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8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

12 DANIEL M. MILLER,  
 13 Plaintiff,  
 14 v.  
 15 FACEBOOK, INC. and YAO WEI YEO,  
 16 Defendants.

Case No. 3:10-CV-00264 (WHA)

**FACEBOOK'S NOTICE OF AND  
 MOTION FOR SUMMARY  
 JUDGMENT RE CONTRIBUTORY  
 COPYRIGHT INFRINGEMENT**

Date: April 7, 2011  
 Time: 8:00 A.M.  
 Court: Courtroom 9, 19th Floor  
 Judge: Honorable William Alsup

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**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on April 7, 2011 at 8:00 a.m. or as soon thereafter as the matter may be heard, in the courtroom of the Honorable William Alsup, United States District Court, 450 Golden Gate Avenue, San Francisco, CA 94102, Facebook, Inc. (“Facebook”) will move the court for summary judgment on Facebook’s Motion re Contributory Copyright Infringement. This motion is based on the Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, all pleadings on file in this action, deposition testimony from Counterdefendant Miller, supporting declarations and exhibits, oral argument of counsel, and any other matter that may be submitted at the hearing.

Dated: March 3, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Julio C. Avalos

Julio C. Avalos  
Attorneys for Defendant  
FACEBOOK, INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a case seeking to hold Facebook, Inc. (“Facebook”) liable for a third party video  
4 game simply because the video game’s creator used the Facebook website as one means to make  
5 the game available on the Internet. Miller’s claim of indirect copyright infringement fails for the  
6 following reasons:

- 7 1. Release. Miller expressly released Facebook from liability associated with third  
8 party content, such as the third party video game at issue.
- 9 2. No copying. Miller cannot prove access, an essential element of his infringement  
10 claim. His only evidence is that his game was available as one of trillions of web  
11 pages on the Internet. His claim is nothing more than speculation. *Art Attacks Ink,*  
12 *LLC v. MGA Entm’t*, 581 F.3d 1138 (9th Cir. 2009).
- 13 3. No protectable elements. Miller cannot show any protectable elements were copied.  
14 Miller’s game does not have characters or a story. It is an extremely elemental  
15 game. The similarity between the two games arises from the similar game  
16 mechanics, which copyright does not protect. 35 USC § 102(b); *Data East USA,*  
17 *Inc. v. EPYX*, 862 F.2d 204 (9th Cir. 1988) (“*Data East*”).
- 18 4. No indirect infringement. Due to the inaccuracy and incompleteness of Miller’s  
19 communications, Facebook’s actions were reasonable and did not materially  
20 contribute to the alleged infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508  
21 F.3d 1146 (9th Cir. 2007).

22 Facebook had no control over the conduct at issue. It did not create the content. It did not  
23 host the content. Indeed, the game may be played and is available today through its presumed  
24 creator’s own website, and Plaintiff has done nothing to take it down or to block its availability to  
25 the world. In short, Miller’s case is bankrupt when it comes to facts to support his claim. On that  
26 basis, summary judgment in favor of Facebook is warranted.

27 **II. FACTS**

28 **A. Facebook Generally.**

Facebook is one of the most popular websites in the world with over 500 million active  
users. *See* Dkt. 71, Facebook’s Answer to Plaintiff’s Second Amended Complaint and  
Counterclaims (“Counterclaims”), ¶ 5. Facebook provides an interactive social networking

1 service that allows its users to connect with friends, family, and coworkers. *Id.* The Facebook  
2 service is available at www.facebook.com.

3 One of Facebook’s services is Facebook Platform. Facebook Platform allows third party  
4 developers to offer their own independent applications to Facebook users through the Facebook  
5 website. Declaration of Julie Tung (“Tung Decl.”), ¶ 3. These applications are not created by or  
6 hosted on Facebook’s servers. Plaintiff’s Second Amended Complaint (“SAC”), ¶ 19; *see also*  
7 Avalos Decl., Ex. A at 266:17-23, Ex. F at 100:12-18. Instead, third party applications reside on  
8 external third party servers and are connected to users through a set of Application Programming  
9 Interfaces (“API”) and tools, such as “iFrame.”<sup>1</sup> *Id.*, Ex. A at 269:7-18. There are currently tens  
10 of thousands of third-party applications available on the Facebook website. Tung Decl., ¶ 6.

11 **1. Users Release Facebook of Liability for Third Party Content as a**  
12 **Condition of Access.**

13 As a condition of using Facebook’s website, all potential users are required to register and  
14 agree to Facebook’s Terms of Use (now referred to as “Statement of Rights and Responsibilities”  
15 or “SRR”). Registrants agree that Facebook reserves the right to amend its SRR. Since its  
16 launch, Facebook has updated its governing provisions to account for the new innovations and  
17 services provided to its users. Declaration of Ali Grabler (“Grabler Decl.”) Decl., ¶ 6.

18 Miller registered for a Facebook account on February 12, 2006. *See* Decl. of Tina Doshi  
19 In Support of Facebook Inc.’s Motion to Transfer Venue, Dkt. 13-3, ¶ 3. Miller is an active user  
20 of Facebook. Declaration of Julio C. Avalos (“Avalos Decl.”), Ex. A at 266:5-10. Since the first  
21 time Miller joined Facebook, he has consistently agreed through the SRR that Facebook would  
22 not be liable for content made available on the Facebook website by third-parties. Miller uses the  
23 Facebook website to interact with friends, promote his ‘K2xL’ company and its website, and to  
24 provide a game for Facebook users. *See* Court Order Granting Facebook Inc.’s Motion to  
25 Transfer Venue, Dkt. 17 at 4.

26  
27  
28 <sup>1</sup> A Facebook “iFrame” is a frame within a Facebook canvas page that allows a third-party  
developer to transmit his or her application to Facebook users from a third-party website.



1 It is undisputed that when he registered his Facebook account, Miller agreed to  
2 Facebook's SRR. *Id.* at 2; *see* Dkt. 13-3, ¶¶ 4-5. He checked a box representing that: "I have  
3 read and agree to the Terms of Use." The registration process could not be completed without  
4 checking this box. *Id.*, ¶ 5. At the time, the SRR stated:

5 Facebook is not responsible for the conduct, whether online or  
6 offline, of any user of the Web site or Member of the Service ...  
7 *Under no circumstances will the Company be responsible for any*  
8 *loss or damage, including personal injury or death, resulting from*  
9 *anyone's use of the Web site or the Service, any Content posted on*  
10 *or through the Web site or the Service or transmitted to Members,*  
11 *or any interactions between users of the Web site or Members,*  
12 *whether online or offline.*

13 *Id.*, Ex. A, at 3 & 4 (emphasis added). In addition, Facebook expressly reserved the right to  
14 amend the SRR. *Id.* at 1 ("We reserve the right, at our sole discretion, to change, modify, add, or  
15 delete these Terms of Use at any time without further notice."). Plaintiff assented to these SRR  
16 by completing the registration process and continuing to use Facebook's services. *Id.*, ¶¶ 3-4.

17 On or around October 23, 2006, Facebook updated its SRR. Facebook required the same  
18 agreement in the revised terms of service which stated that Facebook would not be liable for third  
19 party content made available through Facebook. In relevant part, the SRR stated:

20 You agree not to hold Facebook responsible or liable for the user  
21 Content or actions of third parties (including your interactions with  
22 users) on or relating to the Facebook Service . . . *If you have a*  
23 *dispute with a third party relating to the Facebook Service, you*  
24 *release Facebook and its directors, officers, employees and agents*  
25 *(collectively "Facebook Entities") from any claims, causes of*  
26 *action and damages (actual or consequential) of every kind and*  
27 *nature, known and unknown, arising out of or in any way connected*  
28 *with such dispute.*<sup>2</sup>

29 Grabler Decl., Ex. B (emphasis added).

30 \_\_\_\_\_  
31 <sup>2</sup> This provision remained virtually unchanged through at least August 2009 when it was updated  
32 to state: "FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT,  
33 INFORMATION, OR DATA OF THIRD PARTIES, AND YOU RELEASE US, OUR  
34 DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND  
35 DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY  
36 CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTIES."  
37 Grabler Decl., Ex. C. This provision remains in place today.

1                   **2.       Facebook’s Policies to Address Infringement Issues.**

2           Facebook engages in substantial efforts to combat infringement. Facebook’s SRR  
3 expressly requires users to not use others’ content. Specifically, the SRR requires that users  
4 represent and warrant that they own or have the necessary rights in the content that they post on  
5 the service. *Id.*, Ex. A at ¶ 2.1. The SRR also states that Facebook reserves the right to remove  
6 content without prior notice if it violates the terms of use, and to terminate access for any user  
7 determined to be a repeat infringer. *Id.* at ¶¶ 5.2 & 5.5.

8           Facebook also has a system in place for receiving notices of intellectual property  
9 infringement on the website. Facebook users may notify Facebook of infringement claims by  
10 accessing the “How to Report Claims of Intellectual Property Infringement,” included in the SRR  
11 under the section titled, “Protecting Other People’s Rights.” *Id.* at ¶ 5. This link directs users to  
12 a web page which provides access to a form compliant with Digital Millennium Copyright Act  
13 (“DMCA”), as well as contact information for Facebook’s DMCA designated agent. *See Grabler*  
14 *Decl.*, Ex. E. In May of 2009, Facebook’s designated agent contact information was as follows:

15                   Agent:           Theodore W. Ullyot  
16                   Address:       151 University Avenue,  
17                                   Palo Alto, Ca, 94301  
18                   Email:         [ip@facebook.com](mailto:ip@facebook.com)  
19                   Fax:           (650) 543-4801

20 *Id.*

21                   **B.       The Boomshine Game.**

22           Miller claims that on May 5, 2009, a copyright was registered for the *Boomshine*  
23 “computer file.” SAC, ¶ 12. He further claims that this registration covers a video game called  
24 *Boomshine* that he made available on his website, [www.k2xl.com](http://www.k2xl.com). SAC, ¶ 12. This game has  
25 been described as a “chain reaction type game.” *Id.* ¶ 10; *see also Avalos Decl.*, Ex. B.

26           *Boomshine* has no story line. It has no characters. The game is of the most minimal in  
27 design. The design is extremely closely linked to the procedures of the game. Roughly speaking,  
28 *Boomshine* includes the following components: (a) a game title screen, (b) a level introduction

1 screen, (c) background music, (d) game sound effects, (e) a game background or playing field,  
2 (f) moving balls, dots or objects beginning with random position and trajectory, and when their  
3 motion takes them to the edge of the game screen, they bounce back into the game playfield, (g) a  
4 scoring system, (h) level success indicator, (i) an end screen, and (j) a game completion screen.  
5 Screenshots reflecting these parts are attached hereto. Avalos Decl., Ex. C. Plaintiff has never  
6 made *Boomshine* available on Facebook. *Id.* Ex. A , at 45:13.

7 **C. ChainRxn.**

8 *ChainRxn* is the other video game at issue in this case. The game is hosted on a third  
9 party website, <http://chainrxn.zwiggler.com>.<sup>3</sup> SAC, ¶ 18. The game is alleged to have been  
10 created by Yeo, not Facebook. SAC, ¶ 19. However, no one involved in this litigation knows for  
11 certain who, when, or how *ChainRxn* was developed. All that is known is that someone who  
12 operates under the name Yao Wei Yeo is affiliated with the *ChainRxn* game in some way.

13 Like *Boomshine*, *ChainRxn* is a very simple chain reaction-type game. Avalos Decl., Ex.  
14 B, at 4, ¶ 5. It shares many features common to the genre. Screenshots of the *ChainRxn* game  
15 currently available at the Zwiggler website are attached as Exhibit D to the Avalos Declaration.  
16 There are also many differences between the *ChainRxn* and *Boomshine* games. For example, the  
17 two games have different music, different color choices, different scoring mechanisms and  
18 graphical depictions, different starting and ending pages, and differences in aspects of page  
19 layout. Other than the basic game mechanics (or rules) of the game, the differences are  
20 substantial. They are described in detail in the Expert Declaration of David Crane as well Mr.  
21 Crane’s concurrently-filed declaration. Avalos Decl., Ex. E; Declaration of David Crane (“Crane  
22 Decl.”), ¶¶ 31-82, Ex. 13 . Miller claims that *ChainRxn* was made available through Facebook  
23 Platform.

24 **D. Plaintiff’s Claims Of Copyright Infringement.**

25 Miller has no facts that defendant Yeo copied any aspect of the *Boomshine* game for any  
26 purpose. Specifically, when asked whether he was “aware of any facts that Yeo copied

27 <sup>3</sup> Zwiggler, to the extent it is a separate entity, is not a party to this litigation. Miller has alleged  
28 that defendant Yeo does business as Zwiggler, but has been unable to produce any evidence to  
support that allegation.

1 *Boomshine* by improperly accessing and decompiling the *Boomshine* source code with a  
2 decompiling program,” Miller testified simply: “No.” Avalos Decl., Ex. A at 27:13-25. When  
3 asked whether he knew “if Defendant Yeo ever viewed the *Boomshine* application via the  
4 K2xL.com website,” Miller again answered simply, “No.” *Id.* at 28:18-20. The sole facts related  
5 to access that Miller has identified is that his game was available among the trillions of web pages  
6 on the Internet. Avalos Decl., Ex. G at 16.

7 The battle between Miller and Zwigglers Apps began on April 30, 2009. On that day,  
8 Miller apparently contacted “Zwigglers Apps” through the Facebook website and asked  
9 Zwigglers Apps to remove *ChainRxn* from Facebook, alleging that the game was a “direct  
10 duplication” of *Boomshine*. Avalos Decl., Ex. I. Shortly thereafter, Zwigglers Apps responded  
11 and said *ChainRxn* was not a direct duplication of the *Boomshine* game.

12 Notwithstanding the absence of any knowledge or evidence of any copying by the  
13 designers of the *ChainRxn* game and an express denial of copying by Zwigglers Apps, an attorney  
14 named Robert Madayag sent a letter to Facebook at its general address. Avalos Decl., Ex. H at  
15 62:11-17; *see also* Declaration of Randolph Moon (“Moon Decl.”) Ex. B. The letter was sent on  
16 May 7, 2007. The letter complained of the *ChainRxn* game. The letter was inaccurate in nearly  
17 every way. The following significant errors existed:

- 18 1. Failure to identify the proper owner. The letter purported to be sent on  
19 behalf of an entity named “K2xL,” not Miller. In fact, Madayag never  
20 mentioned Miller nor identified him as the owner of the rights in  
*Boomshine*. Instead, Miller was merely cc’d at the end of the letter without  
21 explanation.
- 22 2. Failure to identify the proper location of the challenged content. The letter  
23 errantly demanded that Facebook disable “only the portion of the  
24 *ChainRxn* Facebook Website containing material infringing K2xL’s  
25 rights,” (emphasis added). The Facebook website did not then, and has not  
26 ever hosted any content related to *ChainRxn*. The letter also incorrectly  
27 indicated that the infringing material was located at the *ChainRxn*’s  
28 Facebook profile page URL. Moon Decl., Ex. B; *see also* Avalos Decl.,  
Ex. H at 41: 21-25. No game was ever located on ChainRxn’s profile page,  
which merely includes data and commentary about the game. Notably, the  
letter did not reference Facebook’s Application Directory listing for  
*ChainRxn*.
3. Failure to identify specific copyrighted material at issue. The letter merely  
stated that Zwigglers “copied content” from K2XL’s website at

1                                   http:k2xl.com/games/boomshine. The letter adds that the identified game  
2                                   copies “proprietary and copyrighted materials.”

3                                   A number of other deficiencies existed in the letter. The letter was not delivered to the proper  
4                                   individuals. Specifically, the letter was not originally sent to Facebook’s designated agent for  
5                                   intellectual property notices, as specified in the SRR or designation on file with the U.S.

6                                   Copyright Office. *Compare* Grabler Decl, Ex. E *with* Moon Decl. Ex. B . The letter was not  
7                                   signed under penalty of perjury. The letter did not include a statement that Mr. Madayag was  
8                                   authorized to act on behalf of the copyright owner or a good faith belief that the alleged  
9                                   infringement was unauthorized. *See* Avalos Decl., Ex. H at 60:17-20; *see also* Moon Decl., Ex.  
10                                   B.

11                                   About two weeks later, Mr. Madayag e-mailed a copy of the May 7th Letter to  
12                                   ip@facebook.com, Facebook’s identified agent for alleged infringement notices. Moon Decl.,  
13                                   Ex. A; Avalos Decl., Ex. H at 69:3-11. Within two days, Facebook responded to Mr. Madayag’s  
14                                   e-mail. Facebook informed Plaintiff his assertion that the Facebook website contained infringing  
15                                   content was wrong because *ChainRxn* “was created and is operated by a third party developer.”  
16                                   Facebook followed that it “does not have the ability to control the content made available through  
17                                   the application.” *See* Moon Decl., Ex. A. Facebook also informed Mr. Madayag that a copy of  
18                                   his allegations would be forwarded to the application developer to resolve Plaintiff’s concerns.

19                                   *Id.*

20                                   On the same day, Facebook emailed Yeo and provided him with a copy of Plaintiff’s  
21                                   infringement allegations. *Id.*, Ex. C. Facebook also demanded that Yeo remove or disable  
22                                   *ChainRxn* immediately if it was in fact infringing. *Id.* Yeo responded that he has received a  
23                                   similar letter and was seeking legal advice. *Id.* On that basis, Facebook took no further action.

24                                   *Id.*, ¶ 14.

25                                   Nearly a month later, Facebook received a second letter from Mr. Madayag (“June 15th  
26                                   Letter”).<sup>4</sup> *Id.*, Exs. A & B. This letter once again errantly indicated that the allegedly infringing

27 \_\_\_\_\_  
28 <sup>4</sup> As admitted by Madayag, the “May 6, 2009” date of this letter was a typographical error.  
Avalos Decl., Ex. H at 63:20-24; *Id.*, Moon Decl., Ex. A.

1 material was located at *ChainRxn*'s Facebook profile page. *Id.*, Ex. B. Again, no reference was  
2 made to the *ChainRxn* listing in Facebook's Application Directory. Without a factual basis, the  
3 letter stated *ChainRxn* "copied" *Boomshine*. The letter also once again failed to identify Miller as  
4 the owner of the allegedly infringed work. *Id.*

5 Days later, Facebook once again responded and inquired as to whether Plaintiff had been  
6 in contact with Defendant Yeo regarding the alleged infringement. *Id.*, Ex. A. Facebook  
7 informed Plaintiff that it had emailed Yeo with a copy of Miller's latest complaint and requested  
8 that Plaintiff "let [Facebook] know if they do not contact you in 48 hours." *Id.* Madayag never  
9 responded to this e-mail. Avalos Decl., Ex. H at 79:15-80:11. That same day, Facebook emailed  
10 Defendant Yeo and requested he "address this matter with all due urgency." Moon Decl., Ex. C.  
11 Yeo responded to Facebook indicating that he had already responded to them, but would do so  
12 again in case they failed to register Yeo's response. *Id.* Facebook did not receive any further  
13 communications from Plaintiff or Yeo and believed the issue had been resolved. *Id.*, ¶11.  
14 Because Facebook felt the issue was addressed, it took no further action. *Id.* Miller sued  
15 Facebook several months later.

### 16 **III. SUMMARY JUDGMENT STANDARD**

17 Summary judgment is appropriate where "there is no genuine issue as to any material  
18 fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).  
19 "Material facts are those which may affect the outcome of the case." *ViCHIP Corp. v. Lee*, 438  
20 F.Supp.2d 1087, 1092-93 (N.D. Cal. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
21 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "In copyright cases, summary judgment is  
22 routinely granted when no reasonable person could find the works substantially similar or when  
23 the alleged similarity concerns only non-copyrightable elements of the subject work." *Milligan v.*  
24 *Worldwide Tupperware, Inc.*, 972 F.Supp. 158, 161 (W.D.N.Y. 1997) (internal citations omitted).

25 "The moving party has the initial burden of identifying relevant portions of the record that  
26 demonstrate the absence of a fact or facts necessary for one or more essential elements of each  
27 cause of action upon which the moving party seeks judgment." *Greenwich Ins. Co. v. Media*  
28 *Breakaway, LLC*, No. CV08-937 CAS, 2009 U.S. Dist. LEXIS 63454, \*13 (C.D. Cal. Jul. 22,

1 2009 ) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265  
2 (1986)). “If the moving party has sustained its burden, the nonmoving party must then identify  
3 specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material  
4 facts on the elements that the moving party has contested.” *Id.* at \*13-14, citing, Fed. R. Civ. P.  
5 56(c).

6 There are no material facts in dispute.

7 **IV. ARGUMENT**

8 **A. Miller Released Facebook of Liability for Third Party Content.**

9 As a matter of law, Miller has released Facebook of liability for all third party content,  
10 such as the *ChainRxn* game. Miller concedes he has been a registered and continuous Facebook  
11 user since February 12, 2006. Dkt. 111, ¶ 2. In order to be a registered user, Miller agreed to  
12 Facebook’s SRR. Dkt. 13, ¶ 3. And by agreeing to the SRR, Miller expressly released Facebook  
13 from liability for third-party content available on its website. At all relevant times, Facebook’s  
14 SRR have included a release of liability for third-party content made available through the  
15 Facebook website. *See Grabler Exs., A-C.*

16 The law of the case dictates that Facebook’s SRR are a valid contract, are binding on  
17 Plaintiff in this action, and that Facebook is released from liability for third party content. On  
18 January 15, 2010, the Northern District of Georgia enforced a term of the SRR against Miller and  
19 found he was bound by Facebook’s SRR. *See* Dkt. 17. The court noted that “[i]t is standard  
20 contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes  
21 a decision to take the benefit with the knowledge of the terms of the offer, the taking constitutes  
22 an acceptance of the terms, which accordingly become binding on the offeree.” *Id.* at 3 (quoting  
23 *Register.com, Inc., v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (finding defendant’s online  
24 terms of service binding on plaintiff where “benefit [was] offered subject to stated conditions, and  
25 the offeree [made] a decision to take the benefit with knowledge of the terms of the offer”) (other  
26 citations omitted).

27 The same conclusion necessarily applies here. Under the law of the case, this Court  
28 should recognize and adopt issues previously decided in this litigation, including those relating to

1 contract enforcement. *See DiSiomone v. Browner*, 121 F.3d 1262, 1266-67 (9th Cir. 1997) (“no  
2 litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time  
3 or changes in the composition of the court will provide a more favorable result the second time”);  
4 *Shum v. Intel Corp.*, No. C-02-03262-DLJ, 2008 U.S. Dist. LEXIS 83005 , \*33(N.D. Cal. Sept.  
5 26, 2008) (court found that where it had already made several pre-trial rulings on the meaning of  
6 contract terms, they remained “law of the case”); *see also Maxit Designs, Inc. v. Coville, Inc.*, No.  
7 CIV. S-0501040 WBS DAD, 2006 U.S. Dist. LEXIS 68838 (E.D. Cal. Sept. 25, 2006) (“law of  
8 the case” doctrine applied to enforce arbitration clause found in numerous contracts between the  
9 parties where the court had previously enforced an identical arbitration clause in a different  
10 contract between the parties). Because the Northern District of Georgia has found that Miller is  
11 bound to the SRR, this Court must do the same.

12 Moreover, courts have routinely applied the liability disclaimer in Facebook’s SRR to  
13 dismiss claims against Facebook. In *Young v. Facebook*, the court found that plaintiff’s  
14 allegation that Facebook breached the implied covenant of good faith and fair dealing by failing  
15 to provide safety services “is without merit because . . . Facebook expressly disclaimed any duty  
16 to protect users’ online safety.” *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 U.S.  
17 LEXIS 116530, \*14, (N.D. Cal. Oct. 25, 2010). In dismissing plaintiff’s Breach of Contract and  
18 Negligence claims, the court again cited to Facebook’s liability disclaimer for the alleged  
19 conduct. *Id.* at \*11, \*16; *see also In re Facebook PPC Adver. Litig.*, No. 5:09-CV-03043, 2010  
20 U.S. Dist. LEXIS 39776, \*13 (N.D. Cal. April 22, 2010) (enforcing disclaimer of liability in  
21 Facebook’s SRR to block claims relating to third-party behavior).

22 This Court should reach the same conclusion as other courts faced with similar issues.  
23 Facebook’s SRR make clear that users releaser Facebook from all liability for third party content  
24 as a condition of access to the service. Miller’s entire direct infringement complaint rests on third  
25 party content, which has been released as to Facebook. Accordingly, summary judgment is  
26 warranted.

27 ///

28 ///



1           **B. Plaintiff Cannot Establish Direct Infringement.**

2           Facebook is also entitled to summary judgment because Miller cannot prove direct  
3 infringement by Yeo or anyone else. “[T]here can be no contributory infringement by a  
4 defendant without direct infringement by another.” *Religious Tech. Ctr. V. Netcom On-Line*  
5 *Commun. Servs.*, 907 F.Supp. 1361, 1371 (N.D. Cal. Nov. 21, 1995). *See also Contessa Food*  
6 *Prods., v. Lockpur Fish Processing Co.*, 123 Fed. Appx. 747, 751 (9th Cir. 2005) (“[D]irect  
7 infringement by a primary infringer” is required to establish contributory infringement.). To  
8 establish direct copyright infringement, a plaintiff must prove “(1) ownership of a valid copyright,  
9 and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v.*  
10 *Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

11           Miller cannot prove that Yeo illegally copied the expressive constituent elements of his  
12 game. Because Miller has no direct evidence of copying, Plaintiff must prove “(1) the  
13 defendant’s access to the copyrighted work prior to defendant’s creation of its work, and (2) the  
14 substantial similarity of both the general ideas and expression between the copyrighted work and  
15 defendant’s work.” *Data East USA, Inc., v. EPYX*, 862 F.2d 204, 206 (9th Cir. 1988); *Sid &*  
16 *Marty Krofft Television Products, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1162 (9th Cir.  
17 1977). Miller cannot satisfy either prong.

18                   **1. Plaintiff Cannot Establish Access to The Copyrighted Work.**

19           Miller’s sole claim of access by the so-called direct infringer is that “*Boomshine* has been  
20 available to anyone with Internet access since it was first published in March, 2007.” Avalos  
21 Decl., Ex. G at 16. This is not enough to withstand summary judgment. “To prove access, a  
22 plaintiff must show a reasonable possibility, not merely a bare possibility, that an alleged  
23 infringer had the chance to view the protected work.” *Art Attacks Ink, LLC v. MGA Entm’t Inc.*,  
24 581 F.3d 1138, 1143 (9th Cir. 2009) (*cf. Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999)  
25 (“access may not be inferred through mere speculation or conjecture”) (citing 4 NIMMER §  
26 13.02[A]). It is no more than speculation that Miller believes his website was stumbled upon by  
27 an unspecified web application developer at an unspecified time and took action to literally copy  
28 the expressive elements of his game.

1           The Ninth Circuit’s opinion in *Art Attacks* is instructive. *Art Attacks* sold “Spoiled Brats”  
2 themed T-shirts in 1996. *Id.* at 1141. *Art Attacks* sold their airbrushed designs from an online  
3 website as well as at booths at several county fairs throughout southern California. *Id.* It was  
4 undisputed that “[m]illions of fair attendees ha[d] walked past the booth over the years.” *Id.* at  
5 1142. *Art Attacks* sued MGA Entertainment, Inc. (“MGA”) for copyright infringement claiming  
6 that MGA’s ‘Bratz’ dolls were substantially similar. *Id.* To prove access, *Art Attacks* presented  
7 evidence that “an MGA decision-maker may have attended a county fair at which *Art Attacks*  
8 displayed the Spoiled Brats designs” and that the designs were available on the Internet. *Id.* at  
9 1143. The Ninth Circuit found this evidence insufficient to establish access. The Court found  
10 that there was no “direct evidence that [the decision-maker] ever saw an *Art Attacks* booth.” *Id.*  
11 at 1144. “Furthermore, *Art Attacks* has failed to show that [the decision-maker] visited the Los  
12 Angeles County Fair during the relevant period. Though there may be some slight chance that  
13 [the decision-maker] did visit the fair sometime during the relevant period, that chance does not  
14 create more than a ‘bare possibility’ of a chain of events linking *Art Attacks* designs to MGA.”  
15 *Id.* Turning to the availability of the content on the Internet, the court found that plaintiff had not  
16 established the requisite wide dissemination despite the fact that the copyrighted works had been  
17 available on the Internet for a full five years before defendant created the allegedly infringing  
18 work. *Id.* at 1145 (“Although we recognize the power of the internet to reach a wide and diverse  
19 audience, the evidence here is not sufficient to demonstrate wide dissemination.”); *see also Rice*  
20 *v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003) (finding sale of 17,000 copies of the  
21 copyrighted work insufficient to establish wide dissemination.).

22           The undisputed facts before this Court present an even more compelling argument against  
23 a finding of access than those in the *Art Attacks* opinion. *Art Attacks* introduced some evidence  
24 of ability to access through large scale trade shows in addition to mere availability on the Internet.  
25 All Miller has shown is the availability on the Internet among the trillions of other websites in  
26 existence.<sup>5</sup> This is not enough, and Miller’s accusation of access to support copying rests solely

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27 <sup>5</sup> Miller also cannot establish access because he has no idea when *ChainRxn* was created. He  
28 readily admits that availability on a website is different from the date of creation of code. Avalos  
Decl., Ex. A at 177:10-16.

1 on speculation.<sup>6</sup> On that basis alone, summary judgment in favor of Facebook is warranted.

2 **2. ChainRxn Does Not Use Boomshine’s Protectable Elements.**<sup>7</sup>

3 Video games such as *Boomshine* are entitled to a very thin layer of copyright protection.  
4 *See, e.g., Capcom U.S.A., Inc. v. Data East Corp.*, No. C 93-3259 WHO, 1994 U.S. Dist. LEXIS  
5 5306, \*26 (N.D. Cal. March 18, 1994) (finding that because video games “consist of abstract  
6 rules and play ideas,” “[i]t follows, therefore, that audiovisual works like the two presently before  
7 the Court are largely unprotectable games”). In a videogame or graphical user interface case, the  
8 Ninth Circuit requires “analytical dissection of” the similarities between the works in order to  
9 determine whether those similarities result from unprotectable or protectable expression. *Data*  
10 *East*, 862 F.2d at 208-09; *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994);  
11 *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (“A court must take care to  
12 inquire only whether ‘the protectable elements, standing alone, are substantially similar’”) (citations omitted); *Frybarger v. IBM Corp.*, 812 F.2d 525, 529-30 (9th Cir. 1987) (district court  
13 correctly concluded that similar features in videogames were unprotectable ideas and that no  
14 reasonable jury could find expressive elements substantially similar) (remaining citations  
15 omitted). This “[e]xtrinsic analysis is objective in nature [and] ‘depends not on the responses of  
16 the trier of fact, but on specific criteria which can be listed and analyzed.’” Cal. Bus. Law  
17 Deskbook § 26:14 (2010 ed.) (citing *Funky Films, Inc. v. Time Warner Ent’t Co.*, 462 F.3d 1072,  
18 1077, 1011 (9th Cir. 2006)).

20 Analytical dissection of video games to determine noninfringement is particularly well  
21 suited for summary judgment. The Ninth Circuit has required that “[b]ecause only those elements  
22 of a work that are protectable and used without the author’s permission can be compared when it  
23 comes to the ultimate question of illicit copying we use analytic dissection to determine the scope

24 <sup>6</sup> Indeed, another developer of a similar chain reaction game has testified that when he developed  
25 his similar chain reaction game in May 2009, he had never heard of or accessed *Boomshine*. *See*  
*Avalos Decl.*, Ex. J at 45:17-24.

26 <sup>7</sup> Notably, Miller has dropped any claim of copying of computer code. Notwithstanding his  
27 allegation that *Boomshine* was decompiled by defendant Yeo, he has now (a) conceded that he is  
28 not aware of any facts to support such an allegation and (b) claimed that he put in place  
“obfuscation” code to hide the actual code he wrote. A comparison of the *Boomshine* and  
*ChainRxn* code also reveals that there is absolutely no commonality in the code. *See* Crane  
Report ¶¶ 109-127; Crane Decl., ¶¶ 83-100.

1 of copyright protection *before* works are considered as a whole.” *Apple Computer*, 35 F.3d at  
2 1443 (emphasis added) (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475-76  
3 (9th Cir. 1992) (explaining that purpose of analytic dissection is to define scope of copyright  
4 protection); *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 443 (9th Cir. 1991) (copyright holder  
5 cannot rely on standard elements to show substantial similarity of expression)).

6 Further, “no substantial similarity of expression will be found when ‘the idea and its  
7 expression are ... inseparable,’ given that ‘protecting the expression in such circumstances would  
8 confer a monopoly of the *idea* upon the copyright.’” *Data East*, 862 F.2d at 208 (quoting *Herbert*  
9 *Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (emphasis in original)).

10 Similarity of game play is irrelevant, as game procedures are not protectable expression.  
11 *See Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, 400 F.3d 1007 (7th Cir. 2005)  
12 (finding no infringement after filtering protectable from non-protectable elements despite the fact  
13 “it is pretty clear that [defendant] set out to copy [plaintiff’s golf simulator] game”); *Atari, Inc. v.*  
14 *Amusement World, Inc.*, 547 F. Supp 222, 229 (D. Md. 1981). This is because game mechanics,  
15 which are no more than procedures and methods of operations, are not protected under the  
16 Copyright Act. *See* Section 102(b) (precluding copyright protection for “processes,”  
17 “procedures,” “systems,” or “methods of operations”). *See, e.g., Allen v. Academic Games*  
18 *League of America, Inc.*, 89 F.3d 614, 617 (9th Cir. 1996).

19 The analysis of *Data East* is useful here. The warring parties in *Data East* both made  
20 Karate games. “The district court found that except for ... minor particulars ... Data East’s and  
21 Epyx’s games are *qualitatively identical*.” *Id.* at 206 (emphasis added). After analytic dissection,  
22 the district court found that the two games shared numerous elements associated with the game  
23 experience. *Id.* at 209. Based on these similarities, the district court determined that substantial  
24 similarity existed between the two games. The Ninth Circuit reversed, finding that the district  
25 court had committed “clear error” in finding infringement.

26 The Ninth Circuit found that the fifteen features overlapping elements encompassed the  
27 “idea of karate” and as such, “they necessarily follow from the idea of a martial arts karate  
28 combat game, or are inseparable from, indispensable to, or even standard treatment of the idea of

1 the karate sport.” *Id.* at 209. The court found that the similarities between the two works were  
2 unprotectable and that once these unprotectable elements were removed, defendant’s game did  
3 not infringe.

4 Similarly, in *Atari* , plaintiff claimed that defendant’s “Meteor” videogame infringed its  
5 copyright in its “Asteroids” videogame. 547 F. Supp. 222. These games were reminiscent of the  
6 chain reaction type games at issue in this case, but featured more elaborate graphics such as  
7 spaceships. The underlying theme of both games involved a spaceship in outer space combating  
8 space rocks with the use of projectile weapons. The court found that the two video games had  
9 extensive identical or similar design features related to the design of the game. Despite the  
10 extraordinary similarities, the court found that defendant did not infringe because most of the  
11 “similarities are inevitable, given the requirements of the idea of a game involving a spaceship  
12 combating space rocks and given the technical demands of the medium of a video game.” *Id.* at  
13 229. The court noted that “it is not enough to observe that there are a great number of  
14 similarities in expression between the two games. It is necessary to determine whether the forms  
15 of expression are forms of expression that simply cannot be avoided in any version of the basic  
16 idea of a videogame involving space rocks.” *Id.* The court found, *inter alia*, that the progressive  
17 difficulty of the game, the fact that all spaceships must be able to fire weapons to destroy space  
18 rocks, the award of points for destroying objects, the sounds, the ability to rotate, and the  
19 increasing pace of the game, were forms of expression that would necessarily appear in any  
20 expression of the underlying idea of the game. *Id.*

21 The matter before this Court presents a more compelling noninfringement case than those  
22 in *Data East* and *Atari*. In both those cases the works at issue were virtually indistinguishable in  
23 appearance and game mechanics; they had more expressive events such as uniform color, design  
24 of spaceships, and character depictions. Nevertheless, the court found no infringement.

25 In the case before this Court, the level of expression is decidedly less than the expression  
26 in *Data East* or *Atari*.

27 ///

28 ///

1 The nine elements that Miller claims Yeo has copied from *Boomshine* appear to be  
2 virtually all ideas or expressions inseparable from ideas. For instance, the first game element that  
3 Miller claims Yeo illegally copied is:

4 “(1) the object [of both games] is to explode a certain number of  
5 circles, or balls, each level by starting a chain reaction so that if one  
6 ball collides with an explosion from another ball, that ball will  
7 explode and this will continue in a chain reaction until a ball  
8 doesn’t collide with an explosion.”

9 Avalos Decl, Ex. G at 9-10. This so-called “element” is not protected by copyright. Indeed, it is  
10 not an element at all; it is a recitation of the idea behind *Boomshine* and perhaps all other chain  
11 reaction type games which have existed for decades. This is precisely the type of procedure that  
12 cannot be protected under section 102(b) and was found unprotectable in *Atari*.

13 The same is true for Miller’s other allegedly protectable, allegedly infringed game  
14 elements fare no better as described below:

- 15 • “(2) the playing screen background is black and rectangular and once a level is completed by  
16 exploding a certain number of balls, the playing screen turns bright.” A rectangular screen is  
17 necessary for game mechanics. Nevertheless, the colors used and game field differ between  
18 the two games.
- 19 • “(3) there are multiple multi-colored balls moving in a linear fashion, at varying speeds, and  
20 bouncing off the edges of the play screen to create a seemingly random overall ball  
21 movement.” This description is classic game mechanics and the ball color choices differ  
22 between games.
- 23 • “(4) the number of balls on the playing screen as well as the number of balls you must  
24 explode to advance to the next level increases with each level.” The numbers are different  
25 between games but this description is nothing more than procedure because it is the way to  
26 advance.
- 27 • “(5) on the first level, the player has to explode one out of five balls to advance to the next  
28 level, on the second level, two out of ten balls, and with each additional level, the total  
number of balls present on the playing screen increase in increments of five.” The necessary  
number of balls to explode differs between the two games.
- “(6) the player begins a chain reaction by selecting a spot on the playing screen with the  
cursor (which has an illuminated appearance against the black background) and clicking the  
mouse, which the player can only do once in an attempt to pass a level, and this causes an  
explosion which is an increase in circular diameter which if any balls touches will likewise  
explode by increasing in diameter while maintaining its color and circular shape.” The  
explosions of the balls causing other explosions is the procedure of the game. The ball colors,  
sizes, and speeds differ between the two games.
- “(7) the explosions last for a set period of time, after which the diameter of the ball decreases  
until it is gone and explosions continue until no balls come into contact with any explosions.”

1 The length of the explosion affects whether other balls are touched and are therefore  
2 procedures. The length of time for explosions differs.

- 3 • “(8) if the player fails to explode the required number of balls, the player has to restart the  
4 level but does not go back to the first level or any past level the player has already beaten.”  
5 The requirement of repeating failed levels is not expressive. It’s a procedure.
- 6 • “(9) between each level, there are intermediate screens that state whether or not you passed  
7 the current level and, if so, how many balls you have to explode during the next level.” None  
8 of the expression of the intermediate screens are the same.

9 *Id.*

10 The Expert Declaration of David Crane discusses each of these elements in detail and  
11 explains how the accused features are either necessary features of the game or are expressed  
12 differently.

13 Just as in *Data East* and *Atari*, these “similarities are inevitable, given the requirements of  
14 the idea of a [‘video game or gaming application wherein a user or player clicks on a floating  
15 circle that causes the clicked circle to expand and causes other contacted floating circles to  
16 likewise expand in a chain reaction”]<sup>8</sup> and given the technical demands of the medium of a video  
17 game.” *Data East*, 862 F. 2d 204 at 229.<sup>9</sup> Under established law, the vast majority of identified  
18 elements are procedures.

19 To the extent the elements are expressive in any way, *Boomshine* and *ChainRxn* have  
20 different expression. For example, music, start screens, transition screens and color choice all  
21 differ. *Boomshine* has gentle piano music. *ChainRxn* has no music. *Boomshine*’s balls some  
22 times are virtually invisible. *ChainRxn*’s balls are designed to be visible. *Boomshine* has a  
23 greenish background. *ChainRxn* has a black background.

### 24 C. Miller Cannot Establish Indirect Infringement Liability.

25 Finally, summary judgment is warranted because Miller cannot show indirect  
26 infringement. Miller has limited his indirect infringement claim to the type of claim described in

27 <sup>8</sup> This is Miller’s own definition of a chain reaction game. See Avalos Decl., Ex. B.

28 <sup>9</sup> *Boomshine* does contain some expressive elements. Its background music, sound effects, as  
well as the choice of color, font, and layout on its title and intermediate screens may be protected  
by copyright. But *ChainRxn* does not copy these elements. Avalos Decl., Ex. A at 227:3-229:3;  
Crane Report at ¶¶ 47-97; Crane Decl., ¶¶ 31-82.

1 *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007).<sup>10</sup> To prove a claim  
2 for indirect infringement under the *Visa* case, Miller must prove that Facebook “(1) has  
3 knowledge of another’s infringement and (2) either (a) materially contributes to or (b) induces  
4 that infringement.” In the context of Internet services, the Ninth Circuit further refined the test  
5 and held that “a computer system operator can be held contributorily liable if it ‘has *actual*  
6 knowledge that *specific* infringing material is available using its system,’ and can ‘take simple  
7 measures to prevent further damage’ to copyrighted works, yet continues to provide access to  
8 infringing works.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007)  
9 (citations omitted) (emphasis in original). Miller cannot establish the requisite elements of  
10 knowledge for specific infringing material for two reasons. First, the letters to Facebook were  
11 insufficient to establish knowledge of what content he wanted removed, where that content was  
12 located, or how Facebook was to remove it. Second, Facebook’s actions demonstrated careful  
13 efforts to resolve a dispute in a “he said, she said” battle.

14 1. **Miller’s Letters Are Too Vague to Establish That Facebook Materially**  
15 **Contributed to or Induced Infringement.**

16 Miller did not provide an effective notice to support a claim of indirect infringement.  
17 Courts have suggested that infringement cannot be found if a copyright infringement notice fails  
18 to comply with the Digital Millennium Copyright Act (“DMCA”) notice requirements.<sup>11</sup> *Rosen v.*  
19 *Hosting Servs., Inc.*, No. CV10-2186-CAS 2010 WL 5630637 at \*3 (C.D. Cal. Aug. 16, 2010).  
20 *See also Perfect 10, Inc. v. Google*, No. CV 04-9484 AHM (SHx) 2010 U.S. Dist. LEXIS 75071,  
21 \*23 (C.D. Cal. July 26, 2010). Under the DMCA, a written notification must be provided to the  
22 designated agent of a service provider and include substantially the following:

23 (i) A physical or electronic signature of a person authorized to act on behalf of the  
24

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25 <sup>10</sup> Facebook also is not liable under the “inducement” strand of caselaw because it has never  
26 promoted the use of its services specifically to infringe copyrights. *See Perfect 10, Inc. v.*  
27 *Amazon.com, Inc.*, 508 F.3d 1146, 1170 n.11 (9th Cir. 2007) (“Google’s activities do not meet the  
28 ‘inducement’ test explained in *Grokster* because Google has not promoted the use of its search  
engine specifically to infringe copyrights.”). In fact, Facebook’s terms of use explicitly forbid  
such activity. *See Grabler Decl., Ex. A* at 5.

<sup>11</sup> Facebook is not currently seeking a summary judgment ruling relating to the DMCA safe  
harbors under §§ 512(a) and (d), but reserves all rights with respect to trial and future pleadings.



1 owner of an exclusive right that is allegedly infringed.

2 (ii) Identification of the copyrighted work claimed to have been infringed, or, if  
3 multiple copyrighted works at a single online site are covered by a single  
notification, a representative list of such works at that site.

4 (iii) Identification of the material that is claimed to be infringing or to be the  
5 subject of infringing activity and that is to be removed or access to which is to be  
6 disabled, and information reasonably sufficient to permit the service provider to  
locate the material.

7 (iv) Information reasonably sufficient to permit the service provider to contact the  
8 complaining party, such as an address, telephone number, and, if available, an  
electronic mail address at which the complaining party may be contacted.

9 (v) A statement that the complaining party has a good faith belief that use of the  
10 material in the manner complained of is not authorized by the copyright owner, its  
agent, or the law.

11 (vi) A statement that the information in the notification is accurate, and under  
12 penalty of perjury, that the complaining party is authorized to act on behalf of the  
owner of an exclusive right that is allegedly infringed.

13 17 U.S.C. § 512(c)(3). In addition to the conditions listed under subsection (c), Section 512(d)  
14 provides a stricter requirement: “identification of the reference or link, to material or activity  
15 claimed to be infringing, that is to be removed or access to which is to be disabled, *and*  
16 information reasonably sufficient to permit the service provider to locate that reference or link.”

17 17 U.S.C. § 512(d)(3) (emphasis added). Both letters sent by Plaintiff’s counsel in 2009 fail to  
18 substantially comply with these requirements and should not be found to establish knowledge as a  
19 matter of law.

20 **a. The May 7, 2009 Letter Was Fatally Flawed.**

21 Madayag’s first letter to Facebook sent on behalf of “K2XL” was flawed from beginning  
22 to end in every material respect. The letter identifies K2xL as the owner of the copyright in  
23 www.K2xL.com, and the “content thereon.” Plaintiff now contends, however, that the owner of  
24 the *Boomshine* copyright is Danny Miller, not K2xL. SAC, ¶ 12. In addition to misidentifying  
25 the copyright owner, the first Letter is improperly vague as to what the copyrighted work is. The  
26 letter referred Facebook to the general website for K2xL (www.K2xL.com), merely mentioning  
27 that *Boomshine* is included in its broad definition of rights. Moon Decl, Ex. B; *see Google*, 2010  
28 U.S. Dist. LEXIS 75071, \*27 (finding notification insufficient where plaintiff merely provided

1 the “top-level URL for the entire website” and failed to identify the specific infringing URL); *see*  
2 *also Hendrickson v. eBay*, 165 F.Supp.2d 1082, 1084 (C. D. Cal. Sept. 6, 2001) (in finding  
3 plaintiff’s notification letter deficient, the court noted that letter “did [not] fully describe  
4 Plaintiff’s copyright interest.”). Mr. Madayag also did not provide notice of infringement to the  
5 proper agent of Facebook, as specified by Facebook. *Compare* Moon Decl., Ex. A with Grabler  
6 Decl., Ex. E; *see also* Avalos Decl., Ex. H at 30:25-33:7; *see Perfect 10, Inc. v. Amazon.com, Inc.*,  
7 No. CV 05-4753 AHM (SHx), 2009 U.S. Dist. LEXIS 42341, \*13-15 (C.D. Cal. May 12, 2009)  
8 (finding that plaintiff’s take-down notification letter did not confer actual knowledge when  
9 plaintiff sent letter to incorrect designated DMCA agent); *see also Google*, 2010 U.S. Dist.  
10 LEXIS 75071 (internal citations omitted) (granting summary judgment for service provider when  
11 Plaintiff’s notification letters were emailed to incorrect address for designated DMCA agent.).

12 The first letter provided an equally unsatisfactory description of the allegedly infringing  
13 work. The letter requested that Facebook only ‘disable that portion of the Chain Rxn Facebook  
14 Website containing material infringing K2xL’s rights,’ but failed to identify that “portion”.<sup>12</sup> *See*  
15 17 U.S.C. § 512(c)(3)(iii). Facebook should not be obligated to comb through the two works to  
16 determine what is and is not infringing. “This would impermissibly ‘shift a substantial burden  
17 from the copyright owner to the provider.’” *Google*, 2010 U.S. Dist. LEXIS 75071, \*30, fn.7  
18 (internal citations omitted). Even if Facebook could somehow identify the infringing work, it  
19 would be impossible for it “disable that portion ... containing material infringing K2xL’s rights.”  
20 Facebook had no access to the *ChainRxn* game file nor any ability to alter “portions” of that game.  
21 Indeed, the game exists today and is available on a third party website.

22 Most importantly, this “notification” letter fails to even mention the *ChainRxn*’s  
23 Application Directory listing or request that it be removed. The absence of such critical  
24 information fails to even come close to identifying “the reference or link, to material or activity  
25 claimed to be infringing.” *See* 17 U.S.C. § 512(d)(3). The law does not “impose such  
26 investigative duties on service providers.” *See Perfect 10, Inc., v. CC Bill LLC*, 488 F. 3d 1102 at

27 \_\_\_\_\_  
28 <sup>12</sup> Plaintiff’s letters both cite URLs reflecting the *ChainRxn* “Profile” page. This profile page  
does not display the actual *ChainRxn* application. Moon Decl., ¶ 4.

1 1114. Rather, “the burden of policing copyright infringement—identifying the potentially  
2 infringing material and adequately documenting infringement—squarely on the owners of the  
3 copyright.” *Id.*

4 Zwigglers Apps had also disputed copying prior to any letter being sent to Facebook. The  
5 May 7 letter offered no evidence to contradict this representation, simply asserting that Zwigglers  
6 Apps had “copied” Miller’s game. This fact is particularly important because the May 7th Letter  
7 also failed to include statements that (1) Plaintiff had a good faith belief that the use of  
8 *Boomshine* was not authorized, (2) the information in the letter was accurate under penalty of  
9 perjury, and (3) Mr. Madayag was authorized to act on behalf of the copyright owner. *See* 17  
10 U.S.C. §§ 512(c)(3)(v) & (vi). *See CC Bill LLC*, 488 F.3d at 1112; *see also Hendrickson*, 165  
11 F.Supp.2d at 1989-1090.

12 **b. The June 15, 2009 Letter Was Fatally Flawed.**

13 The June 15, 2009 Letter (“June 15th Letter”) suffers from many of the same deficiencies  
14 as the May 7th Letter and adds little to the necessary notice. The conclusory June 15, 2009 Letter  
15 added no detail whatsoever. Like with the May 7th Letter, the June 15 Letter did not identify  
16 the reference or link to *ChainRxn’s* Application Directory listing. Avalos Decl., Ex. H at 45:2-12;  
17 *see* Moon Decl., Ex. A; *see also* 17 U.S.C. § 512(d)(3). The Letter also did not request  
18 *ChainRxn’s* removal for the Application Directory. *Id.* In addition, the June 15th Letter did not  
19 identify the owner of the copyrighted material whose rights had allegedly been infringed. *Id.*  
20 The June 15 Letter also only gave the most general description of the rights at issue by referring  
21 to “our client’s valid intellectual property rights.” In fact, other than reference to the DMCA  
22 statute, the word copyright is used nowhere in the letter.

23 **2. Miller Cannot Establish Knowledge Under the Facts.**

24 Facebook acted in a way to resolve the complex “he said, she said” nature of the dispute  
25 and did not act with knowledge. Behaving responsibly to resolve copyright disputes between  
26 parties is considered a proper way to immunize a website service from liability for indirect  
27 copyright infringement. *See Amazon.com*, 508 F.3d at 1172. Facebook took simple, affirmative  
28 steps to assist Miller with his infringement claim. As noted above, on May 20, 2009

1 Mr. Madayag complained of “copied content” from K2xL’s website, and sought “only to disable  
2 that portion of the *ChainRxn* Facebook Website” that infringed. *See* Moon Decl., Ex. B. Two  
3 days later, Facebook contacted the developer of the application to request that he resolve the  
4 complaint, and separately asked Mr. Madayag to contact Facebook again if the issue with the  
5 developer went unresolved. *Id.*, Exs. A&C. The application developer said he was seeking legal  
6 counsel. On June 15, 2009, Facebook received a responsive letter and email from Mr. Madayag  
7 which again complained of “copied content,” and demanded that Facebook “take down” the  
8 *ChainRxn* application. *Id.*, Ex. A. Facebook contacted the developer on June 22, 2009 to exhort  
9 him to address the issue with “all due urgency,” and asked Mr. Madayag to inform Facebook if  
10 the developer did not contact him in 48 hours. *See* Moon Decl., Exs. A, C. The developer  
11 claimed he was working out the dispute with Miller. *Id.* Mr. Madayag never responded to  
12 Facebook’s message, and this suit followed in October of 2009. Avalos Decl., Ex. H at 79:15-  
13 80:11. Notably, at no time has Miller ever attempted to get the company hosting the *ChainRxn*  
14 application to remove the infringing content. *Id.*, Ex. A at 112:12-18. On these undisputed facts,  
15 no reasonable jury could find that Facebook materially contributed to the alleged infringement.

16 **V. CONCLUSION**

17 For these reasons, summary judgment in favor of Facebook is warranted.

18 Dated: March 3, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

19  
20 /s/ Julio C. Avalos

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