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

11
12 Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5894

12 PERFECT 10, INC., a California corporation,

13 Plaintiff,

14 vs.

15 VISA INTERNATIONAL SERVICE
ASSOCIATION; FIRST DATA CORP., a
16 corporation; CARDSERVICE
INTERNATIONAL, INC., a corporation;
17 MASTERCARD INTERNATIONAL
INCORPORATED, a corporation;
18 HUMBOLDT BANK, a national banking
association; and DOES 1 through 100,
19 inclusive,

20 Defendants.
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Case No. C 04 0371 JW (PVT)

**CONSOLIDATED REPLY OF ALL
DEFENDANTS ON MOTIONS TO
DISMISS AMENDED COMPLAINT**

Date: November 15, 2004
Time: 9:00 a.m.
Dept: Courtroom 8, 4th Floor
Judge: Honorable James Ware

CONSOLIDATED REPLY OF ALL DEFENDANTS
ON MOTIONS TO DISMISS AMENDED COMPLAINT

Case No. C 04 0371 JW (PVT)

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28 CONSOLIDATED REPLY OF ALL DEFENDANTS
ON MOTIONS TO DISMISS AMENDED COMPLAINT

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SF: 95547.5

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1 **I. INTRODUCTION**

2 Plaintiff's opposition sheds any last pretense about Plaintiff's objectives in this case.
3 It cannot be any clearer that this case is an attempt to foist onto the Defendants the role of
4 global policeman. To Plaintiff, this is a case of "public policy" and it concerns, among other
5 things, web sites in *Bulgaria* and *Vanuatu*. See Memorandum of Points and Authorities in
6 Support of Plaintiff's Combined Opposition to Motions to Dismiss ("Opposition") at 7.
7 Under Plaintiff's theory, Defendants -- and by extension numerous other potential
8 defendants in analogous positions -- must cleanse the Internet, and literally the entire world,
9 merely because Defendants offer global payment systems.

10 Plaintiff's opposition to the current motion rests upon a profound misreading of the
11 Ninth Circuit's recent decision in *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 380 F.3d
12 1154 (9th Cir. 2004) ("*Grokster*") and upon wishful thinking and metaphorical argument
13 applied to aggressive, but still inadequate, pleading. The Plaintiff's original complaint failed
14 for numerous reasons, many of which were detailed by this Court in granting the original
15 motion to dismiss. While Plaintiff has boldly -- and wildly -- made new, conclusory
16 allegations to attempt to overcome deficiencies in its original complaint, Plaintiff still cannot
17 state a viable claim on any of its theories. The reason for this failure is that the Plaintiff's
18 entire conception of Defendants' liability in this case is misguided and unfounded.

19 Cutting to the core, Plaintiff rests its case upon the following points:

- 20 (1) administration by Visa and MasterCard of global payment networks;
- 21 (2) adoption of rules and regulations for the handling of merchant accounts
22 by member banks of MasterCard and Visa;
- 23 (3) terms and conditions allegedly set in contracts entered between some
24 merchants and Cardservice International or First Data Corp. (and allegedly by
25 Humboldt Bank as a principal for which Cardservice or First Data Corp. acts as
26

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1 agent) in “merchant account agreements” like Exhibit 1 to Plaintiff’s Amended
2 Complaint;

3 (4) Defendants’ receipt of fees from transactions;

4 (5) alleged activities of Visa and MasterCard to investigate or terminate
5 merchants for illegal activity or (in Plaintiff’s language) “otherwise improper
6 business practices”;

7 (6) notices to Defendants by Plaintiff of alleged infringements by businesses
8 that have merchant accounts with banks that are members of the Visa and
9 MasterCard payment systems¹;

10 (7) the alleged fact that infringing websites would be devoid of any
11 commercial viability without access to Defendants’ payment systems; and

12 (8) the unsupported conclusion that, without payment services from
13 Defendants, third-party webmasters cannot exist.

14 Defendants cannot be liable even if these points are accepted as true. As shown
15 below, Plaintiff utterly fails to allege that Defendants actually participate in, supervise, or
16 support any infringing activity. The Amended Complaint alleges, at best, that Defendants
17 provide business support for enterprises that are alleged to have engaged in infringements,
18 and that does not suffice to impose liability.²

19 Plaintiff confuses the difference between infringing activities and transaction
20 processing systems. Defendants, by operating or participating in payment systems, do not

21 _____
22 ¹ While Defendants First Data Corp., Cardservice International, and Humboldt Bank, unlike
23 Visa and MasterCard, have direct relationships with some merchants, Plaintiff has not
24 alleged that any of these Defendants actually has a business relationship with any particular
25 infringer identified by Plaintiff.

26 ² Curiously, Plaintiff’s assumption that “commercial viability” is essential for large-scale
27 Internet-based infringements is remarkably naïve, and is one that is universally known to be
false. Napster, which had no revenues at all, was not “commercially viable,” and its users
who allegedly engaged in massive infringements were not acting commercially. Moreover,
cases such as *ALS Scan v. RemarQ Communities*, 239 F.3d 619 (4th Cir. 2001), demonstrate
that non-commercial bulletin boards can be vehicles for massive infringement. That case,
like this one, involved a plaintiff’s assertion of copyright infringement of pornographic
photographs.

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1 insert themselves into or control infringements. Plaintiff’s characterization of payment
2 systems as providing “critical business support” does not support Defendants’ liability for
3 the conduct of unrelated third party web sites or other merchants. Despite a second chance
4 from the Court and the most artful efforts by its counsel, Plaintiff has once again failed to
5 allege the types of conduct or involvement by Defendants that would make them liable to
6 Plaintiff.

7 **II. PLAINTIFF’S COPYRIGHT INFRINGEMENT ALLEGATIONS FAIL.**

8 Plaintiff appears to equate Defendants’ alleged failure to exercise a contractual right
9 to terminate merchants with both (a) an exercise of control over copyright infringements and
10 (b) an active contribution by Defendants to third-party copyright infringements. Such rules
11 of equivalence would allow no limit to liabilities that could be imposed upon a vast array of
12 businesses for failing to step in and act for copyright owners. Such a rule would establish
13 copyright owners as Masters of the Internet, to whose enforcement interests all others must
14 bow. Copyright law has never gone so far. Nor should it now.

15 **A. Plaintiff Fails To State A Claim for Vicarious Copyright Liability.**

16 Any infringing conduct of third-party websites does not flow through MasterCard’s
17 and Visa’s systems, and it does not come within any monitoring the MasterCard and Visa
18 payment systems provide. As this Court previously recognized, this case is vastly different
19 from *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001), where Napster directly
20 maintained an index of infringing files for its users.

21 Plaintiff’s best facts still cannot allege the sort of supervision and control over
22 infringing activity that are necessary to support vicarious liability. Plaintiff nowhere alleges
23 such a right and ability to supervise and control infringing activity. Instead, Plaintiff distorts
24 the vicarious liability standard by referring to a “right and ability to *terminate or suspend*
25 *merchants and their customers*” instead of a right and ability to *supervise and control*
26 *infringing activity*. Opposition at 17:7-8 (confusing vicarious and contributory standards).

1 The best Plaintiff can allege is that Defendants may threaten to withhold access to their
 2 transaction processing systems if third parties engage in “illegal, fraudulent, or otherwise
 3 improper business practices.” Opposition at 9:23-10:1.

4 Plaintiff does not mean literally that the Defendants have the right and ability
 5 actively to supervise and control the alleged reproduction and distribution activities of third
 6 parties. Plaintiff means, instead, that because Defendants process financial data and
 7 payments, allegedly have a right of review of certain business practices, and have a power to
 8 terminate relationships, they therefore are “virtually present” at infringing activities and
 9 therefore must “virtually depart” by terminating their relationships with all alleged
 10 infringers.³ Because vicarious liability (unlike contributory infringement) does not have a
 11 knowledge requirement, Plaintiff’s argument would impose liability on all companies that
 12 have the power to terminate their business dealings with alleged infringers, regardless of
 13 knowledge of the infringements and apparently without even being asked to do so by a
 14 copyright holder!

15 As addressed extensively in Defendants’ Opening Brief on Motion to Dismiss, filed
 16 April 19, 2004 (“Defendants’ Opening Brief on Original Complaint”), at 1-6, 11-16 and
 17 Defendants’ Reply Brief on Motion to Dismiss, filed June 1, 2004 (“Defendants’ Reply
 18 Brief on Original Complaint”) at 1-3, 12-16. Plaintiff’s proposed new theories of vicarious
 19 and contributory liability would not merely authorize, but would also compel, a commercial
 20 blockade of companies merely upon their being accused of infringement, and the proposed
 21 theories would turn those who do business with alleged infringers into police officers,
 22 investigators, prosecutors, judges, juries, and punishers of the alleged infringement.

23
 24
 25 ³ Plaintiff must use the word “virtual” in discussing a “virtual presence” (Opposition at p.
 26 18), or “virtual ‘site and facilities’” (*Id.* at 17) to avoid a violation of Rule 11, Fed. R. Civ.
 27 P., because Plaintiff cannot allege an actual presence or an actual or apparent partnership. In
 this context, “virtual” has the same meaning as “virtual” in the phrase “virtual reality”: it is
 a synonym for “not.” “Virtual presence” and “virtual site and facilities” allegations are
 concessions that there are *not* a presence and *not* a site and facilities.

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1 Plaintiff thus seeks a form of blunt, vigilante justice. The copyright law does not
2 support such a theory.

3 The Plaintiff's failure here is not a pleading error. It is a fundamental
4 misapprehension of copyright law. Plaintiff no doubt has pleaded the best case it can, by
5 artfully arranging allegations to create merely an illusion of liability. The Court should be
6 satisfied that Plaintiff can do no better, and the Court should now dismiss the case with
7 prejudice in its entirety.

8 Turning to the recent decision of the Ninth Circuit decision in *Grokster*, there can be
9 no doubt that it sounds yet another a death knell for Plaintiff's claims. Plaintiff's Houdini-
10 like effort to escape the *Grokster* decision required contortions and distortions that this
11 Court may readily reject.

12 As Plaintiff correctly notes, in *Grokster* the Ninth Circuit affirmed the district court's
13 holding that the defendants, distributors of peer-to-peer software, were not secondarily liable
14 for copyright infringement. The Ninth Circuit considered and rejected both contributory and
15 vicarious claims against the defendants. *See Grokster*, 380 F.3d at 1165, 1166. Plaintiff
16 argues that the *Grokster* decision supports its claim of vicarious liability for copyright
17 infringement against Defendants because factors discussed by that court indicate that
18 Defendants in this case have the "right and ability to supervise the infringing parties."
19 Opposition at 13. While Plaintiff attempts to argue that the Ninth Circuit in *Grokster*
20 enunciated some fact intensive, complicated balancing test (Opposition at 13:7-14), Plaintiff
21 has pulled its "factors" out of thin air.

22 Nothing in the *Grokster* opinion supports a finding of liability in this case. Indeed,
23 that opinion emphasizes the historical distinction between dance hall operators and landlords
24 in vicarious copyright liability cases. As the Ninth Circuit stated, "[t]he dance hall operator
25 is liable, while the landlord escapes liability, because the dance hall operator *has the right*
26 *and ability to supervise infringing conduct*, while the landlord does not." *Grokster*, 380

1 F.3d at 1164 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir.
2 1996))(emphasis added).

3 None of the *facts* alleged in this case indicate that Defendants have a right and ability
4 to supervise the alleged infringing conduct. While Plaintiff continues to press the fact that
5 Defendants have the right and ability to control because they can terminate the *merchant*
6 *accounts* of allegedly infringing websites, this Court has already soundly rejected that
7 argument. See *Perfect 10 v. Visa Int'l Serv. Ass'n*, 2004 WL 1773349 *4, *5 (N.D. Cal.,
8 Aug. 5, 2004). Nothing in *Grokster* suggests that the retained contractual right of
9 Defendants, banks, or other businesses to terminate business relationships could provide a
10 basis of liability. To the contrary, *Grokster* expressly approved narrow application of
11 vicarious liability only to those situated somewhere on the landlord-to-employer spectrum of
12 relationships. Nor do Defendants' internal regulations or merchant agreements alleged by
13 Plaintiff establish a right and ability to control and supervise alleged infringing conduct. As
14 discussed in Defendants' opening brief, nowhere has Plaintiff alleged that Defendants have
15 the ability to affect or control allegedly infringing conduct by third parties other than by
16 terminating merchant status. This is in contrast to *Napster*, which as noted by the *Grokster*
17 court "had an express policy reserving the right to block infringers' *access* for any reason."
18 *Grokster*, 380 F.3d at 1165 (citing *Napster*, 239 F.3d at 1023)(emphasis added). Access to
19 an infringement system is vastly different from access to a payment system. Defendants in
20 this case have neither the right nor the ability to block access to allegedly infringing content;
21 they at best have the right to deny access to a payment system.⁴

22 While Plaintiff misleadingly argues that it has alleged that "defendants have 'an
23 express policy reserving the right to block infringers' access," (Opposition at 14), the
24 paragraphs in its amended complaint to which it refers simply allege that Defendants reserve

25 _____
26 ⁴ Notably, the *Grokster* Court found that while Grokster nominally reserved the right to
27 terminate access through its user agreement, it had no ability to actually terminate access to
file-sharing functions, and so this factor did not indicate a right and ability to control
infringing conduct.

1 the right to terminate merchant accounts. Amended Complaint ¶¶ 20, 21. Here, as in the
2 *Grokster* case, the sort of monitoring and supervisory relationship that has supported
3 vicarious liability in the past is completely absent. As in *Grokster*, and unlike *Napster*,
4 Defendants do not “operate and design an ‘integrated service,’ which they monitor and
5 control.” *Grokster*, 380 F.3d at 1165. (citing lower court decision, 259 F. Supp. 2d at 1045).

6 Moreover, as discussed in the opening brief by MasterCard and other Defendants on
7 this motion to dismiss, the *Grokster* court expressly rejected the “blind eye” theory of
8 copyright infringement liability urged by plaintiffs in that case and which is really all that
9 Plaintiff can allege in this case. The *Grokster* court stated that “[t]he Copyright Owners
10 finally argue that Grokster and StreamCast should not be able to escape vicarious liability by
11 turning a ‘blind eye’ to the infringement of their users, and that ‘[t]urning a blind eye to
12 detectable acts of infringement for the sake of profit gives rise to liability.’” *Grokster*, 380
13 F.3d at 1165 (citing *Napster*, 239 F.3d at 1023). As the Ninth Circuit explained, however,
14 “[i]f the [defendants] had a right and ability to control and supervise that they proactively
15 refused to exercise, such refusal would not absolve them of liability . . . [but] there is no
16 separate ‘blind eye’ theory or element of vicarious liability that exists independently of the
17 traditional elements of liability.” *Id.*

18 Because Plaintiff’s fundamental theory of liability fails and cannot be cured by
19 pleading, the Court should dismiss the vicarious copyright infringement claim with
20 prejudice.

21 **B. Plaintiff Fails To State A Claim For Contributory Copyright**
22 **Infringement.**

23 Plaintiff hardly expounds its contributory infringement claim in its opposition, and
24 for good reason: it cannot allege any contribution *to* alleged infringing activity of third
25 parties. Defendants simply do not provide any service, product, or labor used as part of any
26 infringing conduct. Once again, Plaintiff has failed to plead any conduct by Defendants that
27

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1 contributes to a violation of any of the exclusive rights of the copyright holder set forth in 17
2 U.S.C. § 106: Defendants are not alleged to contribute to reproduction of works;
3 preparation of derivative works; distribution of copies to the public by sale or other transfer
4 of ownership, or by rental, lease or lending; public display; or public performance of
5 Plaintiff's works. Plaintiff accuses Defendants instead of (a) providing a payment system
6 that is necessary to the operation of businesses and (b) failing to impose an economic "death
7 penalty" on alleged infringers.

8 Once again, Plaintiff strains logic and credulity by asserting (Opposition at 17:28-
9 18:2) that Defendants are "'virtually present' at, and pass on the validity of, each individual
10 transaction." Even if such a "virtual presence" doctrine were valid, Plaintiff has not shown
11 the payment transaction to infringe upon, or even implicate, any of the Section 106 rights of
12 a copyright holder. Plaintiff has not alleged, and cannot allege, that Defendants were
13 "virtually present" at any *infringing activity* as opposed to payment transactions.

14 Plaintiff's argument spins out of control by invoking the concept of "site and
15 facilities" as a straw man and by making a comparison between *A & M Records, Inc. v.*
16 *Abdallah*, 948 F. Supp. 1449 (C.D. Cal. 1996) and *Fonovisa v. Cherry Auction, Inc.*, 76 F.3d
17 259 (9th Cir. 1996). In *Abdallah*, the defendant furnished the very tools for infringement,
18 namely blank audio tapes measured and cut precisely to the duration of the intended
19 infringing recordings; in *Fonovisa*, the defendant provided the actual physical facilities for
20 illegal distribution of counterfeit recordings. Plaintiff's reliance on both those cases (and no
21 others) is puzzling, because the differences between those cases and this one is stark:
22 Plaintiff cannot allege that Defendants provide a "site and facilities" -- either literal or
23 metaphorical -- for infringing activity, and it cannot allege that Defendants provide any tools
24 or instruments for violations of the Section 106 rights of a copyright owner.

25 Notably absent from the contributory infringement argument of Plaintiff's
26 Opposition is any reference to the *Napster* case, which Plaintiff's counsel identified during
27

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1 oral argument on Defendants’ motion to dismiss the original complaint as Plaintiff’s best
2 case on the issue. Neither *Napster* nor any other case supports Plaintiff’s aggressive
3 theories. Because Plaintiff’s pleading failures are substantive, persistent and non-curable,
4 the Court should now dismiss the copyright claims with prejudice.

5 **III. PLAINTIFF CANNOT STATE A CLAIM FOR CONTRIBUTORY OR**
6 **VICARIOUS TRADEMARK INFRINGEMENT.**

7 Plaintiff’s Opposition barely goes through the motions on its largely unaltered
8 trademark infringement claims. Notably, Plaintiff ignores the controlling precedent of
9 *Lockheed Martin v. Network Solutions*, 194 F.3d 980 (9th Cir. 1999)(“*Lockheed Martin*”),
10 even though this Court appropriately followed *Lockheed Martin* in its order dismissing the
11 original complaint.

12 In *Lockheed Martin*, the Ninth Circuit directly held that, to be liable for contributory
13 trademark infringement, a defendant must either have “intentionally induce[d] a third party
14 to infringe the plaintiff’s mark or supplie[d] a product to a third party with actual or
15 constructive knowledge that the product is being used to infringe the [mark].” *Id.* at 984.
16 Plaintiff has pleaded no new facts that would support an allegation that Defendants have
17 induced third parties to infringe Plaintiff’s mark.

18 While Plaintiff makes the claim in its opposition that defendants provide the
19 “ultimate inducement: payment for products and services” (Opposition at 18), the allegation
20 it cites to support this proposition is paragraph 9 of its Amended Complaint. But paragraph
21 9 simply describes the manner in which certain defendants process payments; it does not
22 allege the supply of goods or services directly used in a trademark infringement and does not
23 support a claim of intentional inducement.

24 Nor has Plaintiff alleged new facts that would support an allegation that Defendants
25 have supplied a product to a third party with knowledge that it being used to infringe
26 Plaintiff’s mark. As stated by this Court in its August 6, 2004 Order, “[t]he only service
27

1 Defendants supply is the ability to accept certain credit cards as payment, and this service
 2 has no apparent link to the alleged infringing activities.” *Perfect 10*, 2004 WL 1773349 at
 3 *6. Moreover, as discussed in detail in Defendants’ Opening Brief on Original Complaint at
 4 19-20, where, as here, a Defendant provides a service rather than a product, it is liable only
 5 if it *directly controls and monitors* the instrumentality used by the third party to infringe the
 6 trademark. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir.
 7 1996)(emphasis added); *Lockheed Martin*, 194 F.3d at 984-85. As recognized by the
 8 *Lockheed Martin* court, the direct control and monitoring required would be particularly
 9 difficult to establish regarding the provision of internet services, precedent Plaintiff chooses
 10 to simply ignore in its opposition. Plaintiff has failed to allege any facts that would satisfy
 11 the “direct control and monitoring” rule.

12 Plaintiff’s citation to *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*,
 13 955 F.2d 1143 (9th Cir. 1992) is remarkably candid, since the case opposes Plaintiff’s
 14 theory. While Plaintiff artfully and metaphorically refers in its Opposition to a “symbiotic
 15 financial partnership” between Defendants and alleged third-party infringers, *Hard Rock*
 16 requires an “actual or apparent partnership,” not a metaphorical or “virtual” one. *See Hard*
 17 *Rock*, 955 F.2d at 1150. Moreover, *Hard Rock* teaches that secondary trademark
 18 infringement liability requires a much stronger showing than secondary copyright
 19 infringement liability, requiring such a strong showing that the defendant and the third-party
 20 infringer amount to “joint tortfeasors.” *Id.*⁵

21 As with its copyright claims, the theory underlying Plaintiff’s contributory and
 22 vicarious trademark infringement claims cannot support a cause of action, no matter how
 23 Plaintiff tries to articulate its allegations. The Court should dismiss the trademark
 24 infringement claims with prejudice.

25 _____
 26 ⁵ “The essential elements of both a joint venture and partnership are a sharing of profits as
 27 well as losses and a right to joint management and control of the business.” *People v. Park*,
 87 Cal. App. 3d 550, 564 (Cal. App. 1978). Plaintiff falls far short of alleging the requisite
 standard.

1 **IV. PLAINTIFF'S REMAINING CLAIMS ALSO FAIL.**

2 Plaintiff pays no more than lip service to the claims for alleged violation of rights of
3 publicity, unfair competition, and false advertising, and it has not sought to cure its earlier
4 pleading defects. For the reasons stated in Defendants' earlier briefs on the present motions
5 and their motion to dismiss the original complaints, Plaintiff's claim must fail.

6 **V. CONCLUSION**

7 Throughout the case, Plaintiff has applied the highest degree of invective and
8 hyperbole to its allegations and arguments, couched in terms of "stolen content," "theft,"
9 "fencing," and similar language. Such language did not carry the day before; nor should it
10 now.⁶ While Plaintiff has urged this Court to provide it new remedies so that it can force
11 Defendants to police the Internet and global commerce on its behalf, the Ninth Circuit in
12 *Grokster* explained that the Copyright Act is not so malleable: "It is prudent for courts to
13 exercise caution before restructuring liability theories for the purpose of addressing specific
14 market abuses, despite their apparent present magnitude. [¶] Indeed, the Supreme Court has
15 admonished us to leave such matters to Congress." *Grokster*, 380 F.3d at 1167. Defendants
16 have explained at length why it would be unwise to foist onto them, and financial
17 institutions and other businesses, the broad policing and enforcement obligations Plaintiff
18
19

20 ⁶ On this point Judge Noonan's comments at the Ninth Circuit's oral argument in the
21 *Grokster* case are apt. Judge Noonan, criticizing the strongly-worded argument of the music
22 publishing plaintiffs' counsel in that case, observed: "You can use these harsh terms, but
23 you are dealing with something new. And the question is, does the statutory monopoly that
24 Congress has given you reach out for the something new, and that's a very debatable
25 question. You don't solve it by calling it 'theft.' You have to show why this court should
26 extend a statutory monopoly to cover the new thing." *Metro-Goldwyn-Mayer Studios v.*
27 *Grokster, Inc.*, case no. 03-55894 (9th Cir. argued Feb 3, 2004)(sound file available at
www.ca9.uscourts.gov. by clicking on "audio files" and searching case number; relevant
portion is at 0:25:30 of the sound file). While Judge Noonan's point related to the federal
copyright statutes, his point is salutary with respect to all of Plaintiff's claims. Hyperbolic
language and invective do not carry Plaintiff's claims across the pleading threshold. Given
Plaintiff's persistent failure to meet that threshold, the Court should now dismiss all claims
in the case with prejudice.

1 urges here. But even if a court saw a need, there is no legal basis in the Copyright Act or in
2 precedents for the expansive application of the law sought by Plaintiff.

3 Plaintiff has, with creative and able counsel, articulated clearly its proposed new
4 liability theories and has made clear the limits of its ability to plead acceptable claims on
5 any of its causes of action. Now that the limits of Plaintiff's pleading capacity are clear, the
6 Court should dismiss the action in its entirety with prejudice.

7 Respectfully submitted,

8 Dated: November 1, 2004

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16 Dated: November 1, 2004

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11 Andrew P. Bridges attests that he has obtained
12 the concurrence of the signatories indicated
13 above.

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