

1 Ira P. Rothken (SBN #160029)
2 ROTHKEN LAW FIRM
3 3 Hamilton Landing, Suite 224
4 Novato, CA 94949
5 Telephone: (415) 924-4250
6 Facsimile: (415) 924-2905

7 Attorney for Defendants
8 Justin Bunnell, Forrest Parker, Wes
9 Parker and Valence Media, Ltd.
10

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 COLUMBIA PICTURES, et. al.,
14 Plaintiffs,

15 vs.

16 JUSTIN BUNNELL, et. al.,
17 Defendants.
18

Case No. 06-01093 JSL (JCx)

DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
[Rule 12(b)(6)]

19 Date: May 8, 2006
20 Time: 1:00 p.m.
Place: Ctrm 4

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1. Introduction and Statement of Facts

The subsections below are a summary of plaintiffs' allegations. Distilled down, in terms of technology, nothing more is alleged in the complaint than a visitor to defendants' website can take advantage of automated search processes embodied there to search for and locate "dot torrent" files. Such files contain textual information assembled by automated processes and without copyrighted content. After leaving the defendants' website, the visitor can pursue the data in the .torrent file using third party software; and that pursuit may, according to the desires of the user and the uncertain nature of the availability of third party files on the internet, lead to infringing files located elsewhere on the Internet.

a. Framework Allegations

Plaintiffs "are among the leading motion picture studios in the world." (Complaint at 6:6-7.) Plaintiffs produce copyrighted movies and television programs that have been copied without authorization; and copies of plaintiffs' programs are being exchanged over the Internet by persons who infringe plaintiffs' copyrights and who deprive plaintiffs of the rewards on which their industry is premised. (*Id.*, at 3:15-24.)

Defendants are Internet entrepreneurs providing searching and indexing services via a "torrent website" that is used by visitors who are exchanging files in an Internet peer-to-peer networking environment identified by the name "BitTorrent." (*Id.*, at 3:9-10, 3:26-4:2, 4:22-25 and 5:6-12.) In peer-to-peer networking, "the actual downloading and uploading – takes place directly between users (or 'peers') of the network." (*Id.*, at 4:1-2.) Defendants are not alleged to be users or peers.

Plaintiffs forthrightly acknowledge: "BitTorrent is used for legitimate purposes or copyright infringement." (*Id.*, at 4:2-3.) In contrast to conventional search engines like Google, the torrent system provides the user with a virtual representation of a selected portion of the Internet for the user's greater

1 convenience and utility. Google provides a list of links that the user must
2 investigate while the torrent system incorporates automated processes that locate
3 the information desired regardless of missing links or a lack of information at the
4 website indicated by the link.

5 In addition to using an indexing/linking "torrent site" like that operated by
6 defendants, individual users who use .torrent files must access another Internet
7 resource called a "BitTorrent tracker," (*Id.*, at 4:22-25), which "manages the
8 distribution of files, connecting uploaders (those who are distributing a movie)
9 with downloaders (those who are copying a movie). A tracker functions in
10 many respects like a 'traffic cop,' directing a BitTorrent user's computer where to
11 find users who have a particular file." (Complaint at 5:13-15.) A torrent site like
12 that operated by defendants "instructs the client software [in the visitor's
13 computer] how to connect to a tracker." (*Id.*, at 5:20.) There is no allegation that
14 defendants' website manages file distribution like a tracker.

15
16 b. Alleged Acts of Infringement

17 No specific or actual acts of infringement are alleged to have been
18 committed, either by defendants or by any third party.

19 As for defendants, there is no suggestion that defendants themselves have
20 copied or distributed any infringing file. The gist of the Claim for Relief is that
21 "Defendants are liable ... for ... acts of users of their torrent site." (Complaint at
22 9:24-25, 10:9-10 and 10:19-20.) There is no allegation that any infringing
23 materials are actually posted on defendants' website. All claims are based on the
24 alleged infringing activities of third parties carried out through BitTorrent peer-
25 to-peer networking.

26 There is no specific allegation of any act of infringement by any third party.
27 Attached to the complaint as Exhibit A is a list of 18 "titles" along with copyright
28 registration information. In the Claim For Relief alleged in the complaint at

1 9:19 - 10:27, defendants are alleged to have knowingly induced, knowingly
2 caused and/or otherwise materially contributed and/or to have become
3 vicariously liable for "the unauthorized reproduction and distribution of
4 copyrighted motion pictures and television programs, including those listed on
5 Exhibit A hereto." The Claim is entirely categorical and conclusory.

6 The only references in the complaint to specific copyrighted works are to
7 movies Men in Black II, Batman Begins and The Italian Job, allegedly "offered
8 for download" (*Id.*, at 8:1-2) and to television programs Alias and The Simpsons
9 allegedly indexed "by the titles of individual copyrighted television series." (*Id.*,
10 at 8:4-5.) However, Alias does not appear on Exhibit A, which only identifies a
11 single, specific episode of The Simpsons. There is no allegation in the
12 Complaint that defendants are somehow responsible for collective infringement
13 of The Simpsons as an "individual copyrighted television series." There is no
14 allegation of a download of the specific episode of The Simpsons listed in
15 Exhibit A, which is the only tether for plaintiff Twentieth Century Fox Film
16 Corporation in this action. There is no better tether for any other plaintiff.

17 Although the Claim for Relief categorically alleges that downloads were
18 "unauthorized," there is no specific allegation of any actual unauthorized
19 download. As shown in the Request for Judicial Notice, Exhibit A, a
20 well-established website offers an authorized download of the trailer for "Batman
21 Begins." As Exhibit B shows, a Google search seeking both "Batman Begins"
22 and "downloads" produces links to other apparently authorized downloads,
23 apparently indiscriminately mixed with links to infringers. The absence of
24 allegations of specific ***unauthorized*** downloads in the complaint is not
25 inadvertent: rather, it is part of an improper complaint that purports to impose
26 ***presumptive liability*** on an Internet service provider for ***failure to investigate***
27 whether Internet materials offered by some third parties for other third parties to
28 download were authorized for distribution by the copyright owner.

1
2 c. Defendants' Alleged Activities

3 The charges against defendants are broadbrush, categorical accusations
4 repeated in various phrasings and combinations but without support of
5 allegations of specific facts. There is nothing behind allegations that defendants
6 "tout the infringing nature of the torrent files" (complaint at 3:8) and display
7 "blatant infringements" (*Id.*, at 7:21).

8 At 9:9-12 of the complaint, plaintiffs allege that: "The evidence of
9 inducement is flagrant and voluminous and includes, but is not limited to, the
10 overwhelming infringing content available on Defendants' torrent site and the
11 indexing of torrent files according to the specific titles of copyrighted television
12 programs." As noted above, there is no "infringing content" actually on
13 defendants' website and the only "availability" is through links that the users can
14 access "[b]y clicking" (complaint at 4:17).

15 In terms of technology, nothing more is alleged that a visitor to defendants'
16 website can take advantage of automated search processes embodied there to
17 search for and locate "dot torrent" files. Such files contain textual information
18 assembled by automated processes and without copyrighted content. After
19 leaving the defendants' website, the visitor can pursue the material in the .torrent
20 file using third party software; and that pursuit may, according to the desires of
21 the user, lead to infringing files located elsewhere on the Internet.

22 There is nothing alleged to distinguish defendants' website from that
23 maintained by Google. As shown in Exhibit B to the Request for Judicial
24 Notice, everything alleged about defendants' website is true about Google, and
25 even more so, because Google outperforms the allegations in the complaint.
26 Plaintiffs' factually empty and broadbrush categorical accusations are like mud
27 that covers all distinctions.

28 Plaintiffs' complaint further has a tendency to induce impressions contrary

1 to its own factual allegations, as exemplified by paragraph 29:

2 "Defendants exercise control over the infringing content on their
3 torrent site. Defendants decide exactly what torrents are indexed on
4 their site. If fact, Defendants have a stated policy forbidding the
5 uploading of torrents for pirated software (or 'warez') but they have no
6 such policy for movies or television programs. The fact is that
7 Defendants easily could prevent infringement of Plaintiffs' copyrighted
8 works by not indexing torrent files corresponding to Plaintiffs'
9 copyrighted works. Defendants also have the ability to decide which
10 users can access their torrent site, including the right and ability to
11 exclude or ban specific users, such as by not allowing users with
12 particular login names to upload or download torrent files."

13 The last clause of paragraph 29 helps to correct any false impressions induced
14 by the preceding language. As alleged in such clause, a visitor to defendants'
15 website logs in with a name and can then upload or download torrent files. [Of
16 course, an individual can log in with various names and/or from various computers.]

17 "Defendants operate one of the largest and most active torrent sites on the
18 Internet." (Complaint at 7:12-13.) "Defendants' website has at times claimed to
19 provide over 25,000 torrent files for movies, and over 20,000 for television shows."
20 Even disregarding other "voluminous" classes of .torrent files indexed on the site,
21 such as software programs (referenced in the allegation about "warez"), it is evident
22 from the complaint that many thousands of links to .torrent files are accessible
23 through defendants' website at any given time and that there is constant turnover.
24 The information available to defendants (like anyone else) is contained in the name
25 of the link and file written by the person who originates or uploads the link.
26 Defendants do not originate or upload links to infringing materials.

27 If there is infringement, the chief and primary act is obviously committed by
28 the person who copies materials from a DVD or other commercial product prior to

1 any involvement with the Internet. There is nothing in paragraph 29 that suggests
2 that defendants could do anything to "prevent" such infringement. The alleged
3 capacity of defendants to "prevent infringement" or to "decide exactly what torrents
4 are indexed on their site," as alleged in paragraph 29, is nothing more than a
5 capacity to censor .torrent files on the basis of link and filename. Hence, the
6 means by which "Defendants [could] exercise control over the infringing content on
7 their torrent site" would be to inspect all link uploads for filenames that might lead
8 to infringing materials and then either to disable all such .torrent files out of fear or
9 to investigate each particular .torrent file and determine whether referenced material
10 located elsewhere on the Internet was copied from a commercial movie or TV
11 show, and, if copied, whether the copying was authorized. Apparently, plaintiffs
12 are demanding that defendants monitor the Internet as a whole for infringing
13 materials at defendants' own expense and for the benefit of the entertainment
14 industry. In any event, allegation about control here are factually empty.

15 Other allegations in the complaint contain craftily constructed ambiguities.
16 For example, it is alleged at 8:9-11 that "One category of movie torrents is called
17 'New - CAM,' which refers to in-theater movies recorded by camcorder, a
18 category that, by definition, contains illegal content." Even if (contrary to the
19 facts in this user-defined environment) defendants were responsible for naming a
20 category of .torrent files on their website "New - CAM," there is no ascertainable
21 source for allegations about "refers" or "definition" as such category can refer to
22 "home movies" amongst other things.

23 Apparently, it is nothing more than plaintiffs' impressions that are being
24 alleged. Likewise ambiguous and impressionistic are allegations about
25 "evidence of inducement [that] is flagrant and voluminous" and "overwhelming
26 infringing content available on Defendants' torrent site." (Complaint at 9:10-11).
27 We ask: voluminous compared to what? flagrant under whose standard? who
28 or what is being overwhelmed? and what kind of indirect connection is meant by

1 the word "available?" The only alleged connection is a string of symbols in a
2 "URL" and filename in a file maintained by defendants that resembles a name of
3 a title of a production that has been copyrighted by plaintiffs. In the chief
4 example examined, that of *The Simpsons*, supra, there is not even an alleged
5 match between any referenced string of symbols in a URL and/or filename and
6 the copyright alleged to have been infringed.

7 8 **2. Legal Argument**

9 a. Legal Standard.

10 In deciding a motion pursuant to Rule 12(b)(6), the court accepts all
11 allegations of the complaint as true, construed in the light most favorable to the
12 nonmoving party. A complaint should not be dismissed unless plaintiff can prove
13 no set of facts in support of his claim which would entitle him to relief. *Wylar*
14 *Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th
15 Cir. 1998).

16 As a balancing principle, conclusory allegations of law and unwarranted
17 inferences are insufficient to defeat a motion to dismiss for failure to state a
18 claim. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
19 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

20 In *Dura Pharmaceuticals v.*, 544 U.S. 336, 125 S. Ct. 1627, 1634 (2005),
21 the court held that allegations of loss were insufficient and stated: that "We
22 concede that ordinary pleading rules are not meant to impose a great burden upon
23 a plaintiff. [Citation.] But it should not prove burdensome for a plaintiff who has
24 suffered an economic loss to provide a defendant with some indication of the loss
25 and the causal connection that the plaintiff has in mind."

26 27 b. Plaintiff's Complaint Should Be Dismissed.

28 Summary. Of central importance is the absence of any allegation that

1 defendants themselves copied, reproduced or distributed any infringing materials.
2 Therefore, any claim must be based on "doctrines of secondary liability," namely
3 contributory or vicarious copyright infringement. *Metro-Goldwyn-Mayer Studios,*
4 *Inc. v. Grokster*, __ U.S. ___, 125 S.Ct. 2764, 2776, 162 L.Ed.2d 781 (2005)
5 (hereinafter "Grokster").¹

6 To support a claim of secondary liability, there must be a showing of
7 "actual infringement" (*Grokster*, 125 S.Ct. at 2782). **The complaint fails to**
8 **allege any actual infringement whatsoever.** Because "BitTorrent is used for
9 legitimate purposes or copyright infringement," (complaint at 4:2-3), "mere
10 knowledge of or infringing potential or of actual infringing uses would not be
11 enough." (*Grokster* at 125 S.Ct. 2780, affirming *Sony Corp. of America v.*
12 *Universal City Studios, Inc.*, 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774
13 (1984).) The claim cannot rest on allegations about the nature of the BitTorrent
14 network and the facilities defendants provide, e.g., "By clicking on the file name,
15 an illegal copy of the movie or television program is automatically copied to a
16 user's computer." – complaint at 4:17-19.

17 Plaintiffs have failed to allege any specific facts of defendants' alleged
18 wrongdoing. There are no facts showing a "clear expression or other affirmative
19 steps taken to foster infringement" on the parts of defendants. (*Grokster*, at 125
20 S.Ct. 2770.) Repeated conclusory accusations are not a substitute.

21 Without any predicate of actual infringement and without any substantial
22 allegations linking defendants even to hypothetical infringement, there are no
23 actual damages suffered "as a result of the infringement" and no claim to
24 defendants' profits, which must be "attributable to the infringement" under 17

25
26 ¹ Valence Media Ltd is a foreign entity located outside the United States and defendants' conduct
27 in this case may ultimately be governed by the law in the jurisdiction where Valence is located and
28 as such defendants reserve all rights on such issue. (see Article, "Dutch Supreme Court Rules
Kazaa Legal" in PCWorld.com at <http://www.pcworld.com/news/article/0,aid,113968,00.asp>.)

1 U.S.C. § 504(b). Evaluated according to "tort principles of causation and
2 damages," plaintiffs' claims are void of substance. *Polar Bear Prods. v. Timex*
3 *Corp.*, 384 F.3d 700, 708 (9th Cir. 2004), amended 2004 U.S. App. LEXIS 22140
4 (9th Cir. Mont., Oct. 25, 2004), reprinted as amended at 2004 U.S. App. LEXIS
5 22131 (9th Cir. Mont., Oct. 25, 2004) (hereinafter "Polar Bear").

6
7 1. Plaintiff's complaint should be dismissed because of the absence of
8 any allegation of actual primary infringement.

9 "Secondary liability for copyright infringement does not exist in the
10 absence of direct infringement by a third party." *A & M Records, Inc. v.*
11 *Napster, Inc.*, 239 F.3d 1004, 1013, n. 2. (2001). See also *Sega Enterprises,*
12 *Ltd. v. MAPHIA*, 948 F. supp. 923, 932 (N. D. Cal. 1996).

13 In *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F.3d 693, 706 (2d
14 Cir. 1998), the court adopted the rule stated in a treatise, "For a defendant to be held
15 contributorily or vicariously liable, a direct infringement must have occurred" and
16 noted that "West has failed to identify any primary infringer, other than Trittipio,
17 West's counsel." Summary judgment was granted in favor of Bender.

18 See also *Newborn v. Yahoo!, Inc.*, 391 F.Supp.2d 181, 186 (D.C. D.C. 2005);
19 *National Car Rental Sys. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 434 (8th
20 Cir. 1993) (citing *Nimmer on Copyright*).

21 Here, plaintiffs have failed to identify any infringement whatsoever. There is
22 no primary infringer identified and there are no infringing acts alleged. Plaintiffs
23 are in a position like that of "West [which] has hypothesized that users" will access
24 defendants' website to infringe. Plaintiff's categorical accusations of defendants'
25 unlawful intent and a hypothetical possibility of misuse of defendants' search
26 engines by third parties cannot and do not overcome the absence of allegations of
27 actual primary infringement and the complaint should be dismissed.

1 2. Plaintiff's complaint should be dismissed because of insufficient
2 allegations of secondary responsibility.

3 Plaintiffs' attempts to smear defendants with a broad brush of categorical
4 accusations are the most improper aspect of this improper complaint. The
5 complaint has been drafted not to identify issues but rather to confuse them. Such
6 improper tactics are especially prejudicial here because of the disproportionate
7 wealth and power of the parties. Plaintiffs' fears about copyright infringement
8 over the Internet do not give them a license to launch a pre-emptive war against
9 technical innovators whose products plaintiffs think are being used by infringers.
10 The *Sony* doctrine prevents such tactics.

11 Another improper and prejudicial feature of the complaint is its neglect of
12 context. The Internet is an enterprise of enormous scale and complexity and any
13 matter needs to be set in context. Plaintiffs' misleading complaint pretends that
14 the only thing happening at defendant's website is copyright infringement of
15 plaintiffs' movies and television programs and plaintiffs are pretending that the
16 only thing happening on the Internet is copyright infringement. But Judge Whyte
17 pointed to the real nature of things in the leading case of *Religious Technology*
18 *Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361, 1372
19 (N. D. Cal. 1995): "The court does not find workable a theory of infringement
20 that would hold the entire Internet liable for activities that cannot reasonably be
21 deterred." See also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S.
22 390, 396-397; 88 S. Ct. 2084; 20 L. Ed. 2d 1176 (1968).

23 The principle was stated and followed in the vacated decision *MGM*
24 *Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1164 (9th Cir. 2004) which applied
25 the *Sony* doctrine and held as follows:

26 "[T]he peer-to-peer file-sharing technology at issue is not simply a tool
27 engineered to get around the holdings of *Napster I* and *Napster II*. The
28 technology has numerous other uses, significantly reducing the

1 distribution costs of public domain and permissively shared art and
2 speech, as well as reducing the centralized control of that distribution."

3 Although the Supreme Court vacated the Ninth Circuit decision, the
4 reasoning was not rejected. The Supreme Court holding affirmed the continuing
5 validity of the *Sony* doctrine that "absolves the equivocal conduct of selling an
6 item with substantial lawful as well as unlawful uses." 125 S.Ct. at 2778.

7 *Grokster* held that, even though defendants could shelter under the *Sony* doctrine
8 for simple distribution of their software, they could also be held liable on the
9 strength of "statements or actions directed to promoting infringement." *Id.*, at
10 2779. In *Grokster*, there were plentiful statements and actions of the defendants
11 directed to promoting infringement. Here, there are only conclusory accusations.

12 Turning to specific claims, to support their claim of contributory
13 infringement, plaintiffs must allege that defendants had knowledge of actual
14 infringing activity and that plaintiffs induced, caused or materially contributed to
15 that activity. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

16 A defendant must possess either actual or constructive knowledge of the
17 infringing activity to be found contributorily liable. *Ellison*, supra. Here, there is
18 no actual infringing activity and no knowledge, actual or constructive, of any
19 infringing activity. At most there are claims that defendants have a duty to
20 acquire knowledge by inspecting indices of uploads and comparing filenames
21 found there with some speculative compendium of copyrighted titles. No such
22 duty exists. See *Perfect10 v. Google, Inc.*, 2006 U.S. Dist. LEXIS 6664 (C.D.
23 Cal., filed February 17, 2006) at *68.

24 There are no factual allegations of materiality. "Participation in the
25 infringement must be substantial. The ... assistance must bear a direct relationship
26 to the infringing acts, and the contributory infringer must have acted in concert
27 with the direct infringer." *Zvi Livnat v. Shai Bar Lavi*, 1998 U.S. Dist. LEXIS 917,
28 No. 96 Civ. 4967, 1998 WL 43221, at *3 (S.D.N.Y. Feb. 2, 1998).

1 Claims that defendants induced, caused or contributed to infringement are
2 based on nothing more than categorical accusations and phantasms based on false
3 impressions plaintiffs have intentionally constructed and that are analyzed in the
4 factual presentation, supra. Defendants submit that to allow this action to go
5 forward on such a basis is contrary to the purpose of achieving "substantial
6 justice." Fed.R.Civ.Pro. 8(f). Plaintiffs' enormous advantages of wealth and
7 access to litigation resources should not be further amplified by sanctioning their
8 pleading that gives no notice at all other than notice of an intention to destroy.
9 The claim for contributory copyright infringement should be dismissed.

10 A claim of vicarious liability is also factually void for the same reasons that
11 required the dismissal of plaintiff's claim in *Parker v. Google, Inc.*, 2006 U.S.Dist.
12 LEXIS 9860 (E.D.N.Y., March 10, 2006) at ** 15-16:

13 "Here, Plaintiff's claim of vicarious copyright infringement must fail.
14 Plaintiff has again failed to allege any infringing conduct. He points to
15 no specific registered works that were infringed nor does he allege
16 specific conduct by a third party which Google may have had the right
17 and ability to supervise. Next, Plaintiff fails to allege an 'obvious and
18 direct financial interest in the exploitation of copyrighted materials.'
19 Parker alleges merely that Google's advertising revenue is directly
20 related to the number of Google users and that the number of users 'is
21 dependent directly on Google's facilitation of and participation in the
22 alleged infringement.' (Doc. No. 11 P157.) This vague and conclusory
23 statement does not allege any actual relationship between infringing
24 activity and the number of users and thus does not allege obvious and
25 direct financial interest sufficient to maintain this claim of vicarious
26 infringement. See *Ellison*, 357 F.3d at 1079 (vicarious copyright
27 infringement claim fails where 'record lacks evidence that AOL
28 attracted or retained subscriptions because of the infringement or lost

1 subscriptions because of AOL's eventual obstruction of the
2 infringement')."

3 Here, as in *Parker*, there is a complete absence of factual showing but only
4 ambiguous, categorical accusations. As analyzed in the Statement of Facts, *supra*,
5 plaintiffs here "has ... failed to allege any infringing conduct" (*Parker*, *supra*) on the
6 part of anyone, either an uploader to defendants' website, a user of defendants'
7 website or defendants' themselves. The claim that defendants had a power or right
8 to stop or limit infringement by users of its website (see *Shapiro, Bernstein & Co.*,
9 316 F.2d 304, 308 (2nd Cir. 1963)) is nothing more than an unsupportable argument
10 that defendants must inspect their indices and either remove URLs to file names
11 resembling copyrighted titles or verify that no infringing materials are referenced
12 therein. "[V]ague and conclusory statements" (*Parker*, *supra*) in this complaint
13 about defendants' profits (see complaint at 8:26-9:6) are no stronger than those in
14 the prolix *pro se* complaint that the court dismissed in *Parker*, *supra*. There is
15 nothing of substance in the claim for vicarious copyright infringement and the
16 claim should be dismissed.

17
18 3. Plaintiff's complaint should be dismissed because of lack of causation
19 and damages.

20 In *Polar Bear*, *supra*, 384 F.3d 708, the court held that a copyright claim for
21 damages must be supported by a showing of causation and damages comparable to
22 that required of a tort plaintiff. For the reasons set forth *supra*, there is no such
23 showing here. No actual infringements are alleged. Plaintiffs, apparently acting
24 as representatives of the entertainment industry, are claiming some sort of
25 collective damages against defendants, as a scapegoat for infringements
26 supposedly assisted by the Internet development community. There is nothing, in
27 fact, more than scapegoating alleged in this complaint and it is insufficient.

28 The claim for injunctive relief must also fall. "An injunction can issue only

1 after the plaintiff has established that the conduct sought to be enjoined is illegal
2 and that the defendant, if not enjoined, will engage in such conduct." *Memphis*
3 *Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8; 98 S. Ct. 1554; 56 L. Ed. 2d 30
4 (1978) quoting and citing *United Transportation Union v. Michigan Bar*, 401 U.S.
5 576, 584 (1971).

6
7 **3. Conclusion**

8 Plaintiffs are attempting to steamroller defendants by means of an improper
9 pleading. At the level of concrete specificity, the complaint is fatally defective in
10 lacking allegations of any actual infringement. Not a single element of any cause
11 of action is properly alleged. Allegations about defendants' supposed wrongdoing
12 are nothing more than attempts to create impressions that are devoid of substance.
13 No genuine claim for relief is presented but rather some sort of tertiary liability
14 not legally recognizable as a cause of action.

15 For the foregoing reasons, defendants respectfully request that the court
16 dismiss plaintiffs' complaint.

17 ///

18 ///

19 Dated: March 27, 2006

ROTHKEN LAW FIRM

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21
22 

23 Ira P. Rothken, Esq.,
24 Attorney for Defendants

25 3 Hamilton Landing, Suite 224
26 Novato, CA 94949
27 Telephone: (415) 924-4250
28 Facsimile: (415) 924-2905

1 **PROOF OF SERVICE**

2
3 I am over the age of 18 years, employed in the county of Marin, and not a party to the
4 within action; my business address is 3 Hamilton Landing, Suite 224, Novato, CA 94949.

5 On March 27, 2006, I served the within:

6 DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN
7 SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO
8 STATE A CLAIM [Rule 12(b)(6)]

9 by FEDEX by placing a copy in a FEDEX envelope, prepaid and depositing in a FEDEX BOX for
10 delivery on the person(s) or entities follows:

11 **Duane Charles Pozza**

12 **Katherine A Fallow**

13 Jenner and Block

14 601 Thirteenth Street NW, Suite 1200 South

15 Washington, DC 20005

16 202-639-6000

17 Email: dpozza@jenner.com

18 **Karen R Thorland**

19 **Walter Allan Edmiston, III**

20 Loeb and Loeb

21 10100 Santa Monica Blvd, Ste 2200

22 Los Angeles, CA 90067-4164

23 310-282-2000

24 Email: kthorland@loeb.com

25 I declare under penalty of perjury that the foregoing is true and correct.

26 Executed March 27, 2006, at San Rafael, California.

27
28
