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NOV 19 2012

5 UNITED STATES DISTRICT COURT FOR THE  
6 SOUTHERN DISTRICT OF CALIFORNIA  
7  
8 SAN DIEGO DIVISION

9  
10 AF HOLDINGS, LLC

11 Plaintiff,

12 vs.

13 CHRIS ROGERS,

14 Defendant  
15

) Case No.3: 12-cv-01519-BTM-BLM

) DEFENDANT ROGERS' MEMORANDUM  
) OF POINTS AND AUTHORITIES IN  
) SUPPORT OF MOTION TO DISMISS.

16  
17 **DEFENDANT ROGERS' NOTICE OF MOTION TO DISMISS COMPLAINT**

18 **Come Now** the Defendant Chris Rogers who, for reasons more fully  
19 described below, moves to dismiss all of Plaintiff's Claims for Relief for failure to state a claim  
20 pursuant to Fed. R. Civ. 12(b)(6).  
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## 1. INTRODUCTION

1  
2 The Plaintiff is one of recent wave of 'Copyright Trolls' that have built a business model  
3 of extortion. They have no interest in protecting copyrights and instead use the courts to  
4 intimidate Defendants to settle in order to avoid legal costs and embarrassment, or in filing mass  
5 complaints, to win some through default. These practices are well documented by the popular  
6 media (See for Example, <http://www.usnews.com> article dated February 02, 2012, "Porn  
7 Companies file Mass Piracy Lawsuits": [http://www.usnews.com/news/articles/2012/02/02porn-](http://www.usnews.com/news/articles/2012/02/02porn-companies-file-mass-piracy-lawsuits-are-you-at-risk)  
8 [companies-file-mass-piracy-lawsuits-are-you-at-risk](http://www.usnews.com/news/articles/2012/02/02porn-companies-file-mass-piracy-lawsuits-are-you-at-risk)). Prenda Law (Plaintiff's Council), in  
9 association with Pornographers AF Holdings and others, currently have hundreds of active cases  
10 listed on their website. The fact that very few of the hundreds of Defendants are actually taken  
11 to trial is obvious. An IP address is not sufficient to identify the infringer of a particular  
12 copyrighted work. Numerous courts have recognized this fact and the Plaintiff's council has been  
13 forced to admit it on numerous occasions. In fact, the complaint makes clear that the Plaintiff has  
14 no idea whether the Defendant has actually committed copyright infringement. In order to side  
15 step these issues is to accuse Defendants of negligence. Never mind that "copyright negligence"  
16 does not exist. For the Plaintiff, even though the negligence claim utterly lacks merit it served  
17 its purpose, intimidation. The Defendant has been named on Plaintiff's Council's Website,  
18 threatened with public embarrassment and massive legal costs. I have been told by Prenda Law  
19 that I should settle for a convenient (for them) fee in order to avoid certain financial ruin. All  
20 claims in the Complaint fail to offer valid facts in support of a claim upon which relief may be  
21 granted under FRCP 12(b)(6). The negligence claim, in particular, does not even follow a  
22 viable, coherent legal theory.  
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28 DEFENDANT ROGERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS.

1 For this abuse of the court system and for reasons outlined more fully below, Defendant  
2 Rogers respectfully requests that this court dismiss Plaintiff's ill-considered action.  
3

4  
5 **II. FACTUAL BACKGROUND**

6 Plaintiff is the purported owner of the copyrighted adult video that is the subject  
7 of this action. Defendant is an ISP subscriber accused of negligence and/or copyright  
8 infringement/contributory copyright infringement based on allegations that his internet access was  
9 accessed by The Defendant and/or an "unidentified third party infringer" that allegedly used said  
10 access to commit copyright infringement.  
11

12  
13 **III. STATEMENT OF ISSUES TO BE DECIDED**

- 14  
15 1. Is Plaintiff's Negligence action against Defendant Rogers preempted by Copyright Act  
16 §301 or the doctrines of conflict preemption or field preemption?  
17  
18 2. Is Defendant Rogers entitled to immunity from suit under CDA §230 based on the  
19 allegations that he provided internet access to an unidentified individual that  
20 subsequently harmed Plaintiff?  
21  
22 3. Has Plaintiff alleged a sufficient factual basis regarding the existence of a duty to survive  
23 dismissal under FRCP 12(b)(6)?  
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DEFENDANT ROGERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
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**IV. LEGAL ARGUMENT****PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV.****P. 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF****MAY BE GRANTED**

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6 A Complaint may be dismissed under Rule 12(b)(6) if it appears beyond doubt that the  
7 plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *Hishion*  
8 *v. King & Spalding*, 467 U.S. 69, 73 (1984). A dismissal under this rule may be based on the  
9 failure to allege a cognizable legal theory, or by the failure to allege sufficient facts under a  
10 cognizable legal theory. *Roberston v. Dean Witter Reynolds, Inc.* 746 F.2d 530, 533-34 (9<sup>th</sup> Cir.  
11 1984). Plaintiff commits both sins herein.

12  
13 Allegations of fact in the complaint must be taken as true and construed in the light most  
14 favorable to the Plaintiff. See *Livid Holdings, LTD. v. Salomon Smith Barney, Inc.*, 416 F.3d  
15 940, 946 (9<sup>th</sup> Cir. 2005). Notably, however, “the tenet that a court must accept as true all of the  
16 allegations contained in a complaint is inapplicable to legal conclusions,” and the courts are not  
17 “bound to accept as a true and legal conclusion couched as factual allegation.” *Ashcroft v. Iqbal*,  
18 129 S.Ct. 1937, 1949 (2009)(internal quotation marks and citations omitted). See also *McGinchy*  
19 *v. Shell Chem. Co.*, 845 F.2d 802, 810 (9<sup>th</sup> Cir. 1988)(“[C]onclusory allegations without more are  
20 insufficient to defeat a motion to dismiss for failure to state a claim.). As such, “bare assertions  
21 amounting to nothing more than a formulaic recitation of the elements” of a claim are not  
22 entitled to a presumption of truth” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9<sup>th</sup> Cir.  
23 2009).

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1 exclusive rights given the work under the bill is narrower than the scope of common law rights in  
2 the work might have been.” H.R.Rep. No. 1476, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 130 (1976), reprinted in  
3 1976 U.S.C.C.A.N 5659. The message is unmistakable: The rights granted by the Copyright Act  
4 must be vindicated within the confines of the Copyright Act and it’s jurisprudence.  
5

6 The test for copyright preemption asks two essential questions. First, do the claims fall  
7 “within the subject matter of copyright law?” *Firoozye* 153 *F.Supp.* 2d at 1121-22. Second, do the  
8 claims seek to “protect the rights equivalent to any of the exclusive rights within the scope of  
9 federal copyright law?” *Id.* If the answer to these questions is yes, then Plaintiff’s claims “should  
10 be litigated only as federal copyright claims.” *Id.* In the instant case, the answer to each question  
11 is obviously affirmative, and Plaintiff’s negligence cause of action against Chris Rogers is  
12 therefore preempted by §301.  
13

14 **A. Plaintiff’s Claim is Within the Subject Matter of Copyright.**  
15

16 There can be no doubt that Plaintiff’s claim herein, which is based on the alleged  
17 unauthorized reproduction and distribution of Plaintiff’s copyrighted motion picture, is within  
18 the subject matter of copyright. The Copyright Act describes the “Subject matter of copyright”  
19 as follows. “Copyright protection subsists, in accordance with this title, in original works of  
20 authorship fixed in a tangible medium of expression... Works of authorship include the  
21 following categories... (6) motion pictures and other audiovisual work.” 17 U.S.C. §102. As the  
22 House Committee report notes,  
23

24 “As long as work fits within one of the general subject matter categories of sections 102  
25 and 103 [sections 102 and 103 of this title], the bill prevents the States from protecting it  
26 even if it fails to achieve Federal statutory copyright because it is too minimal or lacking  
27 in originality to qualify, or because it has fallen into the public domain.”  
28

DEFENDANT ROGERS’ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS.

1 H.R.Rep. No. 1476, 94<sup>th</sup> Cong., 2d Sess. 130 (1976), reprinted in 1976 U.S.C.C.A.N. 5659,  
2 5748.

3 Thus, the first test for copyright preemption is satisfied whether or not the individual  
4 work at issue is deemed copyrightable, and is satisfied solely by virtue of the fact that the work is  
5 a motion picture, falling within the subject matter of copyright. The work that forms the basis of  
6 Plaintiff's claim in the instant case qualifies as a motion picture, and thus is within the subject  
7 matter of copyright. The first part of the preemption test is satisfied.  
8

9  
10  
11 **B. Plaintiff Seeks to Protect Rights that are Identical to the §106 Exclusive Rights**

12 There can be no doubt that Plaintiff's negligence claim against Chris Rogers seeks to  
13 protect rights that are equivalent to the section 106 rights of reproduction, distribution, etc.  
14 Plaintiff's complaint makes it abundantly clear the negligence claim against Defendant Rogers  
15 seeks to protect Plaintiff's copyrighted work from unauthorized copying and sharing. This is  
16 precisely the role of copyright law.  
17

18 Indeed, Plaintiff cannot manage to formulate any statement of its right to relief without  
19 reference to its "exclusive rights" under the copyright act or the violation of those rights by  
20 "copying." See, e.g. Plaintiff's complaint at ¶41 ("copying and sharing of Plaintiff's Video");  
21 ¶46 ("copying and sharing of Plaintiff's Video" and "... interfered with Plaintiff's exclusive  
22 rights in the copyrighted work."); ¶27 ("infringement"). It seems fair to conclude, based on the  
23 allegations of the complaint, that Plaintiff seeks redress for the violations of his exclusive rights,  
24 which were violated by the copying and sharing of an unidentified individual.  
25  
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28 DEFENDANT ROGERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS.

1 Plaintiff's own focus on its "exclusive rights" is instructive. 12 U.S.C. §106 is entitled  
2 "Exclusive Rights in Copyrighted Works." And lays out the familiar exclusive rights, including  
3 the right to distribute and the right to reproduce. These are the rights that trigger copyright  
4 preemption. These are precisely the rights that Plaintiff claims were violated as a result of Mr.  
5 Rogers' alleged negligence, and plaintiff is unable to formulate any version of the claim without  
6 reference to its "exclusive rights." Moreover, the act that triggers liability to Plaintiff (under  
7 Plaintiff's theory), is the unauthorized copying and sharing of Plaintiff's work by a third party.  
8 This is exactly the situation that the twin doctrines of vicarious and contributory copyright  
9 liability have been developed to address.  
10  
11

12 The Ninth Circuit has adopted the "extra element" test to help determine whether the  
13 state law claim "seeks to protect rights which are qualitatively different from copyright rights.  
14 The state claim must have and 'extra element' which changes the nature of the action" in order to  
15 survive preemption *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973, 977 (9<sup>th</sup>  
16 Cir. 1987). Many courts have addressed this issue and determined that negligence claims do not  
17 add the required "extra element" that qualitatively changes the nature of the action, and thus are  
18 preempted. As the Central District of California recognized,  
19  
20

21 Because the essential allegation is still that Defendants unlawfully copied  
22 Plaintiff's ideas, it is still a copyright infringement claim. Moreover,  
23 **recharacterization of the claim as one of negligence' does not add a legally**  
24 **cognizable additional element** because a general claim for copyright  
25 infringement is fundamentally one founded on strict liability. The alteration of  
26 the required mental state does not add an 'additional element'... Plaintiff's  
27 negligence claim is preempted by federal copyright law.  
28

DEFENDANT ROGERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS.

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

4           In addition to the court in *Dielsi*, a number of other courts have found that copyright law  
5 preempts negligence causes of action and that the alteration of the required mental state does not  
6 add a legally cognizable extra element. See, e.g. *Felix the Cat Productions v. New Line Cinema*,  
7 2000 WL 770481 (C.D. Cal. April 28, 2000)(“Recharacterizing Plaintiff’s copyright claim as one  
8 for negligence does not add an additional element”); *Watermark Publishers v. High Tech. Sys.*,  
9 1997 U.S. Dist. LEXIS 22512 at \*15(S.D. Cal. Jun 18, 1997) (preempting Plaintiff’s negligence  
10 claim, and noting “the only possible basis for a duty to protect another from copyright  
11 infringement- if such a duty can exist- is in copyright law; thus the alleged existence of a duty is  
12 not an ‘extra element’”); *Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc.* 713  
13 F.Supp.2d 215 (S.D.N.Y 2010) (negligence claim under either New York or Illinois law was  
14 properly preempted by Copyright Act §301); *Bridgeport Music, Inc. v. 11c Music, et. Al.* 154  
15 F.Supp.2d 1330 (M.D. Tenn., 2001)(photographer’s negligence claim simply restates copyright  
16 infringement claim); *Drum Major Music v. Young Money Entertainment*, 2002 WL 423350  
17 (S.D.N.Y. Feb. 7, 2012)(negligence claim preempted by Copyright Act).

18           Based on the foregoing, it is clear that Plaintiff’s negligence claim against Defendant  
19 Rogers is preempted by Copyright Act §301. The work at issue is a motion picture – certainly  
20 within the subject matter of copyright as defined by §102. In addition, Plaintiff seeks to protect  
21 rights that are identical to the rights protected by Copyright Law and Plaintiff is incapable, in  
22 fact, of asserting any right to relief without reference to these exclusive rights. Because  
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28           DEFENDANT ROGERS’ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS.

1 Plaintiff's sole claim against Defendant Rogers is preempted, the complaint should be dismissed  
2 pursuant to Fed. R. Civ. P. 12(b)(6) for failing to posit a cognizable legal theory entitling  
3 Plaintiff to relief.  
4

5  
6 **C. Plaintiff's Claims are Also Preempted by the Doctrines of Conflict and Field**

7 **Preemption**

8 In addition to the obvious statutory preemption via §301, Plaintiff's claims are also  
9 preempted under the non-statutory doctrines of federal preemption. A state law cause of action  
10 is preempted not only when so decreed by specific statute, like §301. A state law cause of action  
11 is also preempted when the Constitution or other federal legislation evidences an intent to fully  
12 occupy the field in question, or when there is a fundamental incompatibility between federal and  
13 state law. Thus, when the state law "stands as an obstacle to the accomplishment and execution  
14 of the full purposes and objectives of Congress", it is preempted. See *Capital Cities Cable, Inc.*  
15 *v. Crisp* 467 U.S. 691 (1984).  
16  
17

18 In the instant case, Plaintiff seeks to hold an ISP subscriber liable for providing Internet  
19 access to an individual that subsequently used that connection to infringe Plaintiff's copyright.  
20 However, holding an information conduit liable for the content of the information transmitted  
21 represents a fundamental conflict between Plaintiff's state law claim and the existing federal  
22 legislation, including the DMCA, the Copyright Act, and the CDA.  
23

24 The Copyright Act, DMCA, and CDA all include carefully crafted limitations of liability  
25 for mere intermediaries in the information transmission process, like Defendant here. The  
26 Copyright Act has created a substantial body of case law discussing the requirements for  
27

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1 imposing secondary liability on a third-party that has not directly infringed a copyright. This  
2 regime does not authorize the imposition of liability for “negligent infringement.”

3  
4 Moreover, as described further below, the CDA also has broad immunity provisions  
5 designed to prevent the imposition of tort liability based on the communications of a third party.  
6 The DMCA likewise includes several statutory “safe harbors,” that are designed to shield third  
7 party intermediaries from copyright liability resulting from merely transmitting information.  
8 Taken together, these demonstrate Congress’ desire to occupy the field with regard to third party  
9 liability for the electronic communications of another – communications that invariably traverse  
10 state lines and defy state regulations. As such, state regulation over this field is prohibited.

11  
12 Additionally, Plaintiff’s proposed cause of action directly conflicts with the copyright  
13 principles of secondary liability and the broad policies of an open Internet underlying both the  
14 CDA and DMCA. Thus, Plaintiff’s cause of action for negligence is also preempted under the  
15 doctrines of conflict preemption and field preemption.  
16

17  
18 **2. PLAINTIFF’S NEGLIGENCE CLAIM IS BARRED BY CDA §230 IMMUNITY AND**  
19 **SHOULD BE DISMISSED UNDER RULE 12(B)(6).**

20  
21 Assuming, arguendo, that the Plaintiff’s cause of action for negligence could survive  
22 preemption, Plaintiff’s claims are nonetheless barred by Communications Decency Act  
23 immunity under 47 U.S.C. §230. Specifically, §230(c)(1) provides that “No provider or user of  
24 an interactive computer service shall be treated as the publisher or speaker of any information  
25 provided by another information content provider.” 47 U.S.C. 230(c)(1). The CDA goes on to  
26  
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28 DEFENDANT ROGERS’ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
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1 state that “No cause of action may be brought and no liability may be imposed under any State or  
2 local law that is inconsistent with this section.” 47 U.S.C. 230 (e)(3).

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

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

16 Courts must undertake a three-part inquiry to determine whether a defendant is eligible  
17 for CDA immunity. They are “(1) the defendant [is] a provider or user of an interactive  
18 computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of  
19 information; and (3) the information at issue [is] provided by another information content  
20 provider.” *Delfino v. Agilent Technologies, Inc.*, 52 Cal. 3d 376, 389 (Ct. App., 6<sup>th</sup> App. Dist.,  
21 2006), quoting *Gentry v. eBay, Inc.*, 99 Cal. App. 4<sup>th</sup> 816, 839 (Ct. App. 4<sup>th</sup> Dist., 2002).

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1 As noted above, courts must first determine whether the defendant qualifies as a  
2 “provider... of an interactive computer service.” Although this phrasing conjures images of  
3 traditional internet service providers, (i.e. Comcast or Time Warner), the CDA defines the term  
4 in a way that leaves no doubt that it would apply to the allegations against Defendant Rogers.  
5 Specifically, §230(f)(2) defines an interactive computer service as “any information service,  
6 system or access software provider that provides or enables computer access by multiple users to  
7 a computer server, **including specifically a service or system that provides access to the**  
8 **Internet...**” 47 U.S.C. 230(f)(2)(emphasis added).  
9

10  
11 Defendant Rogers is accused of providing Internet access to an individual that ultimately  
12 pirated Plaintiff’s film. This act is the sole basis of Defendant Rogers’ liability. The act of  
13 providing internet access to a third party, however, is **exactly** the type of activity that qualifies  
14 one for CDA immunity as the provider of an interactive computer service and it is specifically  
15 included in the definition cited above. Indeed, the California Court of Appeals examined almost  
16 precisely the same issue in *Delfino v. Agilent Technologies, Inc.*, 52 Cal. Rptr.3d 376 (2006). The  
17 Plaintiff in *Delfino* sought to impose liability on Agilent Technologies based on Agilent’s  
18 provision of Internet access to a particular employee, who used that access to send allegedly  
19 threatening and defamatory emails. Plaintiff sought to impose liability on Agilent based on a  
20 theory of negligent infliction of emotional distress, based on allegations very similar to those  
21 made by Plaintiff in the present case. Specifically, Plaintiff claimed that Agilent “was informed  
22 and knew that [the employee] was using it’s computer system” to commit torts against the  
23 Plaintiff. Agilent claimed immunity under the CDA and the trial court confirmed. On appeal, the  
24 6<sup>th</sup> Appellate district confirmed the grant of immunity and noted that “Agilent clearly meets the  
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1 definition of that term under section 230(f)(2), in that it “provides or enables computer access by  
2 multiple users.” *Id.* at 390. Another California case, *Kathleen R. v. City of Livermore*, held that a  
3 public libraries provision of computers and Internet access qualified them for CDA protection as  
4 the provider of an interactive computer service. See 104 Cal.Rptr.2d 772 (1<sup>st</sup> Dist. 2001).

5  
6 The conduct here that purportedly gives rise to liability is virtually identical to the  
7 conduct of the defendants in *Delfino* and *Kathleen R.*, namely, the provision of Internet access to  
8 a third party. As the courts in *Delfino* and *Kathleen R.* concluded, and as the language of §230  
9 makes clear, a defendant whose liability is premised upon his ownership or control of a “**service**  
10 **or system that provides access to the Internet,**” should properly qualify as the provider of an  
11 interactive computer service, and satisfies the first requirement for CDA immunity.

12  
13 The second requirement for CDA immunity to apply is that “the cause of action treat[s]  
14 the defendant as the publisher or speaker of information.” *Delfino* at 389. The California  
15 Supreme Court has held that the CDA makes no attempt to exclude pre-CDA “distributors” of  
16 information, and one who was characterized as a passive distributor is likewise entitled to  
17 immunity. *Barret v. Rosenthal*, 51 Cal.Rptr.3d 55 (2006).

18  
19 Moreover, although this element is couched in terms that are familiar to defamation suits,  
20 “it is clear that immunity under section 230 is not so limited” *Delfino* at 390. Numerous courts  
21 have applied CDA immunity to defendants accused of a variety of torts beyond defamation,  
22 including nuisance, premises liability, misappropriation of right of publicity, and, relevantly,  
23 negligent failure to control a third party’s online conduct. See, e.g. *Kathleen R.*, *supra*;  
24 *Carafano v. Metrosplash.com, inc.*, 339 F.3d 1119 (9<sup>th</sup> Cir. 2003); and *Doe v. America Online,*  
25 *Inc.* 783 So2d 1010 (Fla. 2001).  
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1           Indeed, several courts have specifically held that CDA immunity bars a Plaintiff's claim  
2 for negligence, like the one alleged herein. See, e.g. *Doe v. MySpace*, 528 F.3d 413 (5<sup>th</sup> Cir.  
3 2008)(Defendant immune from liability for negligence); *Carafano v. Metrosplash*, 339 F.3d  
4 1119(9<sup>th</sup> Cir. 2003)(same); *Barnes v. Yahoo! Inc.* 2005 WL 30055602 at \*4 (D. Or. Nov. 8,  
5 2005)(same); *Ben Ezra, Weinstein, & Co., v. Am. Online. Inc.* 206 F.3d 980, 986 (10<sup>th</sup> Cir.  
6 2000)( CDA bars claims for negligent failure to police network); *Jane Doe One v. Oliver*, 755  
7 A.2d 1000, 1002-04 (Conn. Super. Ct. 2000)(CDA bars claims for negligence, inter alia); *Parker*  
8 *v. Google, Inc.* 422 F.Supp.2d 492, 500-501 (E.D. Pa. 2006)(CDA bars claims for invasion of  
9 privacy, negligence, and defamation).  
10  
11

12           The case of *Kathleen R.*, noted above, is again instructive. In that case, Plaintiff  
13 attempted to hold the city of Livermore liable for allowing a twelve-year-old to access and  
14 download sexually explicit images from an Internet connection in the public library. *Kathleen R.*  
15 104 Cal.2d at 773. Notably, the Plaintiff alleged that the minor went to the library and  
16 downloaded sexually explicit photos onto a floppy disk that he brought to the library. *Id.* The  
17 minor then allegedly took the floppy disk to another location where he printed the pictures. The  
18 state court of appeals had no trouble determining that Plaintiff was attempting to hold the library  
19 responsible as the speaker of publisher of the explicit materials by virtue of the library's role as a  
20 conduit for Internet service. The court held that §230 immunizes "interactive computer service  
21 providers from liability for mere failure to 'restrict access to offensive materials disseminated  
22 through their medium.'" *Id.* at 780, quoting *Blumenthal v. Drudge*, 992 F.Supp. 44, 49 (Dist.  
23 D.C. 1998).  
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1           The allegations against the defendant herein are almost identical to those in *Kathleen R.*  
2 In each Plaintiff seeks to impose liability on the basis of the defendant's provision of Internet  
3 access to a third party or third parties. In each, the Defendant is accused only of being a conduit  
4 for objectionable material that was downloaded from a connection offered by the Defendant. In  
5 each case, the defendant's liability is premised on a third party's use of the defendant's Internet  
6 access to copy pornographic materials to a storage device for later use. And, like the City of  
7 Livermore in *Kathleen R.*, the defendant here is entitled to CDA immunity.  
8

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

19           Plaintiff herein explicitly seeks to impose liability on Defendant Rogers based on the  
20 Defendant's alleged provision of Internet access to an unidentified individual that infringed the  
21 Plaintiff's copyright. The provision of Internet access to a third party, however, makes  
22 Defendant Hatfield the provider of an interactive computer service and entitles him to immunity  
23 under the CDA. This immunity extends to all attempts to hold the Defendant liable for the  
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DEFENDANT ROGERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
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1 allegedly tortious information supplied by a third-party. Thus, in addition to being preempted as  
2 described above, Plaintiff's claims are barred by Defendant's CDA §230 immunity.

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5 **3. PLAINTIFF'S BARE ASSERTIONS REGARDING DEFENDANT'S DUTY CANNOT**  
6 **SURVIVE A 12(B)(6) MOTION UNDER IQBAL & TWOMBLY**

7 Plaintiff's negligence claim against Defendant Rogers is devoid of factual support and  
8 does not satisfy the federal courts' heightened pleading standards in the wake of *Bell Atlantic v.*  
9 *Twombly* and *Iqbal v. Ashcroft*. Plaintiff's claim against Defendant Rogers, indeed amounts to  
10 little more than a formulaic recitation of the elements of a cause of negligence, along with  
11 general "defendant-unlawfully- harmed me" accusations like those rejected in *Iqbal & Twombly*.  
12

13 The clearest example of the deficiencies in Plaintiff's complaint arises with regard to the  
14 alleged duty owed by Defendant Rogers. "[T]o state a negligence cause of action, the defendant  
15 must owe a duty of due care to the person injured, or to a class of persons of which the plaintiff  
16 is a member." *Valdez v. J. D. Diffenbaugh Co.*, 51 Cal. App. 3d 494, 124 Cal. Rptr. 467

17  
18  
19 (1975). Paragraph 42 of Plaintiff's complaint is the only paragraph that attempts to establish a  
20 legal duty owed by Defendant Rogers to Plaintiff. In support of this proposition, Plaintiff offers  
21 the following: "Defendant Hatfield had a duty to secure his Internet connection." (Doc. 1 at  
22 ¶42).

23  
24 This is *precisely* the "[t]hreadbare recital of the elements of a cause of action, supported  
25 by mere conclusory statements" that "do not suffice." *Twombly* 127 S.Ct. at 1955. This court is  
26

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1 not “bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal* 129 S.Ct.  
2 at 1950.

3 Plaintiff has offered no factual or legal support for the (literally) unprecedented proposition that  
4 an ISP subscriber (ergo, *all ISP subscribers*) owe a duty to Plaintiff (and all pornography  
5 companies, and all other companies that own intellectual property rights) to take specific steps to  
6 secure their Internet connection to prevent copyright infringement. The allegation that  
7 “Defendant Rogers had a duty to secure his Internet connection” is the epitome of a legal  
8 conclusion couched as a factual statement, and is the only support for the unprecedented  
9 proposition embodied within it.  
10  
11

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

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

20 *Liberty Media Holdings v. Swarm* No. 11-00262-DAE-RLP (Docket NO. 66 - Order Granting in  
21 Part and Denying in Part Defendant Hatcher’s Motion to Dismiss...)(D. Haw. January 30, 2012).  
22 See also, *Liberty Media Holdings v. Swarm...and Does 1-62*, 2011 WL 1869923 (S.D. Cal. May  
23 12, 2011). On motion for expedited discovery, Court determined that Plaintiff’s cause of action  
24 for negligence could not withstand a motion to dismiss). Plaintiff herein has offered nothing  
25 more than a threadbare assertion that Defendant Rogers had a duty to secure his Internet  
26 connection, entirely devoid of any factual support for the proposition. Thus, assuming arguendo  
27

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1 that negligence is not preempted *and* that Defendant does not qualify for CDA immunity,  
2 Plaintiff's cause of action for negligence must nonetheless be dismissed for failing to allege  
3 sufficient factual basis to support the claim.  
4

5  
6 **4. PLAINTIFF'S LACK OF FACTS REGARDING DEFENDANT'S**  
7 **INFRINGEMENT AND CONTRIBUTORY INFRINGEMENT CANNOT**  
8 **SURVIVE A 12(B)(6) MOTION.**

9 The infringement claim and contributory infringement claim are devoid of plausible  
10 evidence or facts, and therefore do not satisfy the pleading standards of *Iqbal* and *Twombly*. All  
11 allegations against Defendant Rogers are based on a 'snapshot' of bittorrent activity obtained by  
12 AF Holdings. Using questionable methods, they identified an IP number that may, or may not  
13 have been linked with Defendant Rogers' ISP account.  
14

15  
16  
17 **A. An IP Address is Not Sufficient to Identify a Person**

18 The IP evidence is not sufficiently linked to Defendant and therefore fails the Plausibility  
19 Test set forth in *Iqbal* and *Twombly*. There is a growing body of district court decisions to quash  
20 and dismiss cases of copyright infringement that are based merely on IP address, *See, e.g., In re*  
21 *Bit Torrent Adult Film*, supra, 2:11-cv-03995, May 1, 2012, at p. 6; *Malibu Media LLC v. John*  
22 *Does 1-10*, 2:12-cv-3623, Order, June 27, 2012. Most pertinent is the decision of Judge Gary  
23 Brown in *K-Beech, Inc. v. John Does 1-37 2:11-cv-03995* PACER Case # 321301 (EDNY 2011)  
24

25 The assumption that the person who pays for Internet access at a given  
26 location is the same individual who allegedly downloaded a single sexually  
27 explicit film is tenuous, and one that has grown more so over time. **An IP**

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1 **address provides only the location at which one of any number of computer**  
2 **devices may be deployed...**

3 Thus, it is no more likely that the subscriber to an IP address carried out a  
4 particular computer function – here the purported illegal downloading of a single  
5 pornographic film – than to say an individual who pays the telephone bill made a  
6 specific telephone call.

7 Indeed, due to the increasingly popularity of wireless routers, it much less  
8 likely.

9 Plaintiff's counsel estimated that 30% of the names turned over by ISPs are  
10 not those of individuals who actually downloaded or shared. In sum, although the  
11 complaints state that IP addresses are assigned to “devices” and thus by  
12 discovering the individual associated with that IP address will reveal “defendants’  
13 true identity,” this is unlikely to be the case. **Most, if not all, of the IP addresses  
14 will actually reflect a wireless router or other networking device.**

15 *K-Beech, Inc. v. John Does 1-37 2:11-cv-03995* PACER Case # 321301 (EDNY 2011)(emphasis

16 added) Judge Brown goes on to note that regardless is a wireless router has been secured,  
17 neighbors or passerby could access the Internet using an IP address from “beyond 600 feet”  
18 away.

19 **B. Forensic Software Used by Plaintiff Is Unreliable Further Undermining Plausibility.**

20 IP evidence cited by Plaintiff is unreliable and therefore does not meet the Plausibility  
21 Test put forth in *Iqbal* and *Twombly*. An error rate of at least 30% has been cited for the  
22 forensics investigation companies used in bittorrent cases. In a case out of the Southern District  
23 of New York, Plaintiff's counsel estimated “that 30% of the names turned over by ISPs are not  
24 those of individuals who actually downloaded or shared copyrighted material.” *Opinion and  
25 Order, Digital Sin, Inc. v. John Does 1-176*, 2012 W.L. 263491, 12-cv-00126 (S.D.N.Y. Jan. 30,  
26 2012) at p. 5. Even more concerning is that the Plaintiffs are willing to rely on dubious  
27 information when attempting to encourage

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1 Defendants to settle the action without a review of the strength of the individual claim. No civil  
2 litigator would file lawsuits with an error rate of 30% without having to consider the  
3 consequences under Federal Rules of Civil Procedure Rule 11 and 28 U.S.C. 1927.  
4

5  
6 **C. A “Snapshot” Observation is Not Enough to Plausibly Infer Copyright Infringement**

7 **Under §106**

8 Disregarding IP addresses, there is still no plausible evidence to show copyright  
9 infringement or contributory infringement took place. Under Copyright Law §106 “A  
10 copyrighted work would be infringed by reproducing it in whole or in any substantial part.” In  
11 Plaintiff’s Complaint ¶23 the limited scope of the evidence is mentioned, “Plaintiffs investigators  
12 detected Defendant’s illegal download on 5/7/2012 at 7:45:42 PM (UTC). However, this is a  
13 simply a snapshot observation of when the IP address was observed in the BitTorrent swarm”  
14 This, one minute “snapshot” would show only a tiny fraction of the video could have been  
15 reproduced within that one minute time frame, not the “substantial part” required to constitute  
16 infringement under §106.  
17  
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19  
20 **IV. CONCLUSION**

21 For the reasons outlined above, Defendant respectfully requests that this court dismiss the claim  
22 of negligence against Defendant Rogers. Plaintiff’s cause of action is explicitly preempted by  
23 Copyright Act §301, and is further preempted by the doctrines of conflict and field preemption.  
24 Additionally, Defendant is immune from liability for the alleged acts under CDA §230 and  
25 Plaintiff’s complaint should therefore be dismissed. Plaintiff has also failed to adequately allege  
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1 the existence of a duty owed by the Defendant to the Plaintiff. Each of these failings are  
2 independently adequate for dismissal.  
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7 Dated this 17th of November, 2012

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10 Christopher Allan Rogers  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

AF Holdings, LLC )  
Plaintiff )  
vs. )  
Chris Rogers )  
Defendant )  
\_\_\_\_\_ )

Case No. 3:12-cv-01519-BTM-BLM

DECLARATION OF SERVICE

Person Served:  
Brett L. Gibbs, Council for Plaintiff  
Date Served:  
11/19/12

I, the undersigned declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; that I served the above named person the following documents:

in the following manner: (check one)

- 1) By personally delivering copies to the person served.
- 2) By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to their person served at the place where the copies were left.
- 3) By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left.

- 4) By placing a copy in a separate envelope, with postage fully prepaid, for each address named below and depositing each in the U.S. Mail at  
on \_\_\_\_\_, 20\_\_\_\_ .  
Brett L. Gibbs  
38 Miller Avenue #263  
Mill Valley, CA 94941

Executed on Nov. 19, , 2012 at SAN DIEGO, CA.