., Inc.* 907 F. Supp. 1361, 1372 (N.D. Cal. 1995)). This test has been cited in dozens of opinions nationwide, including in this Court’s own decisions. *See e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1163 (9th Cir. 2004), *vacated and remanded on other grounds*, 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)); *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 799 (9th Cir. 2007) (credit card services to online infringers not a “site and facilities” provision under *Napster*).

Of course, because common-law tort concepts are necessarily flexible, the provision of a site or facility is not the only way for a secondary infringer to materially contribute to its users’ infringement. For example, this Court and other courts relying on its guidance have held that in-line linking to full-size infringing images, providing Content Delivery Network services to “speed up” webpages, verifying ages for adult websites, reviewing the quality of digital images, and promoting concerts featuring infringing songs could all constitute material contribution. *See e.g., Perfect 10, Inc. v. Amazon.com*,

Inc., 508 F.3d at 1173; *ALS Scan, Inc. v. CloudFlare, Inc.*, No. 16 Civ. 5051 (GW) (AFMX), 2017 WL 1520444, at *2 (C.D. Cal. Feb. 16, 2017); *Fahmy v. Live Nation Entm't, Inc.*, No. 15 Civ. 01158 (CAS), 2015 WL 3617040, at *8 (C.D. Cal. June 8, 2015); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. at 1171.

The District Court's holding would collapse these cases down to a single fact: whether a defendant can show that there were no "simple measures" available to it to remove infringing materials. *VHT, Inc. v. Zillow Grp., Inc.*, No. 15 Civ. 1096 (JLR), 2017 WL 2654583 ("Op"), at *16 (W.D. Wash. June 20, 2017) (rejecting any "alternative theories of material contribution" other than the "simple measures test"). Especially in light of the flexibility required in common law-based doctrines and the potential abuses online providers can make of the "simple measures" test, this court should reiterate that one size does not fit all, and that the "simple measures" test is not a get out of jail free card for infringers.

2. Inducement.

The District Court's opinion also errs by restricting the inducement prong of contributory infringement. The District Court (but not the jury) found that Zillow did not specifically promote the use of its Digs site to view infringing photos. But the Supreme Court and this Court's precedents also

allow for other “affirmative steps taken in order to foster infringement” to create inducement liability. *Grokster*, 545 U.S. at 936-37; *see also Giganews*, 847 F.3d at 672.

For example, companies can induce infringement by distributing a device with the object of promoting its infringing use, assisting users in locating and copying copyrighted materials, failing to develop filtering tools, or following a business model built on selling advertising space on a site featuring unlicensed copyrighted works. *See Grokster*, 545 U.S. at 938-39; *Fung*, 710 F.3d at 1032, 1034-35. By only addressing whether Zillow promoted its site “specifically” to infringe copyrights, misreading and overemphasizing a footnote in *Amazon, Op.*, at *16, the District Court ignored these other fact patterns that can establish inducement.

Indeed, the record shows that Zillow made it very easy for users to copy photos, including those it knew were unlicensed for Digs. [SER117:5-25; SER246]. The record also featured testimony from Zillow employees that the company did not develop filtering tools. [SER50:12-17; SER80:24-84:13; SER103:20-104:5] And the company directly profited from advertised products that were featured in photos from its larger pool of unlicensed and licensed photos without discriminating between them. [See SER50:12-17;

SER80:24-84:13; SER89:1-90:16; SER103:20-104:5]. These acts, all credited by the jury, fit comfortably in the *Grokster* and *Fung* mold.

If the District Court's opinion is affirmed, and the cases cited above where liability was found under material contribution or inducement contributory liability theories were robbed of their vitality, now-shuttered and notorious pirate music sites, like *Grokster* and *Isohunt*, not to mention *Napster*, *Grooveshark*, and *MP3tunes*, would be emboldened to simply reopen their illegal businesses.

B. Vicarious Liability.

To establish a vicarious infringement claim, a copyright owner must show that a defendant “profit[s] from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930 (citing *Shapiro*, 316 F.2d at 307). In the present appeal, the jury determined that Zillow (1) has the right and ability to control the infringing conduct, and (2) derives a direct financial benefit from it. *VHT, Inc. v. Zillow Grp., Inc.*, No. 15 Civ. 1096 (JLR), 2017 WL 955533 (W.D. Wash. Feb. 9, 2017.); *Fonovisa*, 76 F.3d at 261.

However, the District Court focused its opinion on whether Zillow had a “practical ability” to *prevent* copyrighted photos from being posted from its listing site to its Digs site. Op. at *17. However, under *Grokster*, the vicarious

liability test reaches the question of whether or not a defendant has a practical ability to stop or limit directly infringing conduct. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 730 (9th Cir.), *amended and superseded on reh'g*, 508 F.3d 1146 (9th Cir. 2007); *see, e.g., Napster*, 239 F.3d at 1023-24 (“Napster, however, has the ability to locate infringing material listed on its search indices, and the right to terminate users’ access to the system” post-infringement); *Fonovisa*, 76 F.3d at 262 (swap meet operator controlled and patrolled premises and had the right to terminate infringing vendors); *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013). This includes the ability to stop infringement it after the fact by taking down works or disconnecting users.

On the face of the record, Zillow had such an ability to limit the infringements, because it eventually removed from its sites the VHT photos listed in VHT’s cease and desist letter (however belatedly). [SER714-16]. That Zillow did not do so despite having knowledge, and the District Court nonetheless vacated the jury’s finding, is legal error that runs directly counter to fundamental precedents of this Court and other courts. It should not stand.

III. THIS COURT SHOULD NOT ENCOURAGE COMPANIES TO BUILD THEIR BUSINESSES AROUND COPYRIGHT EVASION

A. The Burden of Enforcing Copyright Rights on the Internet Should Not Be Shifted More Heavily onto Copyright Owners.

The District Court’s holding undermines the balance contemplated above, as well as the longstanding history of secondary liability at common law. Copyright owners – and the industries that copyright law supports – undoubtedly will bear the brunt of the damage. As has been well-publicized in just one provider’s “transparency reports,” Google has received billions of reports of copyright infringement. *See Transparency Report*, Google.com, available at <https://transparencyreport.google.com/copyright> (last visited Dec. 8, 2017).

Not having the same type of resources that larger companies do, “digital theft . . . has an outsized impact on independent artists and creators.” *Protecting Legitimate Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Sandra Aistars, Executive Director, Copyright Alliance). Copyright infringement “takes a direct economic toll on these small business owners, who must shoulder the burden of policing infringements while at the same time” running their businesses, and the

“losses due to infringement have been devastating.” Comments of the National Press Photographers Association, from Mickey H. Osterreicher, General Counsel, to U.S. Copyright Office, at 2 (Jan. 6, 2012) (on file with U.S. Copyright Office) (submitted in response to solicitation from U.S. Copyright Office regarding copyright small claims).

The District Court’s decision will exacerbate the challenges by discouraging the development of new measures – even simple measures – that a platform would need to implement in order to discharge their obligations under principles of secondary liability. Further, the ruling below encourages platforms to design their systems to avoid making removal of infringing material more difficult. For the copyright owner, this means that not only will more demands need to be sent, but the copyright owner will then need to show that “simple measures” were available and were implemented by the provider. If this is the test, then a copyright owner effectively has no recourse.

B. The Statute Compels an Interpretation of the Law That Encourages Collaboration, not Subversion.

The Copyright Act and common law have carefully assessed the obligations of a party that receives benefits from the use of copyrighted works, and they consistently have avoided rewarding passive actors who can – but do not – take feasible steps to curtail infringement. For example, online music piracy resulted in widespread damage to the record industry in the early 2000s

until the courts determined that filesharing platforms were required to – and could – take steps against infringement on their websites. *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d at 1015; *Grokster*, 545 U.S. at 928; *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 124 (2d Cir. 2010). Without the competition of mainstream file-sharing sites, legitimate providers such as Apple’s iTunes, Pandora, and Spotify were able to grow and thrive, creating revenue for them and for copyright owners alike.

The case of *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010), demonstrates that stakeholders can and do develop private solutions aimed at reducing infringements without fear of being held liable for contributory infringement even in the absence of a DMCA-like “safe harbor.” In that case, eBay took efforts to minimize infringement well beyond instituting a “notice and takedown”-type system – which it also had in place. *Id.* at 99. Voluntarily (and without requiring any *quid pro quo* from the parties protected by eBay’s measures), eBay spent as much as \$20 million each year to promote trust and safety on its website; set up a “trust and safety” department with 4000 employees, over 200 of which were dedicated solely to deterring infringement; implemented a “fraud engine” as early as 2002 in order to ferret out illegal listings, including incorporating general filters and “Tiffany-specific filters”; periodically conducted manual reviews of listings to remove

counterfeit goods; sent warning messages to those offering Tiffany items for sale; and canceled certain transactions. By late 2006, approximately two years after Tiffany filed its action for contributory trademark infringement against eBay, eBay implemented additional measures including delaying the ability of buyers to view listings of certain brand names. *Id.* at 98-100. In large part due to those proactive measures, this Court affirmed a lower court’s holding that eBay was not liable as a contributory trademark infringer. *Id.* All the while, eBay remained and still is a thriving Internet business notwithstanding the proactive measures it took to help ensure that infringement on its site was reduced. While we do not suggest that every site operator must institute systems as comprehensive as eBay’s, neither should the Court allow site operators who are aware of and welcome infringement on their sites to hide behind the principle of “simple measures” to avoid liability.⁵

⁵ No reason exists to suggest that service providers like Zillow could not easily take other reasonable measures to help detect and deter infringement. *See A&M Records, Inc. v. Napster, Inc.*, Nos. 99 Civ. 05183, 00 Civ. 1369 (MHP), 2001 WL 227083, at *1 (C.D. Cal. Mar. 5, 2001) (in addition to enjoining facilitation of distribution of identifiable copyrighted works, requiring as part of injunction that “[a]ll parties shall use reasonable measures in identifying variations of the filename(s), or of the spelling of the titles or artists’ names, of the works identified by plaintiffs,” and, if it is reasonable to believe that a file is a variation on a copyrighted work, to take down such file); *Religious Tech. Ctr. v. Netcom On-Line Commc’ns Servs., Inc.* 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (finding it fair to hold defendant liable for contributory infringement if defendant could, but did not, take reasonable measures to prevent further damage to plaintiffs’ copyrighted works).

These types of solutions should be the focus of the parties. They are the expected acts under traditional principles of secondary copyright infringement law. Unlike the decision below, which subverts the concept of collaboration and threatens to unleash a “race to the bottom,” the Court’s copyright jurisprudence should be consistent with the policy of requiring platforms that make copyrighted works available to ensure that infringing material is available. A proper analysis under secondary liability principles will focus platforms on minimizing infringement as much as possible, not minimizing enforcement as much as possible.

CONCLUSION

For the reasons set forth above, and for those set forth in VHT's brief, *amicus curiae* respectfully requests that the decision below be modified as described hereof.

Dated: New York, New York
December 18, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2007, the word processing software used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 18, 2017, a true and correct copy of the foregoing Brief of *Amici Curiae* was timely filed in accordance with Fed. R. App. P. 25(a)(2)(D) and served on all counsel of record via CM/ECF.

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