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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,

Plaintiff,

-against-

POWER VENTURES, INC. d/b/a POWER.COM, a
California corporation; POWER VENTURES, INC.
a Cayman Island Corporation, STEVE VACHANI,
an individual; DOE 1, d/b/a POWER.COM, an
individual and/or business entity of unknown nature;
DOES 2 through 25, inclusive, individuals and/or
business entities of unknown nature,

Defendants.

Case No. 5:08-cv-05780 (JF)

**DEFENDANTS' CORRECTED
MEMORANDUM OF LAW IN
OPPOSITION TO FACEBOOK
INC.'S MOTION FOR JUDGMENT
ON THE PLEADINGS PURSUANT
TO FED. R. CIV. P. 12(C) OR, IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT OF
LIABILITY UNDER CALIFORNIA
PENAL CODE § 502(c)**

Date: February 26, 2010
Time: 9:00 a.m.
Judge: Hon. Jeremy D. Fogel
Courtroom: 3

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1 Defendants Power Ventures, Inc. and Steve Vachani (hereafter collectively referred to as
2 “Defendants” or “Power”) respectfully submit this Memorandum Of Law In Opposition To
3 Facebook Inc.’s Motion For Judgment On The Pleadings Pursuant To Fed. R. Civ. P. 12(c) Or, In
4 The Alternative, Partial Summary Judgment Of Liability Under California Penal Code § 502(c).

5 I. INTRODUCTION

6 Facebook seeks judgment on a single claim, Count 3 of Facebook’s First Amended
7 Complaint, a novel civil claim under a state criminal statute, California Penal Code § 502. This
8 claim is based on the fact that, during a roughly two-month period, from December 2008 through
9 January 2009, Power offered Facebook users a different and potentially superior browser through
10 which they could access their Facebook accounts to copy, update, and/or port their own “User
11 Content.” This “User Content” includes photos, profiles, messages, notes, text, information, music,
12 video, advertisements, listings, and other content that users upload, publish or display on the
13 Facebook site. *See* Amended Answer at 7:3-6. Facebook owns no copyright to such User Content.
14 *Id.* at 7:6-7. Indeed, Facebook’s Terms of Use expressly state that “Facebook does not assert any
15 ownership over your User Content.” *Id.* at 7:7-8.

16 Though Facebook “does not assert any ownership” over this User Content, Facebook does
17 attempt to prevent users from copying it – to make it difficult for users to port their User Content to
18 other websites. *See* Vachani Decl. ¶ 2. This gives Facebook an unfair competitive advantage
19 because users will be less likely to join a new social networking website if the user is unable to port
20 his contacts and other User Content without laboriously re-typing and/or re-uploading each item.
21 *See id.* ¶ 3. Thus, even if Power offers new technology that is superior to Facebook, a user is not
22 likely to migrate to that new technology if doing so would require, for example, re-typing hundreds
23 of entries in an address book stored in the user’s Facebook account. *See id.* ¶ 4. So, while
24 Facebook “does not assert any ownership” over the user’s address book, Facebook does employ a
25 variety of measures to make it very difficult to copy it. *See id.*

26 Power’s browser provides users with utilities that allow them to copy their own User
27 Content for purposes of updating it and making it portable to other sites – without copying other
28 elements of the Facebook website. *See id.* ¶ 5; Amended Answer at 7:12-15. Facebook does not

1 allege that Power has copied any element of the Facebook website that is subject to a copyright
2 owned by Facebook – and in fact Power has not done so. *See* Vachani Decl. ¶ 6; Amended Answer
3 at 7:15-16. Facebook does not allege that any data, any software, or any computer owned by
4 Facebook has been damaged in any way by users accessing their accounts through the Power
5 browser – and in fact no such damage has occurred. *See* Vachani Decl. ¶¶ 7, 11.

6 The sole injury alleged in Facebook’s complaint is the supposed injury to Facebook’s
7 “reputation and goodwill” caused by users accessing their Facebook accounts through the Power
8 browser. *See* First Amended Complaint ¶ 119. Facebook has submitted no evidence of that (or
9 any other) injury in support of this motion. ***Most importantly, Facebook has neither alleged nor***
10 ***submitted evidence that it has suffered any injury to its data, software or computers.***

11 A plaintiff attempting to state a claim for violation of a statute must plead and prove the
12 statute in question grants a right to sue. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir.
13 2004); *Laster v. T-Mobile USA, Inc.*, 2009 WL 4842801 (C.D. Cal. Dec. 14, 2009). Having
14 suffered no injury to its data, software or computers, Facebook cannot establish standing to assert a
15 claim under Penal Code § 502. This criminal statute creates a private right of action only in very
16 limited circumstances. Standing to assert a civil claim under § 502 is conferred only to “the owner
17 or lessee of the computer, computer system, computer network, computer program, or data who
18 suffers damage or loss by reason of a violation.” Penal Code § 502(e). The statute further defines
19 the types of damage or loss recognized by the statute. Section 502(b)(8) provides a definition for
20 “injury”:

21 “Injury” means any alteration, deletion, damage, or destruction of a
22 computer system, computer network, computer program, or data
23 caused by the access, or the denial of access, to legitimate users of a
computer system, network, or program.

24 And § 502(b)(9) provides a definition for “victim expenditure”:

25 “Victim expenditure” means any expenditure reasonably and
26 necessarily incurred by the owner or lessee to verify that a computer
27 system, computer network, computer program, or data was or was
28 not altered, deleted, damaged, or destroyed by the access.

1 A party asserting a private civil claim under § 502 must establish that it suffered “injury” to its data
2 or computers, or that it made a “victim expenditure” to verify whether its data or computers
3 suffered such an injury.

4 This, Facebook cannot do. Having suffered no injury to its data or computers, the best
5 allegation Facebook could muster is unspecified harm to its “reputation and goodwill.” *See* First
6 Amended Complaint ¶ 119. Power denies that such harm occurred. But regardless, that issue is
7 immaterial because harm to “reputation and goodwill” simply is not cognizable under § 502. A
8 party cannot establish standing to assert a civil claim under § 502 based on alleged harm to its
9 “reputation and goodwill.”

10 Having suffered no injury to its data or computers, Facebook has no right to assert any
11 claim under § 502. The claim also fails because Facebook has not pled or proved a violation of the
12 elements of the statute. Finally, even if Facebook could establish its standing and the elements of a
13 violation, Power has raised triable issues concerning the defenses of fair use, copyright misuse, and
14 federal preemption.

15 II. APPLICABLE LEGAL STANDARDS

16 A. The Rule 12(c) Judgment On The Pleadings Standard

17 For purposes of Facebook’s motion for judgment on the pleadings under Fed. R. Civ. P.
18 12(c), the allegations of the non-moving party (Power) must be accepted as true, while the
19 allegations of the moving party (Facebook) which have been denied are assumed to be false. *Hal*
20 *Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990) (“[T]he allegations of
21 the non-moving party must be accepted as true, while the allegations of the moving party which
22 have been denied are assumed to be false.”). Judgment on the pleadings is proper only when the
23 moving party clearly establishes on the face of the pleadings that no material issue of fact remains
24 to be resolved and that it is entitled to judgment as a matter of law. *Id.* However, judgment on the
25 pleadings is improper when the district court goes beyond the pleadings to resolve an issue; such a
26 proceeding must properly be treated as a motion for summary judgment. Fed. R. Civ. P. 12(c); *cf.*
27 *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1301 (9th Cir. 1982) (discussing Fed. R. Civ. P.
28 12(b)(6)), *cert. denied*, 467 U.S. 1251, 104 S. Ct. 3533, 82 L. Ed. 2d 838 (1984).

1 **B. The Rule 56 Summary Judgment Standard**

2 Summary judgment is appropriate where “there is no issue as to any material fact” and “the
3 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party
4 “has both the initial burden of production and the ultimate burden of persuasion on a motion for
5 summary judgment.” *Nissan Fire & Marine Ins. Co. v. Fritz*, 210 F.3d 1099, 1102 (9th Cir. 2000),
6 *citing* 10A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and*
7 *Procedure* § 2727 (3d ed. 1998).

8 To meet its burden of production, Facebook must produce evidence of every factual
9 element of its claim, and also must demonstrate that there is no genuine issue as to any of those
10 facts. *See Fonteno v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir. 1986) (holding when a plaintiff moves
11 for summary judgment on an issue upon which he bears the burden of proof, “he must establish
12 beyond peradventure all of the essential elements of the claim to warrant judgment in his favor”).
13 The court must accept all of the nonmoving party’s direct evidence as true. *Eastman Kodak Co. v.*
14 *Image Technical Services, Inc.*, 504 U.S. 451, 457, 112 S.Ct. 2072, 2077 (1992). The “district
15 court has the responsibility to construe all facts in the light most favorable to the non-moving
16 party.” *Nelson v. City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009). All ambiguities or questions of
17 credibility are to be resolved against the moving party. *United States v. Diebold*, 369 U.S. 654
18 (1962). “[I]f a rational trier of fact might resolve the issue in favor of the nonmoving party,
19 summary judgment must be denied.” *T. W. Electrical Services, Inc. v. Pacific Electrical*
20 *Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). Even where the underlying facts are
21 undisputed, “[s]ummary judgment should not be granted where contradictory inferences may be
22 drawn from undisputed evidentiary facts.” *United States v. Perry*, 431 F.2d 1020, 1022 (9th Cir.
23 1970).

24 “If a moving party fails to carry its initial burden of production, the nonmoving party has no
25 obligation to produce anything ... [and] may defeat the motion for summary judgment without
26 producing anything. *Nissan Fire*, 210 F.3d at 1102. If, however, a moving party carries its burden
27 of production, the nonmoving party must produce evidence to support its claim or defense. *Id.*

III. ARGUMENT

A. Facebook Has Not Met Its Burden To Establish Standing To Sue Under Penal Code § 502

1. The Only “Injury” Alleged Is To “Facebook’s Reputation And Goodwill”

Facebook’s First Amended Complaint (Docket Entry No. 9) (hereafter, “Complaint”) does not assert any form of injury or victim expenditure cognizable under § 502. Facebook’s allegations of injury supporting the § 502 claim are set forth at ¶¶ 118-119:

118. Facebook suffered and continues to suffer damage as a result of Defendants’ violations of the California Penal Code § 502 identified above.

119. Defendants’ conduct also caused irreparable and incalculable harm and injuries to Facebook (including but not limited to, Facebook’s reputation and goodwill), and, unless enjoined, will cause further irreparable and incalculable injury, for which Facebook has no adequate remedy at law.

Facebook’s allegations are heavy with adjectives, but light on facts. Facebook’s injuries are said to be “irreparable” and “incalculable,” but there is no description of exactly what those injuries might be – with one possible exception. The only type of injury that is alluded to in the Complaint is the purported harm to “Facebook’s reputation and goodwill.” Although, again, there is no indication as to exactly what harm is alleged to have befallen “Facebook’s reputation and goodwill.” Power’s answer denies the allegations of ¶¶ 118-119. (*See* Amended Answer, Docket Entry No. 54, at ¶¶ 118-119.) Thus, so far as Facebook’s motion for judgment on the pleadings under Rule 12(c) is concerned, Facebook’s allegations must be assumed false. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990) (“[T]he allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false.”).

2. Facebook Submitted No Evidence Of Injury

Facebook’s motion does not include any evidence of injury. The only evidence submitted with Facebook’s motion is the Declaration of Julio C. Avalos (Docket Entry No. 57), one of Facebook’s lawyers, attaching settlement communications between Facebook’s counsel and Mr. Vachani, who was, at the time of the correspondence, an unrepresented party. The settlement

1 correspondence does not establish or evidence any injury to Facebook, and the purpose for which it
2 was submitted is unclear.¹

3 **3. Facebook Has Not Met Its Burden To Establish “Injury”**
4 **As Defined By § 502(b)(8)**

5 Facebook has not alleged any “alteration, deletion, damage, or destruction” of any
6 computer or data owned by Facebook. *See* Cal. Penal Code § 502(b)(8). Nor has Facebook
7 alleged any “denial of service” to legitimate users. *See id.* Nor has Facebook submitted any
8 evidence of such injuries. Thus Facebook has not met its burden to establish an “injury” as defined
9 by Penal Code § 502(b)(8).

10 **4. Facebook Has Not Met Its Burden To Establish A “Victim**
11 **Expenditure” As Defined By § 502(b)(9)**

12 Facebook also failed to allege or to submit evidence that it has made a “victim expenditure”
13 as defined by § 502(b)(9). Facebook contends it “has been forced to commit corporate resources to
14 deal with the repeated attacks by Power,” in that Facebook “implemented technical measures to
15 block users from accessing Facebook through Power.com.” Facebook Mot. at 8:1-5. But there is
16 no evidence of any expenditure made for these purposes. And if such expenditures were made,
17 they still would not qualify as “victim expenditures” under the statute.

18 First, consider what happened to the Facebook website. The pleadings establish that
19 Facebook users accessed their own Facebook accounts and their own User Content through the
20 Power browser. Nothing more. There is no allegation, let alone evidence, that any “computer
21 system, computer network, computer program, or data was ... altered, deleted, damaged, or
22 destroyed by the access.” Penal Code § 502(b)(9).

23 Facebook’s characterization of these actions as “cyber attacks” is hyperbole. *See* Facebook
24 Mot. at 3:16 (“cyber-attack”); *id.* at 8:2 (“repeated attacks by Power”); *id.* at 8:11 (“Power’s
25 attacks”); *id.* at 8:11-12 (“even more attacks”). Actions by users to access their own accounts and
26 to copy their own User Content through the Power browser are not “attacks.” These users
27 employed a utility that is commonplace in the industry and which Facebook itself makes available

28 ¹ Defendants object to this evidence under Fed. R. Evid. 402, 403, 407, 408. Defendants hereby
move to strike the Declaration of Julio C. Avalos (Docket Entry No. 57) in its entirety.

1 to its users to access accounts on other websites. *See* Vachani Decl. ¶ 8; Amended Answer at 2:4-
2 3:25 (“Facebook solicits users to enter their account names and passwords for users’ email
3 accounts at Google’s Gmail, AOL, Yahoo, Hotmail, or other third party websites. Facebook then
4 uses the account information to allow the user to access those accounts through Facebook, and to
5 import information – *i.e.*, to ‘scrape’ data – from those third-party sites into Facebook.”).
6 Facebook’s use of the hyperbolic phrase “cyber attack” to describe this common industry practice
7 is preposterous.

8 Next, consider Facebook’s response. The pleadings establish that Facebook “implemented
9 technical measures to block users from accessing Facebook through Power.com.” Amended
10 Answer ¶ 63. These technical measures were quite simple. Facebook blocked Power’s IP address,
11 so that users attempting to access their Facebook accounts through Power’s browser would be
12 denied access. *See* Vachani Decl. ¶ 9. Nothing more.

13 An IP (Internet Protocol) address is a numeric label that is assigned to devices, including
14 web servers and other types of computers, participating in a computer network. *Id.* For example,
15 the IP address for the Power.com web server is 70.38.96.9, and the IP address for the
16 Facebook.com web server is 69.63.186.36. *Id.* The blocking of an IP address is a simple feature
17 that can be implemented with push-button ease by virtually any web host. *Id.* The “expenditure”
18 of “corporate resources” to accomplish this “technical measure” would involve, essentially, a few
19 clicks of a mouse to access the IP blocking feature of the web host, and ten keystrokes to enter
20 Power.com’s IP address among those to be blocked. *Id.*; *see also* First Amended Complaint ¶ 136
21 (“Facebook employs numerous technological measures, including identifying and blocking the IP
22 addresses of known offenders.”).

23 Facebook contends that “[t]he time and resources invested by Facebook in tracking Power’s
24 attacks, blocking Power’s attacks, and then fielding even more attacks after Power’s admitted
25 circumvention are cognizable injuries demonstrating damage or loss under the computer trespass
26 statutes.” Facebook Mot. at 8:10-13. Facebook’s contention is both factually and legally
27 unsupported. The only fact established by the pleadings and the evidence is that Facebook blocked
28 Power’s IP address. There is no evidence of record concerning what, if any, “expenditure” was

1 made by Facebook to block Power's IP address. Nor is there any allegation or evidence related to
2 any "tracking" or "circumvention" efforts, let alone any "expenditure" related thereto.

3 In any event, resources expended to "track" or "block" access are not a cognizable "victim
4 expenditure" under § 502. The only expenditures cognizable under § 502 are those "reasonably
5 and necessarily incurred ... to verify that a computer system, computer network, computer program
6 or data was or was not altered, deleted, damaged or destroyed by the access." Cal. Penal Code
7 § 502(b)(9). There is no allegation, let alone evidence, that Facebook made any expenditure at all,
8 let alone any expenditure "verify" the matters described in the statute.

9 Facebook's reliance on *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*, 119
10 F.Supp.2d 1121 (W.D. Wash. 2000), is misplaced. *Shurgard Storage* involved a different statute
11 and a very different set of facts. The plaintiff in *Shurgard Storage* alleged that one of its
12 employees had been lured by a competitor to act as a double-agent, to obtain confidential business
13 plans and trade secrets from the plaintiff's computer system, and to email them to a competitor,
14 before eventually being hired away by that competitor. *See* 119 F.Supp.2d at 1123. The issue in
15 *Shurgard Storage* was whether the plaintiff had sufficiently pled "damage" to support a claim
16 under the federal Computer Fraud and Abuse Act (CFAA), which defines "damage" to include
17 "any impairment to the integrity ... of data ... or information." *Shurgard Storage*, 119 F.Supp.2d
18 at 1126, *quoting* 18 U.S.C. § 1030(e)(8)(A). The court found the CFAA's use of the term
19 "integrity" ambiguous, and engaged in a lengthy analysis of the legislative history of the statute to
20 conclude that the disclosure of trade secrets alleged in the complaint impaired the "integrity" of the
21 data, and thus qualified as "damage" under the CFAA. *Shurgard Storage*, 119 F.Supp.2d at 1127;
22 *see also id.* at 1126-29 (reciting an extensive discussion of the legislative history of the CFAA).

23 *Shurgard Storage* is factually very different from the instant case, because this case does
24 not involve any theft of proprietary data or trade secret information. On the contrary, the only data
25 accessed through Power's utilities were user's own "User Content," over which Facebook has
26 disclaimed any ownership. *See* Vachani Decl. ¶ 5; Amended Answer at 7:13-15 ("Power.com
27 provides users with utilities that allow them to copy their own User Content ... without copying
28 other elements of the Facebook website."); *id.* at 7:6-9 ("Facebook owns no copyright to such User

1 Content. Indeed, Facebook’s own Terms of Use expressly state that ‘Facebook does not assert any
2 ownership over your User Content.’”).

3 More importantly, the question of injury in *Shurgard Storage* arose under a very different
4 statute from the one at issue here. This motion concerns Facebook’s claim under California Penal
5 Code § 502, which is a fundamentally different statute than the federal CFAA, with a
6 fundamentally different standing requirement. The language defining injury under § 502 is not
7 even remotely similar to the language of the CFAA. The statutes were enacted by different
8 legislative bodies and have different legislative histories. *Shurgard Storage* says nothing that is
9 even remotely relevant to the application of the distinct standing requirements for a private litigant
10 asserting a civil claim under § 502. There is no authority for private litigant standing under § 502
11 based on expenditures to “track” or “block” users from accessing their own User Content on their
12 own accounts. Neither *Shurgard Storage*, nor any other authority, supports the expansion of the
13 private right of action under § 502 to allow such a claim.

14 **5. Facebook Has Not Met Its Burden To Establish Causation**

15 Even if Facebook had met its burden to show an injury or a victim expenditure cognizable
16 under § 502 – and Facebook has not met that burden – that alone would not be enough. Facebook
17 must also show that such injury or victim expenditure was caused “by reason of” defendants’
18 alleged violation. Cal. Penal Code § 502(e)(1). Facebook’s claim fails in this respect as well.
19 Facebook has neither alleged nor submitted evidence of any causal link between Power’s actions
20 and any injury to or victim expenditure by Facebook. Moreover, Power has submitted evidence
21 that no such injury or victim expenditure was or could have been caused by its conduct. According
22 to the declaration of Power’s CEO, Steven Vachani:

23 10. The utilities made available to users through the Power browser
24 were merely capable of accessing the user’s own account, displaying
25 the Facebook website, copying the user’s own “User Content,” and
26 updating the user’s own “User Content” if directed to do so by the
27 user. The Power browser does not provide any capability to cause
28 the alteration, deletion, damage, or destruction of a computer system,
computer network, computer program, or data. Nor does the Power
browser provide any capability to cause a denial of access to
Facebook by a legitimate user.

1 11. I am not aware of any instance in which use of the Power
2 browser caused any alteration, damage, deletion or destruction to any
3 of Facebook's data or computers. That did not happen and could not
4 have happened.

5 12. Upon learning that users were accessing their accounts through
6 the Power browser, Facebook would have no reason to believe that
7 its computer system, computer network, computer program, or data
8 had been altered, deleted, damaged, or destroyed by such access.
9 Facebook is familiar with the utilities used by the Power browser
10 because Facebook itself has used similar utilities for years. Thus
11 Facebook should have been aware, and so far as I could tell *was*
12 aware, that it had no cause for such concern. In its communications
13 to me, Facebook never suggested any concern that its computers or
14 data had been altered, deleted, damaged, or destroyed. Since there
15 was no cause for concern, Facebook did not, to my knowledge, make
16 any expenditure to verify that its computers or data had not been
17 altered, deleted, damaged, or destroyed.

18 13. Facebook's only response was to block access through Power's
19 IP address. Facebook's decision to block Power's IP address was a
20 pure business decision with only one realistic purpose: to thwart a
21 potential competitor from implementing new technology that may
22 prove superior to Facebook's technology. Facebook's decision to
23 block Power's IP address was in no sense a "reasonable" or
24 "necessary" measure to verify that the Facebook computers or data
25 had not been altered, deleted, damaged or destroyed. Facebook had
26 no need for such verification, and IP blocking has nothing to do with
27 such verification.

28 Vachani Decl. ¶¶ 10-13.

**B. Facebook Has Not Met Its Burden To Establish A Violation Of
Penal Code § 502(c)(1)**

Facebook has not met its burden to establish a violation of § 501(c)(1) for at least five reasons. *First*, Facebook has neither alleged nor submitted proof that users' accessing their own accounts through the Power browser did anything that altered, damaged, deleted or destroyed any data, computer, computer system or computer network owned by Facebook. That did not happen.

See Vachani Decl. ¶ 11.

Second, Facebook has neither alleged nor submitted proof of any "scheme or artifice to defraud, deceive or extort anyone." *Compare* Cal. Penal Code § 502(c)(1)(A) *with* Vachani Decl. ¶ 14 ("The only intended use and the only actual use of the Power browser was to display the user's own Facebook account and to enable the user to copy and/or update the user's own 'User Content.'")

1 We had no scheme to defraud, deceive or extort anyone. Nor could the Power browser be used for
2 such a scheme. Nor, to my knowledge, was the Power browser used for such a scheme.”).

3 *Third*, Facebook has neither alleged nor submitted proof that anyone using the Power
4 browser “wrongfully control[led] or obtain[ed] money, property or data.” *Compare* Cal. Penal
5 Code § 502(c)(1)(B) *with* Vachani Decl. ¶ 15 (“The Power browser was not intended to and is not
6 capable of wrongfully controlling or obtaining money, property or data. We did not intend it for
7 such use. Nor, to my knowledge, was the Power browser ever used for such purposes.”).

8 *Fourth*, Facebook has never identified any instance in which Power accessed any data
9 without the express permission of the user and rightful owner of the accessed data. Facebook’s
10 motion contends – without evidentiary support – that “Power has admitted to knowingly accessing
11 and without permission taking, copying, and/or making use of Facebook login information data.”
12 Facebook Mot. at 6:7-8. That contention is absolutely false, and is presented in a manner
13 purposely designed to mislead the Court by creating the impression that Power obtained users’
14 login information (usernames and passwords) by hacking into Facebook’s computers. The real
15 facts are that Power has never obtained any usernames or passwords from Facebook’s computers.
16 *See* Vachani Decl. ¶ 16. Every username and password obtained by Power was manually entered
17 through the Power.com website by a user who wished to access his or her own account through the
18 Power browser. *See id.* No data owned by Facebook has ever been altered or destroyed from such
19 access. *See id.* And the only data that was “copied” or “used” in any substantial way was the user’s
20 own User Content, and only for such purposes as were specifically directed by the user. *See id.*²

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22 ² Magistrate Judge Seeborg’s decision in *Facebook Inc. v. ConnectU LLC*, 489 F.Supp.2d 1087
23 (N.D. Cal. 2007) held that Facebook stated a claim under § 502(c)(2) where it alleged that
24 ConnectU collected email addresses of registered Facebook users, and then sent commercial email
25 to those persons “without permission.” But *ConnectU* is both factually and legally distinguishable.
26 *ConnectU* was a Rule 12(b)(6) case, which required that Facebook’s allegations be accepted as true
27 and that all inferences be drawn in Facebook’s favor. The procedural posture on this motion
28 requires that similar allegations, which have been denied by Power, “are assumed to be false.”
Hal Roach Studios v. Richard Feiner & Co., 896 F.2d at 1550. Furthermore, Power has made a
substantial showing that it has never accessed any user account other than as specifically directed
by the user, has never directly sent any communication to any address obtained through Facebook,
and has never made any use of “User Content” other than as specifically directed by the user. *See*
Vachani Decl. ¶¶ 10, 14. Given the distinct procedural posture and distinct facts of this case,
ConnectU is not a useful precedent.

1 *Fifth*, the pleadings do not establish, and Facebook has submitted no proof, that Power
2 acted with the requisite *men rea* to “knowingly” commit a violation § 501(c)(1). To establish
3 liability, Facebook is required to establish that Power “knowingly” committed every element of an
4 offense under § 501(c)(1). *See, e.g., People v. Hawkins*, 98 Cal.App.4th 1428, 1439 (2002)
5 (rejecting the assertion that “‘knowingly’ only modifies ‘accesses’ and not the rest of the crime”).
6 Neither the pleadings nor the proof submitted by Facebook establish that Facebook acted
7 “knowingly” “without permission” to damage any data or computer as part of any scheme to
8 accomplish any of the objects prohibited by § 501(c)(1). On the contrary, the only record evidence
9 on this issue establishes that Power acted with a good faith belief that (i) “access to users’
10 Facebook accounts through the Power browser was done in every instance with the permission of
11 the user,” Vachani Decl. ¶ 17, that “in every instance those users had ownership of all “User
12 Content” that was accessed and/or copied through the Power browser,” *id.*, and “that no other
13 permission was legally required for users to access their own accounts and User Content through
14 the Power browser,” *id.* “To the extent that Facebook’s Terms of Use purport to restrict users from
15 accessing their own User Content in this manner, Power had, and continues to have, a good faith
16 belief that Facebook’s Terms of Use were legally unenforceable or otherwise violative of the
17 copyright and unfair competition laws.” *Id.* ¶ 18.³

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³ In December 2008, after receiving notice that Facebook objected to users’ access through the Power browser, Power immediately began working with Facebook to implement a different type of connection through “Facebook Connect.” Vachani Decl. ¶ 19. Power maintained its belief that it had done nothing wrong, and that it had every legal right to allow users access to their own Facebook accounts through the Power browser. *Id.* Nevertheless, in an effort to reach an amicable resolution, Power agreed to try to work through “Facebook Connect” instead. *Id.* By January 2009, Power had taken down its existing Facebook integration through the Power browser, and had focused its efforts exclusively on implementing “Facebook Connect.” *Id.* Power has not made any connection to Facebook since January 2009, and has no current plan to re-start its Facebook integration. *Id.* Nevertheless, at all times through January 2009, and continuing through to today, Power believed and continues to believe, in good faith, that it had all permissions legally required to permit users to access their own Facebook accounts and to copy their own User Content through the Power browser. *Id.* Power never “knowingly” acted “without permission,” as those terms are used in § 502(c). *Id.*

1 **C. Facebook Has Not Met Its Burden To Establish A Violation Of**
2 **Penal Code § 502(c)(2)-(4) or § 502(c)(7)**

3 Facebook has not met its burden to establish a violation of § 501(c)(2)-(4) and (7) because
4 neither the pleadings nor the evidence establish that Power “knowingly” accessed any Facebook
5 account “without permission,” for the same reasons as those set forth in Part III.B, above.
6 Facebook has not met its burden to establish a violation of § 501(c)(4) for the additional reason that
7 neither the pleadings nor the evidence establish that Power “knowingly” and “without permission”
8 added, altered, damaged, deleted or destroyed any data, computer software, or computer programs.
9 *See* Vachani Decl. ¶ 11 (“I am not aware of any instance in which use of the Power browser caused
10 any alteration, damage, deletion or destruction to any of Facebook’s data or computers. That did
11 not happen and could not have happened.”).

12 **D. Power Has Raised Triable Issues Of Fact Concerning Its**
13 **Affirmative Defenses**

14 Power has asserted two formidable affirmative defenses based on Fair Use under 17 U.S.C.
15 § 107, *see* Amended Answer ¶¶ 161-164, and the common law doctrine of copyright misuse, *id.*
16 ¶¶ 165-168. The facts asserted in those defenses must be accepted as true on this motion. *See* Part
17 II.A and II.B, above.

18 It now appears that a third defense, federal preemption, may also apply. As explained in
19 Part III.A.1, *supra*, the only injury Facebook alleges in support of its § 502 claim is injury to
20 “Facebook’s reputation and goodwill.” If Facebook had asserted an injury under § 502 based on
21 the use or display of copyrighted information through the Power browser, the § 502 claim would be
22 preempted by the Copyright Act, 17 U.S.C. § 301(a). This may be why Facebook purposely
23 omitted such an allegation of harm.

24 **IV. CONCLUSION**

25 For the foregoing reasons, Facebook’s motion for judgment on the pleadings, or in the
26 alternative, for summary judgment, of liability under California Penal Code § 502(c) should be
27 denied.
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Respectfully submitted,
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3
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