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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

AF HOLDINGS, LLC, Plaintiff, v. JOHN DOE & JOSHUA HATFIELD, Defendants.	Case No.: 4:12-cv-02049-PJH **BRIEF AMICUS CURIAE OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT** Date: August 8, 2012 Time: 9:00 a.m. Courtroom 3, 3rd Floor Hon. Phyllis J. Hamilton

INTEREST OF AMICUS

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 19,000 contributing members. EFF's mission is to ensure that the civil liberties and due process guaranteed by our Constitution and laws do not diminish as communication, commerce, government, and much of daily life move online. EFF has contributed its expertise to many cases in which copyright infringement using the BitTorrent protocol is alleged, as amicus curiae, as party counsel, and as court-appointed attorneys *ad litem*. In addition, EFF promotes the development of new technologies to facilitate ubiquitous, open access to the Internet via wireless local networking ("Wi-Fi") and educates the public about its benefits. EFF thus has an interest in cases such as this one with the potential to expand liability risk and expense for operators of open Wi-Fi.

INTRODUCTION

Amicus curiae the Electronic Frontier Foundation (EFF) files this brief in support of Defendant Joshua Hatfield's Rule 12(b)(6) motion to dismiss Plaintiff AF Holdings LLC's ("AFH's") First Amended Complaint – specifically, AFH's negligence claim against Mr. Hatfield. Dkt. No. 14. EFF submits this brief because it is deeply concerned that AFH's negligence theory of liability, if accepted, would open a chasm of legal risk for unsuspecting wireless Internet ("Wi-Fi") providers. Every day, cafes, airports, libraries, laundromats, schools, government facilities, and individuals operate "open" Wi-Fi routers, sharing their connection with roommates, neighbors, customers and passers-by. Sometimes people use those connections for bad acts. Most of the time they do not, and the world gets a valuable public service: simple, ubiquitous Internet access.

Indeed, the U.S. government, as well as state and local governments, have recognized the economic and public safety benefits of open Wi-Fi and have made the rollout of open Wi-Fi a public priority. EFF is also working to promote the availability of open Wi-Fi by improving the technology and advocating its benefits.

Defendant Hatfield's motion to dismiss is correct: AFH's negligence claim is in direct conflict with the federal law of secondary liability for copyright and is therefore preempted under both Section 301 of the Copyright Act and Constitutional doctrines. But the claim also conflicts with fundamental public policy. AFH's "copyright negligence" theory, if adopted by a court, would seriously harm public, private, and civil society efforts to promote open W-Fi by imposing a broad and uncertain risk of liability on providers, effectively requiring them to become copyright police for the benefit of legal strangers such as AFH.

Allowing AFH to proceed with its negligence theory would also contribute to the growing problem of mass copyright litigation, in which plaintiffs have attempted to sue hundreds or even thousands of anonymous John Doe defendants from all over the country in a single lawsuit, alleging copyright infringement, often of a single pornographic movie. The plaintiffs invoke the courts' subpoena power to identify Internet subscribers and then use coercive tactics, including the threat of being publicly associated with the plaintiff's pornographic movies, to obtain settlements. AFH and its counsel have been involved in several such suits. Giving credence to AFH's negligence theory as an alternative to secondary copyright liability will allow AFH and similar plaintiffs to make more credible threats – and thus secure more coercive settlements – against more innocent Internet subscribers.

ARGUMENT

I. AFH's "Copyright Negligence" Theory Would Hinder Federal, State, Private, and Civil Society Efforts To Promote Open Wi-Fi.

A. AFH's Theory Runs Directly Contrary to Copyright Law and Policy

Copyright law promotes "a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928, 125 S. Ct. 2764, 2775 (2005). Thus, "the administration of copyright law is an exercise in managing the tradeoff" between artistic protection and technological innovation, and is "mindful of the need to keep from trenching on

regular commerce . . . ." *Id.* at 937.

Secondary copyright liability embodies that careful balance by ensuring that the standard for such liability remains high. Copyright law recognizes only two forms of secondary copyright liability: vicarious and contributory (which includes active inducement). Vicarious liability requires proof that the defendant profited from the infringement and had the right and ability to control it. Contributory liability requires proof that the defendant, with "knowledge of the infringing activity, induce[d], cause[d] or materially contribute[d] to the infringing conduct of another." *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). "These doctrines of secondary liability emerged from common law principles and are well established in the law." *Grokster*, 545 U.S. at 930, 125 S. Ct. at 2776 (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 486, 104 S. Ct. 774, 811 (1984) (Blackmun, J., dissenting)).

In both cases, secondary liability turns on specific intentional acts. In *Sony*, there was no evidence that the defendant had done anything to encourage infringement beyond selling a "staple article of commerce." *Sony*, 464 U.S. at 426. In *Grokster*, by contrast, the Court determined that such evidence existed, and found liability on that basis. There is no question that "mere knowledge of infringing potential or of actual infringing uses would not be enough [] to subject a distributor to liability." *Grokster*, 545 U.S. at 937, 125 S. Ct. at 2780.

Negligence, by contrast, can turn on a mere failure to take reasonable care. *See City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 753 (Cal. 2007). No court has ever accepted such a low standard for copyright liability, nor should it. Such a dramatic expansion in secondary liability, and the legal uncertainty it would engender, would have ramifications far beyond this case. In particular, basing copyright liability on mere negligence would have a chilling effect on the growth of publicly available wireless networks.

B. AFH's Theory Would Thwart Public Efforts to Promote Public Wi-Fi

As of this year, 111,205 public Wi-Fi locations are active in the United States, operated

by municipalities, institutions, private businesses, and others.[1] One report cited by the Federal Communications Commission ("FCC") estimated that 415 cities and counties in the U.S. have engaged in "deploying, planning, or running Wi-Fi networks."[2] Just last month, *The New York Times* reported that "[h]alf of the busiest airports in the United States now have free Wi-Fi, including Denver, Las Vegas, San Francisco, Phoenix and Houston," adding that the Denver International Airport provides free Wi-Fi access to 10,000 travelers daily.[3] Businesses ranging from McDonald's (at 11,500 locations)[4] to Starbucks likewise offer free Wi-Fi service to customers.[5] In the first quarter of 2012, 77.1 percent of public Wi-Fi locations in the U.S. provided no-cost access.[6]

Widespread availability of open Wi-Fi is a public good. Many people have had the experience of being lost in a strange place with no way to find a map, having an urgent email to send with no way to do so, or trying to meet a friend with no way to contact them. Open Wi-Fi offers a solution in these situations. Moreover, it can be used by people who don't subscribe to cellular data service, cannot afford such service, or are traveling outside the territory of their cellular carrier.

Elected officials and public servants at all levels of government have spoken out on the benefits of public wireless Internet access. In remarks at the Department of Commerce in 2004, President George W. Bush said:

Spokane, Washington, yesterday established a wi-fi hot zone that allows users

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[1] *JiWire*, Mobile Audience Insights Report Q1 (2012), *available at* http://www.jiwire.com/insights ("JiWire Report").

[2] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 23 FCC Rcd. 9615, 9622 (2008).

[3] Susan Stellin, *Free Wi-Fi, but Speed Costs*, N.Y. Times, June 4, 2012, http://www.nytimes.com/2012/06/05/business/airports-and-hotels-look-at-tiered-pricing-for-internet-access.html.

[4] *Free Wi-Fi @ McDonald's*, http://www.mcdonalds.com/us/en/services/free_wifi.html (last visited June 12, 2012).

[5] *Wi-Fi (United States)*, http://www.starbucks.com/coffeehouse/wireless-internet (last visited June 12, 2012).

[6] JiWire Report.

> within a hundred-block area of the city to obtain wireless broadband access. Imagine if you're the head of a chamber of commerce of a city, and you say, "Gosh, our city is a great place to do business or to find work. We're setting up a wi-fi hot zone, which means our citizens are more likely to be more productive than the citizens from a neighboring community." It's a great opportunity.[7]

The Federal Trade Commission has likewise reported that municipal wireless systems "are often less expensive to deploy than traditional fiber optic or cable wireline networks."[8] And in public comments about these networks, Federal Communications Commissioner Michael Copps stated that he "think[s] anybody getting broadband to the inner-city and to all segments of the population is performing a public service."[9]

The benefits of open wireless Internet access extend to national security. As the FCC has reported, "Wi-Fi networks are demonstrating their importance in homeland security measures," specifically noting that "the Minneapolis Wi-Fi network aided rescue workers following the collapse of the I-35 bridge."[10] The Department of Homeland Security even funded a Wi-Fi network along Interstate 19 in Arizona, designed primarily for emergency services and the Border Patrol, but intending to later provide access for community services and residents.[11]

The public benefits of open wireless Internet access have also been expressed at the municipal level. Indianapolis Mayor Bart Peterson called his city's Wi-Fi network "a beneficial

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[7] George W. Bush, *Remarks on Innovation at the U.S. Department of Commerce*, Washington, D.C. (June 24, 2004) (transcript available at http://www.gpo.gov/fdsys/pkg/WCPD-2004-06-28/html/WCPD-2004-06-28-Pg1144.htm).

[8] FTC Staff, *Municipal Provision of Wireless Internet* (Sept. 2006), available at http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf.

[9] Jim Hu, *Newsmaker: Why our Broadband Policy's Still a Mess*, CNET News (Feb. 28, 2005, 7:00 AM), http://news.cnet.com/Why-our-broadband-policys-still-a-mess/2008-1034_3-5590929.html.

[10] In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 23 FCC Rcd. 9615, 9652 n.36 (2008).

[11] Patrick Norton, *VOIP at 80 MPH: World's First Wi-Fi Highway*, ExtremeTech (Feb. 23, 2005, 5:10 PM), http://www.extremetech.com/extreme/74530-voip-at-80-mph-worlds-first-wifi-highway.

economic development tool" that can "enhance tourism in our great city."[12] Cleveland City Councilman Kevin J. Kelley, commenting on the development of open wireless access in his ward, stated that the effort "is about giving our children an advantage; it is about providing opportunity to every resident in this ward."[13] And Dennis Newman, the Chief Information Officer of Winston-Salem, North Carolina, similarly explained that the city's municipal wireless has "made downtown appealing to those who want to come and sit at a coffee table or outside."[14]

Open Wi-Fi also conserves a scarce public resource – radio spectrum. Because Wi-Fi devices send signals over a shorter distance and at lower power than cellular towers, it allows more people to use the same frequency at the same time in the same geographic area. This also avoids congestion on cellular networks. More efficient use of the radio spectrum is another reason why public policy favors protecting and encouraging open Wi-Fi, not adding new liability.

As part of its mission to foster beneficial use of the Internet in all walks of life, EFF is working to develop new Wi-Fi technology that allows an Internet subscriber to share wireless access with guests and the public while keeping each user's communications secure. This technology will further the public benefits of open Wi-Fi and allow more people to feel comfortable opening their Internet access points to the public, while remaining confident that their own communications are protected from eavesdropping. EFF's efforts follow the opinion of nationally recognized computer security expert Bruce Schneier, who considers maintaining

[12] *Indianapolis' Fountain Square District – Largest Free Wi-Fi Zone in Indiana*, Mobile Dev & Design (July 24, 2007, 2:29 PM), http://mobiledevdesign.com/hardware_news/wifi_in_indiana_0724/.

[13] Esme Vos, *Cleveland, Ohio Neighborhood Deploys Large Outdoor Free Wi-Fi Network*, MuniWireless (Nov. 10, 2011), http://www.muniwireless.com/2011/11/10/cleveland-ohio-neighborhood-deploys-large-outdoor-free-wi-fi-network/.

[14] Joe DePriest, *Newton Hopes Free Wi-Fi Enlivens Downtown*, Charlotte Observer, Sept. 25, 2011, http://www.charlotteobserver.com/2011/09/25/2637701/newton-hopes-free-wi-fi-enlivens.html.

an open Wi-Fi node a matter of "basic politeness" that is also consistent with good security practices.[15]

The negligence standard AFH proposes would put all of this at risk. Service providers could suddenly be subject to legal threat if they failed to take reasonable care to prevent infringing activities – and it is not at all clear what constitutes reasonable care. By the logic of AFH's complaint, reasonable care could be interpreted to require monitoring the online activities of everyone who uses one's Internet connection – an expensive and intrusive proposition.

Thus, AFH asks this Court to do precisely what the Supreme Court has counseled against: reset the balance between artistic protection and innovation under copyright law in a way that is likely to impede legitimate commerce. *See, e.g., Grokster*, 545 U.S. at 937, 125 S. Ct. at 2780 ("The inducement rule . . . premises liability on purposeful, culpable expression and conduct, and thus *does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose*.") (emphasis added). EFF urges the Court to refuse AFH's request.

II. AFH's "Copyright Negligence" Theory Would Exacerbate The Problem Of Coercive Settlements In Mass Doe Copyright Litigation.

The Court's decision here may have another important impact: limiting the spread of a growing business model of mass copyright litigation. In a nutshell, these are copyright infringement lawsuits brought indiscriminately and *en masse* against Internet subscribers in pursuit of coercive settlements. Each suit is brought against anywhere from 20 to 5,000 John Doe defendants, accusing them of downloading infringing copies of pornographic movies using the BitTorrent protocol. Plaintiffs, including AFH, submit a list of Internet Protocol (IP) addresses that they claim identify computers engaged in copyright infringement. Having filed suit, plaintiffs request permission to take early discovery in the form of subpoenas to Internet service providers (ISPs) for the names and addresses of the Internet subscribers corresponding

[15] Bruce Schneier, *Steal This Wi-Fi*, Wired Magazine, Jan. 10, 2008, http://www.wired.com/politics/security/commentary/securitymatters/2008/01/securitymatters_0110

to the IP addresses. These subpoenas identify the owners of Internet subscriptions, not who was using an Internet connection at any given time. Once leave to serve subpoenas is granted, the court's role in these cases effectively ends. Plaintiffs pursue the Internet subscribers so identified extrajudicially, demanding settlements of between $1,000 and $4,000. Coercive tactics, including bringing suit in distant fora, the threat of having one's name publicly associated with the downloading of obviously pornographic titles, and misleading claims about the scope of copyright law, compel many people so targeted to settle despite having never infringed the plaintiff's copyright. In short, these suits are brought without any intention of litigating them and without regard to who is in fact liable.

Over the past four years, over 250,000 Doe defendants have been sued, and, anecdotally, many have settled. AFH's counsel and its predecessor firm stated in a declaration to this Court that as of February 24, 2012 they had filed at least 118 such suits against over 15,000 John Doe defendants. *See* Exhibit A to the Declaration of Mitchell Stoltz ("Stoltz Decl."). This mode of litigation has been described by one federal judge as "problematic in nature" and carrying the "potential to perpetuate … abuse." *CP Prods. v. Does 1-300*, No. 10-cv-6255, 2011 WL 737761, at *1 (N.D. Ill. Feb. 24, 2011) (Stoltz Decl. Ex. B). Another found that

> [t]his course of conduct indicates that the plaintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does. Whenever the suggestion of a ruling on the merits of the claims appears on the horizon, the plaintiffs drop the John Doe threatening to litigate the matter in order to avoid the actual cost of litigation and an actual decision on the merits.
>
> The plaintiffs' conduct in these cases indicates an improper purpose for the suits.

K-Beech, Inc. v. John Does 1-85, No. 3:11-cv-00469 (E.D. Va. Oct. 13, 2011) (Stoltz Decl. Ex. C).

Judicial recognition of AFH's "copyright negligence" theory would throw fuel on the fire of this abuse of the judicial system by giving credence to plaintiffs' legal threats against

individuals simply for allowing others to use their Internet connections, without evidence that those individuals have infringed the plaintiff's copyright or materially contributed to any infringement. Indeed, in settlement demand letters sent to Internet subscribers in this District, the predecessor to AFH's counsel's law firm asserted misleadingly that "the Internet Service Provider [] account holder may be held legally responsible for the infringement(s) and settlement fees." *See* Stoltz Decl. Ex. D (Exhibit to the Complaint in *Abrahams v. Hard Drive Prods.*, No. 12-cv-1006 (N.D. Cal. Feb. 28, 2012)).

By contrast, rejecting AFH's negligence theory prior to discovery will make future frivolous legal threats against innocent Internet subscribers less credible, and thus reduce the number of coercive settlements of meritless cases. EFF urges the Court to do so.

CONCLUSION

For all of these reasons, amicus respectfully requests that the Court grant Defendant Hatfield's Motion to Dismiss.

DATED: July 3, 2012

Respectfully submitted,

By: /s/ Corynne McSherry

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2012, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

Executed on July 3, 2012, in San Francisco, California.

/s/ Corynne McSherry
Corynne McSherry