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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 Xcentric Ventures, LLC,

10 Plaintiff,

11 v.

12 Mediox Limited., a foreign corporation  
13 d/b/a ComplaintsBoard.com;  
14 ComplaintsBoard.com, an unregistered  
15 business entity; Mark Schultz, an individual

16 Defendants.

No. CV-12-00130-PHX-GMS

**ORDER**

17 Pending before the Court is the Motion to Dismiss of Defendants Mediox Ltd.,  
18 ComplaintsBoard.com, and Mark Schultz (“Defendants”). (Doc. 11.) For the reasons  
19 discussed below, the Motion is granted in part and denied in part.

20 **BACKGROUND**

21 Plaintiff Xcentric Ventures, LLC (“Xcentric”) is an Arizona limited liability  
22 company that owns and operates the website www.RipoffReport.com (the “Ripoff  
23 Report”). (Doc. 1 at 2.) The Ripoff Report permits consumers to post complaints about  
24 companies with whom they have had negative experiences. (Doc. 11 at 2.) Defendant  
25 Mediox Ltd. is a foreign corporation that owns and operates ComplaintsBoard.com, a  
26 website with the same premise as the Ripoff Report. (*Id.*) Defendant Mark Schultz is a  
27 former shareholder, director, and officer of Mediox, as well as an alleged part owner of  
28 ComplaintsBoard.com. (Doc. 11-1 at 7–8; Doc. 1 at 3.)

1 Xcentric owns copyrights of all the consumer complaints posted on the Ripoff  
2 Report. (Doc. 1 at 4.) In December 2008, Xcentric filed suit against the then-identified  
3 registrant of ComplaintsBoard.com, Elizabeth Arden, for systematically copying  
4 complaints from the Ripoff Report and posting them onto the ComplaintsBoard.com  
5 website. (*Id.* at 4–5.) Xcentric obtained a default judgment and permanent injunction  
6 against Elizabeth Arden on October 22, 2009. (*Id.* at 5.) Xcentric then began enforcement  
7 and collection proceedings, at which point Defendants (or at least some of them) entered  
8 into the litigation to oppose Xcentric’s efforts.<sup>1</sup> (Doc. 16 at 2–3.)

9 Xcentric filed suit against the current Defendants on January 20, 2012. (Doc. 1 at  
10 1.) Its Complaint alleges that Defendants “encourage and permit consumers to post  
11 content that has been exclusively licensed to Xcentric” and display Xcentric’s  
12 trademarked phrases on their website. (*Id.* at 5–6.) Xcentric asserts claims of copyright  
13 and trademark infringement, as well as a claim of unfair competition, against Defendants.  
14 (*Id.* at 7–10.)

15 Defendants contend that Xcentric’s Complaint should be dismissed because (1)  
16 Defendants do not have sufficient minimum contacts with the forum to justify this  
17 Court’s exercise of personal jurisdiction, (2) Xcentric has failed to state a claim because  
18 Defendants are protected by the DMCA’s safe harbor provisions, (3) Xcentric failed to  
19 timely serve Medioplex, (4) ComplaintsBoard.com is an improper party because it is a  
20 piece of property rather than an entity, and (5) Xcentric has failed to state a claim against  
21 Mark Schultz because he is protected by Arizona’s corporate veil doctrine.

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22  
23 <sup>1</sup> Xcentric attaches to its Response a series of pleadings and communications from  
24 Defendants and persons affiliated with Defendants that relate to Xcentric’s enforcement  
25 proceedings after the 2009 judgment. (Docs. 16-1–5.) On a motion to dismiss, however, a  
26 district court is limited in considering external documents. *U.S. v. Ritchie*, 342 F.3d 903,  
27 907–08 (9th Cir. 2003). While matters of public record, such as prior court proceedings,  
28 are proper subjects of judicial notice, the court may take notice only of the authenticity  
and existence of a particular order or pleading, not the veracity or validity of its contents.  
*Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001); *Walker v. Woodford*, 454  
F. Supp. 2d 1007, 1022 (S.D. Cal. 2006) *aff’d in part*, 393 F. App’x 513 (9th Cir. 2010).  
As such, the Court will not consider the contents of these exhibits on, and finds it  
unnecessary to the resolution of, this motion to dismiss.

1 **I. Personal Jurisdiction**

2 **A. Legal Standard**

3 “The party seeking to invoke the court’s jurisdiction bears the burden of  
4 establishing that jurisdiction exists.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986)  
5 (citing *Data Disc, Inc. v. Systems Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977));  
6 *Cubbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005,  
7 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). “When a defendant moves to dismiss for lack of  
8 personal jurisdiction, the plaintiff is ‘obligated to come forward with facts, by affidavit or  
9 otherwise, supporting personal jurisdiction.’” *Id.* (quoting *Amba Mktg. Sys., Inc. v. Jobar*  
10 *Int’l, Inc.*, 551 F.2d 784, 787 (9th Cir.1977)). “The mere allegations of a complaint, when  
11 contradicted by affidavits, are not enough to confer personal jurisdiction over a non-  
12 resident defendant.” *Chem Lab Products, Inc. v. Stepanek*, 554 F.2d 371, 372 (9th Cir.  
13 1977) (citing *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967));  
14 *Data Disc*, 557 F.2d at 1284 (citing *Taylor*, 383 F.2d at 639). However, “uncontroverted  
15 allegations in [the plaintiff’s] complaint must be taken as true, and ‘conflicts between the  
16 facts contained in the parties’ affidavits must be resolved in [the plaintiff’s] favor for  
17 purposes of deciding whether a prima facie case for personal jurisdiction exists.” *Am.*  
18 *Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (citing  
19 *WNS, Inc. v. Farrow*, 884 F.2d 200, 2003 (5th Cir. 1989)).

20 To establish a prima facie case for personal jurisdiction, the plaintiff has the  
21 burden of showing that: (1) the forum state’s long-arm statute confers jurisdiction over  
22 the nonresident defendant; and (2) the exercise of jurisdiction comports with principles of  
23 due process. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir.  
24 1995). Arizona’s long-arm statute confers jurisdiction to the maximum extent allowed by  
25 the Due Process Clause of the United States Constitution. ARIZ. R. CIV. P. 4.2(a); *Doe v.*  
26 *American Nat’l Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997). Therefore, the issue is  
27 whether the exercise of personal jurisdiction accords with due process. Due process  
28 requires a nonresident defendant to have “certain minimum contacts with [the forum]

1 such that the maintenance of the suit does not offend ‘traditional notions of fair play and  
2 substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (internal citation  
3 omitted). There are two types of personal jurisdiction, general and specific. *Burger King*  
4 *Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.5 (1985).

5 Xcentric only argues that this Court has specific jurisdiction over Defendants; it  
6 does not claim that this Court may exercise general jurisdiction over them. (Doc. 16 at 4.)  
7 Specific jurisdiction is analyzed under a three-pronged test: “(1) [t]he non-resident  
8 defendant must *purposefully direct his activities* or consummate some transaction with  
9 the forum or resident thereof; *or* perform some act by which he *purposefully avails*  
10 *himself* of the privilege of conducting activities in the forum, thereby invoking the  
11 benefits and protections of its laws; (2) the claim must be one which arises out of or  
12 relates to the defendant’s forum-related activities; and (3) the exercise of jurisdiction  
13 must comport with fair play and substantial justice, i.e. it must be reasonable.” *Mavrix*  
14 *Photo, Inc. v. Brand Tech., Inc.*, 647 F.3d 1218, 1227–28 (9th Cir. 2011) *cert. denied*,  
15 132 S. Ct. 1101, 181 L. Ed. 2d 979 (2012) (emphasis in original).

16 Here, because the underlying lawsuit sounds in copyright, a purposeful direction  
17 analysis is appropriate rather than a purposeful availment analysis. *Brayton Purcell LLP*  
18 *v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010). Purposeful direction is  
19 evaluated using the Supreme Court’s three-part *Calder* effects test. *Id.* Under this test,  
20 “the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed  
21 at the forum state, (3) causing harm that the defendant knows is likely to be suffered in  
22 the forum state.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433  
23 F.3d 1199, 1206 (9th Cir. 2006) (en banc) (internal quotation marks omitted).

## 24 **B. Analysis**

25 For the first prong of the *Calder* test, Xcentric alleges the following intentional  
26 acts by Defendants: encouraging and permitting consumers to post content that has been  
27 exclusively licensed to Xcentric and using Xcentric’s trademarks on the  
28 ComplaintsBoard.com website. (Doc. 1 at 5–6.) Defendants counter that they merely

1 “provide information on companies throughout the world” and that this passive act is  
2 insufficient to establish purposeful direction. (Doc. 11 at 7.) In support of this assertion,  
3 Defendants attach an affidavit from Sergei Kudriavstev, an officer, director, and  
4 shareholder in Mediolex, stating that the information provided on ComplaintsBoard.com  
5 “is not specifically directed at Arizona companies.” (Doc. 11-1 at 2.)

6 Kudriavstev’s affidavit does not controvert the allegations in Xcentric’s  
7 Complaint. The fact that ComplaintsBoard.com does not specifically direct information  
8 posted on its site towards companies in Arizona does not conflict with the allegation that  
9 Defendants intentionally encouraged consumers to post Xcentric’s copyrighted content or  
10 that Defendants intentionally used Xcentric’s trademarks. Kudriavstev’s statements  
11 apparently refer to the companies being reviewed on ComplaintsBoard.com, while the  
12 allegations in the Complaint go to the source of the content of those reviews. As such,  
13 Xcentric’s assertion of Defendants’ intentional acts stands uncontroverted, and the Court  
14 must take them as true. Thus, Xcentric has made an adequate showing of intentional acts,  
15 the first *Calder* prong.

16 The second *Calder* prong of express aim is satisfied when “a plaintiff alleges that  
17 the defendant individually targeted [it] by misusing [its] intellectual property on the  
18 defendant’s website for the purpose of competing with the plaintiff in the forum.”  
19 *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1077 (9th Cir. 2011). A claim  
20 that the defendant is accused of plagiarizing and republishing copyrighted material and  
21 that both parties are in the same “relatively specialized field,” is sufficient to allege that  
22 the defendant targeted the plaintiff’s business and entered into direct competition with the  
23 plaintiff. *Id.* at 1078.

24 Here, Xcentric has alleged that Defendants encouraged and permitted users of  
25 ComplaintsBoard.com to plagiarize and republish Xcentric’s copyrighted material and  
26 trademarks. (Doc. 1 at 5.) Furthermore, as admitted by both parties, Xcentric and  
27 Defendants are both in the business of posting negative consumer reviews of businesses.  
28 (*Id.* at 3; Doc. 11 at 2.) Defendants in fact state that they are in competition with

1 Xcentric. (Doc. 11 at 2 (describing ComplaintsBoard.com as “a competing website” to  
2 the Ripoff Report).) As discussed above, the affidavits attached by Defendants state  
3 merely that the content of ComplaintsBoard.com does not target Arizona companies; they  
4 do not controvert Xcentric’s allegations of republication and competition. Thus, the Court  
5 takes Xcentric’s allegations as true, and they satisfy the second prong of express aim.

6 The third prong of the *Calder* effects test is also satisfied, as Xcentric alleges in  
7 the Complaint that all Defendants acted with the “knowledge that they would cause harm  
8 within the State of Arizona,” and Defendants have submitted no affidavit controverting  
9 this allegation. Furthermore, “a corporation incurs economic loss, for jurisdictional  
10 purposes, in the forum of its principal place of business.” *CollegeSource*, 653 F.3d at  
11 1079. Xcentric’s principal place of business is in Tempe, Arizona. (Doc. 1 at 2.) Thus, all  
12 three prongs of the *Calder* effects test are met, and Xcentric has met its burden of  
13 alleging facts that constitute purposeful direction.

14 Defendants do not contest that the Xcentric’s claim arises out of Defendants’  
15 forum-related activities. As alleged by Xcentric, Defendants’ forum-related activities are  
16 that they intentionally encouraged and permitted consumers to copy Xcentric’s  
17 copyrighted reviews and that they intentionally infringed on Xcentric’s trademarks.  
18 These activities are related to the forum because Xcentric is based in Arizona, and they  
19 are the very activities out of which Xcentric’s claim arises. Thus, the second part of the  
20 three-pronged specific jurisdiction test has been met.

21 Because Xcentric has made a satisfactory showing of the first two prongs of the  
22 specific jurisdiction test, the burden now falls on Defendants to put forth a “compelling  
23 case” that this Court’s exercise of personal jurisdiction would be unreasonable. *Mavrix*  
24 *Photo*, 647 F.3d at 1228. The reasonableness determination depends on factors such as:  
25 the extent of the defendant’s purposeful interjection into the forum, the defendant’s  
26 burdens from litigating in the forum, the extent of conflict with the sovereignty of the  
27 defendant’s state, the forum state’s interest in adjudicating the dispute, the most efficient  
28 forum for judicial resolution of the dispute, the plaintiff’s interest in effective and

1 convenient relief, and the existence of an alternative forum. *Russo v. Manheim*  
2 *Remarketing, Inc.*, No. CV-11-393-PHX-JAT, 2012 WL 2191649 at \*11 (D. Ariz. June  
3 14, 2012) (quoting *Ziegler v. Indian River Cnty.*, 64 F.3d 470, 475 (9th Cir. 1995)).

4 The first factor is the extent of purposeful interjection into the forum. As discussed  
5 above, Defendants allegedly purposefully directed their activities to Arizona. However,  
6 the extent of interjection has not been great. Xcentric apparently alleges that Defendants  
7 only remotely encouraged and permitted users to copy Xcentric's content, presumably by  
8 allowing users to place Xcentric's content on the ComplaintBoard without monitoring  
9 whether it was copyrighted. There is no allegation that Defendants themselves ever made  
10 any contact with Arizona by phone calls, letters, or physical trips. This factor, therefore,  
11 weighs in Defendants' favor.

12 The second factor is Defendants' burden from litigating in the forum. Defendants  
13 argue that they would be subject to a significant burden from having to litigate "on the  
14 other side of the world, in a foreign language, utilizing an unfamiliar legal system." (Doc.  
15 11 at 8.) It indeed appears that litigating in the District of Arizona would be inconvenient  
16 for the foreign Defendants. However, the burden on Defendants is to put on a compelling  
17 case against exercising jurisdiction. Defendants have not presented any evidence or  
18 specific facts showing the extent of the burden they would suffer. Furthermore, "the  
19 advent of modern transportation . . . has made the burden of defending in a foreign forum  
20 more palatable." *Ballard v. Savage*, 65 F.3d 1495, 1501 (9th Cir. 1995) (internal  
21 quotations omitted). Thus, this factor does not weigh in Defendants' favor.

22 The third factor is the extent of conflict with the sovereignty of Defendants' state.  
23 Defendants allege that Medioplex is incorporated in the Republic of Seychelles and that  
24 Schultz is a resident of Latvia. (Doc. 11 at 2-3.) As such, foreign sovereignty interests  
25 would be implicated by the District of Arizona's exercise of jurisdiction. This factor  
26 weighs in Defendants' favor.

27 The fourth factor is the forum state's interest in adjudicating the dispute. As  
28 Xcentric notes, Arizona has a "strong interest in protecting its residents from injury and

1 in furnishing a forum where their injuries may be remedied.” *Ochoa v. J.B. Martin &*  
2 *Sons Farms, Inc.*, 287 F.3d 1182, 1193 (9th Cir. 2002). This factor therefore weighs in  
3 Xcentric’s favor.

4 The fifth factor is whether the District of Arizona is the most efficient forum for  
5 resolution of these claims. Defendants appear to argue that a better forum exists “where  
6 Defendants reside,” but they never state what country that is. (Doc. 11 at 8.) Previous  
7 litigation related to the facts of this lawsuit already took place in the District of Arizona.  
8 Therefore, this factor weighs in favor of Xcentric. *See Ballard*, 65 F.3d at 1502  
9 (concluding that it would be more efficient to litigate the dispute in a forum “already . . .  
10 familiar with the facts and procedural history of the litigation.”)

11 The sixth factor is the plaintiff’s interest in efficient and convenient relief.  
12 Xcentric is located in Arizona and has already litigated a similar and related case in this  
13 district. Therefore, this factor weighs in Xcentric’s favor. The final factor is the existence  
14 of an alternative forum. Defendants state that “[t]here is a perfectly acceptable legal  
15 system in place where Defendants reside.” (Doc. 11 at 8.) Again, Defendants do not  
16 specify where that is, and their other allegations indicate that it could be at least two  
17 places. Defendants do not elaborate on why the system in their place of residence,  
18 wherever it may be, is preferable to the District of Arizona. Because the burden is on  
19 Defendants at this stage of the personal jurisdiction analysis, this factor weighs in  
20 Xcentric’s favor.

21 Five of the seven factors in the reasonableness inquiry weigh against Defendants.  
22 As such, they have not met the “heavy burden of rebutting the strong presumption in  
23 favor of jurisdiction.” *Ballard*, 65 F.3d at 1500. Therefore, because Xcentric has made a  
24 prima facie showing that personal jurisdiction exists over Defendants and Defendants  
25 have failed to rebut that showing, the Motion to Dismiss for lack of personal jurisdiction  
26 is denied.

## 27 **II. Failure to State a Claim**

28 Under the Digital Millennium Copyright Act (“DMCA”), a service provider is



1 protected from liability for copyright infringement if it meets a number of requirements.  
2 *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1030 (9th Cir.  
3 2011). Defendants contend that Xcentric has failed to state a claim against them because  
4 they qualify for one of the DMCA’s safe harbors under 17 U.S.C. § 512(c).

5 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil  
6 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a  
7 “formulaic recitation of the elements of a cause of action”; it must contain factual  
8 allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*  
9 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need not contain  
10 detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is  
11 plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.  
12 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the  
13 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
14 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
15 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more than a  
16 sheer possibility that a defendant has acted unlawfully.” *Id.* When a complaint does not  
17 “permit the court to infer more than the mere possibility of misconduct, the complaint has  
18 alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (internal  
19 quotation omitted).

20 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll  
21 allegations of material fact are taken as true and construed in the light most favorable to  
22 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,  
23 legal conclusions couched as factual allegations are not given a presumption of  
24 truthfulness, and “conclusory allegations of law and unwarranted inferences are not  
25 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
26 1998).

27 The safe harbor provision of the DMCA states that a “service provider shall not be  
28 liable for monetary relief” if all of the following requirements are met: (1) it does not

1 have actual knowledge that the material on its network is infringing, (2) it is not aware of  
2 facts or circumstances that would make the infringing activity apparent, and (3) upon  
3 obtaining knowledge or awareness of such infringing activity, it acts expeditiously to  
4 remove or disable access to the copyrighted material. 17 U.S.C. § 512(c) (2010).

5 Defendants again argue that they cannot be held liable because the only act  
6 Xcentric has alleged is that “other people are allegedly posting [Xcentric’s] material” on  
7 ComplaintsBoard.com. (Doc. 11 at 10.) However, Defendants mischaracterize the  
8 Xcentric’s allegations. Xcentric did not allege that Defendants were merely passively  
9 allowing third parties to post copyrighted content on ComplaintsBoard.com. Instead, it  
10 alleged that Defendants actively “encouraged and permitted” this practice by third  
11 parties. This allegation, if taken as true, may be sufficient to preclude Defendants from  
12 taking advantage of the DMCA’s safe harbor provisions. Nevertheless, Defendants are  
13 correct in stating that Xcentric has failed to state a copyright claim on which relief may  
14 be granted.

15 A plaintiff claiming copyright infringement must establish two elements: (1)  
16 ownership of a valid copyright, and (2) that the defendants violated the plaintiff’s  
17 exclusive rights under the Copyright Act. 17 U.S.C. § 501(a) (2003); *Ellison v.*  
18 *Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). There are three doctrines of copyright  
19 liability: direct, contributory, and vicarious. *Ellison*, 357 F.3d at 1076. It is clear from the  
20 Complaint that Xcentric has not alleged direct copyright infringement; it does not claim  
21 that Defendants personally copied Xcentric’s exclusive material, but rather that  
22 Defendants “encouraged and permitted” others to do so. Thus, Xcentric’s allegation of  
23 copyright infringement must be under a theory of either contributory or vicarious  
24 infringement.

25 To state a claim for contributory copyright infringement, a plaintiff must show that  
26 a defendant had knowledge of the infringing activity and induced, caused, or materially  
27 contributed to the infringing conduct of another. *Id.* Vicarious liability is found where “a  
28 defendant has the right and ability to supervise the infringing activity and also has a

1 direct financial interest in such activities.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d  
2 1004, 1022 (9th Cir. 2001).

3 Here, Xcentric has alleged conclusorily that Defendants “encouraged” others to  
4 copy and republish its copyrighted material. It has not alleged any facts that would lead to  
5 a reasonable inference that Defendants knew of their users’ republishing Xcentric’s  
6 copyrighted activity or that Defendants had induced, caused, or materially contributed to  
7 such republication. The most that Xcentric has alleged is that, after it posted a review of a  
8 fictitious company on the Ripoff Report, Defendants created a posting encouraging users  
9 to submit their own reviews of that fictitious company. (Doc. 1 at 6–7.) This action, even  
10 taken as true, does not establish that Defendants intentionally encouraged users to copy  
11 reviews from the Ripoff Report onto ComplaintsBoard.com. At most, it establishes that  
12 Defendants took cues from the Ripoff Report as to which companies it sought its users to  
13 review. This does not constitute infringement. Thus, Xcentric has failed to state a claim  
14 of contributory copyright infringement.

15 Nor has Xcentric pled factual content sufficient to raise a reasonable inference of  
16 vicarious copyright infringement. Xcentric, by alleging that Defendants took actions to  
17 divert traffic from the Ripoff Report to ComplaintsBoard.com, may have pled sufficient  
18 facts for an inference that Defendants had a financial interest in the alleged infringing  
19 activity. However, as stated above, Xcentric pled only that Defendants “encouraged”  
20 third-party users to infringe on Xcentric’s content. This is not a fact allegation that  
21 plausibly supports the element of Defendants’ “right and ability to supervise the  
22 infringing activity.” *Napster*, 239 F.3d at 1022. Xcentric has thus failed to state a claim of  
23 vicarious copyright infringement.

24 Because Xcentric has failed to state a claim for copyright infringement, Counts 1  
25 and 2 of the Complaint are dismissed. However, because the copyright claims could be  
26 saved by amendment, the Court will provide leave to amend to state a cognizable claim  
27 within thirty days of the date of this order. *Didyounge v. Allstate Ins. Co.*, CV-12-348-  
28

1 PHX-GMS, 2012 WL 1983779 at \*3 (D. Ariz. June 4, 2012) (citing *Gompper v. VISX,*  
2 *Inc.*, 298 F.3d 893, 898 (9th Cir. 2002)).

3 **III. Lack of Timely Service**

4 Defendants contend that Xcentric’s claims against Medioxlex must be dismissed  
5 because Xcentric did not timely serve it in accordance with the Federal Rules of Civil  
6 Procedure. Defendants argue that, under Rule 4(m), a defendant must be dismissed if it is  
7 not served within 120 days after the complaint is filed.

8 The parties do not dispute that Xcentric did not serve Medioxlex until 137 days  
9 after the Complaint was filed. However, Xcentric contends that the 120-day rule does not  
10 apply to its service of process on Medioxlex because Rule 4(m) does not apply to foreign  
11 companies. Rule 4(m) expressly does not apply to service in a foreign country under Rule  
12 4(f) or 4(j)(i). Defendants counter that the exceptions are only for service on a person in a  
13 foreign country or a foreign state, subdivision, agency, or instrumentality, and that  
14 Medioxlex is none of these things.

15 It is true that Rule 4(f) and 4(j)(i) do not, by their terms, address service on a  
16 corporation in a foreign country. Nevertheless, the majority of courts addressing the  
17 issue have found that the 120-day rule of Rule 4(m) does not apply to service on a  
18 corporation in a foreign country. *Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 807  
19 (7th Cir. 2005); *Baja Dev. LLC v. TSD Loreto Partners*, No. CV-09-756-PHX-LOA,  
20 2009 WL 2762050 at \*1 (D. Ariz. Aug. 28, 2009); *Po-Hai Tang v. CS Clean Sys. AG*,  
21 No. 11-CV-00212 BEN RBB, 2011 WL 3235751 at \*2 (S.D. Cal. July 28, 2011); *Bekaert*  
22 *Progressive Composites Corp. v. Wave Cyber Ltd.*, No. 06CV2440-LAB(LSP), 2007 WL  
23 1585526 at \*1 (S.D. Cal. May 31, 2007); *In re Imperial Home Decor Group, Inc.*, 294  
24 B.R. 607, 609 (Bankr. D. Del. 2003); *Flock v. Scripto-Tokai Corp.*, No. Civ. A.H-00-  
25 3794, 2001 WL 34111630, at \* 4–6 (S.D. Tex. June 25, 2001). Service on foreign  
26 corporations is addressed in Rule 4(h), which is not mentioned in Rule 4(m); however,  
27 4(h)(2) expressly incorporates the methods of service prescribed in 4(f)—and 4(f) is one  
28 of the listed exceptions to the 120-day rule in 4(m). As such, this Court will apply the

1 Rule 4(m) exception to the 120-day rule to service on corporations in a foreign country.  
2 Because Mediolex was served in a foreign country, Xcentric was not required to abide by  
3 the 120-day rule. Therefore, Defendants' Motion to Dismiss on the ground that Mediolex  
4 should be dismissed for failure to timely serve is denied.

#### 5 **IV. ComplaintsBoard.com's Status as Property or Entity**

6 Defendants argue that Xcentric has failed to state a claim against  
7 ComplaintsBoard.com because ComplaintsBoard.com is a piece of property rather than a  
8 legal entity and Xcentric has failed to properly plead *in rem* jurisdiction over the  
9 property.

10 Defendants argue that it is an "indisputable fact" that ComplaintsBoard.com is a  
11 piece of property rather than a business entity. Defendants cite *Kremen v. Cohen* for the  
12 holding that domain names are property. 337 F.3d 1024. *Kremen* did in fact hold that,  
13 under California law, domain names are a form of intangible personal property. *Id.* at  
14 1030. This rule does not, however, lead to the conclusion that everything with a name  
15 ending in ".com" is a domain name and therefore a piece of property. Businesses may  
16 have the letters ".com" in their name; this designation does not reduce them to pieces of  
17 property rather than legal entities. *See, e.g., City of New York v. Smokes-Spirits.com, Inc.*,  
18 541 F.3d 425, 434 (2d Cir. 2008); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp.  
19 1119, 1121 (W.D. Pa. 1997); *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*,  
20 No. C09-285Z, 2010 WL 2104239 (W.D. Wash. May 19, 2010).

21 Xcentric alleged in its Complaint that ComplaintsBoard.com is an entity of  
22 unknown origin. This is a factual allegation that a court must take as true on a 12(b)(6)  
23 motion to dismiss. Defendants' conclusory statements that ComplaintsBoard.com is a  
24 domain name rather than a legal entity raise only a question of fact that cannot be  
25 resolved at the motion to dismiss stage. As such, Defendants' Motion to Dismiss the  
26 claims against ComplaintsBoard.com is denied.

27 However, Defendants are correct that Xcentric has not pled the elements necessary  
28 for obtaining *in rem* jurisdiction. To the extent that it is determined that

1 ComplaintsBoard.com is personal property rather than a legal entity, this Court exercises  
2 no jurisdiction over it. The Court has *in personam* jurisdiction over  
3 ComplaintsBoard.com only as a legal entity.

#### 4 **V. Personal Jurisdiction over Mark Schultz**

5 Defendants argue that the corporate veil prevents Xcentric from stating a claim for  
6 relief against Defendant Mark Schultz, who was an officer and shareholder of Mediolex.  
7 Xcentric makes no argument in response to this assertion.

8 In Arizona, a corporation is treated as a separate entity, and the personal assets of  
9 a corporate officer or shareholder may not be reached to satisfy corporate liabilities.  
10 *Loiselle v. Cosas Mgmt. Group, LLC*, 224 Ariz. 207, 228 P.3d 943, 950 (Ct. App. 2010);  
11 *Honeywell, Inc. v. Arnold Const. Co., Inc.*, 134 Ariz. 153, 159, 654 P.2d 301, 307 (Ct.  
12 App. 1982). However, courts can disregard the corporate entity and pierce the corporate  
13 veil if there is sufficient evidence that: 1) the corporation is actually the alter ego of one  
14 or a few individuals and 2) observance of the corporate's separate legal status would  
15 sanction a fraud or promote injustice. *Employer's Liab. Assurance Corp. v. Lunt*, 82 Ariz.  
16 320, 313 P.2d 393, 395 (1957).

17 Xcentric alleges that Mark Schultz is a "part owner" of ComplaintsBoard.com.  
18 However, it also alleges that ComplaintsBoard.com is an "unknown entity" rather than a  
19 corporation. A precondition to the operation of the corporate veil is the existence of a  
20 corporation. Defendants assert that Schultz is a shareholder in Mediolex, a corporation.  
21 This is not, however, what is alleged in Xcentric's Complaint, and a 12(b)(6) motion to  
22 dismiss turns on the allegations in the complaint.

23 Defendants submit an affidavit from Mark Schultz in which he states that he was  
24 formerly an officer, director, and shareholder in Mediolex. (Doc. 11-1 at 7-8.) A district  
25 court may consider affidavits attached to a motion to dismiss for personal jurisdiction. On  
26 a 12(b)(6) motion to dismiss, however, the external documents a district court may  
27 consider are limited. *U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003); *Lee v. City of Los*  
28 *Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Unless the court converts the 12(b)(6) motion

1 into a motion for summary judgment, it may only consider documents attached to the  
2 complaint, documents incorporated by reference in the complaint, or matters of judicial  
3 notice. *Ritchie*, 342 F.3d at 908. Schultz’s affidavit does not fit the criteria for any of  
4 these reviewable documents. In any event, the affidavit does not refute Xcentric’s  
5 allegation—Schultz does not assert that ComplaintsBoard.com is a corporation and that  
6 Schultz is a shareholder or officer of it, thus allowing him to take advantage of the  
7 corporate shield doctrine.

8 Therefore, Defendants cannot rely on the corporate veil doctrine as a basis for  
9 dismissing Xcentric’s Complaint against Schultz. Defendants’ Motion to Dismiss  
10 Xcentric’s claims against Schultz is denied.

#### 11 CONCLUSION

12 Xcentric has sufficiently set forth facts that would allow this Court to exercise  
13 personal jurisdiction over Defendants. Defendants have neither controverted these facts  
14 by affidavit nor rebutted the presumption that the exercise of personal jurisdiction would  
15 be reasonable. As such, Defendants’ Motion to Dismiss for lack of personal jurisdiction  
16 is denied. However, Xcentric has failed to state a plausible claim for copyright  
17 infringement. As such, its claims of copyright infringement are dismissed.

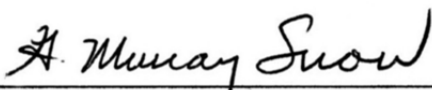
18 Because Rule 4(m)’s 120-day rule for service of process does not apply to  
19 Xcentric’s service of process on Mediolex, a corporation in a foreign country,  
20 Defendants’ Motion to Dismiss as to Mediolex is denied. Defendants’ Motion to Dismiss  
21 as to ComplaintsBoard.com is likewise denied because Xcentric sufficiently alleged that  
22 ComplaintsBoard.com is an entity rather than a piece of property. Finally, nothing in  
23 Xcentric’s allegations gives rise to the operation of the corporate veil doctrine as a  
24 defense for Mark Schultz, so the Motion to Dismiss as to Schultz is also denied.

25 **IT IS THEREFORE ORDERED** that the Motion to Dismiss of Defendants  
26 Mediolex Ltd., ComplaintsBoard.com, and Mark Schultz (Doc. 11) is **GRANTED IN**  
27 **PART** and **DENIED IN PART**. Plaintiff Xcentric’s Counts 1 and 2 for Infringement of  
28 Copyright and Contributory Infringement of Copyright are **DISMISSED** with leave to

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amend, **within thirty (30) days** of the date of this Order, to state a cognizable claim.

Dated this 24th day of October, 2012.

  
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G. Murray Snow  
United States District Judge