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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

16 QUENTIN TARANTINO, an
17 individual,
18 Plaintiff,
19 v.
20 GAWKER MEDIA, LLC, a/k/a
21 Gawker Media, a Delaware
22 corporation; GAWKER MEDIA
23 GROUP, INC, a/k/a Gawker Media, a
Cayman Islands corporation;
GAWKER ENTERTAINMENT,
LLC, a/k/a Gawker Media, a New
York corporation; DOE-1, a/k/a
ANONFILES.com, an unknown
entity/person, and DOES 2 through
10, inclusive,
Defendants.

CASE NO. 14-CV-603-JFW (FFMx)

[Hon. John F. Walter]

**OPPOSITION TO DEFENDANT
GAWKER MEDIA, LLC'S
MOTION TO DISMISS THE
COMPLAINT PURSUANT TO
F.R.C.P. 12(b)(6)**

Date: April 14, 2014
Time: 1:30 p.m.
Ctrm: 16

[Filed Concurrently With:
(i) Appendix of Unpublished
Authorities; and (ii) Opposition to
Request for Judicial Notice]

TABLE OF CONTENTS

		<u>Page No.</u>
1		
2		
3		
4	I. INTRODUCTION	1
5	II. SUMMARY OF ARGUMENT	2
6	II. FACTUAL BACKGROUND	3
7	IV. MEMORANDUM OF POINTS & AUTHORITIES	5
8	A. Motions to Dismiss Under Rule 12(b)(6) Are Disfavored	5
9	B. The Complaint States a Valid Claim Against Gawker for Contributory Copyright Infringement	5
10	1. The Complaint States Valid Claims for Underlying Direct Copyright Infringement	6
11	a. Tarantino Authored and Owns the Screenplay	6
12	b. The First Claim for Relief Alleges Direct Infringement By the Doe Defendants	6
13	c. The Complaint Also Alleges Direct Infringement By Internet Users Via Gawker's Links.	8
14	2. Gawker Had Knowledge of the Infringing Activity	9
15	3. Gawker Induced, Caused and/or Materially Contributed to the Infringing Conduct	10
16	C. It is Inappropriate to Analyze Gawker’s Fair Use Defense Now . . .	12
17	D. The Fair Use Doctrine Does Not Absolve Gawker of Liability . . .	13
18	1. The Primary Infringers’ Use of the Screenplay Was Not Fair	15
19	a. The Purpose and Character of Use Weigh Against a Finding of Fair Use	15
20	(1) The Use Was Not Transformative	15
21	(2) The Use Was Commercial	15
22	b. The Nature of the Copyrighted Work Weighs Against a Finding of Fair Use	16
23	(1) The Screenplay Is Unpublished	16
24	(2) The Screenplay Is a Creative Work	18
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS (CONTINUED)

Page No.

c. The Amount and Substantiality of the Portion Used Weighs Against a Finding of Fair Use 18

d. The Effect of Use Upon the Potential Market Weighs Against a Finding of Fair Use 19

2. Gawker’s Purported “Use” of the Screenplay Was Not Fair.. 21

a. The Purpose and Character of Use Weigh Against a Finding of Fair Use 21

(1) The Use Was Not Truly for News Reporting . . . 21

(2) The Use Was Not Transformative 22

(3) The Use Was Commercial 23

b. The Nature of the Copyrighted Work Weighs Against a Finding of Fair Use 23

c. The Amount and Substantiality of the Portion Used Weighs Against a Finding of Fair Use 23

d. The Effect of Use Upon the Potential Market Weighs Against a Finding of Fair Use 24

E. Motion to Dismiss Punitive Damages Should Not to be Granted . . . 25

V. CONCLUSION 25

TABLE OF AUTHORITIES

FEDERAL CASES

Page No.

1

2

3 *Araya v. Deep Dive Media, LLC and Gawker Media, LLC*

4 5:12-CV-163, 2013 WL 4494881 (W.D.N.C. Aug. 20, 2013) 17, 18, 19

5 *Arista Records, Inc. v. MP3Board, Inc.*,

6 No. 00 Civ. 4660, 2002 WL 1997918 (S.D.N.Y. Aug. 28, 2002) 10

7 *A&M Records, Inc. v. Napster, Inc.*,

8 239 F.3d 1004 (9th Cir. 2001). 5, 6, 9, 10, 14, 16, 20, 22, 25

9 *Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003). 5

10 *Browne v. McCain*,

11 612 F.Supp.2d 1125 (C.D. Cal. 2009) 8, 12, 13, 20

12 *Brownmark Films, LLC v. Comedy Partners*,

13 682 F.3d 687 (7th Cir. 2012) 13

14 *Campbell v. Acuff-Rose Music, Inc.*,

15 510 U.S. 569, 114 S. Ct. 1164 (1994) 15, 18, 19, 20, 23

16 *Columbia Pictures Industries, Inc. v. Fung*,

17 710 F.3d 1020 (9th Cir. 2013) 9, 10, 21

18 *Columbia Pictures v. Krypton Broadcasting*,

19 259 F.3d 1186 (9th Cir. 2001) 20

20 *Disney Enterprises, Inc. v. Hotfile Corp.*,

21 798 F.Supp.2d 1303 (S.D. Fla. 2011). 7, 12

22 *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*,

23 109 F.3d 1394 (9th Cir. 1997) 12, 15

24 *Ellison v. Robertson*,

25 357 F.3d 1072 (9th Cir. 2004). 5

26 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*,

27 499 U.S. 340, 111 S.Ct. 1282 (1991). 6

28 *Four Navy Seals v. Associated Press*,

413 F.Supp.2d 1136 (S.D. Cal. 2005) 5, 12

Harper & Row v. Nation Enter.,

471 U.S. 539, 105 S. Ct. 2218 n.3 (1985) 13, 16, 17, 19, 21, 23, 24

Infinity Broadcast Corp. v. Kirkwood,

150 F.3d 104 (2d Cir.1998) 22

Intellectual Reserve v. Utah Lighthouse Ministry,

75 F.Supp.2d 1290 (D. Utah 1999) 8, 9, 10

(Continued On Next Page)

1	<u>FEDERAL CASES (CONTINUED)</u>	<u>Page No.</u>
2	<i>Leadsinger, Inc. v. BMG Music Pub.</i> , 512 F.3d 522 (9th Cir. 2008).	18
3		
4	<i>Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.</i> , 964 F.2d 965 (9th Cir. 1992).	14
5	<i>Los Angeles News Service v. Reuters Television Int'l</i> , 149 F.3d 987 (9th Cir.1998)	22
6		
7	<i>Lizalde v. Advanced Planning Services, Inc.</i> , 875 F.Supp.2d 1150 (S.D. Cal. 2012)	8
8	<i>MAI Systems Corp. v. Peak Computer, Inc.</i> , 991 F.2d 511 (9th Cir.1993)	8, 9
9		
10	<i>Massey v. Banning United School Dist.</i> , 256 F. Supp.2d 1090 (C.D. Cal. 2003)	25
11	<i>Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.</i> 545 U.S. 913, 125 S.Ct. 2764 (2005).	11
12		
13	<i>Micro Star v. FormGen Inc.</i> , 154 F.3d 1107 (9th Cir. 1998).	14
14	<i>Monge v. Maya Magazines, Inc.</i> , 688 F.3d 1164 (9th Cir. 2012)	21, 22, 24
15		
16	<i>Morongo Band of Mission Indians v. Rose</i> , 893 F.2d 1074 (9th Cir. 1990).	5, 9
17	<i>Núñez v. Caribbean Int'l News Corp.</i> , 235 F.3d 18 (1st Cir. 2000)	17, 22
18		
19	<i>OSU Student Alliance v. Ray</i> , 699 F.3d 1053 (9th Cir. 2012).	5
20	<i>Perfect 10, Inc. v. Amazon. com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	8, 9, 10, 11
21		
22	<i>Perfect 10 v. Google, Inc.</i> , 416 F.Supp.2d 828 (C.D. Cal. 2006).	11
23	<i>Peter Letterese and Assoc., Inc. v. World Institute of Scientology Enter.</i> , 533 F.3d 1287 (11th Cir. 2008)	18
24		
25	<i>Religious Technology Center v. Netcom On-Line Communication Services, Inc.</i> , 907 F.Supp. 1361 (N.D. Cal. 1995).	19
26	<i>Schreiber Distrib. Co. v. Serv-Well Furniture Co.</i> , 806 F.2d 1393 (9th Cir. 1986)	5
27		
28		

(Continued On Next Page)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FEDERAL CASES (CONTINUED)

Page No.

SMC Promotions, Inc v. sMC Promotions,
355 F.Supp.2d 1127 (C.D. Cal. 2005) 20

Sony Corp. of America v. Universal City Studios, Inc.,
464 U.S. 417, 104 S. Ct. 774 (1984) 14, 15, 19

Stewart v. Abend,
495 U.S. 207, 110 S.Ct. 1750 (1990) 18

Supermarket of Homes v. San Fernando Valley Bd.,
786 F.2d 1400 (9th Cir. 1986) 19

Twentieth Century-Fox Film Corp. v. Dunnahoo,
637 F.2d 1338 (9th Cir. 1981). 17

Ty, Inc. v. Publ'ns Int'l Ltd.,
292 F.3d 512 (7th Cir. 2002). 24

UMG Recordings, Inc. v. MP3.com, Inc.,
92 F.Supp.2d 349 (S.D.N.Y.) 22

Warner Bros. Ent' Inc. v. WTV Systems, Inc.,
824 F.Supp.2d 1003 (C.D. Cal. 2011) 20

Worldwide Church of God v. Philadelphia Church of God,
227 F.3d 1110 (9th Cir. 2000) 16

Zito v. Steeplechase Films, Inc.,
267 F.Supp.2d 1022 (N.D. Cal. 2003) 17

FEDERAL STATUTES / RULES

Fed. R. Civ. Proc., Rule 12(b)(6) 5, 12, 13, 25

17 U.S.C. § 106 6

17 U.S.C. § 107. 15, 16, 18, 24

17 U.S.C. § 410 6

17 U.S.C. § 512 2

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1 **I. INTRODUCTION**

2 Gossip website operator Gawker Media, LLC (“Defendant” or “Gawker”) has
3 made a business of predatory journalism, violating people’s rights to make a buck.
4 This time it went too far, expressly encouraging and engaging in copyright
5 infringement in order to promote its own services and generate revenues.

6 While it may be newsworthy when an unpublished copyrighted work of a
7 prominent writer is infringed, newsworthiness alone does not empower a media outlet
8 to actively encourage and participate in another’s brazen infringement under the
9 pretense of news reporting, especially where, as here, that infringement was instigated
10 by Gawker by its articles. Rather than merely publishing a news story reporting that
11 Plaintiff Quentin Tarantino’s (“Plaintiff” or “Tarantino”) screenplay was leaked
12 within limited Hollywood circles, Gawker crossed a line by promoting itself to the
13 public as the first source to obtain the entire Screenplay illegally, and providing it.

14 Earlier this year, Tarantino learned that a copy of his original motion picture
15 screenplay, *The Hateful Eight* (the “Screenplay”), had been copied without his
16 permission and leaked among Hollywood circles. Seizing upon this, Gawker — itself
17 admittedly unable to lay hands on the confidential Screenplay, which was at that point
18 not available anywhere on the Internet nor outside of certain Hollywood circles —
19 publicly solicited its purported 47 million monthly United States readers to infringe
20 Tarantino’s copyright, asking anyone to provide Gawker with an unauthorized copy.

21 Gawker’s solicitation for the copyright infringement worked, as the next day,
22 Gawker began promoting itself as the very first source for the public to be able to
23 obtain the entire Screenplay. In a piece titled “*Here Is the Leaked Quentin Tarantino*
24 *Hateful Eight Script*,” Gawker posted a private in-line hyperlink to an obscure outside
25 commercial file hosting website where defendant DOE-1 a/k/a AnonFiles.com was
26 illegally distributing and making available for download a pirated copy of the
27 Screenplay. Until publication of Gawker’s article, online search engine searches for
28 the Screenplay did not yield any positive results.

1 Gawker contrived the very “news story” that it now seeks to hide behind. That
2 the Screenplay had merely leaked to a limited number of individuals within the
3 confines of Hollywood was by that point already old news, having already been
4 reported by Gawker and various other news outlets. Gawker solicited and obtained
5 a theretofore publicly unknown link to an anonymous download site that was storing
6 and distributing to users infringing PDF copies of the complete copyrighted
7 Screenplay. Gawker then fabricated another, new “story” that the script had been
8 made publicly available online solely so that Gawker could then trumpet to the world
9 without impunity exactly where on the Internet the infringement was taking place,
10 reported as available “Here” on Gawker, thereby propagating such unauthorized
11 reproduction, distribution and display of the Plaintiff’s work by AnonFiles.

12 Gawker could just as effectively have reported the fact that the script was
13 leaked and available on a file upload site without including any specific links to the
14 infringing copy, just as a newspaper can report that a film piracy ring in, *e.g.*,
15 downtown Los Angeles, has obtained and is selling pirated DVDs of a-not-yet
16 released theatrical motion picture without instructing exactly how, where and when
17 readers can illegally buy their own pirated copy. But it was not content to stop there,
18 and instead crossed the journalistic line to become an active inducer of the illegal
19 activity about which it was supposedly reporting. Gawker should be held culpable.

20 **II. SUMMARY OF ARGUMENT**

21 Tarantino’s Complaint adequately alleges extensive facts in support of *prima*
22 *facie* claims for direct copyright infringement against the Doe defendants, including
23 the operator of AnonFiles, who infringed his Screenplay by (*inter alia*) reproducing,
24 distributing and displaying unauthorized copies of it even after receiving a Digital
25 Millennium Copyright Act (“DMCA”) 17 U.S.C. § 512 takedown notice from the
26 Plaintiff’s representatives. The Complaint also sets forth a more than sufficient
27 factual basis for his claim of contributory infringement against Gawker who, with
28 knowledge that such downloadable copies were unauthorized, nonetheless induced,

1 caused and/or materially contributed to the Does' primary infringements. Although
2 it would be premature to consider on the pleadings alone, neither the Doe defendants'
3 nor Gawker's acts of copyright infringement would qualify as protected fair uses.

4 **III. FACTUAL BACKGROUND**

5 Tarantino holds, by authorship, the exclusive copyright in the original
6 unpublished, unreleased motion picture screenplay *The Hateful Eight* (the
7 "Screenplay"), registered with the U.S. Copyright Office. Complaint ("Compl.") ¶ 15.

8 On January 21, 2014, Tarantino discovered that a copy of his unpublished
9 Screenplay had, without his authorization, been leaked to certain members of the
10 entertainment industry, albeit in a limited manner (*i.e.*, through January 23, there were
11 no positive online search engine results for a copy of the script). *Id.* ¶ 16.

12 On January 22, 2014, Gawker posted an article on its website about the
13 occurrence of the leaked script and about Tarantino's public statements on the matter.
14 As no copies were publicly available or locatable online, in its January 22nd article,
15 Gawker also solicited its readers to provide it with an unauthorized copy of the
16 Screenplay, stating: "if anyone would like to ... leak the script to us, please do so at
17 [email address]." *Id.* ¶ 17. Thereafter, on January 23rd, Gawker posted another article
18 with universal resource locator ("URL") click-through links for the downloading of
19 a complete PDF copy of the unpublished registered Screenplay, hosted on the obscure
20 file upload website AnonFiles.com. In its January 23rd article, titled "*Here Is the*
21 *Leaked Quentin Tarantino Hateful Eight Script*," Gawker directed, encouraged and
22 solicited its readers and the general public with click-through URL links on where
23 and how (*i.e.*, "*Here*") to obtain an unauthorized downloadable copy of the
24 Screenplay. *Id.* ¶ 19. In its January 23rd article, Gawker encouraged Internet users to
25 download the PDF "document" and then read the Screenplay illegally, with the
26 invitation that the "document is 146 pages of pure Tarantino. Enjoy!," with the text
27 "146 pages" also a link to the downloadable copy of the Screenplay. Compl. ¶ 19.

28

1 Tarantino’s Screenplay was stored on AnonFiles.com only in the popular
2 portable document format (“PDF”) file format, which by its very nature cannot simply
3 be viewed on a computer’s screen without first being *completely downloaded* through
4 the Internet. *Id.* ¶¶ 1–3, 19–20. Thus, contrary to repeated suggestions throughout
5 Gawker’s moving papers that its readers may have only merely “viewed” the
6 Screenplay on screen, anyone who clicked Gawker’s links to read it thereby
7 necessarily must have (even inadvertently) made an automatic copy of the work on
8 their own computer, regardless of whether they ultimately saved a permanent copy.

9 Notwithstanding its receipt of repeated DMCA notices of infringement,
10 defendant DOE-1 a/k/a AnonFiles.com failed to expeditiously disable access to
11 and/or remove the infringing materials and then, even after the initial downloadable
12 Screenplay PDF file was disabled, a subsequent PDF file copy was made available
13 for download at the exact same AnonFiles URL. *Id.* ¶ 20. Likewise, notwithstanding
14 Tarantino’s repeated demands and DMCA notice for the removal of its posted URL
15 links, Gawker expressly refused to remove the links to download the Screenplay. *Id.*

16 On January 26th, Gawker amended and updated its January 23rd article,
17 writing: “the script has been made public online here *and here*,” to add the text “and
18 here” into its article — with the subsequent text “here” an additional URL click-
19 through link directly to another downloadable PDF copy of the complete Screenplay,
20 hosted on the website scribd.com, which appeared to have been a copy which
21 originated from the AnonFiles download copy. *Id.* ¶ 33.

22 Tarantino contends that Gawker intended to and did directly cause, contribute
23 to, enable, facilitate, aid, abet, induce and/or participate in the infringement of
24 Tarantino’s copyrighted work committed by defendant DOE-1 a/k/a AnonFiles.com,
25 and the other Doe defendants, whose identities are currently unknown. As Gawker’s
26 January 23rd article linked to the first (and otherwise unknown) incidence of the
27 complete Screenplay online, Gawker’s article and links became the source for the
28 widespread public dissemination of the leaked script. Gawker’s click-through links,

1 to the otherwise unknown complete copy of the Screenplay, were a material factor for
 2 the general public to locate and unlawfully obtain the Screenplay. Compl. ¶ 19.

3 **IV. MEMORANDUM OF POINTS & AUTHORITIES**

4 **A. Motions to Dismiss Under Rule 12(b)(6) Are Disfavored**

5 Viewed with disfavor, motions to dismiss under Rule 12(b)(6) for failure to
 6 state a claim are *rarely* granted. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir.
 7 2003). And, Rule 12(b)(6) motions are particularly unsuitable for adjudicating a fair
 8 use defense to copyright infringement such as that advanced herein by Gawker. *Four*
 9 *Navy Seals v. Associated Press*, 413 F.Supp.2d 1136, 1148 (S.D. Cal. 2005) (fair use
 10 “issue is inappropriate for determination in a 12(b)(6) motion”). To avoid dismissal,
 11 a plaintiff need only allege sufficient factual matter to state a claim to relief that is
 12 plausible on its face. *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1061 (9th Cir.
 13 2012), *cert. den.*, 134 S.Ct. 70 (2013). The factual allegations of the complaint must
 14 be accepted as true and construed in the light most favorable to the plaintiff. *Id.*

15 “If a complaint is dismissed for failure to state a claim, leave to amend should
 16 be granted unless the court determines that the allegation of other facts consistent
 17 with the challenged pleading could not possibly cure the deficiency.” *Schreiber*
 18 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). This
 19 policy favoring amendment is to be applied with “extreme liberality.” *Morongo Band*
 20 *of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

21 **B. The Complaint States a Valid Claim Against Gawker for**
 22 **Contributory Copyright Infringement**

23 Tarantino’s Second Claim for Relief seeks liability against Gawker for
 24 contributory copyright infringement. Compl. ¶¶ 31–41. Under this claim, liability
 25 exists if the defendant engages in “personal conduct that encourages or assists the
 26 [direct] infringement” of another. *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1019
 27 (9th Cir. 2001) (citations and quotations omitted); *see, e.g., Ellison v. Robertson*, 357
 28 F.3d 1072, 1077–78 (9th Cir. 2004). To state a viable claim for contributory

1 copyright infringement, a plaintiff need only allege that the defendant (1) had
 2 knowledge of the infringing conduct of another and (2) induced, caused or materially
 3 contributed to the infringing activity. *A&M Records, Inc.*, 239 F.3d at 1019 (citations
 4 and quotations omitted). Both direct underlying infringement, and the elements for
 5 Gawker’s contributory infringement, are more than adequately pled here.

6 **1. The Complaint States Valid Claims for Underlying Direct**
 7 **Copyright Infringement**

8 Plaintiffs must satisfy just “two requirements to present a *prima facie* case of
 9 direct infringement: (1) . . . show ownership of the allegedly infringed material and
 10 (2) . . . demonstrate that the alleged infringers violate at least one exclusive right
 11 granted to copyright holders under 17 U.S.C. § 106.” *A&M Records, Inc.*, 239 F.3d
 12 at 1013; *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361,
 13 111 S.Ct. 1282 (1991) (two elements of infringement).

14 **a. Tarantino Authored and Owns the Screenplay**

15 As to the first element, Tarantino contends (and Gawker does not dispute) that
 16 he owns the Screenplay, which he registered with the U.S. Copyright Office. Compl.
 17 ¶ 15. Such registration constitutes *prima facie* evidence of the validity of the
 18 copyright and of the facts stated in the certificate of registration. 17 U.S.C. § 410(c).

19 **b. The First Claim for Relief Alleges Direct Infringement**
 20 **By the Doe Defendants**

21 As to the second element, Tarantino’s First Claim for Relief alleges that the
 22 Doe defendants directly infringed the copyright in his Screenplay by disseminating
 23 complete, unauthorized downloadable PDF copies of the unreleased work. Compl. ¶¶
 24 21–30. In doing so, they have violated Tarantino’s exclusive rights under Section 106
 25 of the Copyright Act to, *inter alia*, reproduce the copyrighted work, distribute copies
 26 to the public and display the work publicly. 17 U.S.C. §§ 106(1), 106(3), 106(5).¹

27
 28 ¹ *See* Compl. ¶ 24 (“Defendants have infringed Plaintiff’s exclusive copyright in and to the Screenplay directly and indirectly by use, reproduction, display, transmission and/or

1 Unsuccessfully attempting to construct a proverbial straw man, Gawker asserts
 2 that secondary liability cannot exist in the absence of direct infringement and then
 3 erroneously suggests that the Plaintiff’s claim against it is premised only on
 4 underlying acts of direct infringement committed by unknown Internet users who
 5 accessed the Screenplay through the links posted by Gawker on its site.

6 To the contrary, as plainly articulated in the pleadings and discussed further
 7 herein, that is not Tarantino’s only claim or theory of direct infringement in this case,
 8 but one of multiple co-existing theories and pled claims. Instead, by his First Claim
 9 for Relief, he clearly contends that the *Doe defendants* directly infringed his Section
 10 106 rights by reproducing, distributing and displaying unauthorized copies of the
 11 Screenplay to such Internet users. Compl. ¶¶ 21–30.²

12 Defendant “*DOE-1 a/k/a AnonFiles.com, and Does 2-10 . . .* — whether
 13 directly and/or by permitting or facilitating a user of its site to do so — uploaded and
 14 posted, and made available to the public, unauthorized copies of the Screenplay.” *Id.*
 15 ¶ 23 (emphasis added). The Doe defendants’ “copying of, use, reproduction,
 16 distribution, display, transmission and/or dissemination of copies of the Screenplay
 17 . . . is unauthorized, and constitutes an infringement of Plaintiff’s rights, including of
 18 the Screenplay copyright, and violation of copyright law.” *Id.* ¶ 24. Gawker, “with
 19 knowledge of the infringing activity, induced, solicited, encouraged, caused or
 20 materially contributed to *the infringing conduct of DOE-1 a/k/a AnonFiles.com and*
 21 *DOES 2-10*” by driving traffic to their websites. Compl. ¶ 34 (emphasis added).

22 _____
 23 dissemination of the copyrighted work, causing the copyrighted work to be copied and
 distributed, all without the consent of Plaintiff”).

24 ² At least one of the Doe defendants in this case (DOE-1 a/k/a AnonFiles.com) is alleged
 25 to have operated a commercial file-hosting service, the primary function of which is to
 26 store copies of digital files for download. *See* Compl. ¶¶ 18–20. In a case involving
 27 infringement by an analogous download service to that of AnonFiles, the Court described
 28 such a site’s operation: “A visitor . . . can upload electronic files to the website. That
 information is then stored on [its] servers, on which [the defendant] can save and host
 millions of files. The visitor, in turn, receives a unique link that . . . acts as a locator,
 allowing anyone with the link to click it or to plug it into a web browser and then to
 download the file originally uploaded.” *Disney Enterprises, Inc. v. Hotfile Corp.*, 798
 F.Supp.2d 1303, 1306 (S.D. Fla. 2011).

1 As set forth in Tarantino’s Complaint, such factual allegations are clearly more
 2 than sufficient to state a legally cognizable claim against the Doe defendants for
 3 direct copyright infringement under contemporary federal notice pleading standards.
 4 *Browne v. McCain*, 612 F.Supp.2d 1125 (C.D. Cal. 2009) (denying Rule 12(b)(6)
 5 motion to dismiss copyright infringement claim); *Lizalde v. Advanced Planning*
 6 *Services, Inc.*, 875 F.Supp.2d 1150, 1160 (S.D. Cal. 2012) (same);

7 **c. The Complaint Also Alleges Direct Infringement**
 8 **By Internet Users Via Gawker’s Links**

9 However, as to the second element for the underlying direct infringement, even
 10 if Tarantino’s claim for contributory liability *were* only premised on members of the
 11 public directly infringing his Screenplay via their use of Gawker's links and their
 12 downloading of the Screenplay, then there would still be ample support for his claims
 13 — sufficient to survive a challenge on the pleadings. See, Compl. ¶¶ 1-3, 19-20.

14 Crucially, infringing copies of Tarantino’s Screenplay at issue in this case were
 15 made available to Internet users via AnonFiles.com only in a PDF format, which by
 16 definition cannot be viewed on screen without first being *completely downloaded* by
 17 the computer. *Id.*, ¶¶ 1–3, 19–20.³ Downloading a complete, unauthorized copy of a
 18

19 ³ Throughout its Motion to Dismiss (“Mtn to Dismiss”), Gawker seemingly fabricates, in
 20 an attempt to confuse the relevant issues, that somehow the Screenplay was merely read
 21 online by users. In doing so, Gawker then erroneously cites *Perfect 10, Inc. v. Amazon.*
 22 *com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) for the incorrectly stated blanket proposition that
 23 viewing an unauthorized digital copy of a copyright-protected work on a computer alone
 24 can never constitute infringement. See, Mtn to Dismiss at 6:21–22. That is not what
 25 *Perfect 10* held. Regardless, that is not what happened here, nor what is alleged in the
 26 complaint. The complaint repeatedly alleges – which must be accepted as true – that
 27 Internet users infringed Tarantino’s copyright by following Gawker’s get it “*Here*” links
 28 to and actually downloaded the PDF of the Screenplay. Compl. ¶¶ 1–3, 19–20, 33. If a
 user clicked the “download” link – the only option to view or obtain the file – the PDF
 file necessarily is downloaded. But even if (contrary to the allegations of the complaint,)
 Tarantino’s Screenplay had not been made available only as a downloadable PDF,
 Internet users who clicked, accessed and viewed the Screenplay would still be in direct
 infringement of the work even if they did not permanently save or print copies.
Intellectual Reserve v. Utah Lighthouse Ministry, 75 F.Supp.2d 1290, 1294 (D. Utah
 1999). “When a person browses a website, and by so doing displays the [Screenplay] a
 copy of [it] is made in the computer’s random access memory (RAM), to permit viewing
 of the material. And in making a copy, even a temporary one, the person who browsed
 infringes the copyright.” *Id.* (citing *MAI Systems Corp. v. Peak Computer*, 991 F.2d 511,

1 work constitutes infringement. *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d
 2 1020, 1034 (9th Cir. 2013). “Both uploading and downloading copyrighted material
 3 are infringing acts. The former violates the copyright holder’s right to distribution,
 4 the latter the right to reproduction.” *Id.* (citations omitted).

5 Tarantino clearly pleads that the actual download “dissemination of
 6 unauthorized copies of the copyrighted work” occurred as a result of Gawker, that
 7 “the copyrighted work [was] copied and distributed worldwide” “through [Gawker’s]
 8 article and specific URL click-through links therein.” Compl., ¶¶ 1–3, 19–20, 34–35.
 9 A user cannot simply “read” the Screenplay on Anonfiles.

10 “Additionally, a person making a printout or re-posting a copy of the
 11 [Screenplay] on another website would infringe plaintiff’s copyright.” *Intellectual*
 12 *Reserve*, 75 F.Supp.2d at 1294. Although the Complaint may not explicitly identify
 13 one particular, known individual who downloaded or printed copies of the
 14 Screenplay, Gawker’s alleged actions were “substantially certain to result in such
 15 direct infringement” and Tarantino pleads that actual infringement occurred.⁴ *Perfect*
 16 *10, Inc.*, 508 F.3d at 1171; See, Compl., ¶¶ 1–3, 19–20, 34–35.

17 Thus, as Tarantino’s Complaint more than sets forth factual allegations
 18 sufficient to state a legally cognizable claim for underlying direct copyright
 19 infringement, the proper focus moves to the issue of the sufficiency of the allegations
 20 of contributory infringement, which are also more than adequately pled.

21 **2. Gawker Had Knowledge of the Infringing Activity**

22 As to the first element for contributory infringement, Plaintiff sufficiently
 23 alleges that Gawker “had knowledge of the infringing conduct of another.” *A&M*
 24 *Records, Inc.*, 239 F.3d at 1019 (citations omitted); See, Compl. ¶¶ 2-3, 17, 19-20, 33.

25 _____
 26 518 (9th Cir.1993); *see also*, Melville B. Nimmer and David Nimmer, Nimmer on
 27 Copyright § 8.08(A)(1) (infringing act of copying may occur from “loading the
 copyrighted material ... into the computer’s (RAM)”).

28 ⁴ Any perceived flaw in the pleadings could easily be cured by amendment. *Morongo*
Band of Mission Ind., 893 F.2d at 1079 (leave granted with “extreme liberality”).

1 According to Tarantino’s allegations, Gawker was fully aware that infringing
 2 copies of Tarantino’s Screenplay were available using the link posted on Gawker’s
 3 website.⁵ Gawker knew the Screenplay was subject to copyright, and knew the PDF
 4 “document” copy that could be downloaded through Anonfiles was unauthorized.
 5 This is evidenced by Gawker’s own words “*Here Is The **Leaked** . . . Script,*” and
 6 Gawker exhorting its readers to click on the link to Anonfiles to the “document” to
 7 “Enjoy!” it. Compl. ¶¶ 19, 33. In addition, Gawker was served with DMCA notices
 8 confirming what it already knew, and still Gawker kept the link up.⁶ Compl. ¶¶ 3, 36.

9 **3. Gawker Induced, Caused and/or Materially Contributed to**
 10 **the Infringing Conduct**

11 As to the second element for contributory copyright infringement, Plaintiff
 12 sufficiently alleges that Gawker “induced, caused or materially contributed to the
 13 infringing activity.” *A&M Records, Inc.*, 239 F.3d at 1019 (citations omitted). Federal
 14 courts have repeatedly demonstrated that a defendant such as Gawker may be held
 15 contributory liable where, as here, it posts one or more links on the Internet directing
 16 visitors to where they can find illicit content elsewhere online, thereby encouraging
 17 and perpetuating infringing activity.⁷

18 The Ninth Circuit has “acknowledge[d] that services or products that facilitate
 19 access to websites throughout the world can significantly magnify the effects of
 20

21 ⁵ A second link to a copy of the Screenplay, apparently a result of Gawker’s post of the
 22 initial link, was added by Gawker into its Jan. 23rd article several days later. Compl. ¶ 33.

23 ⁶ Even in the absence of such explicit knowledge and notice, Gawker would still be
 24 chargeable with knowledge because “an actor may be contributorily liable for
 25 intentionally encouraging direct infringement if the actor knowingly takes steps that are
 26 substantially certain to result in such direct infringement.” *Perfect 10, Inc.*, 508 F.3d at
 27 1171. “Under such circumstances, intent may be imputed.” *Id.* at 1172.

28 ⁷ *See, e.g., Columbia Pictures Industries, Inc.*, 710 F.3d at 1036 (affirming liability for
 contributory infringement where defendant provided links to torrent files for copyrighted
 movies); *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 Civ. 4660, 2002 WL 1997918
 (S.D.N.Y. Aug. 28, 2002) (denying motion for summary judgment by defendant who
 hosted links to sites containing unauthorized audio files); *Intellectual Reserve*, 75
 F.Supp.2d at 1295 (preliminary injunction against website operator who posted links to
 infringing copies of work hosted elsewhere).

1 otherwise immaterial infringing activities.” *Perfect 10, Inc.*, 508 F.3d at 1172
2 (citations omitted). “Moreover, copyright holders cannot protect their rights in a
3 meaningful way unless they can hold providers of such services . . . accountable for
4 their actions . . .” *Id.* at 1172 (citation omitted); *See also, Metro-Goldwyn-Mayer*
5 *Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928–29, 125 S.Ct. 2764 (2005).

6 *Perfect 10, Inc.* is instructive. In that case, an owner of copyrights in various
7 photographic images brought a copyright infringement suit against the operator of
8 popular online search engine Google.

9 Some website publishers republish Perfect 10’s images on the Internet
10 without authorization. Once this occurs, Google’s search engine may
11 automatically index the webpages containing these images and provide
12 thumbnail versions of images in response to user inquiries. When a user
clicks on the thumbnail image returned by Google’s search engine, the
user’s browser accesses the third-party webpage and in-line links to the
full-sized infringing image stored on the website publisher’s computer.

13 *Perfect 10, Inc.*, 508 F.3d at 1157. Although the district court preliminarily enjoined
14 Google from creating and publicly displaying thumbnail versions of Perfect 10’s
15 photographs, it did not enjoin Google from linking to third-party websites that
16 displayed infringing full-size versions of Perfect 10’s images. *Perfect 10 v. Google,*
17 *Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006) *rev’d in part*, 508 F.3d at 1177.

18 The Ninth Circuit Court of Appeals reversed and remanded, saying: “Google
19 substantially assists websites to distribute their infringing copies to a worldwide
20 market and assists a worldwide audience of users to access infringing materials. We
21 cannot discount the effect of such a service on copyright owners” *Perfect 10,*
22 *Inc.*, 508 F.3d at 1172. “Google could be held contributorily liable if it had
23 knowledge that infringing Perfect 10 images were available using its search engine,
24 could take simple measures to prevent further damage to Perfect 10’s copyrighted
25 works, and failed to take such steps.” *Id.*

26 That is similar to what happened here. Gawker (who, as discussed above,
27 admittedly knew of the Does’ infringing activity) had the ability to simply remove
28 from its website the multiple direct URL links to infringing postings of downloadable

1 PDF copies of the complete Screenplay. But to this day, Gawker has obstreperously
 2 failed and refused to take such simple steps, even after receipt of valid DMCA notice.
 3 Compl. ¶36. By its actions and omissions, Gawker has thereby induced, caused and/or
 4 materially contributed to the Does' unauthorized "reproduction, distribution, display,
 5 transmission and/or dissemination of copies of the Screenplay." *Id.* ¶ 24.

6 Furthermore, Gawker is alleged in the Complaint to have engaged in another,
 7 separate act of contributory copyright infringement when it "encouraged an infringing
 8 unauthorized full copy of the Screenplay to be posted for download" *Id.* ¶ 18.⁸
 9 Once, through discovery, Tarantino is able to find out the identity of the individual(s)
 10 who did so, he will promptly seek to add them as additional Doe defendants.

11 Tarantino's allegations therefore plainly state at least one, if not more,
 12 potentially cognizable claims against Gawker for contributory copyright
 13 infringement. *Disney Enterprises, Inc.*, 798 F.Supp.2d at 1310 (denying Rule 12(b)(6)
 14 motion to dismiss contributory and vicarious copyright infringement claims).

15 **C. It is Inappropriate to Analyze Gawker's Fair Use Defense Now**

16 "Defendants devote many pages of briefing to their argument that their use .
 17 . . was a non-infringing fair use." *Four Navy Seals*, 413 F.Supp.2d at 1148. However,
 18 as noted above, courts very rarely analyze fair use simply based on the pleadings
 19 alone. *See, e.g., id.* (the "issue is inappropriate for determination in a 12(b)(6) motion,
 20 since fair use is an affirmative defense to an infringement claim").

21 Generally, when analyzing a Rule 12(b)(6) motion, a court's analysis of the
 22 plaintiff's claims is limited to its allegations in the complaint. At this stage,
 23 a court does not make factual findings, nor deem material facts undisputed
 24 or admitted. Thus, in light of a court's narrow inquiry at this stage and
 limited access to all potentially relevant and material facts needed to
 undertake the analysis, courts rarely analyze fair use on a 12(b)(6) motion.

25 *Browne*, 612 F.Supp.2d at 1130 (citing, *inter alia*, *Dr. Seuss Enter., L.P. v. Penguin*
 26 *Books USA*, 109 F.3d 1394, 1403 (9th Cir. 1997) ("a silent record on an important

27 ⁸ "Gawker Media posted an article on the 'Defamer' section of its Gawker Website" in
 28 which it "actively solicited its readers to provide it with an unauthorized infringing copy
 of the Screenplay, stating 'if anyone would like to . . . leak the script to us, please do so at
 [email address].'" Compl. ¶ 18.

1 factor bearing on fair use disentitle[s] the proponent of the defense” to relief)).⁹

2 It would be premature and inappropriate to attempt to meaningfully analyze
 3 Gawker’s affirmative defense of fair use at this extremely early stage of the litigation.
 4 “The facts, as alleged in the complaint, are simply insufficient to conduct a thorough
 5 analysis of fair use at this time. The parties have not had a full opportunity to conduct
 6 discovery. As a result, Plaintiff is not yet aware of all relevant and material facts
 7 supporting his claim and potentially refuting [Gawker]’s fair use defense.” *Id.* “Thus,
 8 given the early stage of this case, undeveloped factual record, limited factual
 9 allegations in the Complaint, existence of potentially disputed material facts, and
 10 nature of the Court’s inquiry on a 12(b)(6) motion, the Court” should decline
 11 Gawker’s “invitation to undertake the fair use analysis at this time.” *Id.*¹⁰

12 Nonetheless, were the Court still inclined to do so at this premature time, then
 13 fair use would still be of no avail to the Defendants in this case.

14 **D. The Fair Use Doctrine Does Not Absolve Gawker of Liability**

15 The very limited doctrine of fair use, which “permits courts to avoid rigid
 16 application of the copyright statute when, *on occasion*, it would stifle the very
 17 creativity which that law is designed to foster,” has no application to the present
 18 situation and does not excuse Defendants from their liability for willfully infringing
 19 Tarantino’s copyright. *Harper & Row v. Nation Enter.*, 471 U.S. 539, 550, 105 S. Ct.
 20 2218 n.3 (1985) (citations omitted; emphasis added).

21 As a preliminary matter, it is important to focus on exactly *whose* unauthorized
 22

23 ⁹ “[C]ourts should usually refrain from granting Rule 12(b)(6) motions on affirmative
 24 defenses. Rule 12(b)(6) tests whether the complaint states a claim for relief, and a
 25 plaintiff may state a claim even though there is a defense The mere presence of a
 potential affirmative defense does not render the claim for relief invalid.” *Brownmark
 Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (citation omitted).

26 ¹⁰ Notwithstanding the Court’s highly limited access to potentially relevant and material
 27 facts necessary to undertake the analysis, Gawker suggests that it may nonetheless
 28 occasionally be possible to consider fair use on a motion to dismiss where no material
 facts are in dispute. *Mtn to Dismiss* at 11:1–13. While that may sometimes be so, the
 viability of Gawker’s affirmative defense is not apparent from the face of the Complaint
 and there *are* significant disputed material facts, such as, *e.g.*, the potential effect of the
 defendants’ misconduct on the market for Tarantino’s work.

1 “use” of the Plaintiff’s Screenplay is or is not a fair one — that of the primary
2 infringers (*i.e.*, the Doe defendants) or rather the contributory infringer (Gawker). *See*
3 *Lewis Galoob Toys, Inc.*, 964 F.2d at 970 (“Much of the parties’ dispute regarding the
4 fair use defense concerns the proper focus of the court’s inquiry: (1) Galoob or (2)
5 consumers who purchase and use the Game Genie”).

6 The correct focus here is, of course, placed on the unauthorized use actually
7 made by the primary infringers because, as Gawker points out, secondary liability for
8 copyright infringement cannot be found in the absence of direct liability. *Id.* (“The
9 district court properly focused on whether consumers who purchase and use the Game
10 Genie would be infringing Nintendo’s copyrights”). Attempting to brush off the Ninth
11 Circuit’s guidance of *Lewis Galoob Toys* as “merely dicta,”¹¹ Gawker would instead
12 have the Court attempt to analyze Gawker’s own misconduct. But it would be a
13 nonsensical endeavor to attempt to evaluate whether it engaged in fair *use* where, by
14 its own admission, “Gawker did not actually ‘use’ the script”. *Mtn to Dismiss*, 20:23.

15 Indeed, the only time that the U.S. Supreme Court has ever applied a fair use
16 defense to claims of secondary liability for copyright infringement, it correctly and
17 exclusively focused on the conduct of those alleged to be primarily infringing. *Sony*
18 *Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447–56, 104 S. Ct.
19 774 (1984) (consumers’ unauthorized home time-shifting of tv programs is legitimate
20 fair use). Likewise, since deciding *Lewis Galoob Toys*, the Ninth Circuit has
21 demonstrated that, especially in the context of online copyright infringements, the
22 appropriate analysis centers on the primary infringers’ actions. *See, e.g., A&M*
23 *Records, Inc.*, 239 F.3d at 1014–19 (“Napster users do not have a fair use defense”).

24 The appropriate focus is thus placed on whether the Doe defendants’ wholesale
25 infringement of Tarantino’s Screenplay can be excused as fair use. It cannot.

26
27 ¹¹ Actually, it was *Lewis Galoob Toys*’ entire fair use analysis that the Ninth Circuit later
28 characterized *generally* as “dicta” because it was unnecessary in light of the court’s
holding that audiovisual displays created by the Game Genie were not derivative works.
Micro Star v. FormGen Inc., 154 F.3d 1107, 1113 (9th Cir. 1998). *Micro Star* is further
inapplicable because it was a case of direct rather than for secondary liability. *Id.*

1 **1. The Primary Infringers’ Use of the Screenplay Was Not Fair**

2 The Copyright Act sets forth four non-exclusive factors to be considered in
3 determining whether the use made of a work in any particular case is a fair use. 17
4 U.S.C. § 107. “All are to be explored, and the results weighed together, in light of the
5 purposes of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 114
6 S.Ct. 1164 (1994).

7 **a. The Purpose and Character of Use Weigh Against a**
8 **Finding of Fair Use**

9 **(1) The Use Was Not Transformative**

10 The first statutory factor mandates an analysis of “the purpose and character
11 of the use, including whether such use is of a commercial nature or is for nonprofit
12 educational purposes.” 17 U.S.C. § 107(1). This “central purpose” of this factor is to
13 ask “whether and to what extent the new work is ‘transformative’” — that is, whether
14 the defendants simply supersede or supplant the original work, or instead adapt it by
15 adding something new, with a further purpose or different character. *Campbell*, 510
16 U.S. at 579; *see, e.g., Dr. Seuss Enter., L.P.*, 109 F.3d at 1399–1401.

17 Here, the Screenplay was reproduced, distributed and displayed as a
18 downloadable PDF without Tarantino’s authorization in its entirety, with absolutely
19 no transformation or modification whatsoever. Compl. ¶2. “Because there is no effort
20 to create a transformative work with new expression, meaning, or message, the
21 infringing work’s commercial use further cuts against the fair use defense.” *Dr. Seuss*
22 *Enter., L.P.*, 109 F.3d at 1401 (quotations omitted).

23 **(2) The Use Was Commercial**

24 The first fair use factor also requires consideration of whether the Defendants’
25 use “is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C.
26 § 107(1). “[E]very commercial use of copyrighted material is presumptively an unfair
27 exploitation of the monopoly privilege that belongs to the owner of the copyright.”
28 *Sony Corp. of America*, 464 U.S. at 451.

1 “Direct economic benefit is not required to demonstrate a commercial use.
 2 Rather, repeated and exploitative copying of copyrighted works, even if the copies
 3 are not offered for sale, may constitute a commercial use.” *A&M Records, Inc.*, 239
 4 F.3d at 1015; *see also, e.g., Worldwide Church of God v. Philadelphia Church of*
 5 *God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (church that copied religious text for its
 6 members “unquestionably profit[ed]” from the unauthorized “distribution and use”).

7 Here, far from being a “nonprofit educational” endeavor (17 U.S.C. § 107(1)),
 8 defendant DOE-1 a/k/a AnonFiles.com is alleged to be operating a commercial for-
 9 profit file hosting service, which appears to be supported at least in part by “pop-up”
 10 advertisements paid for by third parties. *See* Compl. ¶¶ 12, 18–20;
 11 <http://anonfiles.com/>. By attracting Internet traffic from users seeking access to the
 12 Screenplay, it presumably generated additional advertising revenues from its
 13 unauthorized use of Tarantino’s work. This factor therefore cuts against fair use.

14 **b. The Nature of the Copyrighted Work Weighs Against**
 15 **a Finding of Fair Use**

16 The next fair use factor is “the nature of the copyrighted work.” 17 U.S.C. §
 17 107(2). Because the Screenplay is a confidential, unpublished work of fiction (Compl.
 18 ¶ 16), this factor also weighs very heavily against a finding of fair use. *Harper &*
 19 *Row*, 471 U.S. at 564 (“A use that so clearly infringes the copyright holder’s interests
 20 in confidentiality and creative control is difficult to characterize as ‘fair’”).

21 **(1) The Screenplay Is Unpublished**

22 “The fact that a work is unpublished is a critical element of its ‘nature.’ . . .
 23 [T]he scope of fair use is narrower with respect to unpublished works.” *Id.*, *and see*
 24 Senate Rep. No. 94-473, at 64 (1975) (“applicability . . . to unpublished works is
 25 narrowly limited since, although the work is unavailable, this is the result of a
 26 deliberate choice . . . of the copyright owner”). “The right of first publication
 27 encompasses not only the choice whether to publish at all, but also the choices of
 28 when, where, and in what form . . .” *Harper & Row*, 471 U.S. at 564. “Under ordinary

1 circumstances, the author’s right to control the first public appearance of his
2 undisseminated expression will outweigh a claim of fair use.” *Id.* at 565.

3 Gawker tries to minimize this crucial factor by falsely asserting that
4 Tarantino’s Screenplay was already publicly available at the time that Gawker posted
5 links directing readers on where and how to obtain an unauthorized downloadable
6 PDF copy of it. But the pleadings (which must be accepted as true) plainly allege the
7 opposite to be so: “the general public would not have known about or found the
8 complete copy of the Screenplay on the AnonFiles Website if not for Gawker Media’s
9 article post and specific click-through URL links to the Screenplay.” Compl. ¶ 19.

10 And “online search engine searches for a copy of the script, through January
11 23, did not have any positive results” until *after* Gawker widely publicized to the
12 public where to obtain it. *Id.* ¶ 16. Indeed, Gawker admits the Screenplay wasn’t
13 locatable or available to the public, as it was apparently itself previously unable to
14 find the Screenplay anywhere online or otherwise, leading it to make a plea to and
15 solicit one of its millions of readers to provide it with an unauthorized copy: “if
16 anyone would like to ... leak the script to us, please do so at [email address].” *Id.* ¶ 17.

17 Additionally, for purposes of copyright law, a work being “publicly available”
18 is not at all synonymous with it having been “published” where, as here, it was
19 disseminated without the authority of its owner. *Twentieth Century-Fox Film Corp.*
20 *v. Dunnahoo*, 637 F.2d 1338, 1344 (9th Cir. 1981); *Zito v. Steeplechase Films, Inc.*,
21 267 F.Supp.2d 1022, 1026 (N.D. Cal. 2003). Indeed, “the very concept of publication
22 implies the authority of the copyright owner.” *Nimmer on Copyright* § 7.03 n.6.¹²

23
24 ¹² Gawker’s reliance on the non-controlling authority of *Núñez v. Caribbean Int’l News*
25 *Corp.*, 235 F.3d 18 (1st Cir. 2000) for Gawker’s proposition “that the unpublished nature
26 of the works becomes less critical” where they “have already been distributed publicly —
27 in an authorized *or unauthorized* manner” is misleading at best, as *Núñez* did not in fact
28 articulate any such rule. Mtn to Dismiss, 19:1–4 (emphasis added). To the contrary, while
the photographs at issue in that case had not been previously published, they had in fact
been commissioned “for the very purpose of semi-public dissemination,” which the
plaintiff took part in. *Id.* at 24. Gawker was recently reprimanded by another federal court
for similar misrepresentative advocacy. *Araya v. Deep Dive Media, LLC and Gawker
Media*, 5:12-CV-163, 2013 WL 4494881 (W.D.N.C. Aug 20, 2013) (“So, not only does

1 Thus, contrary to Gawker’s erroneous and misleading suggestions, the
 2 Screenplay plainly had not “already . . . been published by others” within the meaning
 3 of fair use jurisprudence. Mtn to Dismiss at 3:26–27; *see also id.* at 21:2.

4 **(2) The Screenplay Is a Creative Work**

5 The second statutory fair use factor also “calls for recognition that some works
 6 are closer to the core of intended copyright protection than others, with the
 7 consequence that fair use is more difficult to establish when the former works are
 8 copied.” *Campbell*, 510 U.S. at 586 (citations omitted). Under this factor, “the more
 9 creative a work, the more protection it should be accorded from copying;
 10 correlatively, the more informational or functional the plaintiff’s work, the broader
 11 should be the scope of the fair use defense.” *Leadsinger, Inc. v. BMG Music Pub.*,
 12 512 F.3d 522, 531 (9th Cir. 2008) (citation and quotations omitted); *see also Stewart*
 13 *v. Abend*, 495 U.S. 207, 237, 110 S.Ct. 1750 (1990) (“fair use is more likely to be
 14 found in factual works than in fictional works”).

15 Because Tarantino’s Screenplay is “a work of creative expression, as opposed
 16 to an informational work, which is precisely the sort of expression that the copyright
 17 law aims to protect,” this factor again weighs against a finding of fair use.
 18 *Leadsinger, Inc.*, 512 F.3d at 531.

19 **c. The Amount and Substantiality of the Portion Used**
 20 **Weighs Against a Finding of Fair Use**

21 The third factor provided by the Copyright Act is “the amount and
 22 substantiality of the portion used in relation to the copyrighted work as a whole.” 17
 23 U.S.C. § 107(3). “Whatever the use, the portion of the copyrighted work that is taken
 24 must be reasonable; in other words, this third factor examines whether defendants
 25 have ‘helped themselves overmuch’ to the copyrighted work in light of the purpose
 26 and character of the use.” *Peter Letterese and Assoc., Inc. v. World Institute of*
 27 *Scientology Enter.*, 533 F.3d 1287, 1314 (11th Cir. 2008) (quoting *Campbell*, 510

28 _____
 the [Gawker] misapply the facts of the [case], but it misstates the holding as well . . .”).

1 U.S. at 587). “The inquiry is whether the amount taken is reasonable in light of the
2 purpose of the use and the likelihood of market substitution.” *Id.* at n.30.

3 Because 100 percent of the Screenplay was reproduced, distributed and
4 displayed as a downloadable PDF in its entirety without Tarantino’s authorization
5 (Compl. ¶ 2), the third factor likewise weighs against fair use in this case.
6 *Supermarket of Homes v. San Fernando Valley Bd.*, 786 F.2d 1400, 1409 (9th Cir.
7 1986) (no fair use where defendant copied the entire work verbatim; “no more of a
8 work may be copied than is necessary for the particular use”).¹³

9 **d. The Effect of Use Upon the Potential Market Weighs**
10 **Against a Finding of Fair Use**

11 The fourth and “single most important element of fair use” also weighs equally
12 strongly in favor of Tarantino. *Harper & Row*, 471 U.S. at 566. This factor “poses
13 the issue of whether unrestricted and widespread conduct of the sort engaged in by
14 the defendant (or by others) would result in a substantially adverse impact on the
15 potential market for or value of the plaintiff’s work.” *Nimmer on Copyright* §
16 13.05[A][4] (notes omitted). Where, as here, the defendants’ “use is for commercial
17 gain, that likelihood may be presumed.” *Sony Corp. of America*, 464 U.S. at 451.

18 Even in the absence of such a presumption, however, unrestricted and
19 widespread copying, distribution and public display of Tarantino’s screenplays would
20 most certainly have a significant impact on his livelihood. As is alleged in the

21
22 ¹³ Gawker contends that, even if the entirety of Tarantino’s work was used here, “the
23 mere fact that all of a work is copied is not determinative of the fair use question.” Mtn to
24 Dismiss at 21:25–26 (quoting *Religious Technology Center v. Netcom On-Line Comm.*
25 *Services, Inc.*, 907 F.Supp. 1361, 1380 (N.D. Cal. 1995)). However, the “copying of an
26 entire work *will ordinarily* militate against” a finding that such wholesale
27 misappropriation was fair. *Religious Tech. Center*, 907 F.Supp. at 1380. Nor do courts
28 “*routinely* find fair use notwithstanding use of entire works,” as the Defendant claims;
Quite the opposite is so, in fact. Mtn to Dismiss at 2:27 (emphasis added). Critically,
Gawker truncates the most important part of the passage quoted in its brief, *viz.*: “the
mere fact that all of a work is copied is not determinative of the fair use question, *where*
such total copying is essential given the purpose of the copying.” *Id.* (emphasis added)
citing *Sony Corp.*, 464 U.S. 417 (allowing total copying in context of time-shifting
copyrighted television shows by home viewers)). It was not at all “essential” to copy
Tarantino’s Screenplay in its entirety, as explained herein. Gawker has again engaged in
similar type of misrepresentative conduct that it was reprimand for in *Araya, supra*.

1 pleadings and to be proven at trial with extensive evidence,¹⁴ that, in addition to use
 2 as a film, the “Plaintiff routinely publishes his screenplays for substantial advances
 3 and royalties.” Compl. ¶ 16. As a literary work *per se*, this Screenplay thus “has an
 4 independent economic value and is, in itself, viable.” *Columbia Pictures v. Krypton*
 5 *Broadcasting*, 259 F.3d 1186, 1193 (9th Cir. 2001) (citations and quotations omitted).

6 Consequently, if anyone were free to give away complete, downloadable copies
 7 of copyright-protected scripts authored by Tarantino without any legal repercussions
 8 whatsoever, then it logically follows that he would not be able to sell as many
 9 authorized, published copies of his works -- and a film based on it as a previously
 10 unpublished script is diminished even more so. *See A&M Records, Inc.*, 239 F.3d at
 11 1017 (“Having digital downloads available for free on the Napster system necessarily
 12 harms the copyright holders’ attempts to charge for the same downloads”). Such an
 13 inference of market harm “simply makes common sense[] when a commercial use
 14 amounts to mere duplication of the entirety of an original” *Campbell*, 510 U.S.
 15 at 591 (citation and quotations omitted).

16 The balance of the above factors, taken together with the public interest,
 17 demonstrates that a fair use was not made here. The Screenplay is a confidential,
 18 unpublished work of fiction. It was copied wholesale for commercial purposes, with
 19 absolutely no modification or commentary added. Such use was non-transformative
 20 and threatens to supplant the market for Plaintiff’s works. Balancing these statutory
 21 factors, taken together with the public interest, compels a finding of no fair use.¹⁵

23 ¹⁴ Attempting to effectively evaluate the fourth fair use factor in the absence of any
 24 factual record only highlights why, “in light of a court’s narrow inquiry at this stage and
 25 limited access to all potentially relevant and material facts needed to undertake the
 analysis, courts rarely analyze fair use on a 12(b)(6) . . .” *Browne*, 612 F.Supp.2d at 1130.

26 ¹⁵ As this Court has observed, “it is virtually axiomatic that the public interest can only
 27 be served by upholding copyright protections and correspondingly, preventing the
 28 misappropriation of skills, creative energies, and resources which are invested in the
 protected work.” *Warner Bros. Ent’ Inc. v. WTV Systems, Inc.*, 824 F.Supp.2d 1003, 1015
 (C.D. Cal. 2011) (citations omitted). Indeed, “copyrighted works must be protected as an
 incentive for people to create new works.” *SMC Promotions, Inc v. sMC Promotions*, 355
 F.Supp.2d 1127, 1137–38 (C.D. Cal. 2005) (citations omitted).

1 **2. Gawker’s Purported “Use” of the Screenplay Was Not Fair**

2 As explained above, the only appropriate inquiry here is as to whether the Doe
3 defendants’ infringement of Tarantino’s Screenplay can be excused as fair use, not
4 whether Gawker — the alleged contributory infringer — somehow instead qualifies
5 to invoke this affirmative defense itself. Nonetheless, were the Court inclined to so
6 inquire, then it will again become apparent that fair use is still of no avail. “Without
7 a single factor tipping in its favor,” Gawker plainly “has not met its burden.” *Monge*
8 *v. Maya Magazines, Inc.*, 688 F.3d 1164, 1184 (9th Cir. 2012).

9 **a. The Purpose and Character of Use Weigh Against a**
10 **Finding of Fair Use**

11 **(1) The Use Was Not Truly for News Reporting**

12 “Waving the news reporting flag is not a get out of jail free card in the
13 copyright arena.”¹⁶ *Monge*, 688 F.3d at 1183. The Ninth Circuit has warned that, in
14 such cases, “[t]he promise of copyright would be an empty one if it could be avoided
15 merely by dubbing the infringement a fair use ‘news report’ of the [work].” *Id.* at
16 1173 (quoting *Harper & Row*, 471 U.S. at 557).

17 Gawker’s “use” of hyperlinks to the entire downloadable Screenplay does not
18 qualify as *bona fide* news reporting because the links alone served no legitimate
19 journalistic purpose. Merely reporting that the script had leaked is not at all the same
20 as providing unfettered access to the work as a whole; Gawker could just as
21 effectively have written that the script was available elsewhere online without
22 providing readers with any direct guidance to obtain a complete infringing copy.¹⁷

23 _____
24 ¹⁶ The Ninth Circuit has repeatedly held that “publication of photographic [or material]
25 evidence that constitutes proof of a newsworthy event is not automatically fair use, . . .”
26 especially when use of the material was “not even necessary to prove that controverted
fact,” as there were other means available. *Monge*, 688 F.3d at 1174 and 1175.

27 ¹⁷ Similarly, for instance, although complete digital copies of Tarantino’s past films may
28 be available somewhere on the Internet for pirating, Gawker could not legitimately seek
out, aggregate and publish illicit links to them under the pretense that it was only
“reporting” such piracy as news. *See, e.g., Columbia Pictures Industries, Inc.*, 710 F.3d at
1036. That the Screenplay is a literary work rather than a video does not alter this result.

(2) The Use Was Not Transformative

Gawker argues that its “use” of the Screenplay was transformative because it was for a purpose other than producing a motion picture. However, “difference in purpose is not quite the same thing as transformation, and [the Supreme Court] instructs that transformativeness is the critical inquiry under this factor.” *Monge*, at 1176 citing *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998).¹⁸ As discussed above, the Screenplay is a commercially viable literary work independent of any film that might ultimately be made from it. Compl. ¶ 16.

And the copies of the Screenplay to which Gawker’s links led were not in any way transformative -- they were just PDFs generated by scanning an entire hard copy of the script. “Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.” *A&M Records, Inc.*, 239 F.3d at 1015 (citing, e.g., *Infinity Broadcast Corp.*, 150 F.3d at 108; *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 351 (S.D.N.Y. 2000)).¹⁹

It is not as if Gawker merely linked to a limited portions of or highlights from the Screenplay, let alone offered any original critical commentary or critique to portions thereof.²⁰ Rather, Gawker impudently directed visitors to a complete, unadorned downloadable PDF copy and directed them to “Enjoy!” The Plaintiff’s

¹⁸ Gawker’s argument that publication of the complete work for purposes of a news story amounted to transformation is nearly identical to that of Maya’s in *Monge*, who “relie[d] heavily on *Núñez*,” the position of which the Ninth Circuit expressly rejected, finding the case “distinguishable” from Maya’s use, just as it is from Gawker’s use. *Id.* at 1175. The *Monge* Court found that, “[a]lthough *Núñez* also involved news reporting, the similarities end there” for Maya, having “left the inherent character of the [work] unchanged, just as it ends there for Gawker’s unnecessary use of the complete original work. *Id.* at 1175-76.

¹⁹ See also, *Monge*, 688 F.3d at 1174 (“Transformation in the news reporting context has been litigated repeatedly in [the Ninth] circuit ...” and, in such context, the Ninth Circuit “stated that despite the newsworthiness of the [work] at issue, which documented a . . . riot in Los Angeles, their mere rebroadcast was not in itself transformative . . .”)(citing *L.A. News Service v. Reuters Television Int’l*, 149 F.3d 987, 993 (9th Cir.1998)).

²⁰ In its January 23rd article, Gawker merely quoted from and linked to another website’s (*The Wrap*) mere summary of the Screenplay’s plot, adding little to no additional insight. Of course, adding commentary wouldn’t be enough to avoid liability for complete use. See *Monge*, at 1176 (“Wholesale copying [even] sprinkled with written commentary,” would be “at best minimally transformative” and still unlikely to be fair use (citation omitted)).

1 literary work was in no way transformed thereby. *Campbell*, 510 U.S. at 579.

2 **(3) The Use Was Commercial**

3 Although Gawker contends that its commercial purpose here may have been
4 “incidental” to the Defendant’s purported news reporting activity (Mtn to Dismiss at
5 17:11–13), such an argument “misses the point entirely. The crux of the
6 profit/nonprofit distinction is not whether the sole motive of the use is monetary gain
7 but whether the user stands to profit from exploitation of the copyrighted material
8 without paying the customary price.” *Harper & Row*, 471 U.S. at 562. That is very
9 much the case here, as Gawker commercially benefitted from attracting “Here” its
10 millions of readers who were seeking to gain access to a copy of the Screenplay.

11 Gawker advertised itself as the very first source for the public to be able to
12 obtain the entire Screenplay online, to Gawker’s commercial advantage. Compl. ¶ 2.
13 Gawker’s unauthorized taking was part and parcel of its commercial ventures: gossip
14 websites which are very well-funded by lucrative paid advertising. Because Gawker’s
15 “use” was admittedly of a commercial nature, this factor also therefore “tends to
16 weigh against a finding of fair use.” *Harper & Row*, 471 U.S. at 562 (use of excerpts
17 in defendant’s weekly news and politics periodical not fair use).

18 **b. The Nature of the Copyrighted Work Weighs Against**
19 **a Finding of Fair Use**

20 The Screenplay is a confidential, unpublished work of fiction, which “falls
21 within the core of the copyright’s protective purposes.” *Campbell*, 510 U.S. at 586.

22 **c. The Amount and Substantiality of the Portion Used**
23 **Weighs Against a Finding of Fair Use**

24 Fair use inherently requires that the defendant utilize no more of a work than
25 is reasonably necessary to “conjure up” the original. *Campbell*, 510 U.S. at 588. For
26 instance, “were a book reviewer to quote . . . so much of the book as to make the
27 review a substitute for the book itself, he would be cutting into the publisher’s
28 market, and the defense of fair use would fail.” *Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d

1 512, 517 (7th Cir. 2002).

2 Where, as here, the defendant claims that it was merely reporting factual
 3 information, fair use permits the use of only so much as is “necessary adequately to
 4 convey the facts.” *Harper & Row*, 471 U.S. at 563. Gawker did not need to post in-
 5 line links to any portion — let alone the entirety as a downloadable PDF — of the
 6 Screenplay *at all* in order to effectively report to readers that the Screenplay had been
 7 leaked, or that an infringing copy was available elsewhere online.²¹ Gawker linked
 8 to “much more than was necessary to corroborate its story.” *Monge*, 688 F.3d at 1173,
 9 1183 (“[N]ews reporting does not enjoy a blanket exemption from copyright . . .
 10 simply because they wish to report on the same events a work depicts;” no fair use
 11 where defendant’s “reporting purpose could have been served through publication of
 12 . . . other sources rather than copyrighted photos” (citations omitted)). Because
 13 Gawker’s links served no legitimate journalistic purpose and merely aided in the
 14 further pirating of Plaintiff’s work, the third factor again weighs against fair use.

15 **d. The Effect of Use Upon the Potential Market Weighs**
 16 **Against a Finding of Fair Use**

17 With respect to the fourth fair use factor, “the effect of the use upon the
 18 potential market for or value of the copyrighted work,” Gawker argues that the sole
 19 market for the Plaintiff’s Screenplay is among potential motion picture producers, and
 20 that Gawker’s linking to infringing copies of the work does not give rise to potential
 21 harm to that market. 17 U.S.C. § 107(4). That argument is nonsensical in and of itself,
 22 in effect arguing that all written screenplays may be copied and disseminated under
 23 a fair use defense, that only a potential derivative audiovisual film work would be
 24 protected. If an unpublished screenplay becomes widely read by the public, there is
 25 no question that the ability for film makers (including, in this instance, Tarantino) to

26 _____
 27 ²¹ Almost laughably, Gawker submits that it *had* to link to the entire Screenplay because
 28 “Gawker could not create half of a hyperlink to avoid using more than necessary.” Mtn to
 Dismiss at 21:13–14. Of course, they could have linked to a single page or, better yet, not
 at all, or included merely a screen grab image of the caption/title page or of the download
 page, with the URL redacted, versus providing and facilitating access to the entire work.

1 profit from a film based on it is significantly diminished, in this instance by millions
 2 of dollars. In addition, Gawker entirely ignores that, as unequivocally alleged in the
 3 Complaint, there also exists a substantial secondary market for the sale of published
 4 copies of Tarantino’s wildly popular screenplays as literary works *per se*. Compl. ¶
 5 16. That Tarantino may not have made a movie out of the Screenplay is beside the
 6 point because Gawker’s non-transformative “use” supplants the commercial market
 7 for such work, not only as a potential film, but as a published script. As explored
 8 further above, if anyone were free to give away complete, downloadable copies of
 9 Tarantino’s movie scripts, then he would not be able to sell as many authorized,
 10 published copies of those same works. *See A&M Records, Inc.*, 239 F.3d at 1017.

11 **E. Motion to Dismiss Punitive Damages Should Not be Granted**

12 Insofar as the motion seeks dismissal of Tarantino’s prayer for punitive and
 13 exemplary damages, the Plaintiff does not intend to pursue such remedy and will
 14 amend his Complaint accordingly if the Court so desires. However, a Rule 12(b)(6)
 15 motion “will not be granted merely because [a] plaintiff requests a remedy to which
 16 he or she is not entitled.” *Massey v. Banning United School Dist.*, 256 F. Supp.2d
 17 1090, 1092 (C.D. Cal. 2003) (citation and quotation omitted). “It need not appear that
 18 plaintiff can obtain the specific relief demanded as long as the court can ascertain
 19 from the face of the complaint that some relief can be granted.” *Id.* (emphasis in
 20 original) (citation and quotation omitted).

21 **V. CONCLUSION**

22 For the foregoing reasons, Tarantino respectfully requests that Gawker’s
 23 motion to dismiss be denied in its entirety.

24 DATE: March 24, 2014

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