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12 **IN THE UNITED STATES DISTRICT COURT**
 13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 STEVEN M. GARDNER, an
 15 individual,

16 Plaintiff,

17 vs.

18 CAFEPRESS INC., a Delaware
 19 Corporation, et al.

20 Defendants.

CASE NO. 3:13-CV-01108 (GPC) JMA

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 CAFEPRESS INC.'S NOTICE OF
 MOTION AND MOTION FOR
 RECONSIDERATION OF THE
 COURT'S ORDER ON SUMMARY
 JUDGMENT (DKT. NO. 48)**

[Filed concurrently with: Notice of
 Motion; and Declaration of Adrienne
 Lawrence]

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I. INTRODUCTION

CafePress Inc. (“CafePress”) respectfully seeks reconsideration of the Court’s ruling on its Summary Judgment Motion (Dkt. No. 48) on the grounds that the Court’s conclusion that CafePress was not, as a matter of law, entitled to safe harbor protection under 17 U.S.C. § 512(c) was clear legal error because it (1) turned on unrelated, indisputably non-infringing aspects of CafePress’ services as opposed to whether the images at issue in this lawsuit were stored at the direction of a user, which is the focus of the statute and its protections, and (2) denied summary judgment based on certain of Plaintiff’s arguments, not evidence, which are insufficient to defeat summary judgment as a matter of law.

First, the Court’s conclusion that CafePress cannot as a matter of law be deemed a “service provider” because it determines the retail prices and pays users a royalty for products sold through the Marketplace (Order at 8) is premised on a distinction that is immaterial under the statute, which distinguishes between material stored at the direction of a user and allegedly infringing content made available by the website itself. DMCA eligibility does not turn on sales, pricing, or other activities performed by an Internet service provider because there is nothing inherently infringing (or noninfringing) about setting prices on a website. There is simply no basis in the text of the DMCA or controlling Ninth Circuit precedent to support this view. In fact, the DMCA broadly defines “service provider” under § 512(k)(1)(B) to encompass a wide range of providers, and the Ninth Circuit has made clear that the fact that a website may do more than simply host or store materials does not disqualify it from safe harbor protection under § 512(c). *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1019-20 (9th Cir. 2013) (“[I]f Congress wanted to confine § 512(c) exclusively to web hosts rather than reach a wider range of service providers . . . [w]e presume that Congress [] would have taken the more straightforward course of clarifying in the definition of ‘service provider’ that, as it applies to § 512(c), only web hosts qualify”; holding that Veoh was a service provider even though it created smaller file copies, transcoded user videos on its

1 own, prominently displayed those videos on the homepage of its website, made it
2 possible for unrelated users to stream or watch those videos, and allowed unrelated users
3 to download and further access those videos offline).

4 Second, for the same reasons, it was error for the Court to conclude that the back-
5 end services provided by CafePress that “go beyond facilitating the storage and access
6 of” the allegedly infringing images negate summary judgment because the allegedly
7 infringing activities occurred “by reason of the storage at the direction of a user” and are
8 therefore protected under § 512(c). *See* Order at 11. Indeed, the back end services
9 provided by CafePress arguably were much less significant than those provided by Veoh
10 in *Shelter Capital Partners*, where Veoh allowed users to download identical digital
11 copies which could easily be copied millions of times and distributed or sold to thousands
12 of third parties. The reason these features were not deemed material in *Shelter Partners*
13 is because the relevant inquiry for evaluating if a website is eligible for the user storage
14 safe harbor turns on whether the material was stored at the direction of a user, not on
15 whether the website facilitated sales or other access to such material, and therefore the
16 Ninth Circuit applies a “but for” test in analyzing such issues. *See Shelter Capital*
17 *Partners*, 718 F.3d at 1018-20 (rejecting arguments to read § 512(c) narrowly and
18 explaining that the statute is to be construed broadly to protect more than simply web
19 hosting services, and analogizing that the “by reason of” language requires only “but for”
20 rather than proximate causation). Here, because it is undisputed that the uploading of
21 images onto CafePress’ website was initiated entirely by users, the sale of allegedly
22 infringing items on the Marketplace could not have taken place “but for” the images and
23 designs uploaded by users and denial of summary judgment on this basis was improper.

24 Third, the Court further erred in denying summary judgment on the issues of
25 “direct financial benefit” and “right and ability to control” under § 512(c)(1)(B) because
26 the statute and case law make it clear that plaintiff must satisfy both prongs in order to
27 overcome the safe harbor. *See* 17 U.S.C. § 512(c)(1)(B) (safe harbor applies if a service
28 provider “does not receive a financial benefit directly attributable to the infringing

1 activity, in a case in which the service provider has the right and ability to control such
2 activity”); *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1062 & 1078 (C.D. Cal. 2002)
3 (“Even if AOL had the right and ability to control Robertson's infringing activity, it
4 would not be liable for vicarious copyright infringement because it did not derive a direct
5 financial benefit from that activity”; “Ellison must show that AOL derived a direct
6 financial benefit from the infringement and had the right and ability to supervise the
7 infringing activity”), *aff'd in part, rev'd in part and remanded on other grounds*, 357 F.3d
8 1072 (9th Cir. 2004); *Arista Records LLC v. Myxer Inc.*, No. 08-cv-03935 GAF JCX,
9 2011 WL 11660773, at *29 (C.D. Cal. Apr. 1, 2011); *Io Grp., Inc. v. Veoh Networks,*
10 *Inc.*, 586 F. Supp. 2d 1132, 1150 (N.D. Cal. 2008); *Capitol Records, LLC v. Vimeo, LLC*,
11 No. 09-cv-10101, __F. Supp. 2d__, 2013 WL 5272932, at *22 (S.D.N.Y. Sept. 18, 2013)
12 (“[T]he Court concludes that Vimeo lacked the right and ability to control infringing
13 activity . . . The Court thus need not decide whether it received a financial benefit.”);
14 *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110 (W.D. Wash. 2004).
15 Again, the plaintiff bears the burden of proof to overcome the DMCA safe harbor once a
16 defendant makes a prima facie showing of entitlement to the safe harbor. Given that the
17 Court found that Plaintiff offered no evidence that the alleged infringement in this case
18 constituted a draw for subscribers (Order at 13), Plaintiff failed to establish that
19 CafePress received a financial benefit directly attributable to the alleged infringing
20 activity and summary judgment should have been granted on the basis of Plaintiff’s
21 failure to satisfy the first prong alone. *See Perfect 10 v. CCBill*, 488 F.3d 1102, 1117-18
22 (9th Cir. 2007) (holding that “the relevant inquiry is ‘whether the infringing activity
23 constitutes a draw for subscribers, not just an added benefit’”); *Viacom Int’l Inc. v.*
24 *YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013) (granting defendant’s motion for
25 summary judgment where the plaintiff/content owner had the burden of proving that
26 YouTube was not entitled to DMCA protection and lacked such proof); *see also Celotext*
27 *Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (moving party’s burden on summary
28 judgment is discharged by showing “an absence of evidence to support the nonmoving

1 party's case"). Yet even if CafePress were required to show that it lacked the "right and
2 ability to control," summary judgment should have been granted on the second prong as
3 well because it is undisputed that CafePress deters infringement on its site. Mere
4 physical control over the material on its system is not enough because Plaintiff was
5 required to show substantial influence or high levels of control *over the actual infringing*
6 *activity* (i.e., the uploading of the allegedly infringing images). *See Shelter Capital*
7 *Partners*, 718 F.3d at 1030; *CCBill*, 488 F.3d at 1118; *infra*, § II(D). Plaintiff failed to
8 do so and the undisputed evidence is that CafePress had no involvement whatsoever in
9 the uploading of user images. Order at 2.

10 Lastly, it was error to deny CafePress' motion on the issue of "standard technical
11 measures" because the Plaintiff failed to present any evidence to show that the use of
12 metadata to identify or protect copyrighted works was a technical measure "developed
13 pursuant to a broad consensus of copyright owners and service providers," as required
14 under § 512(i)(2).

15 Accordingly, the Court should reconsider its ruling on these grounds because the
16 factual issues identified by the Court are in fact not disputed for purposes of the Motion,
17 which presents purely legal issues that support granting summary judgment in favor of
18 CafePress.

19 **II. RECONSIDERATION OF CAFEPRESS' SUMMARY**
20 **JUDGMENT MOTION IS WARRANTED**

21 **A. Legal Standard For Reconsideration**

22 A court has inherent authority to reconsider or modify its prior orders "to correct
23 not only simple mistakes, but also decisions based on shifting precedent, rather than
24 waiting for the time-consuming, costly process of appeal." *U.S. v. Martin*, 226 F.3d
25 1042, 1049 (9th Cir. 2000); *see also Lahiri v. Universal Music & Video Distrib. Corp.*,
26 606 F.3d 1216, 1222 (9th Cir. 2010) ("In any case, a court may revisit prior decisions in a
27 case and correct errors while the case is still pending."); *Amarel v. Connell*, 102 F.3d
28 1494, 1515 (9th Cir. 1996) ("acknowledging that 'the interlocutory orders and rulings

1 made pre-trial by a district judge are subject to modification by the district judge at any
2 time prior to final judgment,” and “[t]here is “there is no imperative duty to follow the
3 earlier ruling””). Under Federal Rule of Civil Procedure 54(b), a district court may
4 revise an interlocutory order “at any time before entry of a judgment adjudicating all the
5 claims.” Fed. R. Civ. Proc. 54(b).

6 “A district court may properly reconsider its decision if it is (1) presented with
7 newly discovered evidence (2) committed clear error or the initial decision was
8 manifestly unjust, or (3) if there is an intervening change in controlling law.” *Smith v.*
9 *Clark County School Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (“It is common for both
10 trial and appellate courts to reconsider and change positions when they conclude that they
11 made a mistake. This is routine in judging, and there is nothing odd or improper about it.
12 A trial court may reconsider and reach a conclusion contrary to an earlier decision, and a
13 paradigmatic example of when this should be done is when the court made its prior
14 decision without considering the legal standards in a controlling opinion”); *see also*
15 *Van Derheydt v. County of Placer*, 32 Fed. Appx. 221, 222, 2002 WL 460215, at*1 (9th
16 Cir. 2002) (Stating reconsideration is appropriate “(1) to correct manifest errors of law or
17 fact upon which the judgment is based, (2) to present newly discovered or previously
18 unavailable evidence, (3) to apply an intervening change in the law, and (4) to prevent
19 manifest injustice”); *Hadsell v. Cach, LLC*, No. 12-cv-0235-L-RBB, 2014 WL 497433,
20 at *2 (S.D. Cal. Feb. 6, 2014) (granting defendant's motion for reconsideration and
21 reversing denial of summary judgment).

22 **B. The Court Erred In Applying A Narrow Definition Of “Service Provider”**
23 **That Is Unsupported By Statute Or Controlling Case Law**

24 Despite the Court’s acknowledgement that the DMCA broadly defines “service
25 provider” for purposes of 17 U.S.C. § 512(c), the Court’s conclusion that CafePress
26 could not be a deemed service provider as a matter of law is unsupported by the statute
27 and by case law.
28

1 There is no legal authority for drawing a distinction between CafePress and other
2 similar ecommerce sites like Amazon and eBay simply because CafePress allegedly
3 determines retail prices for virtual products sold through the Marketplace (as opposed to
4 individual user shops where the retail prices are set by the sellers, not CafePress), just as
5 there is no statutory basis for excluding sites that license content or sell products from the
6 definition of service provider applicable to the user storage safe harbor. To the contrary,
7 “courts have consistently found that websites that provide services over and above the
8 mere storage of uploaded user content are service providers pursuant to § 512(k)(1)(B).”
9 *Capitol Records, LLC v. Vimeo, LLC*, __F. Supp. 2d__, 2013 WL 5272932, at *7
10 (S.D.N.Y. Sept. 18, 2013) (holding that Vimeo, “a provider of online services that hosts
11 and distributes user material by permitting its users to upload, share and view videos,”
12 qualified as a service provider “[e]ven though Vimeo's activities are not limited to
13 such”); *see also Obodai v. Demand Media, Inc.*, Case No. 11 Civ. 2503 (PKC), 2012 WL
14 2189740, at *3 (S.D.N.Y. June 12, 2012) (holding that a website that published its own
15 content in addition to hosting and sharing users' content was a service provider), *aff'd*
16 *mem. on other grounds*, 522 F. App'x 41 (2d Cir. 2013). As made clear by the Ninth
17 Circuit, “if Congress wanted to confine § 512(c) exclusively to web hosts rather than a
18 wider range of service providers,” it could have done so by “clarifying in the definition of
19 ‘service provider’ that, as it applies to § 512(c), only web hosts qualify.” *Shelter Capital*
20 *Partners*, 718 F.3d at 1019.

21 The mere fact that CafePress performs functions “beyond operating a service that
22 merely facilitates the exchange of information between internet users” (*see* Order at 8) is
23 immaterial because controlling Ninth Circuit precedent makes clear that the focus is on
24 whether the allegedly infringing material was stored at the direction of a user. *See*
25 *Shelter Capital Partners*, 718 F.3d at 1019-20 (“[I]f Congress wanted to confine § 512(c)
26 exclusively to web hosts rather than reach a wider range of service providers . . . [w]e
27 presume that Congress [] would have taken the more straightforward course of clarifying
28

1 in the definition of ‘service provider’ that, as it applies to § 512(c), only web hosts
2 qualify”).

3 The opinion in *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal.
4 2003) does not support a narrower construction. The point made in *Hendrickson*, that the
5 plaintiff failed to show that Amazon “was not merely an internet service provider” but
6 the “direct seller of the infringing item,” supported the finding that Amazon could not be
7 held liable for direct infringement. *See id.* at 915. The issue was whether the allegedly
8 infringing DVD in that case was stored at the direction of a user or made available by
9 Amazon itself, not whether the service provider sells products. *See id.* There is no basis
10 under the statute or other Ninth Circuit law to distinguish between service providers
11 providing services for a fee (whether in the form of a subscription, listing fee, or other
12 transaction charges) or services free of charge. *Compare Shelter Capital Partners*, 718
13 F.3d at 1011 (Veoh offered free services and generated revenues from advertising
14 displayed along with the videos, and was held entitled to safe harbor protection) *with*
15 *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020, 1045 (9th Cir. 2013) (finding
16 no safe harbor where defendant generated revenue from advertising that depended on the
17 number of visitors to his sites and encouraged infringing activity to attract visitors).¹
18 Indeed, most websites are commercial and generate revenue through various means, and
19 there is no basis to treat one type of service provider different because it derives revenue
20 on the basis of, for example, sales, as opposed to ads. *See, e.g., Hendrickson v. eBay*,

22 ¹ In *Columbia Pictures*, the Ninth Circuit held that the operator of a Bit-Torrent tracker
23 did not qualify as a service provider for purposes of the narrower definition applicable to
24 the transitory digital network communications safe harbor under § 512(a) because
25 trackers select the “points” to which a user’s client will connect in order to download a
26 file using the BitTorrent protocol and a service provider for the transitory digital network
27 communications safe harbor must provide “connections . . . between or among points
28 specified by a user.” 17 U.S.C.A. § 512(k)(1)(A). *See Columbia Pictures*, 710 F.3d at
1041. However, the Ninth Circuit implied that Fung was a service provider under
broader definition applied to § 512(c) in finding that Fung “facially eligible” for this safe
harbor based on torrents collected for storage. *Id.* at 1042-43.

1 *Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (operator of a website for the purchase
2 and sale of consumer goods); *Corbis Corp.*, 351 F. Supp. 2d at 1100 (“Amazon operates
3 websites, provides retail and third-party selling services to Internet users, and maintains
4 computers to govern access to its websites.”).

5 The alleged differences between the services provided by CafePress and those
6 provided by Amazon and eBay are not relevant to the material issue of whether the
7 images here were stored at the direction of a user. Alleged differences were evaluated
8 when comparing copies of content created by web hosting service providers to transmit
9 to users and to copies made by Veoh in providing streaming and downloading services
10 that the Court in *Shelter Capital Partners* found were not “meaningfully distinguishable”
11 for § 512(c)(1) purposes. *See Shelter Capital Partners*, 718 F.3d at 1018. That
12 CafePress may set the retail price for products sold on the Marketplace is no different
13 from listing fees charged by eBay. *See Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082,
14 1094 (C.D. Cal. 2001) (“eBay makes money through the collection of an ‘insertion fee’
15 for each listing and a ‘final value fee’ based on a percentage of the highest bid amount at
16 the end of the auction”).

17 Because it is undisputed that users uploaded the images at issue in this case (*see*
18 Order at 3-5), and the DMCA applies a broad definition of “service provider” where the
19 alleged infringement is based on material stored at the direction of a user, CafePress
20 qualifies as a service provider within the meaning of § 512(k)(1)(B).

21 C. **The Court Misconstrued The User Storage Limitation And Did Not Apply**
22 **The Ninth Circuit’s “But For” Test**

23 The Ninth Circuit has repeatedly stated that § 512(c) should not be read narrowly,
24 and the Court’s application of the limitation, “by reason of the storage at the direction of
25 a user,” is inconsistent with the Ninth Circuit’s holding that § 512(c) broadly covers
26 “activities that go beyond storage” under a “but for” test. *Shelter Capital Partners*, 718
27 F.3d at 1017 n.7 and 1019-20; *see also Columbia Pictures*, 710 F.3d at 1042 (“As *CCBill*
28 emphasized, we will not read requirements into the safe harbors that are not contained in

1 the text of the statute,” *citing CCBill*, 488 F.3d at 1116). As explained by the Ninth
2 Circuit, “but for” causation means “the event would not have occurred but for that
3 conduct.” *Shelter Capital Partners*, 718 F.3d at 1017 n.6.

4 Here, the Court found that CafePress’ Marketplace activities precluded summary
5 judgment because CafePress allegedly (i) determines which images are sold through the
6 Marketplace (because CafePress screens images for obvious infringement and
7 compliance with its Content Usage Policy after they are uploaded by users, and because
8 by default all user designs are sold through the Marketplace unless the user chooses to
9 sell through individual shops; *see* Order at 2; Declaration of A. Lawrence, Exh. A at
10 27:7-13), (ii) modifies designs on products sold through the Marketplace (which occurs
11 automatically to adjust the dimensions of the image so that it will print on specific
12 products but CafePress does not modify the content in the image; *see* Order at 2 & 3),
13 (iii) sets the retail price for these products and pays a royalty or commission to the sellers
14 (as opposed to the retail price set by users for items sold through individual shops where
15 the only charges by CafePress are for blank products; *see* Lawrence Decl., Exh. B at
16 45:15-20), and (iv) chooses which products are marketed through “feeds” to Amazon and
17 eBay (but users have the choice of opting out of the Marketplace if they do not wish to
18 have their products offered via these feeds; Order at 2-3; Declaration of Lindsay Moore
19 (Dkt. No. 15-4), ¶ 7). Order at 11. However, none of these alleged activities (which
20 CafePress assumes as true for purposes of this Motion) bar finding that the alleged
21 infringement was “by reason of the storage at the direction of a user” because the user’s
22 uploading and storage of the images without the direction or control of CafePress precede
23 the occurrence of any activities on the Marketplace.

24 Further, *Shelter Capital Partners* held that “[u]nder the broader definition [of
25 service provider] appl[icable] to § 512(c), . . . there is no limitation on the service
26 provider’s ability to modify user-submitted material to facilitate storage and access.”
27 *Shelter Capital Partners*, 718 F.3d at 1019-20 (citing *Io Grp., Inc. v. Veoh Networks,*
28 *Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008)). None of these post-upload activities listed

1 above evidence any involvement by CafePress in the actual uploading of the user image,
2 which was the focus of the Ninth Circuit’s findings. Indeed, there is no evidence that
3 CafePress “actively participate[s] in or supervise[s] file uploading” or “preview[s] or
4 select[s] the files before the upload is completed.” *Shelter Capital Partners*, 718 F. 3d
5 at 1920. Again, it is undisputed that the images are uploaded and stored at the direction
6 of users, and that CafePress itself does not choose which images are uploaded because
7 the process is automated and “no individual sees or approves images before or while they
8 are uploaded.” Order at 2. *Shelter Capital Partners* therefore does not support the
9 Court’s conclusion that CafePress’ “activities go beyond facilitating the storage and
10 access of the allegedly infringing materials” (Order at 11).

11 CafePress’ screening of images for compliance with its Content Usage Policy *after*
12 they are uploaded automatically onto the website at the user’s direction, but before they
13 are made available on the Marketplace also fails to take CafePress outside the safe harbor
14 under *Shelter Capital Partners*. Where Veoh similarly monitored videos for
15 pornography and implemented filtering methods to disable infringing content, it was
16 nonetheless entitled to the safe harbor. *See Shelter Capital Partners*, 718 F.3d at 1012
17 &n.2, 1031; *see also CoStar Group, Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 702 (D.
18 Md. 2001) (holding that the defendant was entitled to the user storage limitation even
19 though its employees manually reviewed photos submitted by users and posted to the
20 website only those that met the defendant’s criteria (photos that depicted real estate and
21 did not appear to be obviously copyrighted), *aff’d on other grounds*, 373 F.3d 544 (4th
22 Cir. 2004).

23 Similarly, the allegation that CafePress allows products to be “fed” to Amazon and
24 eBay, also does not change the equation because the syndication feeds merely facilitate
25 access to material stored at the direction of users. *See Viacom Int’l, Inc. v. YouTube, Inc.*,
26 940 F. Supp. 2d 110, at *10-11 (S.D.N.Y. 2013) (holding that YouTube’s practice of
27 syndicating user content to third party mobile providers did not take YouTube outside the
28 safe harbor).

1 Moreover, whether or not CafePress sets the retail price for products sold through
 2 the Marketplace is equally immaterial to a finding that CafePress is entitled to the safe
 3 harbor protections because the scope of § 512(c) is broad enough to reach sales, even if
 4 the activities are deemed infringing. *See Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d
 5 1082, 1088 (C.D. Cal. 2001) (holding that the safe harbor applied to the sale and
 6 distribution of pirated copies of plaintiff’s work on eBay); *see also Columbia Pictures*,
 7 710 F.3d at 1042 (holding that §512(c), by virtue of the express terms of §
 8 512(c)(1)(A)(i), “explicitly covers not just the storage of infringing material, but also
 9 infringing “activit[ies]” that “us[e] the material [stored] on the system or network.”
 10 (brackets in original)).²

11 “But for” the uploading of images by users, CafePress could not be held liable for
 12 products sold through the Marketplace. Therefore, CafePress’ Marketplace activities do
 13 not create a material dispute that liability is premised on material uploaded and stored at
 14 the direction of a user.

15 **D. The Court Erred In Denying Summary Judgment On “Direct Financial**
 16 **Benefit”/“Right And Ability To Control” Based On The Undisputed Evidence**

17 The requirement that a service provider “not receive a financial benefit directly
 18 attributable to the infringing activity, in a case in which the service provider has the right
 19 and ability to control such activity,” 17 U.S.C. § 512(c)(1)(B), requires that the Plaintiff
 20 prove that CafePress (1) has a direct financial interest in the activity, *and* (2) has the right
 21 and ability to control it. This is not an either/or test—both prongs need to be proven. *See*
 22

23 ² Even though *Columbia Pictures* was an inducement case where the Ninth Circuit had
 24 little difficulty finding that defendant operators of various BitTorrent tracker sites were
 25 ineligible for safe harbor under § 512(c) (because Fung had “red flag” awareness of
 26 infringing files, the advertising revenue stream was tied directly tied to the number of
 27 visitors who were attracted primarily by the infringing activity on the websites, and had
 28 right and ability to control the activity where Fung personally assisted users in locating
 infringing files), the Appellate Court nonetheless found that defendants “would be at
 least facially eligible for the safe harbor” based on torrents uploaded by users of the
 websites. *Id.* at 1042-46.

1 17 U.S.C. § 512(c)(1)(B) (safe harbor applies if a service provider “does not receive a
2 financial benefit directly attributable to the infringing activity, in a case in which the
3 service provider has the right and ability to control such activity”); *Ellison*, 189 F. Supp.
4 2d at 1062 & 1078 (“Even if AOL had the right and ability to control Robertson's
5 infringing activity, it would not be liable for vicarious copyright infringement because it
6 did not derive a direct financial benefit from that activity”; “Ellison must show that AOL
7 derived a direct financial benefit from the infringement and had the right and ability to
8 supervise the infringing activity”), *aff'd in part, rev'd in part and remanded on other*
9 *grounds*, 357 F.3d 1072 (9th Cir. 2004); *Arista Records LLC*, 2011 WL 11660773, at *29
10 (“Both elements must be met for the safe harbor to be denied.”); *Io Grp.*, 586 F. Supp.
11 2d at 1150 (same language); *Capitol Records*, 2013 WL 5272932, at *22 (“[T]he Court
12 concludes that Vimeo lacked the right and ability to control infringing activity . . . The
13 Court thus need not decide whether it received a financial benefit.”); *Corbis Corp.*, 351
14 F. Supp. 2d at 1110.

15 The Court found that Plaintiff failed to meet this burden because “Plaintiff has
16 offered no evidence that the instances of alleged infringement in this case constituted a
17 draw for subscribers—i.e., attracted or retained subscriptions because of the infringement
18 or lost subscriptions because of CafePress’s eventual obstruction of infringement” (which
19 is what must be shown in the Ninth Circuit to establish direct financial benefit). Order at
20 13. Accordingly, the Court erred in denying summary judgment where it was Plaintiff’s
21 burden to prove both elements under subsection 512(c)(1)(B). *See CCBill*, 488 F.3d at
22 1118; *Viacom*, 940 F. Supp. 2d at 115 (granting defendant’s motion for summary
23 judgment because a plaintiff/content owner has the burden of proving that a service
24 provider is not entitled to DMCA protection on a summary judgment motion and proof
25 was lacking in that case); *see also Celotext Corp. v. Catrett*, 477 U.S. 317, 325 (1986)

1 (moving party’s burden on summary judgment is discharged by showing “an absence of
2 evidence to support the nonmoving party’s case”).³

3 Further, it was error for the Court to conclude that CafePress’ alleged involvement
4 in the “listing, sale, manufacture, and delivery of items” may constitute “right and ability
5 to control” under the DMCA because in the Ninth Circuit, “right and ability” must
6 involve “something more” that encourages infringement, and here “the undisputed
7 evidence demonstrates that CafePress deterred infringement.” Order at 13; *see Shelter*
8 *Capital Partners*, 718 F.3d at 1030 (plaintiff must show that a defendant exerted
9 “substantial influence” to induce infringement, or exercised “high levels of control over
10 the activities of users” under the second prong). CafePress’ post-upload activities are
11 irrelevant to determining whether it had the ability to control the actual uploading of the
12 allegedly infringing image. *See Io Grp.*, 586 F. Supp. 2d at 1151 (“the plain language of
13 section 512(c) indicates that the pertinent inquiry is not whether Veoh has the right and
14 ability to control its *system*, but rather, whether it has the right and ability to control the
15 *infringing activity*” (emphasis in original)) and 1153 (concluding that “Veoh’s ability to
16 control its index does not equate to an ability to identify and terminate infringing
17 videos”). Moreover, Plaintiff presented no evidence to show that CafePress in any way
18 engages in the type of control that resembles *Cybernet* or “purposeful conduct” in
19 *Grokster*. *See Shelter Capital Partners*, 718 F.3d at 1030 (“‘Substantial influence’ may
20 include . . . high levels of control over activities of users, as in [*Perfect 10, Inc. v.*]
21 *Cybernet [Ventures, Inc.]*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002)],” where the provider
22 “instituted a monitoring program” and gave users “detailed instructions regard[ing] issues

23
24 ³ Moreover, the financial benefit must be directly attributable to the allegedly infringing
25 activities at issue, and here, the undisputed evidence showed that CafePress deterred
26 infringement. *See* Order at 13; *CCBill*, 488 F.3d at 1118; *see also Ellison v. Robertson*,
27 357 F.3d 1072, 1079 (9th Cir. 2004) (holding that AOL did not have a financial interest
28 in third-party acts of infringement where AOL charged customers a monthly flat fee for
access and there was no evidence that AOL attracted or retained subscribers because of
the alleged acts of infringement or lost subscriptions because of its eventual obstruction
of the infringement).

1 of layout, appearance, and content,” “[o]r it may include purposeful conduct, as in [*MGM*
2 *Studios Inc. v. Grokster*], *Ltd.*, 545 U.S. 913 (2005)],” where the court found inducement
3 of copyright infringement). Indeed, given that CafePress has more than 12 million users
4 and more than 600 million virtual products available on its website every day
5 (Declaration of Lindsay Moore (Dkt. No. 15-4), ¶ 11), it is virtually impossible for
6 CafePress to exercise the level of control required under § 512(c)(1)(B) over allegedly
7 infringing activities. *See also Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d
8 733, 748 (S.D.N.Y. 2012) (ruling that right and ability to control “must take the form of
9 prescreening content, rendering extensive advise to users regarding content and editing
10 user content,” and “considering that millions of images are uploaded daily [to
11 Photobucket], it is unlikely that this kind of prescreening is even feasible”).

12 Based on the Court’s actual findings, Plaintiff did not meet his burden of proof and
13 it was therefore error to deny summary judgment. In any event, because CafePress does
14 not encourage infringement on its site and actively deters infringement, CafePress meets
15 the requirement under § 512(c)(1)(B).

16 **E. The Court Erred In Denying Summary Judgment On “Standard Technical**
17 **Measures” Which Was Required Under *Celotex***

18 While Plaintiff raised CafePress’ deletion of metadata in his opposition, Plaintiff
19 offered no evidence that the use of metadata to identify or protect copyrighted works is a
20 technical measure “developed pursuant to a broad consensus of copyright owners and
21 service providers,” 17 U.S.C. § 512(i)(2). Although Plaintiff sued the alleged user and
22 presumably obtained or could have obtained the original file that was uploaded by that
23 user, there was no evidence that the alleged user in fact inputted any metadata that would
24 be relevant. Mere argument, without evidence, is not sufficient to overcome summary
25 judgment, and no case has ever held that use of metadata to identify or protect
26 copyrighted works was a standard technical measure. Because the Court implicitly
27 concluded that plaintiff did not establish that the use of metadata as a technical measure
28 was developed pursuant to a “broad consensus” (*see* Order at 10), summary judgment

1 should have been granted under *Celotex* in the “absence of evidence to support the
2 nonmoving party’s case.” *Celotext Corp. v. Catrett*, 477 U.S. 317, 325 (1986).⁴

3 Even if it were a standard technical measure, Plaintiff presented no evidence to
4 suggest that metadata would in any way help a copyright owner locate or identify a
5 copyrighted work (even though Plaintiff sued the user, Beverly Teall, and could have
6 obtained from her the metadata associated with the images uploaded by Teall). Plaintiff
7 in any event was able to identify allegedly infringing user images and attached them to
8 his complaint without any difficulty. He offered no evidence or even an explanation of
9 how metadata would have assisted copyright owners in ways not otherwise possible on
10 CafePress’ website.

11 Moreover, case law establishes that a service provider may modify the material
12 submitted by users to facilitate storage and may provide editing tools to users. *See*
13 *Shelter Capital*, 718 F.3d at 1019-20 (“Under the broader definition applying to § 512(c),
14 by contrast, there is no limitation on the service provider’s ability to modify user-
15 submitted material to facilitate storage and access[.]”); *Wolk v. Kodak Imaging Network,*
16 *Inc.*, 840 F. Supp. 2d 733, 744-45 (S.D.N.Y. 2012) (holding that Photobucket’s providing
17 users with editing tools does not interfere with standard technical measures).

18 **III. CONCLUSION**

19 For the foregoing reasons, the Court should grant reconsideration and rule that
20 CafePress is entitled to summary judgment as a matter of law.

21 DATED: March 26, 2014

Respectfully submitted,

GREENBERG TRAURIG, LLP

23
24 By /s/Ian C. Ballon

Ian C. Ballon

Attorneys for Defendant,

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26
27 ⁴ While it is Plaintiff’s burden of proof, CafePress could if necessary submit an expert
28 declaration confirming that metadata has never been adopted as a standard technical
measure.

CafePress Inc.
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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **1840 Century Park East, 19th Floor, Los Angeles, CA 90067-2101.**

On March 26, 2014, I served the documents described as follows:
**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
CAFEPRESS INC.'S NOTICE OF MOTION AND MOTION FOR
RECONSIDERATION OF THE COURT'S ORDER ON SUMMARY JUDGMENT
(DKT. NO. 48)** on the following parties:

Darren J. Quinn
12702 Via Cortina
Suite 105
Del Mar, CA 92014

(BY ELECTRONIC SERVICE) Pursuant to CM/ECF system, registration as a CM/ECF user constitutes consent to electronic serve through the Court's transmission facilities. The Court's CM/ECF system sends a "Notice of Electronic Filing" of the filing to the parties and counsel of record listed below who are registered with the Court's EC/ECF System.

(FEDERAL) I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 26, 2014 at Los Angeles, California.

/s/ Ian C. Ballon
Ian C. Ballon
Email: Ballon@gtlaw.com