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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

5 Attorneys for Defendant
6 SCRIBD, INC.

7
 8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

11 LARRY WILLIAMS,

Plaintiff,

13 vs.

14 SCRIBD, INC., a corporation, GalaxiaMia sued as
 DOE 1; api_user_11797_malvik as DOE 2;
 15 alukmanto as DOE 3; api_user_11797_NEBOJSAJE)
 as DOE 4; mikaj as Doe 5; Srikanthbnm sued as)
 16 DOE 6; api_user_11797_Sathis sued as DOE 7;)
 api_user_11797_tevado... sued as DOE 8;)
 17 api_user_11797_ingrid... sued as DOE 9; and DOES)
 10 to 40 are upload infringers to be named,)

18 Defendants.

CASE NO. 09-cv-1836-LAB-WMc

DEFENDANT SCRIBD, INC.'S
 NOTICE OF RULE 12(b)(6)
 MOTION AND MOTION TO
 DISMISS COMPLAINT

Date: February 22, 2010

Time: 11:15 a.m.

Dept: 9

Judicial Officer: Hon. Larry A. Burns

20 TO PLAINTIFF AND HIS COUNSEL OF RECORD:

21 PLEASE TAKE NOTICE that on February 22, 2010, at 11:15 am or as soon thereafter as
 22 the matter may be heard, in Department 9 of the above-entitled Court located at 940 Front Street,
 23 San Diego, California, in the courtroom of the Honorable Larry A. Burns, United States District
 24 Judge, Defendant SCRIBD, INC. ("Defendant" or "Scribd") will and hereby does move this
 25 Court for an order to dismiss, without leave to amend, all four claims of the Complaint.

26 This motion is made pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), that the
 27 Complaint fails to state a claim upon which relief can be granted, on the following grounds:

ORIGINAL

1 1. Plaintiff's first claim, for alleged copyright infringement, fails to state a claim
2 upon which relief can be granted, because Plaintiff fails to state a claim for direct, contributory,
3 or vicarious copyright infringement as to Scribd. Further, Scribd is protected under the Safe
4 Harbor provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512.

5 2. Plaintiff's second claim, for alleged conspiracy to commit copyright infringement,
6 fails because, if it is a federal claim it is identical to the first claim as contributory copyright
7 infringement, and if it is a state law claim it is preempted by the federal Copyright Act, 17
8 U.S.C. § 101 *et seq.*

9 3. The third claim, for alleged misappropriation of right of publicity, fails as to
10 Scribd because it is preempted by the federal Cox-Wyden Amendment to the Communications
11 Decency Act, 47 U.S.C. § 230.

12 4. The fourth claim, for alleged unjust enrichment, fails because it is preempted by
13 the federal Copyright Act, 17 U.S.C. § 101 *et seq.*

14 This Motion is based upon this Notice of Motion, the accompanying Memorandum of
15 Points and Authorities and the attached Declarations and Exhibits in support thereof, and all
16 pleadings, papers, and records on file in this action, deemed to be on file, or of which this Court
17 may take judicial notice as of the time the Motion is heard, and upon such further oral argument
18 and documentary evidence as may be presented at the time of the hearing.

19

20

21 Dated: November 23, 2009

Respectfully submitted,
GORDON & REES LLP

22

23

24 by Richard P Sybert

25

Richard P. Sybert
Yuo-Fong C. Amato
Attorneys for Defendant
SCRIBD, INC.

26

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Larry Williams (“Plaintiff”), despite being represented by counsel, has asserted
4 four claims against defendant Scribd, Inc. (“Scribd”) that he must know are barred by law. He
5 has nevertheless elected to waste the time of this Court and the time and money of Scribd to
6 bring meritless allegations against Scribd. Plaintiff’s Complaint should be dismissed as to
7 Scribd, as it fails to state claims on which relief can be granted, and it cannot be amended
8 truthfully to remedy this defect.

9 Plaintiff’s first claim for relief, for alleged copyright infringement, does not and cannot
10 sufficiently plead either direct, contributory, or vicarious infringement on the part of Scribd.
11 Further, as a matter of law and from Plaintiff’s own allegations, Defendant Scribd is immunized
12 from liability under the “Safe Harbor” provision, Section 512, of the Digital Millennium
13 Copyright Act (“DMCA”).

14 Plaintiff’s second claim for relief, for alleged conspiracy to commit copyright
15 infringement, is redundant if intended as a federal claim, and preempted by the Copyright Act if
16 intended as a state law claim (which is not clear).

17 Plaintiff’s third claim for relief fails because Scribd, as matter of law, is immunized from
18 liability under Section 230 of the federal Communications Decency Act.

19 Finally, Plaintiff’s fourth claim for relief, for unjust enrichment, is preempted by the
20 Copyright Act.

21 Collectively, this leaves the Plaintiff with nothing. The Complaint should be dismissed
22 with prejudice as to Scribd.

23 **II. FACTS**

24 According to the Complaint, Defendant Scribd, Inc. (“Defendant” or “Scribd”) is the
25 largest “social publishing” company in the world, with more than sixty million readers every
26 month. Complaint ¶ 10. “Social publishing,” according to the Complaint, is an online platform
27 that gives authors from all over the world control to upload and publish documents such as
28 academic papers and creative writing. *Id.* Scribd’s online platform is its website at

1 www.scribd.com. *Id.* Once authors upload their works to Scribd's website, the works are
2 available free of charge. *Id.* Scribd is largely supported by revenues from advertisements. *Id.*

3 Although less than three years old, Scribd's website is already enormously popular. The
4 website encourages self-publication of creative writing, facilitates academic peer review, permits
5 the publication of works in the public domain, and allows numerous publishing companies such
6 as Harvard University Press, the Chicago Tribune, and Simon and Schuster, to offer excerpts of
7 their works to promote the sale of full, electronic versions of those works. Declaration of George
8 Consagra ("Consagra Decl.") ¶¶ 2, 6, and Exhibit F attached thereto. In short, the Scribd website
9 is a powerful tool that removes barriers between authors, publishers, and readers. *Id.*

10 Although Scribd does not want unauthorized works on its site, some users abuse the
11 system and upload to Scribd content they are not authorized to upload. *Id.*; *see* Complaint
12 generally. Scribd has taken responsible and legal steps to combat this. Consistent with its anti-
13 infringement policies, Scribd removes infringing and allegedly infringing material from viewer
14 access upon receipt of proper notice from the holder of the copyright on that content or an
15 authorized agent thereof. *See* Complaint ¶ 17.

16 Plaintiff Larry Williams ("Plaintiff" or "Williams") is the author and the copyright holder
17 of various literary works. Complaint ¶¶ 8-9. Plaintiff has listed these works in Paragraphs 8, 22,
18 and 23 of his Complaint. Of the thirteen listed works in Paragraph 8, two—"Long-Term Secrets
19 to Short-Term Trading" and "The Right Stock at the Right Time"—are registered to John Wiley
20 & Sons, not Mr. Williams.¹ Declaration of Yuo-Fong C. Amato ("Amato Decl.") Decl. ¶¶ 2-3
21 and Exhibits A and B attached thereto. Another work appears as a duplicate ("Day Trade
22 Futures Online By Larry Williams" with registration no. TX5236386, and "Day Trade Futures
23 Online" with registration no. TX0005236386). Paragraphs 22 and 23 of the Complaint allege an
24 additional six works but without copyright registration numbers. A search of the United States
25 Copyright Office website did not yield results for the titles as alleged. Complaint ¶¶ 22-23;

26 ///

27 _____
28 ¹ Not only did Plaintiff pass off some of the John Wiley & Sons ("Wiley") copyrights as his own, but in fact Wiley has since partnered with Scribd to display (and later sell) some of its publications on the Scribd website. *See* Wiley's Scribd profile, available at <http://www.scribd.com/Wiley>.

1 Amato Decl. ¶ 5. Thus, the Complaint alleges only alleges infringement of ten copyrighted
2 works.

3 Of these ten facially-valid copyrights registered to Plaintiff, the available evidence shows
4 that *only two were posted on the Scribd website*—"The Secret of Selecting Stocks for Immediate
5 and Substantial Gains" and "Larry Williams Forecast 2009." *Id.* at ¶¶ 2-4 and Exhibits A-C
6 attached thereto; Consagra Decl. ¶¶ 7-16 and Exhibits G-P attached thereto. And, as set forth
7 below, *Scribd removed them promptly upon receipt of proper notice from Plaintiff.*

8 A matrix of these titles shows this breakdown:

<u>Title of Work</u>	<u>Registration No.</u>	<u>Complaint ¶</u>
Works Registered to John Wiley & Sons (not Plaintiff)		
Long-Term Secrets to Short-Term Trading	TX4945747	8
The Right Stock at the Right Time	TX5814735	8
Works Not Registered		
10 Year Pattern in the U.S. Stock Market	N/A	22, 23
A Classic Larry Williams Trading Pattern	N/A	22, 23
Inner Circle Workshop Notes	N/A	22, 23
The False Break Buy & Sell Pattern	N/A	22, 23
My Million Dollar Stock Market Concept	N/A	22, 23
How to Trade Better	N/A	22, 23
Works Registered to Plaintiff But No Record of Upload to Scribd.com		
Secrets of the COT Report	TX0006254327	8
How I Made One Million Dollars Last Year Trading Commodities	TX0000350660	8
Day Trade Futures Online by Larry Williams/ Day Trade Futures Online	TX5236386/ TX0005236386	8
Definitive Guide to Futures Trading	TX0003120961	8

<u><i>Title of Work</i></u>	<u><i>Registration No.</i></u>	<u><i>Complaint ¶</i></u>
Definitive Guide to Futures Trading: Volume II	TX0003138435	8
Works Registered to Plaintiff But No Record of Upload to Scribd.com (continued)		
Oops! And Scoops! Trading Method	TX0002271277	8
Presenting Larry R. Williams, "Jason" Commodity Trading Method	TX0002271276	8
Winning Futures Trading Strategy	TX0003121166	8
Works Registered to Plaintiff, Uploaded to Scribd.com, and Promptly Removed After Proper Notice		
The Secret of Selecting Stocks for Immediate and Substantial Gains	TX1788404	8
Larry Williams Forecast 2009	TX6902069	8, 22, 23

These last two titles were allegedly uploaded to Scribd's website by defendants *other than Scribd*. *Id.* at ¶¶ 18, 27. The Plaintiff alleges that before these works were taken down by Scribd, the works were "each downloaded and/or viewed hundreds of times," *id.* at ¶ 17, but it is undisputed that each time Plaintiff gave proper notice, Scribd promptly removed access to the allegedly infringing works within one day. Specifically:

1. On or around March 13, 2009, Plaintiff through his counsel sent a notice to Scribd asking that Scribd remove a copyrighted work, "Forecast 2009, Casting Stones, The Fate of Our Future" (registered as "Larry Williams Forecast 2009"). Amato Decl. ¶ 4 and Exhibit C attached thereto. *Just over an hour later*, Scribd wrote back and asked for a clear identification of the allegedly infringing work. *Id.* Plaintiff then provided a direct link to the work, which Scribd removed from its website that very night. *Id.*; Consagra Decl. ¶ 7 and Exhibit G attached thereto.

2. On March 30, 2009, Plaintiff wrote Scribd and asked Scribd to remove a different work, "The Secret of Selecting Stocks for Immediate and Substantial Gains." Amato Decl. ¶ 4 and Exhibit C attached thereto. Scribd again removed this allegedly infringing work on the same day. Consagra Decl. ¶ 9 and Exhibit I attached thereto.

///

1 theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In deciding a
2 motion to dismiss, “all allegations of material fact are taken as true and construed in the light
3 most favorable to the nonmoving party.” *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38
4 (9th Cir. 1996). But a complaint “requires more than labels and conclusions, and a formulaic
5 recitation of the elements of a cause of action will not do . . . on a motion to dismiss, courts ‘are
6 not bound to accept as true a legal conclusion couched as a factual allegation.’” *Bell Atl. Corp.*
7 *v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). And even “[f]actual allegations must
8 be enough to raise a right to relief above the speculative level.” *Id.* (citation omitted). Where
9 factual allegations are contradicted by the complaint’s own exhibits or other documents of which
10 the court may take proper notice, they should also be disregarded. *See Manzarek v. St. Paul Fire*
11 *& Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *In re Gilead Sciences Securities*
12 *Litigation*, 536 F.3d 1049, 1055 (9th Cir. 2008).

13 If the Court finds that Plaintiff failed to state claims upon which relief may be granted, it
14 must then decide whether to grant Plaintiff leave to amend. The Ninth Circuit has “held that a
15 district court should grant leave to amend even if no request to amend the pleading was made,
16 unless it determines that the pleading could not possibly be cured by the allegation of other
17 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations omitted) (emphasis
18 added). These additional facts, of course, would have to be truthful.

19 **B. This Court Can Consider Evidence Not Attached to the Complaint.**

20 Courts may consider evidence not attached to the Complaint (1) if the complaint relies on
21 the documents or if the documents form the basis of the claim, and the documents’ authenticity is
22 unquestioned, or (2) if the documents are a matter of public record or a matter of which the court
23 can take judicial notice, including previously filed documents in other cases. *Swartz v. KPMG*
24 *LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
25 2003); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Kuoha v. Equifirst*
26 *Corp.*, 2009 U.S. Dist. LEXIS 94699n1 (S.D.Cal. Oct. 7, 2009) (stating that “on a motion to
27 dismiss, a court may properly look beyond the complaint to matters of public record and doing
28 so does not convert a Rule 12(b)(6) motion to one for summary judgment”); *Britz Fertilizers*,

1 *Inc. v. Bayer Corp.*, 2009 U.S. Dist. LEXIS 96693 at *88-89 (E.D.Cal. Oct. 16, 2009); *AMCAL*
2 *Gen. Contrs., Inc. v. Co.*, 2009 U.S. Dist. LEXIS 97111 at *7-8 (C.D.Cal. Oct. 20, 2009). An
3 important policy behind admitting documents is to “prevent plaintiffs from surviving a Rule
4 12(b)(6) motion by deliberately omitting...documents upon which their claims are based.”
5 *Swartz, supra*, 476 F.3d at 763 (citation omitted).

6 **1. This Court Can Consider the Copyright Registrations.**

7 Copyright registrations on file with the United States Copyright Office are properly
8 admitted because they are public records. Accordingly, the copyright registrations for “Long-
9 Term Secrets to Short-Term Trading” and “The Right Stock at the Right Time,” registered to
10 John Wiley & Sons, are properly admitted before this Court on this motion to show that Plaintiff
11 does not own valid copyrights to these two works and cannot bring copyright infringement
12 claims regarding them. Amato Decl. ¶¶ 2-3 and Exhibits A-B attached thereto.

13 **2. This Court Can Consider Plaintiff’s Counsel’s Declaration and Its**
14 **Attachments.**

15 In representing Plaintiff and a third party, Tom DeMark, Plaintiff’s counsel Kurt Hallock
16 submitted a declaration for a miscellaneous case, Case No. 09-MC-0289 filed April 7, 2009 in
17 this judicial district, to subpoena Scribd for information regarding the upload infringer
18 defendants. The declaration established that Plaintiff sent a number of correspondences to
19 Scribd; Plaintiff’s counsel declared that Exhibit 1 contained “true and correct copies of the take
20 down requests sent to Scribd, Inc.” relating, in part, to Plaintiff’s works. Amato Decl. ¶ 4 and
21 Exhibit C attached thereto. This declaration and its attached documents are admissible on a
22 motion to dismiss both because (1) the documents form the basis of the claims, and their
23 authenticity is unquestioned, and (2) having been filed, they are a matter of public record. As to
24 (1), these documents, which are some of Plaintiff’s correspondences requesting the removal of
25 allegedly infringing documents, formed the basis of the copyright infringement claim, because
26 Plaintiff relied on them to allege knowledge of infringement and to attempt to prove that Scribd
27 is not entitled to the “safe harbor” protection of 17 U.S.C. § 512, *i.e.*, Title II of the Digital
28 Millennium Copyright Act (“DMCA”), also known as the Online Copyright Infringement

1 Liability Limitation Act (“OCILLA”).³ Complaint ¶¶ 16, 17. Nor can Plaintiff question the
 2 authenticity of the documents, as his attorney has declared under penalty of perjury that they are
 3 authentic. As to (2), these documents are public records filed in Case No. 09-MC-0289 of this
 4 judicial district. For either or both reasons, this Court can properly examine the declaration and
 5 its attachments under this 12(b)(6) motion.

6 **3. This Court Can Consider Scribd’s Responses to the Correspondences**
 7 **Attached to the Declaration.**

8 Scribd’s responses to Plaintiff’s correspondences also form the basis of the copyright
 9 infringement claim, because Plaintiff relied on *omitting* them to allege knowledge of
 10 infringement and to attempt to prove that Scribd is not entitled to a safe harbor defense.
 11 Complaint ¶¶ 16, 17. The authenticity of the responses cannot be disputed, as Plaintiff not only
 12 received them, the date, time, and subject matter can be easily cross-referenced with Plaintiff’s
 13 correspondences attached to the Declaration.

14 Additionally, it would be unfair if Plaintiff could “[survive] a Rule 12(b)(6) motion by
 15 deliberately omitting...documents upon which their claims are based.” *See Swartz, supra*, 476
 16 F.3d at 763 (citation omitted). The correspondences requesting removal of allegedly infringing
 17 documents are not complete unless reviewed in their entirety with Scribd’s responses. Plaintiff
 18 cannot truthfully claim he was ignorant of these responses; therefore, notice to Plaintiff is not in
 19 issue. *See Parrino v. FHP, Inc.*, 146 F.3d 699n4 (9th Cir. 1998) (where plaintiff had notice of
 20 the contents of the documents, the need for a chance to refute evidence is greatly diminished),
 21 *superseded by statute on other grounds as stated, Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th
 22 Cir. 2006).

23 These responses to Plaintiff’s correspondences requesting removal of allegedly infringing
 24 documents indicate that Scribd removed those documents within one day. Amato Decl. ¶ 4 and
 25 Exhibit C attached thereto; Consagra Decl. ¶¶ 7-11, 13-16, and Exhibits H-K, M-P attached
 26

27 ³ OCILLA creates a safe harbor for online service providers against copyright liability if they adhere to and qualify
 28 for certain prescribed safe harbor guidelines and promptly block access to allegedly infringing material or remove
 such material from their systems once they receive a notification claiming infringement from a copyright holder. 17
 U.S.C. § 512.

1 thereto. These documents demonstrate Scribd’s good faith and lack of intent to commit
2 copyright infringement. Plaintiff cannot omit these documents to survive a motion to dismiss,
3 and the Court may properly examine them in the context of a Rule 12(b)(6) motion. *See Swartz,*
4 *supra*, 476 F.3d at 763.

5 **4. This Court Can Consider Plaintiff’s Other Correspondences and**
6 **Scribd’s Responses to Those Correspondences.**

7 Plaintiff alleges that “[e]ven after numerous notifications of infringing works, Scribd
8 continued to display Plaintiff’s work or works through August 25, 2009.” Complaint ¶ 16. This
9 improperly suggests that Scribd did not take down any of the allegedly infringing works until
10 August 2009, through the deliberate omission of “documents upon which [Plaintiff’s] claims are
11 based.” *Swartz, supra*, 476 F.3d at 763. Nor, again, can Plaintiff reasonably contest the
12 authenticity of the following:

- 13 • Plaintiff’s correspondence to Scribd of May 12, 2009 and Scribd’s response of
14 May 12, 2009. Consagra Decl. ¶ 13 and Exhibit M attached thereto.
- 15 • Plaintiff’s correspondence to Scribd of May 15, 2009 and Scribd’s response of
16 May 15, 2009. Consagra Decl. ¶ 14 and Exhibit N attached thereto.
- 17 • Plaintiff’s correspondence to Scribd of August 17, 2009 and Scribd’s response of
18 August 17, 2009. Consagra Decl. ¶ 15 and Exhibit O attached thereto.
- 19 • Plaintiff’s correspondence to Scribd of August 26, 2009 and Scribd’s response of
20 August 26, 2009. Consagra Decl. ¶ 16 and Exhibit P attached thereto.

21 Therefore, this Court can properly examine these documents under a 12(b)(6) motion.

22 **5. This Court Can Consider Other Documents Evidencing Scribd’s**
23 **Qualifications for the DMCA’s “Safe Harbor.”**

24 Plaintiff bases his copyright infringement claim specifically on conclusory comments that
25 Scribd does not qualify for the “safe harbor” exemption from liability under 17 U.S.C. § 512:

- 26 • “Scribd is not an Internet Service Provider as intended by 17 U.S.C. § 512.”
27 Complaint ¶ 10.

28 ///

- 1 • “The notices sent to Scribd were in compliance with 17 U.S.C. 512(c)(3); even
2 though, Scribd is not an ISP entitled to the defense under this Section.” *Id.* ¶ 16.
3 • “Plaintiff included the detailed information required by 17 U.S.C. § 512(h) in the
4 Subpoena dated May 12, 2009 issued in Miscellaneous Case No. 09 MC 0289.”⁴
5 *Id.* ¶ 19.

6 Again, these allegations constitute an attempt by Plaintiff to omit relevant documents
7 regarding the safe harbor under 17 U.S.C. § 512. *See Swartz, supra*, 476 F.3d at 763.
8 specifically the following documents which relate to Scribd’s compliance with 17 U.S.C. § 512,
9 and the authenticity of which Plaintiff cannot reasonably contest:

- 10 • Printout from <http://support.scribd.com/forums/33939/entries/25459> (Scribd’s
11 Terms of Use, specifically 11.1), which shows Scribd has adopted and reasonably
12 implemented a termination policy, pursuant to 17 U.S.C. § 512(i)(1)(A), for
13 accounts of users identified as “repeat infringers.” Consagra Decl. ¶ 3 and
14 Exhibit D attached thereto.
15 • Printout from <http://www.scribd.com/copyright> (Copyright Management System),
16 which also illustrates that Scribd does not interfere with “standard technical
17 measures” that copyright owners use to protect their works, but instead works
18 with copyright owners to prevent infringement where possible. Consagra Decl.
19 ¶ 5 and Exhibit E attached thereto.
20 • Printout from <http://www.scribd.com/about> (About Scribd), which shows Scribd
21 has many legitimate uses. Consagra Decl. ¶ 6 and Exhibit F attached thereto.
22 • Subpoena and accompanying letter dated April 7, 2009 stating, “A copy [of the
23 subpoena for upload infringers] was sent for service on your designated agent for
24 service of process.” Consagra Decl. ¶ 12 and Exhibit L attached thereto.

25 This Court can properly examine these documents under a 12(b)(6) motion.
26

27
28 ⁴ Here, Plaintiff offered the confusing argument that even though Scribd is not a service provider entitled to the
 “safe harbor” defense, Plaintiff complied with the notice requirements of 17 U.S.C. § 512(h) when he notified
 Scribd of the infringing works through his subpoena.

1 IV. ARGUMENT

2 A. Plaintiff Fails To Sufficiently Plead the First Claim for Copyright
3 Infringement.

4 Plaintiff does not clearly allege in his Complaint whether he is suing Scribd for direct,
5 contributory, and/or vicarious copyright infringement. Regardless, as set forth below, Plaintiff
6 fails to sufficiently plead copyright infringement as to Scribd under any theory, and cannot do so,
7 so that amendment would be futile.

8 1. **Plaintiff Fails To Sufficiently Plead Direct Copyright Infringement.**

9 A claim of direct copyright infringement requires that a plaintiff allege ownership of a
10 valid copyright and unauthorized copying of the plaintiff's work. *Feist Publ'ns, Inc. v. Rural*
11 *Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d
12 1004, 1013 (9th Cir. 2001), *aff'd after remand*, 284 F.3d 1091 (9th Cir. 2002). In addition, some
13 courts—including district courts in this Circuit—have noted that the Copyright Act is not meant
14 to be a strict liability statute; therefore, a plaintiff must allege volitional conduct on the part of
15 the defendant. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004); *Religious*
16 *Tech. Cir. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F.Supp. 1361, 1370 (N.D.Cal. 1995);
17 *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1168 (C.D.Cal. 2002). A party
18 cannot be liable for direct infringement if it has not in fact acted to bring about the infringement.

19 In this case, first, Plaintiff has failed to establish copyright ownership of some of the
20 alleged works. Two of the accused works were not registered to Plaintiff but rather to John
21 Wiley & Sons. Amato Decl. ¶¶ 2-3 and Exhibits A-B attached thereto. Plaintiff also failed to
22 provide the copyright registration numbers for six other works, and a search of the Copyright
23 Office website did not reveal registrations for these titles as shown on the Complaint. Complaint
24 ¶¶ 22-23; Amato Decl. ¶ 5. Therefore, Plaintiff has only ten purportedly valid copyright
25 registrations at issue in this matter, and the evidence shows that only two were uploaded on the
26 Scribd website (and promptly taken down after receipt of notice). *See* Amato Decl. ¶¶ 2-4 and
27 Exhibits A-C attached thereto; Consagra Decl. ¶¶ 7-16 and Exhibits G-P attached thereto.

1 Second—and more important, because it goes to *all* the accused works—Plaintiff does
 2 not, and cannot, sufficiently plead volitional conduct by Scribd to bring about the infringement.
 3 Instead, the Complaint clearly alleges that *other defendants* uploaded the allegedly infringing
 4 works onto the Scribd.com website, not Scribd. *See, e.g.*, Complaint ¶ 16 (“Scribd, whose web-
 5 site *hosted* in the infringing activity,” emphasis added); ¶ 18 (“Defendant Galaxiamia uploaded
 6 many of Plaintiff’s copyrighted works to Scribd”); ¶¶ 22, 23 (listing Defendant Galaxiamia as
 7 the defendant who uploaded the work, followed by a paragraph stating that Scribd, “*by and*
 8 *through the website* Scribd.com, distributed” the exact same works; emphasis added).

9 As a matter of law, “storage on a defendant’s system of infringing copies and
 10 retransmission to other servers is not a direct infringement...of the exclusive right to reproduce
 11 the work where such copies are uploaded by an infringing user.” *Religious Tech. Ctr., supra*,
 12 907 F.Supp. at 1371. Therefore, Plaintiff has not sufficiently pled facts that would constitute
 13 direct infringement by Scribd; and cannot do so, based on its own allegations.

14 **2. Plaintiff Fails To Sufficiently Plead Contributory Copyright**
 15 **Infringement.**

16 Plaintiff asserts an equally unavailing claim of contributory copyright infringement.
 17 Contributory copyright infringement requires knowledge or reason to know of the direct
 18 infringement and material assistance in achieving it. *Metro-Goldwyn-Mayer Studios, Inc. v.*
 19 *Grokster, Ltd.*, 545 U.S. 913, 930 (2005); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir.
 20 2004). Where the accused device or service is capable of substantial non-infringing uses, then
 21 the constructive knowledge standard (*i.e.*, reason to know) does not apply, and a plaintiff must
 22 instead show the defendant’s actual knowledge of and material assistance with respect to specific
 23 acts of direct infringement. *A&M Records, supra*, 239 F.3d at 1020-21.

24 Here, Plaintiff’s Complaint formulaically recites the elements of contributory
 25 infringement without alleging facts to substantiate the claim as more than just merely
 26 speculative:

27 ///

28 ///

- 1 • “Defendants knew or should have known the infringed works belonged to
2 Plaintiff and that they did not have permission to exploit Plaintiff’s works.”
3 Complaint ¶ 24.
- 4 • “Defendants knew the infringed works belonged to Plaintiff and that they did not
5 have permission to exploit Plaintiff’s works.” Complaint ¶ 25.
- 6 • “Defendants...materially contributed to the infringing acts of others by
7 encouraging, inducing, allowing and assisting others to reproduce and distribute
8 Plaintiff’s works on the Scribd.com website.” Complaint ¶ 28.

9 This formulaic recitation is insufficient to survive a motion to dismiss. *See Brave New*
10 *Films 501(C)(4) v. Weiner*, 626 F.Supp.2d 1013, 1016 (N.D.Cal. 2009).

11 In fact, Plaintiff has affirmatively alleged that, far from “materially assisting” the
12 infringers, Scribd instead assisted *Plaintiff*—and removed the accused material after receiving
13 proper notice from Plaintiff. Complaint ¶ 17.

14 Further, the *scribd.com* website offers substantial non-infringing uses, including
15 encouraging self-publication, facilitation of academic peer review, publication of works in the
16 public domain, and preview of works available for sale. Consagra Decl. ¶¶ 2, 6, and Exhibit F
17 attached thereto. Therefore, Plaintiff has to prove more than Scribd’s “reason to know” of the
18 uploaders’ alleged direct infringement; he would have to prove actual knowledge. *A&M*
19 *Records, supra*, 239 F.3d at 1020-21. In this case, Plaintiff has not even alleged it.

20 Thus, Plaintiff has not sufficiently pled facts that would constitute contributory
21 infringement as to Scribd.

22 **3. Plaintiff Fails to Sufficiently Plead Vicarious Copyright Infringement.**

23 To state a claim for vicarious copyright infringement, courts formerly required a plaintiff
24 to allege: (1) direct copyright infringement by an individual or entity other than defendant; (2) a
25 direct financial benefit to the defendant; and (3) the defendant’s right and ability to supervise and
26 control the alleged infringing activity. *A&M Records, Inc., supra*, 239 F.3d at 1019. The U.S.
27 Supreme Court has now added to the third element: vicarious infringement is “profiting from
28 direct infringement while *declining to exercise a right to stop or limit it.*” *Grokster, supra*, 545

1 U.S. at 930 (emphasis added). Now a defendant must not only have the right and ability to
 2 supervise and control the infringing activity, it must decline to stop or limit this activity.

3 Again, in the Complaint here, Plaintiff formulaically recites the elements of vicarious
 4 infringement, but without offering facts that would substantiate the claim as more than merely
 5 speculative (and without taking into account the Supreme Court's modification in *Grokster*):

- 6 • "Defendant Scribd had the ability to control the infringing activities of the
 7 individuals or entities who directly infringed Plaintiff's works." Complaint ¶ 29.
- 8 • "Defendant Scribd...obtained a direct financial benefit from the infringing
 9 activities of the individuals or entities who directly infringed Plaintiff's works."
 10 Complaint ¶ 30.

11 This formulaic recitation is insufficient to survive a motion to dismiss. *See Brave New Films*
 12 *501(C)(4)*, *supra*, 626 F.Supp.2d at 1016. As shown below, Plaintiff offers no facts to support
 13 his claim that Scribd received a direct financial benefit, or that Scribd had the right and ability to
 14 supervise the infringing activity and refused to exercise that right and ability.

15 ***a. Plaintiff Offers No Facts to Support His Claim that Scribd***
 16 ***Received a Direct Financial Benefit.***

17 "The essential aspect of the 'direct financial benefit' inquiry is whether there is a causal
 18 relationship between the infringing activity and any financial benefit a defendant reaps, regard-
 19 less of how substantial the benefit is in proportion to a defendant's overall profits." *Ellison*,
 20 *supra*, 357 F.3d at 1079. In *Ellison*, the Ninth Circuit ruled that even if AOL received profits
 21 from subscribers, there was no evidence that the infringing activity encouraged subscriptions or
 22 that users unsubscribed from AOL once the infringing material was removed. *Id.* Therefore,
 23 since the infringing activity did not constitute a "draw" for AOL's customers, the company did
 24 not receive a "direct financial benefit." *Id.*

25 Here, aside from Plaintiff's formulaic assertion that Scribd received a direct financial
 26 benefit, Plaintiff alleges only that "Scribd is supported in large part by commercial entities'
 27 purchase of advertising space on the site;" otherwise, Scribd hosts its site "free of charge."
 28 Complaint ¶ 10. Plaintiff alleges also that Scribd attracts 60 million readers, but that Plaintiff's

1 alleged works were only viewed or downloaded a few hundred times.⁵ *Id.* at ¶¶ 10, 17. This *de*
 2 *minimis* proportion could not, as a matter of law, reflect a “draw” for Scribd’s customers or
 3 advertisers. Plaintiff also alleges no causal relationship between third party users posting
 4 Plaintiff’s works, and any financial benefit Scribd reaped by selling advertisements.

5 Therefore, Plaintiff’s vicarious copyright infringement claim against Scribd must also
 6 fail.

7 ***b. Plaintiff Offers No Facts to Support His Claim that Scribd, If It***
 8 ***Had the Right and Ability to Supervise and Control the Allegedly***
 9 ***Infringing Activity, Refused to Do So.***

10 The crux of a defendant’s “right and ability to supervise and control” requires that
 11 defendant had “pervasive participation” in the allegedly infringing activities. *Adobe Sys. v.*
 12 *Canus Prods.*, 173 F.Supp.2d 1044, 1055 (C.D.Cal. 2001) (interpreting *Fonovisa, Inc. v. Cherry*
 13 *Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996)). Here, however, Plaintiff’s allegations
 14 themselves show that Scribd was not “pervasively participating” in the alleged infringing
 15 activities. The Complaint alleges that *other defendants* uploaded the allegedly infringing works
 16 onto the *scribd.com* website, not Scribd. Complaint ¶ 16 (“Scribd, whose website *hosted* in the
 17 infringing activity,” emphasis added), ¶ 18 (“Defendant Galaxiamia uploaded many of Plaintiff’s
 18 copyrighted works to Scribd”), ¶¶ 22, 23 (listing Defendant Galaxiamia as the defendant who
 19 uploaded the work, followed by a paragraph stating that Scribd, “*by and through the website*
 20 *Scribd.com, distributed*” the exact same works; emphasis added).

21 Further, Plaintiff fails to allege that even if Scribd had the right and ability to supervise
 22 and control, it refused to exercise that right. On the contrary, Plaintiff alleges that Scribd actually
 23 did take down the allegedly infringing works after receiving proper notice of them. Complaint
 24 ¶ 17.

25 Therefore, Plaintiff’s vicarious copyright infringement claim against Scribd must also
 26 fail.

27 ///

28 ⁵ As discussed *supra*, evidence only exists for the upload of two of Plaintiff’s works. Therefore, even if each work
 was viewed or uploaded a few hundred times, that would not exceed two thousand hits.

1 **4. The DMCA Supports Dismissal of the Copyright Infringement Claim.**

2 Even if Plaintiff did state a claim for copyright infringement, Title II of the DMCA, also
3 known as the Online Copyright Infringement Liability Limitation Act (“OCILLA”), provides a
4 “safe harbor” to “provide greater certainty to service providers concerning their legal exposure
5 for infringements that may occur in the course of their activities.” *Ellison, supra*, 357 F.3d at
6 1076 (citations omitted). A service provider who complies with the DMCA cannot be liable for
7 copyright infringement. 17 U.S.C. § 512.

8 As a preliminary matter, a service provider must satisfy the requirements of 17 U.S.C.
9 § 512(i)(1): First, the service provider must have “adopted and reasonably implemented, and
10 informs subscribers and account holders of the service provider’s system or network of, a policy
11 that provides for the termination in appropriate circumstances of subscribers and account holders
12 of the service provider’s system or network who are repeat infringers.” Second, the service
13 provider must “accommodate[] and [] not interfere with standard technical measures.” *See also*,
14 *Ellison, supra*, 357 F.3d at 1080.

15 Then, if the service provider is one that handles “information residing on systems or
16 networks at direction of users” pursuant to Section 512(c), then it must also show the following
17 in order to qualify for the “safe harbor”:

- 18 • “its infringement is ‘by reason of the storage at the direction of a user of material
19 that resides on a system or network controlled or operated by or for the service
20 provider,’ 17 U.S.C. § 512(c)(1)”;
- 21 • “it lacked actual knowledge of the infringing material or was not aware of facts or
22 circumstances from which infringing activity was apparent on its system or
23 network and/or acted expeditiously to remove or disable access to the material
24 upon obtaining such knowledge or awareness, 17 U.S.C. § 512(c)(1)(A)(i)-(iii)”;
- 25 • “it did ‘not receive a financial benefit directly attributable to the infringing
26 activity,’ if it had ‘the right and ability to control such activity,’ 17 U.S.C. §
27 512(c)(1)(B)”;
- 28

- 1 • “it responded expeditiously to remove or disable access to infringing material
- 2 upon notification from the copyright owner, 17 U.S.C. § 512(c)(1)(C)”;
- 3 • “it has properly designated an agent to receive such notification, 17 U.S.C. §
- 4 512(c)(2).”

5 *Tur v. YouTube, Inc.*, 2007 U.S. Dist. LEXIS 50254 at *7-8 (C.D.Cal. June 20, 2007).

6 **Whether a defendant qualifies for the safe harbor is properly resolved on a motion**
 7 **to dismiss.** *See, e.g., Brave New Films 501(C)(4), supra*, 626 F.Supp.2d at 1018 (considering
 8 defendant’s safe harbor claim on a 12(b)(6) motion, but denying it because defendant talk-show
 9 host was not a “service provider”); *Goddard v. Google, Inc.*, 2009 U.S. Dist. LEXIS 67203n5
 10 (N.D.Cal. July 30, 2009) (finding that affirmative defenses can be grounds for a Rule 12(b)(6)
 11 dismissal if the defense is apparent from the complaint); *Parker v. Google, Inc.*, 422 F.Supp.2d
 12 492, 497n3 (E.D.Pa. 2006) (implying that the court would have otherwise reached the safe
 13 harbor issue if the court found that plaintiff sufficiently pled direct copyright infringement);
 14 *Newborn v. Yahoo!, Inc.*, 391 F.Supp.2d 181, 189 (D.D.C. 2005) (implying that the court would
 15 have otherwise reached the safe harbor issue if the court found that plaintiff sufficiently pled
 16 copyright infringement).

17 In this case, as shown below, Scribd clearly sustains any burden to qualify for the “safe
 18 harbor,” and Plaintiff cannot reasonably or truthfully allege otherwise.

19 ***a. Scribd Is a “Service Provider.”***

20 A “service provider” is, among other things, a “provider of online services.” 17 U.S.C.
 21 § 512(k)(1)(B). Plaintiff alleges that “Scribd is not an Internet Service Provider as intended by
 22 17 U.S.C. 512....[because] Scribd does not provide internet access and could and would not
 23 replace an individual’s internet service provider to provide any consumer access to the internet.”
 24 Complaint ¶ 10. However, Plaintiff—probably deliberately—reads “service provider” far too
 25 narrowly; courts have interpreted this definition to be very broad, and to include search engines
 26 and hosting services. *See, e.g., Tur, supra*, 2007 U.S. Dist. LEXIS 50254 at *7-8 (automatically
 27 qualifying *YouTube.com*, a website that hosts videos uploaded by users, as a “service provider”);
 28 *Io Group, Inc. v. Veoh Networks Inc.*, 586 F.Supp.2d 1132, 1155 (N.D.Cal. 2008) (no dispute

1 that *veoh.com*, a website that hosts videos uploaded by users, was a “service provider”); *UMG*
 2 *Recordings, Inc. v. Veoh Networks Inc.*, 2009 U.S. Dist. LEXIS 86932 at *12-13 (C.D.Cal. Sept.
 3 11, 2009) (same); *Hendrickson v. Ebay, Inc.*, 165 F.Supp.2d 1082, 1088 (C.D.Cal. 2001) (finding
 4 *eBay.com* undoubtedly a “service provider”); *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d
 5 1090, 1100 (W.D.Wash. 2004) (*amazon.com* a “service provider”).

6 Here, like all of these online sites, Scribd is also a “service provider.” Plaintiff freely
 7 alleges that, just like YouTube, or Veoh, Scribd hosts on its website documents uploaded by
 8 users, which, by any definition, qualifies as “providing online services.” Complaint ¶¶ 10, 22,
 9 23, 48; 17 U.S.C. § 512(k)(1)(B).

10 ***b. Scribd Adopted and Reasonably Implemented a Termination***
 11 ***Policy for Repeat Infringers.***

12 Scribd has “adopted and reasonably implemented, and informs subscribers and account
 13 holders of the service provider’s system or network of,” a termination policy, pursuant to 17
 14 U.S.C. § 512(i)(1)(A), for subscribers and account holders who are repeat infringers. Consagra
 15 Decl. ¶ 3 and Exhibit D attached thereto. Section 512(i)(1)(A) allows for “a variety of
 16 procedures...[and] an implementation is reasonable if, under ‘appropriate circumstances,’ the
 17 service provider terminates users who repeatedly or blatantly infringe copyright.” *Perfect 10,*
 18 *Inc. v. CCBill LLC*, 488 F.3d 1102, 1009 (9th Cir. 2007). As discussed above, this Court may
 19 properly consider the print-out from <http://support.scribd.com/forums/33939/entries/25459>
 20 (Scribd’s Terms of Use, specifically at 11.1), which illustrates that Scribd has adopted and
 21 reasonably implemented such a policy.

22 ***c. Scribd Accommodates and Does Not Interfere with Standard***
 23 ***Technical Measures.***

24 Pursuant to 17 U.S.C. § 512(i)(2), “standard technical measures” refers to “technical
 25 measures that copyright owners use to identify or to protect copyrighted works and (1) have been
 26 developed pursuant to a broad consensus of copyright owners and service providers in an open,
 27 fair, voluntary, multi-industry standards process; (2) are available to any person on reason-able
 28 and nondiscriminatory terms; and (3) do not impose substantial costs on service providers or

1 substantial burdens on their systems or networks.” But, as Congress indicated at the time, and to
2 date, no such “standard technical measures” have been implemented. *See Perfect 10, Inc., supra*,
3 213 F.Supp.2d at 1174 (citing H.R. Rep. 105-551(II), at 61; S.Rep. at 52). Thus, as a matter of
4 law, Scribd could not have engaged in the interference of “standard technical measures,” since
5 there aren’t any.

6 Examining the underlying facts also shows that Scribd makes every effort to *assist*
7 copyright owners. As discussed above, this Court may properly consider the responses to the
8 takedown notice, and the printout from <http://support.scribd.com/forums/33563/entries/22980>
9 (Take-Down Notice Template). These documents, separately and together, illustrate that Scribd,
10 far from interfering with copyright owners’ rights, will remove and have removed infringing and
11 allegedly infringing material upon proper notice. Consagra Decl. ¶¶ 4-5 and Exhibit E attached
12 thereto.

13 ***d. Scribd Only Stores Information Controlled By Users.***

14 As described in the Complaint at ¶ 10, Scribd’s alleged infringement is “by reason of the
15 storage at the direction of a user of material that resides on a system or network controlled or
16 operated by or for the service provider.” 17 U.S.C. § 512(c)(1). That is, Scribd displays works
17 uploaded by subscribers on its website and does not post infringing material itself, and the
18 requirement of Section 512(c)(1) is met.

19 ***e. Scribd Lacked Actual Knowledge of the Allegedly Infringing***
20 ***Material, and Upon Obtaining Actual Knowledge, Acted***
21 ***Expediently to Remove the Material.***

22 Even where a defendant knows that widespread infringement occurred on its system,
23 general awareness of such infringement, without more, is not enough to preclude the application
24 of the safe harbor. *See UMG Recordings, supra*, 2009 U.S. Dist. LEXIS 86932 at *31-34. The
25 burden is on the copyright holder to properly notify the provider of infringement. *Id.* at *22-25;
26 *see also Perfect 10, supra*, 488 F.3d at 1112-13 (“[p]ermitt[ing] a copyright holder to cobble
27 together adequate notice from separately defective notices also unduly burdens service
28 providers”). Here, once Plaintiff properly notified Scribd, Scribd removed the allegedly
infringing material. Complaint ¶ 17. The question, then, is whether it was done expeditiously.

1 But Plaintiff does not allege that Scribd did not remove the infringing material expeditiously;
 2 instead, Plaintiff alleges that Scribd removed the material “only after numerous notices were
 3 sent.” *Id.* Plaintiff’s allegation is at best misleading. The fact is that Scribd (1) expeditiously
 4 responded to even insufficient notices to inform Plaintiff or his agent of the additional
 5 information required and (2) upon receipt of a proper notice, expeditiously removed the content
 6 at issue. In considering Plaintiff’s purported take-down notices and Scribd’s responses to them
 7 (which this Court may properly do, see discussion *supra*), Scribd removed the allegedly
 8 infringing material within 24 hours of receipt of proper take-down notices. Consagra Decl. ¶¶ 8-
 9 11, 13-16, and Exhibits H-K, M-P attached thereto. This is “expeditious” under any definition.

10 *f. Scribd Does Not Have the Right and Ability to Control*
 11 *Infringing Activities.*

12 Separate from the analysis associated with vicarious infringement, the “right and ability
 13 to control” under the “safe harbor” of the DMCA has been held to mean “something more” than
 14 the ability of a service provider to remove or block access to materials posted on its website or
 15 stored in its system. *Hendrickson, supra*, 165 F.Supp.2d at 1093. Here, however, Plaintiff has
 16 not pled any facts that Scribd has the ability to do “something more” than that. Further, courts
 17 have found that services akin to Scribd, such as Veoh and YouTube, do *not* have the “right and
 18 ability to control” for purposes of the “safe harbor” analysis. *See Io Group, Inc., supra*, 586
 19 F.Supp.2d at 1155; *UMG Recordings, Inc., supra*, 2009 U.S. Dist. LEXIS 86932 at *12-13; *Tur,*
 20 *supra*, 2007 U.S. Dist. LEXIS 50254 at *7-8. As Plaintiff failed to plead sufficient facts as to
 21 this element, and as courts have held that similar service providers do not have the right and
 22 ability to control infringing activities, Scribd cannot be found to have the right and ability to
 23 control the allegedly infringing activities.

24 *g. Scribd Responded Expeditiously to Remove the Allegedly*
 25 *Infringing Material Upon Notification.*

26 As discussed above, Scribd expeditiously removed the allegedly infringing material after
 27 receiving proper notice from Plaintiff.
 28

1 **h. Scribd Has Properly Designated an Agent to Receive Notification**
2 **of Infringement.**

3 As discussed above, this Court may properly consider the letter from Plaintiff's counsel
4 dated April 7, 2009, which stated that "[a] copy [of the subpoena for upload infringers] was sent
5 for service on your designated agent for service of process." Consagra Decl. ¶ 12 and Exhibit L
6 attached thereto. Plaintiff has thus already admitted that Scribd has properly designated an agent
7 to receive notification of infringement.

8 For the foregoing reasons, Plaintiff not only failed to sufficient plead facts constituting
9 copyright infringement as to Scribd, Scribd is also protected from such a claim under the safe
10 harbor as defined by 17 U.S.C. § 512.

11 **B. The Second Claim for Conspiracy to Commit Copyright Infringement is**
12 **Duplicative or Preempted by the Copyright Act.**

13 It is unclear whether Plaintiff pled its second claim for conspiracy to commit copyright
14 infringement as a federal or state claim. See Complaint ¶ 2. To the extent that it is intended as a
15 federal claim, a conspiracy to commit copyright infringement is not sufficiently different from a
16 contributory copyright infringement claim to qualify as a separate claim. See, e.g., *Tegg Corp. v.*
17 *Beckstrom Elec. Co.*, 2008 U.S. Dist. LEXIS 96467 at *36 (W.D.Pa. Nov. 26, 2008).

18 If this claim is intended as a state claim, it is preempted: "A state law cause of action is
19 preempted by the Copyright Act if two elements are present. First, the rights that a plaintiff
20 asserts under state law must be 'rights that are equivalent' to those protected by the Copyright
21 Act...Second, the work involved must fall within the 'subject matter' of the Copyright Act as set
22 forth in 17 U.S.C. [Sections] 102 and 103." *Kodadek v. MTV Networks*, 152 F.3d 1209, 1212
23 (9th Cir. 1998). Accordingly, courts have held that a state civil conspiracy to commit copyright
24 infringement claim is preempted by federal law, because such a claim would protect rights that
25 are equivalent to those protected by the Copyright Act. *Garcia v. Coleman*, 2008 U.S. Dist.
26 LEXIS 68672 at n.8 (N.D.Cal. Sept. 8, 2008); *RDF Media Ltd. v. Fox Broad. Co.*, 372 F.Supp.2d
27 556, 566 (C.D.Cal. 2005).

1 Therefore, Plaintiff's second cause of action for conspiracy to commit copyright
2 infringement must be dismissed with prejudice.

3 **C. The Third Claim For Misappropriation of Right of Publicity is Preempted**
4 **By Section 230 of the Communications Decency Act.**

5 The Cox-Wyden Amendment to the Communications Decency Act ("CDA"), 47 U.S.C.
6 § 230(c), immunizes providers and users of interactive computer services from liability for
7 editorial decisions regarding the posting, screening, and deletion of third party content available
8 through such a service. Specifically, a defendant is immune from liability under Section 230 for
9 the content of postings on its website if (1) it qualifies as a provider or user of an "interactive
10 computer service, and (2) plaintiff's claims would hold the defendant liable as a publisher or
11 distributor of information created or developed by "another information content provider."
12 *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Where Section 230
13 applies, it expressly preempts state law, even state intellectual property law. 47 U.S.C. §§
14 230(e)(3); *Perfect 10, supra*, 488 F.3d at 1118-19.

15 Section 230 applies to any claim arising from third party content, including state
16 securities laws, cyberstalking statutes, trade libel, invasion of privacy, negligence, defamation,
17 and misappropriation of the right of privacy. *Id.* at 1122, 1125 (finding immunity for invasion of
18 privacy, right of publicity, negligence, and the misappropriation of the right of publicity); *Batzel*
19 *v. Smith*, 333 F.3d 1018, 1039-40 (9th Cir. 2003) (finding immunity for defamation so long as
20 defendant did not "actively select defamatory or offensive material for distribution"); *Universal*
21 *Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 421-22 (1st Cir. 2007) (finding immunity for
22 state securities laws and cyberstalking statutes); *Optinrealbig.com v. Ironport Sys.*, 323
23 F.Supp.2d 1037, 1046 (N.D.Cal. 2004) (finding immunity for trade libel).

24 Claims falling within Section 230 immunity (and thereby preempted) are properly
25 resolved on a motion to dismiss. *Goddard, supra*, 2009 U.S. Dist. LEXIS 67203 at n.5 (noting
26 the Ninth Circuit's retraction of its holding to the contrary in *Barnes v. Yahoo! Inc.*, 565 F.3d
27 560 (9th Cir. 2009), through amendment in *Barnes v. Yahoo! Inc.*, 2009 U.S.App.LEXIS 20053
28 (9th Cir. June 22, 2009), and again in *Barnes v. Yahoo! Inc.*, 570 F.3d 1096 (9th Cir. 2009),

1 published after *Goddard; Green v. America Online (AOL)*, 318 F.3d 465, 468 (3d Cir. 2003);
 2 *Universal Comm'n Sys., Inc., supra*, 478 F.3d at 418; *see generally Doe v. MySpace, Inc.*, 528
 3 F.3d 413 (5th Cir. 2008).

4 **1. Scribd is a Provider of "Interactive Computer Services."**

5 Plaintiff cannot dispute that Scribd qualifies as a provider of "interactive computer
 6 services" as broadly defined by Section 230(f)(2). The Ninth Circuit has defined the term
 7 "interactive computer services" to be relatively expansive, as "'any' information services or
 8 other systems, as long as the service or system allows 'multiple users' to access 'a computer
 9 server.'" *Batzel, supra*, 333 F.3d at 1030-31 (9th Cir. 2003) (emphasis in original). As described
 10 in the Complaint at ¶ 10, Scribd provides "social publishing" ("information services") to over
 11 "sixty (60) million readers every month" and allows subscribers to upload works ("multiple
 12 users") by "host[ing] an internet site" (*i.e.*, which necessarily implies over "a computer server").
 13 Based on Plaintiff's description alone, Scribd is clearly an "interactive computer service."

14 **2. Plaintiff's Alleged Injury Was Caused by Information Provided by
 15 Another Information Content Provider.**

16 Plaintiff also cannot dispute (nor amend) that his alleged injury was the result of
 17 information provided by another information content provider. Despite vague language in this
 18 claim lumping all defendants together (Complaint ¶¶ 41-44), Plaintiff clearly alleges in other
 19 parts of the Complaint that *other defendants*, not Scribd itself, uploaded the allegedly infringing
 20 works onto the *scribd.com* website. Complaint ¶ 16 ("Scribd, whose website *hosted* in the
 21 infringing activity;" emphasis added), ¶ 18 ("Defendant Galaxiamia uploaded many of Plaintiff's
 22 copy-righted works to Scribd"), ¶¶ 22, 23 (listing Galaxiamia as the defendant who uploaded the
 23 work, followed by a paragraph that Scribd, "*by and through the website Scribd.com*, distributed"
 24 the exact same works; emphasis added). Plaintiff does not allege that Scribd actively selected
 25 the content for publication or altered the content of the works. To the contrary, even if Plaintiff
 26 remained unhappy with the upload infringers repeatedly uploading his works, Plaintiff alleged
 27 that Scribd removed the infringing material after receiving proper notice. Complaint ¶ 17.
 28

1 As the Complaint on its face establishes Scribd's Section 230 immunity, Plaintiff's third
2 cause of action for misappropriation of the right of publicity against Scribd is preempted and
3 should be dismissed with prejudice.

4 **D. The Fourth Claim for Unjust Enrichment is Preempted by the Copyright**
5 **Act.**

6 Plaintiff's fourth claim for unjust enrichment claim is preempted by the Copyright Act.
7 As stated above, "[a] state law cause of action is preempted by the Copyright Act if two elements
8 are present. First, the rights that a plaintiff asserts under state law must be 'rights that are
9 equivalent' to those protected by the Copyright Act...Second, the work involved must fall within
10 the 'subject matter' of the Copyright Act as set forth in 17 U.S.C. [Sections] 102 and 103."
11 *Kodadek, supra*, 152 F.3d at 1212.

12 First, there is no question that the works involved here fall within the subject matter of
13 the Copyright Act. Plaintiff's claim is premised on allegations of copying of his written,
14 allegedly copyrighted works. It could not be clearer that the works that were allegedly copied
15 fall squarely within within the "subject matter" of the Copyright Act. 17 U.S.C. § 102(a)(1).

16 Second, the rights Plaintiff is asserting under his alleged state law claim of unjust
17 enrichment are equivalent to the rights protected by the Copyright Act. "In order not to be
18 equivalent, the right under state law must have an 'extra element' that 'changes the nature of the
19 action so that it is qualitatively different from a copyright infringement claim.'" *Xerox Corp. v.*
20 *Apple Computer, Inc.* 734 F.Supp. 1542, 1550 (N.D.Cal. 1990); *see also, Grosso v. Miramax*
21 *Film Corp.*, 2004 U.S.App. LEXIS 28043 at*4-5 (9th Cir. Mar. 15, 2005). Courts have indicated
22 that if the underlying unjust enrichment claim is simple copying and benefiting from copying,
23 the claim is equivalent and thus preempted by the Copyright Act. *Shade v. Gorman*, 2009
24 U.S.Dist.LEXIS 8554 (N.D.Cal. Jan. 28, 2009); *Zito v. Steeplechase Films, Inc.*, 267 F.Supp.2d
25 1022, 1027 (N.D.Cal. 2003); *Firoozye v. Earthlink Network*, 153 F.Supp.2d 1115, 1128
26 (N.D.Cal. 2001).

27 ///

28 ///

1 Here, Plaintiff's claims are exactly this, that Scribd copied the works and is benefiting
2 from the copying by attracting new members and advertisers. Complaint ¶¶ 48, 49. Therefore,
3 Plaintiff's claim for unjust enrichment is preempted and should be dismissed with prejudice.

4 **E. Plaintiff Cannot Cure the Complaint's Defects By Amendment.**

5 Plaintiff will not be able to cure the defects regarding his first cause of action for
6 copyright infringement as to Scribd. The underlying facts, some of which are on the face of the
7 Complaint, and some of which can be properly considered before this Court, simply do not
8 support a finding of copyright infringement as to Scribd.

9 Plaintiff's second cause of action is either duplicative of its first cause of action, or
10 preempted by federal law. Plaintiff's third cause of action is barred by federal law against
11 Scribd. Plaintiff's fourth cause of action is, like its second cause of action, preempted by federal
12 law. Plaintiff cannot cure the defects in those claims through amendment.

13 **V. CONCLUSION**

14 For the reasons set forth above, this Court should dismiss with prejudice Plaintiff's
15 Complaint in its entirety.

16
17 Dated: November 23, 2009

Respectfully submitted,
GORDON & REES LLP

18
19
20 by 

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