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**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

<p>AF HOLDINGS, LLC</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>JOHN DOE & JOSH HATFIELD</p> <p style="text-align: center;">Defendant</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No.: 3:12-cv-02049-EDL</p> <p>DEFENDANT HATFIELD’S NOTICE OF MOTION AND MOTION TO DISMISS OR, ALTERNATIVELY, MOTION FOR A MORE DEFINITE STATEMENT</p> <p>Date: July 17, 2012 Tiime: 9:00 A.M.</p>
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**DEFENDANT HATFIELD’S NOTICE OF MOTION AND MOTION TO DISMISS
COMPLAINT AND FOR A MORE DEFINITE STATEMENT**

PLEASE TAKE NOTICE that on Tuesday, July 17 at 9:00 a.m. Defendant Josh Hatfield, by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 12 and other governing law, shall appear before the Honorable United States Magistrate Judge Elizabeth LaPorte at the San Francisco Courthouse, Courtroom E – 15th Floor located at 450 Golden Gate Avenue, San Francisco, CA 94102 and will present its Motion to Dismiss Plaintiff AF Holdings Complaint.

For the reasons more fully described below, Defendant Hatfield seeks dismissal of Plaintiff’s complaint for failure to state a claim under Rule 12(b)(6), for insufficient process and insufficient service of process under Rules 12(b)(4) and 12(b)(5) and seeks a more definitive statement regarding Plaintiff’s allegations of contributory infringement under Rule 12(e).

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The website for the Northern District of California (www.cand.uscourts.gov/wifi) states that the district “is pleased to announce that free wireless public internet access is now available to persons doing business with the court in all Northern District court locations... Wi-Fi makes it possible for users to connect to the public internet using the wireless technology used in most laptops. If users are able to connect to a typical home or business Wi-Fi system, they can connect to the court Wi-Fi.”

This development was undoubtedly welcomed by judges, attorneys, clerks, and court users of all types. According to the Plaintiff’s negligence claim against Mr. Hatfield, however, the Northern District now has a duty, which extends to the producers of pornographic materials and Plaintiff herein, to monitor and secure their connection in such a way that no court user can connect to the network to commit a copyright infringement. This is a hefty burden, especially given the fact that this court (quite intentionally) has offered an unsecured Wi-Fi access that can be used by anyone, including those who wish to commit copyright infringement. Luckily for this court (and millions of Americans), Plaintiff’s theory lacks any legal precedent, is wholly unsupported by existing law and, as one judge has noted, “flies in the face of common sense.”¹

Plaintiff’s negligence theory is, instead, the latest incarnation of the copyright trolling phenomenon that has swept through district courts across the country. Certain features have become hallmarks of this brand of litigation. First, Plaintiff files a single suit seeking the identities of hundreds of unrelated individuals based on a generalized allegation that each has “shared” one of the plaintiff’s copyrighted works – usually a pornographic film with an obviously pornographic title, as here.

Next, the plaintiff seeks an ex parte order for “early discovery” from the court, in the form of ISP subscriber names, addresses, telephone numbers, etc. of the ISP subscriber associated with particular IP addresses. This is usually accomplished (as it was with regard to

¹ *In Re BitTorrent Litigation*, No. 2:11-cv-03999(E.D.N.Y. May 1, 2012)(Doc. 39 at pg. 5)(“While Plaintiffs claim that they can amend their complaints to allege negligence against the owner of a WiFi router who failed to password-protect the device which was then used by an intruder to infringe its copyright, this assertion flies in the face of common sense.”)

1 Defendant herein), by assuring the court in the original action that a) the joinder of hundreds of
2 individuals is proper, and b) that Plaintiff intends to amend the complaint to include each; and c)
3 that the requested expedited discovery will be sufficient to “fully identify” the defendants and
4 serve each with process. Indeed, Plaintiff in the present matter has remained true to form. In
5 *AF Holdings v. Does 1-135* (No. 11-3336-LHK) (hereinafter *AF #1*), the original matter where
6 Plaintiff obtained Defendant’s identity, Plaintiff represented to the court that “Through the
7 information they gather from the ISPs via these subpoenas, the plaintiffs are able to fully
8 “identify”...each P2P network user suspected of violating Plaintiff’s copyrights.” (Doc. 8, pg.
9 2).

10 After obtaining the identity of each ISP subscriber, Plaintiff may now send threatening
11 letters to each account holder demanding thousands of dollars and threatening to sue the
12 subscriber for \$150,000 if they fail to pay. As Plaintiffs well know, a subscriber’s decision to
13 settle is often wholly unrelated to whether or not they have infringed a copyright, and is instead
14 influenced by a desire to avoid the legal expense and embarrassment required to establish one’s
15 innocence.

16 The final step in these mass copyright actions is, almost invariably, a slow death. *AF #1*
17 was no different. After an Order to Show Cause why the matter shouldn’t be dismissed under
18 Rule 4(m) for failure to serve any Defendants within 120 days, the entire matter was eventually
19 dismissed. Notably, Plaintiff filed a declaration in response to the OTSC which noted that
20 Plaintiff’s counsel had filed suit against literally thousands of “Does” nationwide, but at that time
21 had not served a single complaint.

22 The instant action is a direct response, and a transparent attempt to convince courts (and
23 “Does”) that Plaintiff intends to follow through with their threats and that courts should continue
24 to hand over subscriber IDs en masse. However, as the complaint makes clear, Plaintiff has no
25 idea whether a particular subscriber has actually committed copyright infringement. This puts
26 them in a very tricky position, since actually suing people for infringement in this situation might
27 violate Rule 11, as well as exposing the Plaintiff to liability for costs and attorney fees under
28 Copyright Act §505 when the defendant ultimately prevails.

1 Plaintiff's solution? File the instant action (and several identical actions) which accuse
2 the account-holder of negligence – never mind the fact that copyright negligence doesn't exist.
3 Plaintiff can now claim that it has served "X" number of defendants, while meanwhile avoiding
4 liability for costs and attorney fees that are available to prevailing defendants in a copyright
5 action. It is not important that the negligence claim utterly lacks merit; it will serve its purpose
6 nonetheless. Defendant has been publically "named", as well as being forced to retain an
7 attorney and incur costs to defend himself. These are potent weapons for a Plaintiff seeking cost
8 of defense settlements and threatening embarrassment to achieve that end.

9 For the reasons outlined more fully below, Defendant Hatfield respectfully requests that
10 this court dismiss Plaintiff's ill-considered negligence action and provide a more definitive
11 statement with regard to the allegations of contributory infringement leveled against Defendant
12 Hatfield.

13 II. FACTUAL BACKGROUND

14 Plaintiff is the purported owner of the copyrighted adult film that is the subject of this
15 action. Defendant is an ISP subscriber accused of negligence based on allegations that his
16 internet access was accessed by a "John Doe" that allegedly used said access to commit
17 copyright infringement.

18 As noted above, the instant action follows a prior action in this district involving the same
19 parties: AF Holdings v. Does 1-135 (5:11-cv-03336-LHK). AF 1 was filed on July 7, 2011, as a
20 copyright infringement matter against each of the 135 unidentified IP addresses identified in the
21 suit. On July 14, 2011, Plaintiff sought (and eventually received) an ex parte order for early
22 discovery in the form of ISP subscriber names, addresses, and other personal information.
23 Defendant Hatfield was among the Does whose identifying information was obtained in AF 1.
24 Several "Doe" defendants filed Motions to Quash the ISP subpoenas and, on January 19, 2012,
25 Judge Koh Ordered Plaintiff to Show Cause why the matter shouldn't be dismissed for failure to
26 serve defendants under Rule 4(m). A hearing on this order was held on February 22, 2012 and
27 Plaintiff's counsel was ordered to provide detailed information about the individual case and
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1 other mass BitTorrent cases filed by Plaintiff's counsel. On March 27, 2012, AF 1 was
2 dismissed without prejudice for failing to serve Defendants within the statutory period.

3 The instant action was filed on April 24, 2012, and a summons was issued on May 3,
4 2012. On May 10, 2012, Defendant Hatfield was served with a partially illegible copy of the
5 complaint in this suit, accusing him of negligence and an as-yet-unnamed John Doe of copyright
6 infringement. For the reasons that follow, Defendant Hatfield seeks dismissal of the negligence
7 claim brought against him and a more definite statement regarding any secondary infringement
8 claims.

9 III. STATEMENT OF ISSUES TO BE DECIDED

- 10 1. Is Plaintiff's Negligence action against Defendant Hatfield preempted by Copyright Act
11 §301 or the doctrines of conflict preemption or field preemption?
- 12 2. Is Defendant Hatfield entitled to immunity from suit under CDA §230 based on the
13 allegations that he provided internet access to an unidentified individual that
14 subsequently harmed Plaintiff?
- 15 3. Has Plaintiff alleged a sufficient factual basis regarding the existence of a duty to survive
16 dismissal under Fed. R. Civ. P. 12(b)(6)?
- 17 4. Should Plaintiff's complaint be dismissed under Fed. R. Civ. P. 12(b)(4) or 12(b)(5)
18 because the complaint served on defendant is illegible?
- 19 5. Is Defendant entitled to a more definite statement regarding contributory infringement
20 claims?

21 IV. LEGAL ARGUMENT

22 **A. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P.** 23 **12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE** 24 **GRANTED**

25 A complaint may be dismissed under Rule 12(b)(6) if it appears beyond doubt that the
26 plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *Hishion*
27 *v. King & Spalding*, 467 U.S. 69, 73 (1984). A dismissal under this rule may be based on the
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1 failure to allege a cognizable legal theory, or by the failure to allege sufficient facts under a
2 cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.* 749 F.2d 530, 533-34 (9th Cir.
3 1984). Plaintiff commits both sins herein.

4 Allegations of fact in the complaint must be taken as true and construed in the light most
5 favorable to the Plaintiff. *See Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940,
6 946 (9th Cir. 2005). Notably, however, “the tenet that a court must accept as true all of the
7 allegations contained in a complaint is inapplicable to legal conclusions,” and courts are not
8 “bound to accept as true a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*,
9 129 S.Ct. 1937, 1949 (2009)(internal quotation marks and citations omitted). See also
10 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988)(“[C]onclusory allegations
11 without more are insufficient to defeat a motion to dismiss for failure to state a claim.). As such,
12 “bare assertions amounting to nothing more than a formulaic recitation of the elements” of a
13 claim are not entitled to a presumption of truth.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969
14 (9th Cir. 2009).

15 When a complaint fails to adequately state a claim, this fact should be “exposed at the
16 point of minimum expenditure of time and money by the parties and the court.” *Bell Atlantic v.*
17 *Twombly*, 550 U.S. 544, 556 (2007). For the reasons outlined more fully below, Plaintiff’s
18 complaint fails to state a claim upon which relief may be granted, and thus should be dismissed
19 under Rule 12(b)(6).

20
21 **1. PLAINTIFF’S NEGLIGENCE CLAIM IS PREEMPTED AND SHOULD BE
DISMISSED FOR FAILURE TO STATE A CLAIM.**

22 § 301 of the Copyright act provides that

23 “On and after January 1, 1978, **all legal or equitable rights that are equivalent**
24 **to any of the exclusive rights within the general scope of copyright** as
25 specified by section 106 in works of authorship that are fixed in a tangible
26 medium of expression and come within the subject matter of copyright as
27 specified by sections 102 and 103, whether created before or after that date and
28 whether published or unpublished, **are governed exclusively by this title.**
Thereafter, no person is entitled to any such right or equivalent right in any
such work under the common law or statutes of any State.”

1 17 U.S.C. 301(a)(Emphasis Added) Copyright Act preemption is extremely broad. This
2 district has recognized that

3 While the language of section 301 is quite clear, Congress also reinforced
4 its desire to sweep broadly in a report accompanying the legislation: ‘The
5 declaration ... in section 301 is intended to be stated in the clearest and most
6 unequivocal language possible, so as to foreclose any conceivable
7 misinterpretation of its unqualified intention that Congress shall act preemptively,
8 and to avoid the development of any vague borderline areas between State and
9 Federal protection.’ H.R.Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976),
reprinted in 1976 U.S.C.C.A.N. 5659, 5746 (quoted in *Rosciszewski v. Arete*
Associates, 1 f.3d 225, 232 (4th Cir. 1993).

10 Thus, Congress has clearly indicated that state-law claims which come
11 within **the subject matter of copyright law and which protect rights**
12 **equivalent to any of the exclusive rights within the scope of federal copyright**
13 **law ... should be litigated only as federal copyright claims.** *Id.*

14 *Firoozye v. Earthlink Network*, 153 F.Supp.2d 1151, 1121-22 (N.D. Cal. 2001) (emphasis
15 added).

16 The House report goes on to note that “preemption of rights under State law is complete
17 with respect to any work coming within the scope of the bill, even though the scope of exclusive
18 rights given the work under the bill is narrower than the scope of common law rights in the work
19 might have been.” H.R.Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976), reprinted in 1976
20 U.S.C.C.A.N. 5659. The message is unmistakable: the rights granted by the Copyright Act
21 must be vindicated within the confines of the Copyright Act and its jurisprudence.

22 The test for copyright preemption asks two essential questions. First, do the claims fall
23 “within the subject matter of copyright law?” *Firoozye* 153 F.Supp. 2d at 1121-22. Second, do
24 the claims seek to “protect rights equivalent to any of the exclusive rights within the scope of
25 federal copyright law?” *Id.* If the answer to these questions is yes, then Plaintiff’s claims
26 “should be litigated only as federal copyright claims.” *Id.* In the instant case, the answer to each
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1 question is obviously affirmative, and Plaintiff's negligence cause of action against Joshua
2 Hatfield is therefore preempted by §301.

3 A. Plaintiff's Claim is Within the Subject Matter of Copyright

4 The first prong of the copyright preemption test asks whether the Plaintiff's claim is
5 within the subject matter of copyright. There can be no doubt that Plaintiff's claim herein, which
6 is based on the alleged unauthorized reproduction and distribution of Plaintiff's copyrighted
7 motion picture, is within the subject matter of copyright. The Copyright Act describes the
8 "Subject matter of copyright" as follows. "Copyright protection subsists, in accordance with this
9 title, in original works of authorship fixed in a tangible medium of expression...Works of
10 authorship include the following categories...(6) motion pictures and other audiovisual work."
11
12 17 U.S.C. §102.

13
14 As the House Committee report notes,

15 "As long as a work fits within one of the general subject matter categories of
16 sections 102 and 103 [sections 102 and 103 of this title], the bill prevents the
17 States from protecting it even if it fails to achieve Federal statutory copyright
18 because it is too minimal or lacking in originality to qualify, or because it has
fallen into the public domain."

19 H.R.Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976), reprinted in 1976 U.S.C.C.A.N. 5659,
20 5748.

21 Thus, the first test for copyright preemption is satisfied whether or not the individual
22 work at issue is deemed copyrightable, and is satisfied solely by virtue of the fact that the work is
23 a motion picture, falling within the subject matter of copyright. The work that forms the basis of
24 Plaintiff's claim in the instant case qualifies as a motion picture, and thus is within the subject
25 matter of copyright. The first prong of the preemption test is satisfied.
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2 B. Plaintiff Seeks to Protect Rights that are Identical to the §106 Exclusive Rights

3 There can be no doubt that Plaintiff's negligence claim against Joshua Hatfield seeks to
4 protect rights that are equivalent to the section 106 rights of reproduction, distribution, etc.
5 Plaintiff's complaint makes it abundantly clear the negligence claim against Defendant Hatfield
6 seeks to protect Plaintiff's copyrighted work from unauthorized copying and sharing. This is
7 precisely the role of copyright law.
8

9 Indeed, Plaintiff cannot manage to formulate any statement of its right to relief without
10 reference to its "exclusive rights" under the copyright act or the violation of those rights by
11 "copying." See, e.g. Plaintiff's complaint at ¶58 ("unauthorized copying and sharing of
12 Plaintiff's video"); ¶63 ("copying and sharing of Plaintiff's video" and "interfered with
13 Plaintiff's exclusive rights in the copyrighted work"); ¶ 64 (same); ¶65 ("copying and sharing");
14 ¶ 66 ("infringements"); ¶67 ("copy and share Plaintiff's copyrighted video" and "interfering with
15 Plaintiff's exclusive rights in the video."). It seems fair to conclude, based on the allegations of
16 the complaint, that Plaintiff seeks redress for the violation of his exclusive rights, which were
17 violated by the copying and sharing of an unidentified individual.
18
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20 Plaintiff's own focus on its "exclusive rights" is instructive. 17 U.S.C. §106 is entitled
21 "Exclusive Rights in Copyrighted Works," and lays out the familiar exclusive rights, including
22 the right to distribute and the right to reproduce. These are the rights that trigger copyright
23 preemption. These are *precisely* the rights that Plaintiff claims were violated as a result of Mr.
24 Hatfield's alleged negligence, and Plaintiff is unable to formulate any version of the claim
25 without reference to its "exclusive rights." Moreover, the act that triggers liability to Plaintiff
26 (under Plaintiff's theory), is the unauthorized copying and sharing of Plaintiff's work by a third
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1 party. This is exactly the situation that the twin doctrines of vicarious and contributory copyright
2 liability have been developed to address.

3 The Ninth Circuit has adopted the “extra element” test to help determine whether the
4 state law claim “seeks to protect rights which are qualitatively different from copyright rights.
5 The state claim must have an ‘extra element’ which changes the nature of the action” in order to
6 survive preemption *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 977 (9th
7 Cir. 1987). Many courts have addressed this issue and determined that negligence claims do not
8 add the required “extra element” that qualitatively changes the nature of the action, and thus are
9 preempted. As the Central District of California recognized,
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11
12 Because the essential allegation is still that Defendants unlawfully copied
13 Plaintiff’s ideas, it is still a copyright infringement claim. Moreover,
14 **recharacterization of the claim as one of ‘negligence’ does not add a legally**
15 **cognizable additional element** because a general claim for copyright
16 infringement is fundamentally one founded on strict liability. The alteration of the
17 required mental state does not add an ‘additional element’... Plaintiff’s
18 negligence claim is preempted by federal copyright law.

19 *Dielsi v. Falk*, 916 F.Supp. 985, 992-993 (C.D. Cal. 1996)(emphasis added and internal citations
20 omitted). The court in *Dielsi* recognized that simply rephrasing a claim does not change the
21 essential elements of the claim.

22 In addition to the court in *Dielsi* , a number of other courts have found that negligence
23 causes of action are preempted by copyright law and that the alteration of the required mental
24 state does not add a legally cognizable extra element. See, e.g. *Felix the Cat Productions v. New*
25 *Line Cinema*, 2000 WL 770481 (C.D. Cal. April 28, 2000)(“Recharacterizing Plaintiff’s
26 copyright claim as one for negligence does not add an additional element”); *Watermark*
27 *Publishers v. High Tech. Sys.*, 1997 U.S. Dist. LEXIS 22512 at * 15 (S.D. Cal. Jun 18, 1997)
28 (preempting Plaintiff’s negligence claim, and noting “The only possible basis for a duty to
protect another from copyright infringement – if such a duty can exist – is in copyright law; thus
the alleged existence of a duty is not an ‘extra element’”); *Gary Friedrich Enterprises, LLC v.*

1 *Marvel Enterprises, Inc.*, 713 F.Supp.2d 215 (S.D.N.Y. 2010) (negligence claim under either
2 New York or Illinois law was properly preempted by Copyright Act §301); *Bridgeport Music,*
3 *Inc. v. IIC Music, et. al.* 154 F.Supp.2d 1330 (M.D. Tenn., 2001)(negligence claim preempted
4 by Copyright Act despite elements of ‘duty’ and ‘breach’.); *Marvullo v. Gruner + Jahr AG &*
5 *Co.*, 2001 WL 40772, at *7 (S.D.N.Y. Jan. 17, 2001)(photographer’s negligence claim simply
6 restates copyright infringement claim); *Drum Major Music v. Young Money Entertainment*, 2002
7 WL 423350 (S.D.N.Y. Feb. 7, 2012)(negligence claim preempted by Copyright Act).

8 Based on the foregoing, it is clear that Plaintiff’s negligence claim against Defendant
9 Hatfield is preempted by Copyright Act §301. The work at issue is a motion picture – certainly
10 within the subject matter of copyright as defined by §102. In addition, Plaintiff seeks to protect
11 rights that are identical to the rights protected by Copyright Law and Plaintiff is incapable, in
12 fact, of asserting any right to relief without reference to these exclusive rights. Because
13 Plaintiff’s sole claim against Defendant Hatfield is preempted, the complaint should be
14 dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failing to posit a cognizable legal theory
15 entitling Plaintiff to relief.

16 17 C. Plaintiff’s Claims are Also Preempted by the Doctrines of Conflict and Field Preemption

18 In addition to the obvious statutory preemption via §301, Plaintiff’s claims are also
19 preempted under the non-statutory doctrines of federal preemption. A state law cause of action
20 is preempted not only when so decreed by specific statute, like §301. A state law cause of action
21 is also preempted when the Constitution or other federal legislation evidences an intent to fully
22 occupy the field in question, or when there is a fundamental incompatibility between federal and
23 state law. Thus, when the state law “stands as an obstacle to the accomplishment and execution
24 of the full purposes and objectives of Congress”, it is preempted. See *Capital Cities Cable, Inc.*
25 *v. Crisp* 467 U.S. 691 (1984).

26 In the instant case, Plaintiff seeks to hold an ISP subscriber liable for providing internet
27 access to an individual that subsequently used that connection to infringe Plaintiff’s copyright.
28 However, holding an information conduit liable for the content of the information transmitted

1 represents a fundamental conflict between Plaintiff's state law claim and the existing federal
2 legislation, including the DMCA, the Copyright Act, and the CDA.

3 The Copyright Act, DMCA, and CDA all include carefully crafted limitations of liability
4 for mere intermediaries in the information transmission process, like Defendant here. The
5 Copyright Act has created a substantial body of case law discussing the requirements for
6 imposing secondary liability on a third-party that has not directly infringed a copyright. This
7 regime does not authorize the imposition of liability for "negligent infringement."

8 Moreover, as described further below, the CDA also has broad immunity provisions
9 designed to prevent the imposition of tort liability based on the communications of a third party.
10 The DMCA likewise includes several statutory "safe harbors," that are designed to shield third
11 party intermediaries from copyright liability resulting from merely transmitting information.
12 Taken together, these demonstrate Congress' desire to occupy the field with regard to third party
13 liability for the electronic communications of another – communications that invariably traverse
14 state lines and defy state regulations. As such, state regulation over this field is prohibited.

15 Additionally, Plaintiff's proposed cause of action directly conflicts with the copyright
16 principles of secondary liability and the broad policies of an open internet underlying both the
17 CDA and the DMCA. Thus, Plaintiff's cause of action for negligence is also preempted under
18 the doctrines of conflict preemption and field preemption.

19
20 **2. PLAINTIFF'S NEGLIGENCE CLAIM IS BARRED BY CDA §230 IMMUNITY AND**
21 **SHOULD BE DISMISSED UNDER RULE 12(B)(6).**

22 Assuming, arguendo, that Plaintiff's cause of action for negligence could survive
23 preemption, Plaintiff's claims are nonetheless barred by Communications Decency Act
24 immunity under 47 U.S.C. §230. Specifically, §230(c)(1) provides that "No provider or user of
25 an interactive computer service shall be treated as the publisher or speaker of any information
26 provided by another information content provider." 47 U.S.C. 230(c)(1). The CDA goes on to
27 state that "No cause of action may be brought and no liability may be imposed under any State or
28 local law that is inconsistent with this section." 47 U.S.C. 230 (e)(3).

1 A fundamental policy underlying §230 immunity was “to promote the continued
2 development of the Internet and other interactive computer services and other interactive media,”
3 and to preserve the vibrant and competitive free market that presently exists for the Internet and
4 other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C.
5 §230(b)(1 & 2). As the 4th Circuit recognized, the CDA was designed to “avoid the chilling
6 effect upon Internet free speech that would be occasioned by the imposition of tort liability upon
7 companies that do not create potentially harmful messages but are simply intermediaries for their
8 delivery. *Zeran v. America Online, Inc.* 129 F.3d 327, 330-331 (4th Cir. 1998).

9 Although CDA immunity does not provide immunity from liability under *intellectual*
10 *property laws*, Plaintiff’s negligence claim *must not* be a claim under intellectual property laws if
11 it is to survive preemption. Courts have construed “immunity broadly, in the spirit of the CDA’s
12 stated purpose of promoting rather than impeding technology and Internet use.” *Smith v.*
13 *Intercosmos Media Group, Inc.* 2002 WL 31844907 at *3 (E.D. La. Dec. 17, 2002).

14 Courts must undertake a three-part inquiry to determine whether a defendant is eligible
15 for CDA immunity. They are “(1) the defendant [is] a provider or user of an interactive
16 computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of
17 information; and (3) the information at issue [is] provided by another information content
18 provider.” *Delfino v. Agilent Technologies, Inc.*, 52 Cal.3d 376, 389 (Ct. App., 6th App. Dist.,
19 2006), quoting *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 830 (Ct. App. 4th Dist., 2002).

20 As noted above, courts must first determine whether the defendant qualifies as a
21 “provider...of an interactive computer service.” Although this phrasing conjures images of
22 traditional internet service providers, (i.e. Comcast or Time Warner), the CDA defines the term
23 in a way that leaves no doubt that it would apply to the allegations against Defendant Hatfield.
24 Specifically, §230(f)(2) defines an interactive computer service as “any information service,
25 system, or access software provider that provides or enables computer access by multiple users
26 to a computer server, **including specifically a service or system that provides access to the**
27 **Internet...**” 47 U.S.C. 230(f)(2)(emphasis added).
28

1 Defendant Hatfield is accused of providing internet access to an individual that ultimately
2 pirated Plaintiff's film. This act, according to Plaintiff, is the sole basis of Defendant Hatfield's
3 liability. The act of providing internet access to a third party, however, is **exactly** the type of
4 activity that qualifies one for CDA immunity as the provider of an interactive computer service
5 and it is specifically included in the definition cited above. Indeed, the California Court of
6 Appeals examined almost precisely the same issue in *Delfino v. Agilent Technologies, Inc.*, 52
7 Cal.Rptr.3d 376 (2006). The Plaintiff in *Delfino* sought to impose liability on Agilent
8 Technologies based on Agilent's provision of internet access to a particular employee, who used
9 that access to send allegedly threatening and defamatory emails. Plaintiff sought to impose
10 liability on Agilent based on a theory of negligent infliction of emotional distress, based on
11 allegations very similar to those made by Plaintiff in the present case. Specifically, Plaintiff
12 claimed that Agilent "was informed and knew that [the employee] was using its computer
13 system" to commit torts against the Plaintiff. Agilent claimed immunity under the CDA and the
14 trial court confirmed. On appeal, the 6th Appellate district confirmed the grant of immunity and
15 noted that "Agilent clearly meets the definition of that term under section 230(f)(2), in that it
16 "provides or enables computer access by multiple users." *Id.* at 390. Another California case,
17 *Kathleen R. v. City of Livermore*, held that a public libraries provision of computers and internet
18 access qualified them for CDA protection as the provider of an interactive computer service. See
19 104 Cal.Rptr.2d 772 (1st Dist. 2001).

20 The conduct here that purportedly gives rise to liability is virtually identical to the
21 conduct of the defendants in *Delfino* and *Kathleen R.*, namely, the provision of internet access to
22 a third party. As the courts in *Delfino* and *Kathleen R.* concluded, and as the language of §230
23 makes clear, a defendant whose liability is premised upon his ownership or control of "**a service
24 or system that provides access to the Internet,**" should properly qualify as the provider of an
25 interactive computer service, and satisfies the first requirement for CDA immunity.

26 The second requirement for CDA immunity to apply is that the "the cause of action
27 treat[s] the defendant as a publisher or speaker of information." *Delfino* at 389. The California
28 Supreme Court has held that the CDA makes no attempt to exclude pre-CDA "distributors" of

1 information, and one who was characterized as a passive distributor is likewise entitled to
2 immunity. *Barrett v. Rosenthal*, 51 Cal.Rptr.3d 55 (2006).

3 Moreover, although this element is couched in terms that are familiar to defamation suits,
4 “it is clear that immunity under section 230 is not so limited” *Delfino* at 390. Numerous courts
5 have applied CDA immunity to defendants accused of a variety of torts beyond defamation,
6 including nuisance, premises liability, misappropriation of right of publicity, and, relevantly,
7 negligent failure to control a third party’s online conduct. See, e.g. *Kathleen R.*, *supra.*;
8 *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); and *Doe v. America Online,*
9 *Inc.*, 783 So.2d 1010 (Fla. 2001).

10 Indeed, several courts have specifically held that CDA immunity bars a Plaintiff’s claim
11 for negligence, like the one alleged herein. See, e.g. *Doe v. MySpace*, 528 F.3d 413 (5th Cir.
12 2008)(defendant immune from liability for negligence); *Carafano v. Metrosplash*, 339 F.3d 1119
13 (9th Cir. 2003)(same); *Barnes v. Yahoo! Inc.* 2005 WL 30055602 at *4 (D. Or. Nov. 8,
14 2005)(same); *Ben Ezra, Weinstein, & Co., v. Am. Online. Inc.* 206 F.3d 980, 986 (10th Cir.
15 2000)(CDA bars claims for negligence and defamation); *Green v. Am. Online*, 318 F.3d 465, 472
16 (3d. Cir. 2003)(CDA bars claims for negligent failure to police network); *Jane Doe One v.*
17 *Oliver*, 755 A.2d 1000, 1002-04 (Conn. Super. Ct. 2000)(CDA bars claims for negligence, inter
18 alia); *Parker v. Google, Inc.* 422 F.Supp.2d 492, 500-501 (E.D. Pa. 2006)(CDA bars claims for
19 invasion of privacy, negligence, and defamation).

20 The case of *Kathleen R.*, noted above, is again instructive. In that case, Plaintiff
21 attempted to hold the City of Livermore liable for allowing a twelve-year-old to access and
22 download sexually explicit images from an internet connection in the public library. *Kathleen R.*
23 104 Cal.2d at 773. Notably, the Plaintiff alleged that the minor went to the library and
24 downloaded sexually explicit photos onto a floppy disk that he brought to the library. *Id.* The
25 minor then allegedly took the floppy disk to another location where he printed the pictures. The
26 state court of appeals had no trouble determining that Plaintiff was attempting to hold the library
27 responsible as the speaker or publisher of the explicit materials by virtue of the library’s role as a
28 conduit for internet service. The court held that §230 immunizes “interactive computer service

1 providers from liability for mere failure to ‘restrict access to offensive material disseminated
2 through their medium.’” *Id.* at 780, quoting *Blumenthal v. Drudge*, 992 F.Supp. 44, 49 (Dist.
3 D.C. 1998).

4 The allegations against the defendant herein are almost identical to those in *Kathleen R.*
5 In each Plaintiff seeks to impose liability on the basis of the defendant’s provision of internet
6 access to a third party or third parties. In each, the Defendant is accused only of being a conduit
7 for objectionable material that was downloaded from a connection offered by the Defendant. In
8 each case, the defendant’s liability is premised on a third party’s use of the defendant’s internet
9 access to copy pornographic materials to a storage device for later use. And, like the City of
10 Livermore in *Kathleen R.*, the defendant here is entitled to CDA immunity.

11 The final prong of the test for CDA immunity asks whether “the information at issue [is]
12 provided by another information content provider.” *Delfino* at 389. The CDA defines an
13 information content provider as the “person or entity that is responsible, in whole or in part, for
14 the creation or development of information provided through the internet...” 47 USC §203(f)(3).
15 In the present case, it is clear that Defendant Hatfield is not the creator or entity responsible for
16 the creation or development of the film at issue. There is clearly no allegation in the present case
17 that Defendant Hatfield is the creator or developer of the information at issue – Plaintiff’s
18 copyrighted work. As such, Defendant Hatfield easily satisfies the third prong of the preemption
19 test.

20 Plaintiff herein explicitly seeks to impose liability on Defendant Hatfield based on the
21 Defendant’s alleged provision of internet access to an unidentified individual that infringed the
22 Plaintiff’s copyright. The provision of internet access to a third party, however, makes
23 Defendant Hatfield the provider of an interactive computer service and entitles him to immunity
24 under the CDA. This immunity extends to all attempts to hold the Defendant liable for the
25 allegedly tortious information supplied by a third-party. Thus, in addition to being preempted as
26 described above, Plaintiff’s claims are barred by Defendant’s CDA §230 immunity.

27 //

28 //

3. PLAINTIFF'S BARE ASSERTIONS REGARDING DEFENDANT'S DUTY CANNOT SURVIVE A 12(b)(6) MOTION UNDER IQBAL & TWOMBLEY

Plaintiff's negligence claim against Defendant Hatfield is devoid of factual support and does not satisfy the federal courts' heightened pleading standards in the wake of *Bell Atlantic v. Twombly* and *Iqbal v. Ashcroft*. Plaintiff's claim against Defendant Hatfield indeed amounts to little more than a formulaic recitation of the elements of a cause of negligence, along with general "defendant-unlawfully-harmed me" accusations like those rejected in *Iqbal* & *Twombly*.

The clearest example of the deficiencies in Plaintiff's complaint arises with regard to the alleged duty owed by Defendant Hatfield. "[T]o state a negligence cause of action, the defendant must owe a duty of due care to the person injured, or to a class of persons of which the plaintiff is a member." *Valdez v. J. D. Diffenbaugh Co.*, 51 Cal. App. 3d 494, 124 Cal. Rptr. 467 (1975). Paragraph 59 of Plaintiff's complaint is the only paragraph that attempts to establish a legal duty owed by Defendant Hatfield to Plaintiff. In support of this proposition, Plaintiff offers the following: "Defendant Hatfield had a duty to secure his internet connection." (Doc. 1 at ¶59).

This is *precisely* the "[t]hreadbare recital of the elements of a cause of action, supported by mere conclusory statements" that "do not suffice." *Twombly* 127 S.Ct. at 1955. This court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal* 129 S.Ct. at 1950. Plaintiff has offered no factual or legal support for the (literally) unprecedented proposition that an ISP subscriber (*ergo, all ISP subscribers*) owe a duty to Plaintiff (and all pornography companies, and all other companies that own intellectual property rights) to take specific steps to secure their internet connection to prevent copyright infringement. The allegation that "Defendant Hatfield had a duty to secure his internet connection" is the epitome

1 of a legal conclusion couched as a factual statement, and is the only support for the
2 unprecedented proposition embodied within it.

3 The District Court for the District of Hawaii has recently considered a negligence claim
4 in the BitTorrent context and concluded that the

5 “allegations in the FAC are not sufficient to state a claim of negligence for
6 a couple reasons. First, nowhere in the FAC does Plaintiff assert any specified
7 legal duty in connection with its negligence claim. Further, Plaintiff has not cited,
8 nor has this Court found, any case law with analogous facts from which the Court
9 could conclude that the Defendants owed Plaintiff a general duty to secure their
internet connections.”

10 *Liberty Media Holdings v. Swarm* No. 11-00262-DAE-RLP (Docket NO. 66 - Order
11 Granting in Part and Denying in Part Defendant Hatcher’s Motion to Dismiss...)(D. Haw.
12 January 30, 2012). See also, *Liberty Media Holdings v. Swarm...and Does 1-62*, 2011
13 WL 1869923 (S.D. Cal. May 12, 2011). On motion for expedited discovery, Court
14 determined that Plaintiff’s cause of action for negligence could not withstand a motion to
15 dismiss).

16
17 Plaintiff herein has offered nothing more than a threadbare assertion that
18 Defendant Hatfield had a duty to secure his internet connection, entirely devoid of any
19 factual support for the proposition. Thus, assuming arguendo that negligence is not
20 preempted *and* that Defendant does not qualify for CDA immunity, Plaintiff’s cause of
21 action for negligence must nonetheless be dismissed for failing to allege sufficient factual
22 basis to support the claim.

23
24 **4. Plaintiff’s Complaint Should be Dismissed for Insufficient Process and Improper**
25 **Service of Process Because the Document Served on Defendant Is Illegible**

26 In addition to the foregoing, Plaintiff’s complaint must be dismissed under Fed. R. Civ.
27 Pro. 12(b)(4) for insufficiency of process or 12(b)(5) for insufficient service of process. The
28

1 complaint served on Defendant Hatfield is simply illegible in key sections. Plaintiff's demand
2 for relief and exhibits are almost wholly illegible, and the Negligence claim against Defendant
3 Hatfield is illegible in key sections. There can be no argument that a *legible* complaint is
4 necessary for sufficient process and for proper service of process or that a complaint should be
5 dismissed if it is illegible. See, e.g. *Dustin v. Galaza* 2009 WL 981151 (E.D. Cal. April 9,
6 2009)(dismissing Plaintiff's "virtually illegible" complaint).
7

8 The ECF copy of Plaintiff's complaint has been fixed to cure the problem, but Defendant
9 Hatfield was not a party subject to ECF service for the document in question and Plaintiff has not
10 made any effort to serve a legible copy of the complaint on defendant. A copy of the complaint
11 actually received by Defendant Hatfield is annexed hereto as Exhibit "A". Also, notably, an
12 identical AF Holdings case filed the same day (*AF Holdings v. John Doe and Jonathan Botson*,
13 5:12-cv-02048) retains similar deficiencies in its ECF complaint.
14

15 Sufficiency of process and proper service of process require the delivery of a legible
16 document to the Defendant. Indeed, this entire step of the process is designed to give a
17 Defendant notice of the claims against him, and an illegible document obviously undermines this
18 goal. As such, this matter should be dismissed due to insufficient process and improper service
19 of process under 12(b)(4) and 12(b)(5).
20

21 **B. DEFENDANT IS ENTITLED TO A MORE DEFINITE STATEMENT REGARDING**
22 **CONTRIBUTORY INFRINGEMENT CLAIMS**
23

24 Fed. R. Civ. P. 12(e) provides that "a party may move for a more definite statement of a
25 pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the
26 party cannot reasonably prepare a response. The motion must be made before the filing of a
27 responsive pleading and must point out the defects complained of and the details desired..."
28

1 Plaintiff's complaint against Defendant Hatfield purports to sue him for negligence.
2 Multiple allegations against Defendant Hatfield appear, however, to state a claim for
3 contributory infringement. Defendant therefore requests a more definite statement regarding
4 Plaintiff's allegations of contributory infringement against Defendant Hatfield if Plaintiff intends
5 to proceed on those grounds.

6 The proper test in evaluating a motion for a more definite statement is whether the
7 complaint provides the defendant with a sufficient basis to frame responsive pleadings. *Cellars*
8 *v. Pacific Coast Packaging, Inc.*, 189 F.R.D. 575 (N.D. Cal. 1999). A party alleging
9 contributory infringement must show "(1) direct infringement by a primary infringer, (2)
10 knowledge of the infringement, and (3) material contribution to the infringement." *Metro-*
11 *Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004).

12 Plaintiff has included allegations that arguably satisfy each element of a contributory
13 infringement claim in its claim for negligence against Mr. Hatfield. Plaintiff has alleged that
14 John Doe is the primary infringer of Plaintiff's copyright. This constitutes the bulk of Plaintiff's
15 complaint, and is incorporated into Count IV against Defendant Hatfield. Second, Plaintiff has
16 alleged that Defendant Hatfield had knowledge of the infringing acts (¶61, ¶62, and ¶64) and that
17 Defendant Hatfield's internet connection was a substantial cause of the infringement.
18 However, Plaintiff chose to label the cause of action as one of negligence, in a transparent
19 attempt to avoid exposing themselves to attorney fees and costs under Copyright Act §505 when
20 they are ultimately unable to support their allegations.

21 Plaintiff has apparently accused Defendant Hatfield of the elements of contributory
22 infringement, but simultaneously claims that it has accused him only of negligence. Because
23 Defendant cannot ascertain whether he has actually been accused of contributory infringement
24 based on John Doe's alleged use of his internet connection, Defendant is unable to frame a
25 responsive pleading to these allegations. As such, Defendant requests that Plaintiff provide a
26 more definite statement with regard to any claims for contributory infringement against
27 Defendant Hatfield.

1 **IV. CONCLUSION**

2 For the reasons outlined above, Defendant respectfully requests that this court dismiss the
3 claim of negligence against Defendant Hatfield. Plaintiff's cause of action is explicitly
4 preempted by Copyright Act §301, and is further preempted by the doctrines of conflict and field
5 preemption. Additionally, Defendant is immune from liability for the alleged acts under CDA
6 §230 and Plaintiff's complaint should therefore be dismissed. Plaintiff has also failed to serve a
7 legible copy of the instant complaint on defendant and has likewise failed to adequately allege the
8 existence of a duty owed by the Defendant to the Plaintiff. Each of these failings are
9 independently adequate for dismissal. Finally, Defendant requests a more definite statement as
10 to the allegations of contributory infringement against Defendant, if Plaintiff intends to pursue
11 such an action based on the activities alleged in its complaint against Defendant Hatfield.

12
13 May 31, 2012

14 Respectfully Submitted,

15
16 /s/ Nicholas Ranallo _____
17 Attorney for Defendant Hatfield
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21
22 **CERTIFICATE OF SERVICE**

23 I HEREBY CERTIFY that on this 31st day of May, 2012, a true and correct copy of the
24 foregoing was filed with the Clerk of the Court using the CM/ECF system and served on all of
25 those parties receiving notification through the CM/ECF system.

26 By: /s/Nicholas Ranallo
27 Nicholas Ranallo