

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:21-cv-1261-RM-SKC

MILLENNIUM FUNDING, INC.,
VOLTAGE HOLDINGS, LLC,
LHF PRODUCTIONS, INC.,
OUTPOST PRODUCTIONS, INC.,
AFTER II MOVIE, LLC,
MILLENNIUM MEDIA, INC.,
WONDER ONE, LLC,
HITMAN TWO PRODUCTIONS, INC.,
MILLENNIUM IP, INC.,
I AM WRATH PRODUCTIONS, INC.,
KILLING LINK DISTRIBUTION, LLC,
VENICE PI, LLC,
RAMBO V PRODUCTIONS, INC.,
MON, LLC,
NIKOLA PRODUCTIONS, INC.,
BODYGUARD PRODUCTIONS, INC.,
YAR PRODUCTIONS, INC.,
DALLAS BUYERS CLUB, LLC,
SF FILM, LLC,
SCREEN MEDIA VENTURES, LLC,
SPEED KILLS PRODUCTIONS, INC.,
LAUNDRY FILMS, INC.,
CINELOU FILMS, LLC,
BADHOUSE STUDIOS, LLC,
HANNIBAL CLASSICS INC., and
JUSTICE EVERYWHERE PRODUCTIONS LLC,

Plaintiffs,

v.

PRIVATE INTERNET ACCESS, INC.,
EXPRESS VPN INTERNATIONAL LTD (a BVI Limited Company), and
EXPRESS VPN INTERNATIONAL LTD (an Isle of Man Limited Company),

Defendants.

SECOND AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs MILLENNIUM FUNDING, INC., VOLTAGE HOLDINGS, LLC, LHF PRODUCTIONS, INC., OUTPOST PRODUCTIONS, INC., AFTER II MOVIE, LLC, MILLENNIUM MEDIA, INC., WONDER ONE, LLC, HITMAN TWO PRODUCTIONS, INC., MILLENNIUM IP, INC., I AM WRATH PRODUCTIONS, INC., KILLING LINK DISTRIBUTION, LLC, VENICE PI, LLC, RAMBO V PRODUCTIONS, INC., MON, LLC, NIKOLA PRODUCTIONS, INC., BODYGUARD PRODUCTIONS, INC., YAR PRODUCTIONS, INC., DALLAS BUYERS CLUB, LLC, SF FILM, LLC, SCREEN MEDIA VENTURES, LLC, SPEED KILLS PRODUCTIONS, INC., LAUNDRY FILMS, INC., CINELOU FILMS, LLC, BADHOUSE STUDIOS, LLC, HANNIBAL CLASSICS INC., and JUSTICE EVERYWHERE PRODUCTIONS LLC (“Plaintiffs”) file this Second Amended Complaint against Defendants SHARKTECH, INC. (“Sharktech”), PRIVATE INTERNET ACCESS, INC., (“PIA”), EXPRESS VPN INTERNATIONAL LTD (a BVI Limited Company) and EXPRESS VPN INTERNATIONAL LTD (an Isle of Man Limited Company), (both ExpressVPN entities collectively referred to as “ExpressVPN”) and allege as follows:

I. INTRODUCTION

1. An individual that pirates copyright protected content in the United States from her home Internet service via peer-to-peer (P2P) networks such as the BitTorrent Protocol puts herself in great legal peril because her Internet Protocol (“IP”) address is publicly exposed. A copyright owner can subpoena her Internet service provider for log records to obtain her subscriber identification and seek statutory damages for copyright

infringement that can be as high as \$150,000. This risk is known among prolific pirates and feared.

2. Against this background, Defendants promote their Virtual Private Network (“VPN”) services as an essential tool for individuals who wish to pirate content using P2P networks by emphasizing that they provide their end users “anonymous” usage by, for example, deleting end users’ log access records so that their identities cannot be disclosed to copyright owners.

3. Defendants even promote their VPN services as essential tools to use notorious piracy applications and access torrent files from notorious movie piracy websites such as YTS without getting caught although they sometimes attempt to

4. As discussed below, although Defendant PIA attempts to use the codeword “privacy”, employees of Defendant PIA explicitly advocate use of its service for piracy – one is even a member of “The Pirate Party” – and participate in the operation of the notorious website The Pirate Bay. Even worse, after Defendant PIA was served with a subpoena for identification of one its end users that accessed pirated content from the website YTS using its VPN service, Defendant PIA issued a warning to its end users that Plaintiffs’ counsel was “extorting” YTS users.

5. Emboldened by Defendants’ promises that their identities cannot be disclosed, Defendants’ end users use their VPN services not only to engage in widespread movie piracy, but other outrageous criminal conduct such as harassment, illegal hacking and murder. When these crimes become public, Defendants use these tragic incidents as opportunities to boast about their VPN services.

6. As discussed below, even after an officer of Defendant ExpressVPN plead guilty to using a VPN service to hack into devices of Americans on behalf of a foreign government, Defendant ExpressVPN reiterated its support for him.

II. NATURE OF THE ACTION

7. This matter arises under the United States Copyright Act of 1976, as amended, 17 U.S.C. §§ 101, et seq. (the “Copyright Act”).

8. The Plaintiffs allege that Defendants are: (a) directly liable for copyright infringements in violation of 17 U.S.C. §§ 106, 501 and 602; and (b) secondarily liable for copyright infringements and violations under the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1202.

9. The Plaintiffs allege that Defendant PIA is liable for breach of contract in violation of the laws of Colorado and/or Hawaii.

III. JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to 17 U.S.C. §§ 101, et. seq., (the Copyright Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1338 (patents, copyrights, trademarks, and unfair competition) and 28 U.S.C. § 1367(a) (supplemental jurisdiction).

11. Defendants solicit, transact, and/or do business within this jurisdiction, and have committed unlawful and tortious acts both within and outside this jurisdiction with the full knowledge that their acts would cause injury in this jurisdiction. As such, Defendants have sufficient contacts with this judicial district to permit the Court’s exercise of personal jurisdiction over them.

12. Defendants lease servers and are assigned Internet Protocol (“IP”) addresses at non-party Sharktech’s data center in Denver, Colorado.

13. Defendant PIA’s corporate office is in Greenwood Village, Colorado. See <https://www.privateinternetaccess.com/about-us> [last accessed on Nov. 5, 2021] (PIA Corporate office at 5555 DTC Parkway, Suite 360, Greenwood Village, Colorado).

14. Plaintiffs’ injuries arise out of Defendants’ forum-related activities, namely Defendants’ direct and contribution to infringements of Plaintiffs’ copyright protected Works, and DMCA violations at IP addresses and servers controlled by Defendants in this District.

15. Plaintiffs’ injuries arise out of PIA’s breach of a settlement agreement to resolve claims alleged in this case such as *inter alia* the First Amended Complaint.

16. In the alternative, the Court has jurisdiction over Defendant ExpressVPN pursuant to Fed. R. Civ. P. 4(k)(2), the so-called federal long-arm statute, for at least the following reasons: (1) Plaintiffs’ claims arise under federal law; (2) ExpressVPN purposely directs its electronic activity into the United States (“US”) and targets and attract a substantial number of users in the US and, more particularly, this District; (3) ExpressVPN does so with the manifest intent of engaging in business or other interactions with the US; (4) ExpressVPN is not subject to jurisdiction in any state’s courts of general jurisdiction; and (5) exercising jurisdiction is consistent with the US Constitution and laws.

17. ExpressVPN purposefully targets the US market by using many US-based sources for operating its services and promotes its service as providing access to US servers.

18. ExpressVPN (Isle of Man) registered the trademark “EXPRESSVPN” for the services that are the subject of Plaintiffs’ claims with the USPTO and thus in the US.

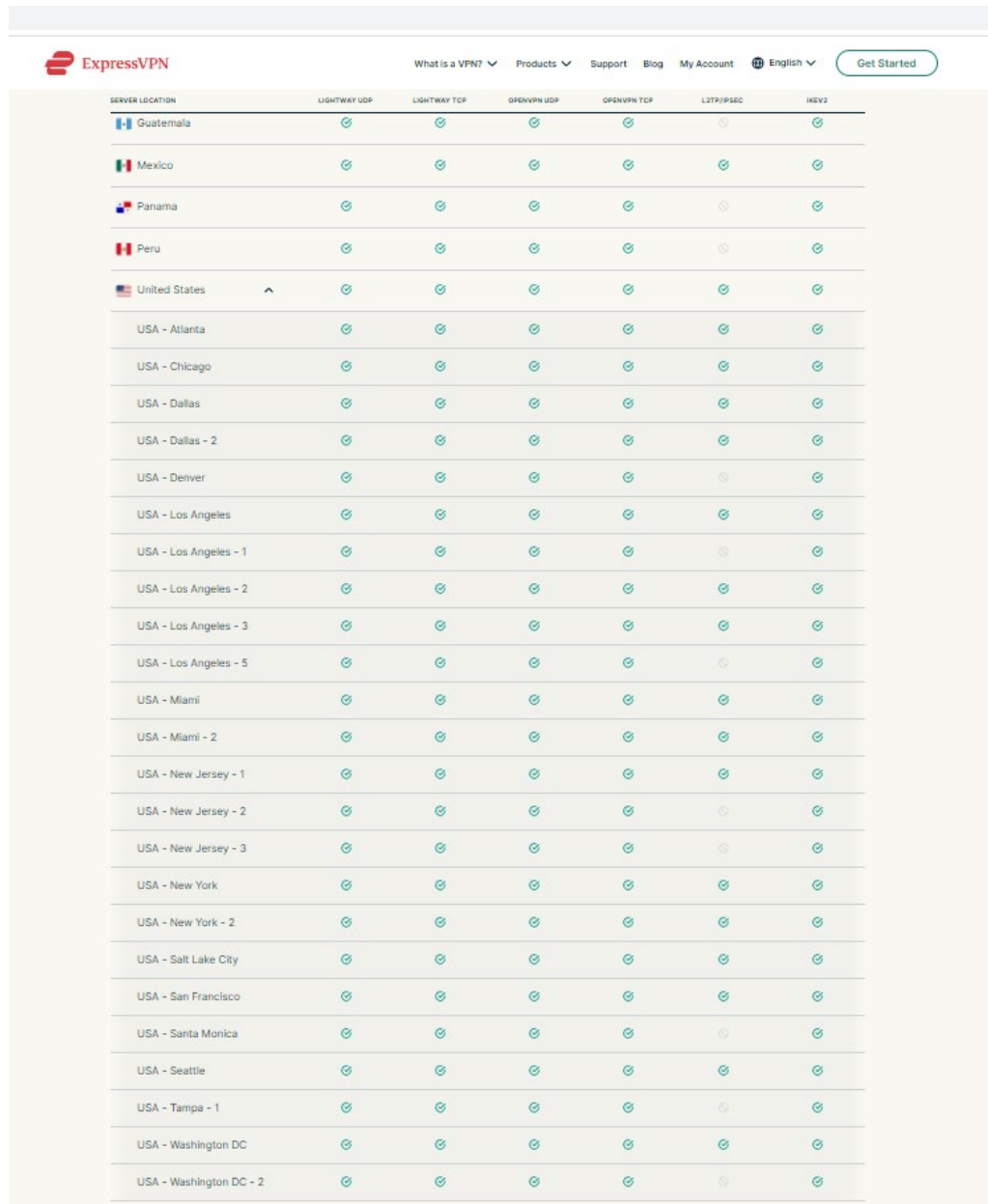
19. To register the trademarks, ExpressVPN (Isle of Man) signed declarations under the penalty of perjury affirming their intent to provide services in the US.

20. ExpressVPN (BVI) uses US payment providers such as Paypal to receive funds in US dollars from US residents.

21. ExpressVPN (BVI) uses the US company Amazon Web Servers for hosting the websites expressvpn.com and vpnconsumer.com.

22. Through about October of 2011, ExpressVPN (BVI) used the US domain registrar 1&1 Internet, Inc. in Chesterbrook, PA to register the website domain expressvpn.com.

23. ExpressVPN (BVI) promotes the availability of multiple servers in over 20 US locations.



The screenshot shows the ExpressVPN website's server location table. The table lists various server locations and indicates which protocols are supported at each location. The protocols are Lightway UDP, Lightway TCP, OpenVPN UDP, OpenVPN TCP, L2TP/IPsec, and IKEv2. A 'Get Started' button is visible in the top right corner.

SERVER LOCATION	LIGHTWAY UDP	LIGHTWAY TCP	OPENVPN UDP	OPENVPN TCP	L2TP/IPSEC	IKEV2
Guatemala	✓	✓	✓	✓	✗	✓
Mexico	✓	✓	✓	✓	✓	✓
Panama	✓	✓	✓	✓	✗	✓
Peru	✓	✓	✓	✓	✗	✓
United States	✓	✓	✓	✓	✓	✓
USA - Atlanta	✓	✓	✓	✓	✓	✓
USA - Chicago	✓	✓	✓	✓	✓	✓
USA - Dallas	✓	✓	✓	✓	✓	✓
USA - Dallas - 2	✓	✓	✓	✓	✓	✓
USA - Denver	✓	✓	✓	✓	✗	✓
USA - Los Angeles	✓	✓	✓	✓	✓	✓
USA - Los Angeles - 1	✓	✓	✓	✓	✗	✓
USA - Los Angeles - 2	✓	✓	✓	✓	✓	✓
USA - Los Angeles - 3	✓	✓	✓	✓	✓	✓
USA - Los Angeles - 5	✓	✓	✓	✓	✗	✓
USA - Miami	✓	✓	✓	✓	✓	✓
USA - Miami - 2	✓	✓	✓	✓	✓	✓
USA - New Jersey - 1	✓	✓	✓	✓	✓	✓
USA - New Jersey - 2	✓	✓	✓	✓	✗	✓
USA - New Jersey - 3	✓	✓	✓	✓	✗	✓
USA - New York	✓	✓	✓	✓	✓	✓
USA - New York - 2	✓	✓	✓	✓	✓	✓
USA - Salt Lake City	✓	✓	✓	✓	✓	✓
USA - San Francisco	✓	✓	✓	✓	✓	✓
USA - Santa Monica	✓	✓	✓	✓	✗	✓
USA - Seattle	✓	✓	✓	✓	✓	✓
USA - Tampa - 1	✓	✓	✓	✓	✗	✓
USA - Washington DC	✓	✓	✓	✓	✓	✓
USA - Washington DC - 2	✓	✓	✓	✓	✗	✓

24. Upon information and belief, ExpressVPN secretly does business in the US under the name VPN Consumer Network.

25. ExpressVPN used an address in San Francisco, CA when registering for services with ARIN under the name VPN Consumer Network and the handle VCN-38.

26. ExpressVPN leases servers and IP addresses from the US companies

Web2Objects, LLC (New York), Leaseweb, Inc. (Virginia) and Sharktech, Inc. (Nevada) for its VPN service.

27. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) - (c) because: (a) all or a substantial part of the events or omissions giving rise to the claims occurred in this District; (b) the Defendants can or could be found, in this District; and/or (c) Defendants are subject to the court's personal jurisdiction with respect to the present action. Additionally, venue is proper in this District pursuant 28 U.S.C. § 1400(a) (venue for copyright cases), because the Defendants or Defendants' agents reside and can be found in this District.

IV. PARTIES

A. The Plaintiffs

28. The Plaintiffs are the owners of the copyrights in the Works shown in Exhibit "1".

29. Each of Plaintiffs LHF Productions, Inc., Millennium Funding, Inc., Outpost Productions, Inc., Millennium Media, Inc., Hitman Two Productions, Inc., Millennium IP, Inc., Rambo V Productions, Inc., Nikola Productions, Inc., and Bodyguard Productions, Inc. is a corporation organized under the laws of the State of Nevada, has a principal office in Nevada and is an affiliate of Millennium Media, Inc. a production company and distributor of a notable catalog of major motion pictures.

30. Each of Plaintiffs Voltage Holdings, LLC and After II Movie, LLC is a limited liability company registered under the laws of the State of Nevada, has principal offices in Los Angeles, California and is an affiliate of Voltage Pictures, a production company

with a notable catalog of major award-winning motion pictures.

31. MON, LLC is a limited liability company registered under the laws of the California, having principal office in Beverly Hills, California and is an affiliate of Voltage Pictures.

32. Venice PI, LLC is a limited liability company registered under the laws of the State of California, having principal office in Los Angeles, California and is an affiliate of Voltage Pictures.

33. Wonder One, LLC is a Wyoming limited liability company with its principal place of business in Sherman Oaks, CA.

34. I am Wrath Production, Inc. is a California corporation with its principal place of business in Los Angeles, CA.

35. Killing Link Distribution, LLC is a California limited liability company with its principal place of business in Beverly Hills, CA 90212.

36. YAR Productions, Inc. is a New York corporation with its principal place of business at Monsey, New York.

37. Dallas Buyers Club, LLC is a Texas limited liability company with its principal place of business at The Woodlands, TX.

38. SF Film, LLC is a New York limited liability company with its principal place of business at Albany, New York.

39. Screen Media Ventures, LLC is a Delaware limited liability company with its principal place of business at New York, NY.

40. SPEED KILLS PRODUCTIONS, INC. is a Wyoming corporation with its

principal place of business at West Hollywood, CA.

41. LAUNDRY FILMS, INC. is a California corporation with its principal place of business in Venice, California.

42. CINELOU FILMS, LLC is a California limited liability company with its principal place of business in California.

43. BADHOUSE STUDIOS, LLC is a Wyoming limited liability company with its principal place of business at West Hollywood, CA.

44. HANNIBAL CLASSICS INC., is a California corporation with its principal place of business at West Hollywood, CA.

45. JUSTICE EVERYWHERE PRODUCTIONS LLC is a Georgia limited liability company with its principal place of business at Los Angeles, CA, 90067.

B. The Defendants

46. Defendant PIA is, upon information and belief, a corporation organized under the laws of Indiana with its principal place of operation in Colorado.

47. Non-party Kape Technologies PLC (“Kape”) is, upon information and belief, a foreign company incorporated in the Isle of Man and is the owner of Defendant PIA.

48. Kape was previously known as Crossrider until it changed its name change in 2018 to disassociate from its prior business of distributing malware that infects users’ devices to effectively hijack a browser session and insert advertisements when a partnered website is visited. See Rae Hodge, “What is Kape Technologies? What you need to know about the parent company of CyberGhost VPN”, CNet, 8/12/2020, <https://www.cnet.com/tech/services-and-software/what-is-kape-technologies-what-you->

[need-to-know-about-the-parent-company-of-cyberghost-vpn/](#) [last accessed on 11/11/2021] (“...Crossrider. The UK-based company was cofounded by an ex-Israeli surveillance agent and a billionaire previously convicted of insider trading who was later named in the Panama Papers. It produced software which previously allowed third-party developers to hijack users' browsers via malware injection, redirect traffic to advertisers and slurp up private data.”)

49. Kape and PIA are mere alter egos.

50. PIA and Kape have many of the same corporate officers.

51. Upon information and belief, Moran Laufer is an officer of both PIA and Kape.

52. PIA and Kape share many of the same resources. Employees of PIA use email addresses with domain KAPE.COM identifying themselves as employees of Kape.

53. PIA and Kape fail to maintain corporate formalities of separate existence. Employees of PIA use email addresses with domain kape.com identifying themselves as employees of Kape.

54. Upon information and belief, Kape pays the salaries and expenses of employees of PIA.

55. Kape directs and dictates the business decisions of PIA. For example, Dr. Venetia Argyropoulou, an officer of Kape and, upon information and belief, a resident of Cyprus and a practicing lawyer in Greece and Cyprus directs and dictates legal decisions for PIA including the decision for PIA to breach a settlement agreement with Plaintiffs.

56. Dr. Argyropoulou even dictates mundane decisions of PIA such as whether

the general counsel of PIA could execute a waiver of personal service in this action.

57. There is such a unity of interest between Kape and PIA that the individuality, or separateness, of Kape and PIA have ceased and the facts are such that an adherence to the fiction of the separate existence of PIA and Kape would, under the particular circumstances, sanction a fraud or promote injustice.

58. Kape is owner of the VPN services CyberGhost and ZenGuard.

59. Kape recently entered into an agreement to purchase Defendant ExpressVPN.

60. Kape is the owner and/or exercises effective control of publications such as VPNMENTOR.COM and WIZCASE.COM.

61. As explained below, Kape promotes its VPN services PIA and CyberGhost and also ExpressVPN explicitly for piracy in its publications.

62. Defendant ExpressVPN (BVI) is, upon information and belief, a limited company organized under the laws of the British Virgin Islands with its principal place of business in Tortola, British Virgin Island.

63. Defendant ExpressVPN (Isle of Man) is, upon information and belief, a limited company organized under the laws of the Isle of Man with its principal place of business in Glen Vine, Isle of Man.

64. Upon information and belief, the same individuals/entities own ExpressVPN (BVI) and ExpressVPN (Isle of Man).

65. Upon information and belief, ExpressVPN (BVI) and ExpressVPN (Isle of Man) are mere alter egos of each other and therefore are referred to collectively as

ExpressVPN.

66. There is such a unity of interest between ExpressVPN (BVI) and ExpressVPN (Isle of Man) that the individuality, or separateness, of ExpressVPN (BVI), and ExpressVPN (Isle of Man) have ceased, and the facts are such that an adherence to the fiction of the separate existence of ExpressVPN (BVI) and ExpressVPN (Isle of Man) would, under the particular circumstances, sanction a fraud or promote injustice.

67. ExpressVPN uses the dba VPN Consumer Network and VPN Consumer Network Services entities to commit fraudulent misrepresentations.

68. VPN Consumer Network and VPN Consumer Network Services allocate/reassign IP addresses to ExpressVPN but intentionally publishes false ARIN Whois records to show that VPN Consumer Network Services (in Panama) is the proper abuse contact.

69. Accordingly, rightsholders such as Plaintiffs are hindered from sending notices directly to ExpressVPN.

70. Defendants lease servers from data centers across the world and are allocated IP addresses from said data centers.

71. Defendants lease servers from Sharktech in Denver, CO and were allocated IP addresses from Sharktech.

72. As discussed more fully below, Defendants purposefully choose data centers that do not publish reassignments of their IP address assignments/allocations to Defendants.

73. Defendants provide VPN services to their customers ("end users").

74. A VPN is a type of Internet Service that provides access to the Internet. A conventional ISP will assign its end user an IP address and log the end users' access to the Internet while using the assigned IP address. In comparison, many VPN providers provide their end users "anonymous" usage by, for example, deleting end users' log access records, assigning their end users IP addresses that are simultaneously shared among many users, and/or encrypting traffic.

75. Defendants promote their VPN services as a tool that can be used to pirate copyright protected content without getting caught.

76. Defendant ExpressVPN even partners with notorious movie piracy websites to promote their VPN service as an essential tool for movie piracy.

77. Emboldened by Defendants' promises that their identities cannot be disclosed, Defendants' end users use the VPN services not only to engage in widespread movie piracy, but other outrageous criminal conduct such as sharing child pornography, harassment, illegal hacking and murder.

78. On June 6, 2018, Ross M. Colby was convicted of two felonies for using PIA VPN service to hack into the computer systems of the company Embarcadero.

79. The same PIA IP addresses that were used to access Mr. Colby's personal email and Facebook accounts was used for the illegal hacking. Upon information and belief, Mr. Colby was a PIA end user.

80. Between December 2015 and March 2016, Preston McWaters used PIA's VPN service to make false bomb threats to schools and stalk a former female co-worker under a fake email address and Twitter accounts he created under the name of her

boyfriend. When a search warrant was executed on Mr. McWater's home, a mobile phone including the PIA mobile app was found. Upon information and belief, Mr. McWaters was a PIA end user.

81. PIA boasted that it had no logs to disclose to law enforcement concerning these serious crimes of Ross M. Colby and Preston McWaters.

82. An unknown ExpressVPN end user used the VPN services to hide details concerning the assassination of the Russian Ambassador to Turkey, Andrei Karlov in 2017. See <https://www.comparitech.com/blog/vpn-privacy/expressvpn-server-seized-in-turkey-verifyies-no-logs-claim/> [last accessed on Nov. 7, 2021].

83. ExpressVPN used this tragic incident to tout its VPN service by bragging that law enforcement could not find information to locate the murder suspects even though their server was seized. <https://torrentfreak.com/expressvpn-anonymous-review/> [last accessed on Nov. 4, 2021] ("Not storing any sensitive information also protects user privacy and security in the event of law enforcement gaining physical access to servers. This was proven in a high-profile case in Turkey in which law enforcement seized a VPN server leased by ExpressVPN but could not find any server logs that would enable investigators to link activity to a user or even determine which users, or whether a specific user, were connected at a given time").

84. ExpressVPN end user Frank Beyer admitted to using the VPN service in connection with the disgusting act of downloading sexual videos of prepubescent children. See *United States of America v. Frank Richard Beyer*, 0:19-cr-60360-RAR (S.D. FL), Affidavit of Nicholas P. Masters in Support of Criminal Complaint [Doc. #1] at ¶20

(“He also admitted to...using a Virtual Private Network...offered through ExpressVPN...”)

85. Upon information and belief, Frank Beyer also used the ExpressVPN service to share copies of copyright protected Works including *Angel Has Fallen*.

86. Upon information and belief, ExpressVPN engages in the same conduct as its end users. ExpressVPN proudly employs as its chief information officer Daniel Gericke, an individual that has admitted to using VPN services to hack into devices of American residents on the behalf of a foreign government.

87. On Sept. 7, 2021, Mr. Gericke entering into a deferred prosecution agreement (“DPA”) requiring him to make a payment of \$335,000 to resolve a Department of Justice investigation regarding violations of U.S. export control, computer fraud and access device fraud laws.

88. In the DPA, Mr. Gericke admitted to: (1) knowingly and willfully conspiring, in violation of Title 18, United States Code, Section 371, to violate the Arms Export Control Act (“AECA”) and the International Traffic in Arms Regulations (“ITAR”); and (2) knowingly conspiring, in violation of Title 18, United States Code, Section 371, to commit access device fraud, and computer fraud and abuse, in violation of Title 18 United States Code, Sections 1029 and 1030. <https://www.justice.gov/opa/press-release/file/1432621/download> [last accessed on 11/6/2021].

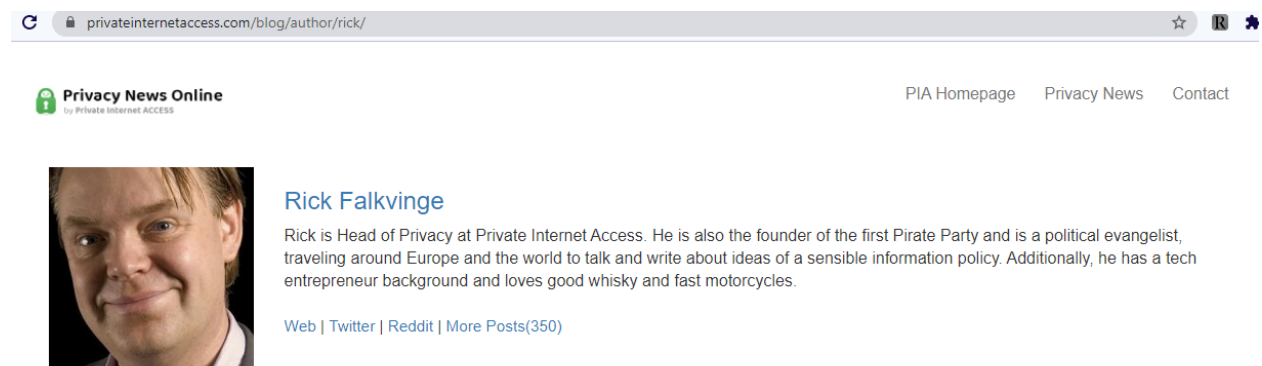
89. Despite admitting to using a VPN to hack into the device of Americans on behalf of a foreign government, on Sept. 27, 2021 ExpressVPN released an official statement stating that “...Daniel fits into our mission as a company, past, present, and future.” <https://www.expressvpn.com/blog/daniel-gericke-expressvpn/> [last accessed on

11/6/2021].



At the same time, while we in no way wish to diminish the sincerity of the concerns we've heard, we want to reassure you that we have considered them extensively and do not share them. To help you understand how we can be so confident, we need to share with you exactly how Daniel fits into our mission as a company, past, present, and future.

90. Upon information and belief, PIA engages in the same conduct as its end users. PIA proudly employs as its head of "Privacy" Rick Falkvinge, the founder of the first "Pirate Party" whose aim is to abolish intellectual property laws. <https://www.privateinternetaccess.com/blog/author/rick/> [last accessed on 11/4/2021].



91. As head of the "Pirate Party", Rick Falkvinge has pushed for legalization of possession of child pornography. See Sverigesradio, "The Pirate Party wants to legalize

the possession of child pornography” Aug 5, 2020, <https://sverigesradio.se/artikel/3899644> [last accessed on 11/6/2021] (English Translation: “Rick Falkvinge wants to get rid of both the ban on possessing child pornography from 1999 and the ban on watching child pornography...”)

92. Rick Falkvinge and his Pirate Party begin hosting the notorious piracy website “The Pirate Bay” in 2010 after an injunction was obtained by several movie studios against the previous host provider. See <https://torrentfreak.com/the-pirate-party-becomes-the-pirate-bays-new-host-100518/> [last accessed on 11/6/2021] (““Today, on 18 May, the Swedish Pirate Party took over the delivery of bandwidth to The Pirate Bay,” says the Party’s Rick Falkvinge in a statement. “We got tired of Hollywood’s cat and mouse game with the Pirate Bay so we decided to offer the site bandwidth,” he adds. “It is time to take the bull by the horns and stand up for what we believe is a legitimate activity.””)

93. Rick Falkvinge states that a reason to use a VPN service that “create no logs” is to avoid “the people behind Expendables 3 are on a suing spree”.

It’s also interesting to see how effective VPNs are at protecting end-users who manufacture unlicensed copies of knowledge and culture from the monopolized copyright industry – apparently, the people behind Expendables 3 are on a suing spree, but hitting a no-log VPN on an end-address is literally a dead end – there’s nowhere to go from there. (Which is another reason to only use VPN services that a) create no logs, b) don’t demand personal information in the first place – like allowing payment with bitcoin.)

<https://www.privateinternetaccess.com/blog/with-the-copyright-industry-disliking-vpns-in-public-you-know-theyre-doing-good/> [last accessed on Nov. 4, 2021].

privateinternetaccess.com/blog/with-the-copyright-industry-disliking-vpns-in-public-you-know-theyre-doing-good/

copyright industry is yapping about here. (Also, it should be noted that the Hulu service is already mistreating its customers in this way.)

The next step is predictable from the SOPA debate – it's pressuring payment providers to **refuse service** to VPN services, in a blatant display of the cartelization of the few payment providers. (There's a double reason to only use a VPN that accepts bitcoin, right there: try shutting off bitcoin payments.)

It's also interesting to see how effective VPNs are at protecting end-users who manufacture unlicensed copies of knowledge and culture from the monopolized copyright industry – apparently, the people behind Expendables 3 are on a **suining spree**, but hitting a no-log VPN on an end-address is literally a dead end – there's nowhere to go from there. (Which is another reason to only use VPN services that a) create no logs, b) don't demand personal information in the first place – like allowing payment **with bitcoin**.)

94. Some of the Plaintiffs in this action such as Millennium Media, Inc. are “the people behind Expendables 3” referred to by PIA.

95. PIA's employee Caleb Chen publishes articles on PIA's website advocating use of the PIA VPN service for piracy.

96. In 2020, Caleb Chen published an article on the PIA website entitled “Popular torrenting site YTS provides IP address logs to copyright lawyers to extort you with” to warn PIA end users and stated within his article “...for non Indian users of YTS, it seems like a pretty damn good idea [to use a VPN].”

when trying to torrent privately is bad enough, knowing that your logs will actually be given up to copyright infringement lawyers and end up being used against you in legal proceedings is a real life and ongoing worst case scenario for torrenters around the world. These sites are really a point of vulnerability for torrenters, both in terms of functionality and apparently liability. Many governments seek to block torrent sites – though countries like [India](#) have confirmed that [visiting a blocked torrent site with the use of a VPN is not illegal](#). In fact, for non Indian users of YTS, it seems like a pretty damn good idea.

The post [Popular torrenting site YTS provides IP address logs to copyright lawyers to extort you with](#) appeared first on [Privacy News Online by Private Internet Access VPN](#).

C. Non-Parties

97. Choopa is a US based host provider that, upon information and belief, provides US IP addresses and servers to Defendants.

98. Sharktech is US based host provider that, upon information and belief, provides US IP addresses and servers to Defendants.

99. Web2Objects LLC is a US based host provider that, upon information and belief, provides US IP addresses and servers to Defendants.

100. Leaseweb is US based host provider that, upon information and belief, provides US IP addresses and servers to Defendants.

101. M247 is a foreign based host provider that, upon information and belief, provides US IP addresses and servers to Defendants.

102. DataCamp Limited is a foreign based host provider that, upon information and belief, provides US IP addresses and servers to Defendants.

103. Because of the nature of Defendants' operations, Plaintiffs cannot ascertain all IP addresses used by Defendants and thus the entire scope of Defendants' infringing activities. However, Defendants are in possession of the IP addresses that were assigned to them from their host providers. Plaintiff believes that information obtained in discovery will lead to the identification of IP address where Works of theirs or of affiliated entities were infringed and permit the Plaintiffs to identify the IP addresses and times where many of their Works were infringed thousands of times and to amend this Second Amended Complaint to join these entities as Plaintiffs. Plaintiff further believes that the information obtained in discovery may lead to the identification of additional infringing parties to be added to this Second Amended Complaint as Defendants. Plaintiffs will seek to amend this Second Amended Complaint to include the proper names and capacities once determined.

V. JOINDER

104. Pursuant to Fed. R. Civ. P. 20(a)(1), each of the Plaintiffs are properly joined because, as set forth in detail above and below, the Plaintiffs assert: (a) a right to relief arising out of the same transaction, occurrence, or series of transactions, namely (i) the use of host providers' services such as Sharktech and M247 by Defendants for directly infringing and contributing to infringements of the copyrights in Plaintiffs' Works and DMCA violations, (ii) there are common questions of law and fact.

105. Pursuant to Fed. R. Civ. P. 20(a)(2), each of the Defendants was properly

joined because, as set forth in more detail below, the Plaintiffs assert that the infringements complained of herein by each of the Defendants (a) arises out of the same transaction, occurrence, or series of transactions or occurrences, and (b) there are common questions of law and fact.

106. Defendants lease servers and are allocated IP addresses from Sharktech, and use said servers and IP addresses to infringe Plaintiffs' Works.

107. Defendants lease servers and are allocated IP addresses from M247 and use said servers and IP addresses to infringe Plaintiffs' Works.

108. Defendants use Kape as an alter ego or marketing partner to explicitly promote their VPN services for the purpose of blatant piracy.

109. Upon information and belief, Defendants are controlled by Kape.

110. Further, the Plaintiffs assert that the breach of contract complained of herein by Defendant PIA (a) arises out of the same transaction, occurrence, or series of transactions or occurrences, and (b) there are common questions of law and fact.

111. Upon information and belief, ExpressVPN induced PIA to breach the contract (settlement agreement) and conspired with PIA and its alter ego Kape to try to deceive Plaintiffs into inadvertently releasing ExpressVPN from a separate lawsuit.

VI. FACTUAL BACKGROUND

A. The Plaintiffs Own the Copyrights to the Works

112. The Plaintiffs are the owner of the copyrights in the motion pictures ("Works") as shown in Exhibit "1". The Works are the subjects of copyright registrations, and this action is brought pursuant to 17 U.S.C. § 411.

113. The Plaintiffs are the owners of the copyrights by virtue of original authorship, assignment and/or company reorganization.

114. The Works are motion pictures currently offered for sale in commerce.

115. Defendants had notice of Plaintiffs' rights through at least the credits indicated in the content of the motion pictures which bore proper copyright notices.

116. Defendants also had notice of Plaintiffs' rights through general publication and advertising associated with the motion pictures, and packaging and copies, each of which bore a proper copyright notice.

117. Defendants also had notice of Plaintiffs' rights through notices that were sent to them from their host providers such as Sharktech.

118. Defendant PIA also had notice of Plaintiffs' rights through a subpoena that was served on it on 10/25/2018 by Plaintiff Venice PI, LLC in Civil Action No. 18-cv-192 ("The ShowBox lawsuit") in the District of Hawaii concerning infringing activity at IP address 173.239.236.38.

119. PIA also had notice of Plaintiffs' rights through a subpoena that was served on it on 1/17/2020 by Plaintiff Venice PI, LLC in Civil Action No. 19-cv-169 ("The YTS lawsuit") in the District of Hawaii concerning infringing activity at IP address 91.207.175.82.

120. Indeed, thereafter Caleb Chen of PIA published an article warning its end users that Plaintiffs' counsel had obtained user logs from the piracy website YTS in the YTS lawsuit.

121. PIA also had notice of Plaintiffs' rights through a subpoena that was served

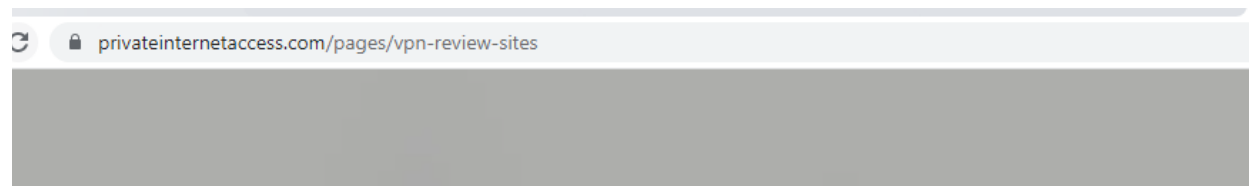
on it in Civil Action No. 20-cv-3170-PAB-NRN in the District of Colorado concerning infringing activity at IP addresses 194.59.251.68 and 193.37.252.19.

122. Defendant ExpressVPN also had notice of Plaintiffs' rights from being served with a lawsuit by many of the same Plaintiffs in Civil Action No. 21-cv-643 in the Eastern District of Virginia.

B. Defendants and their end users Infringe Plaintiffs' Copyrights.

123. Defendants advertise their VPN service for allowing their end users to bypass regional restrictions of streaming platforms to stream copies of copyright protected content including Plaintiffs' Works from locations Plaintiffs have not authorized the platform to stream the Works.

124. Defendant PIA advertises its VPN service for allowing their end users to "unlock Netflix USA".



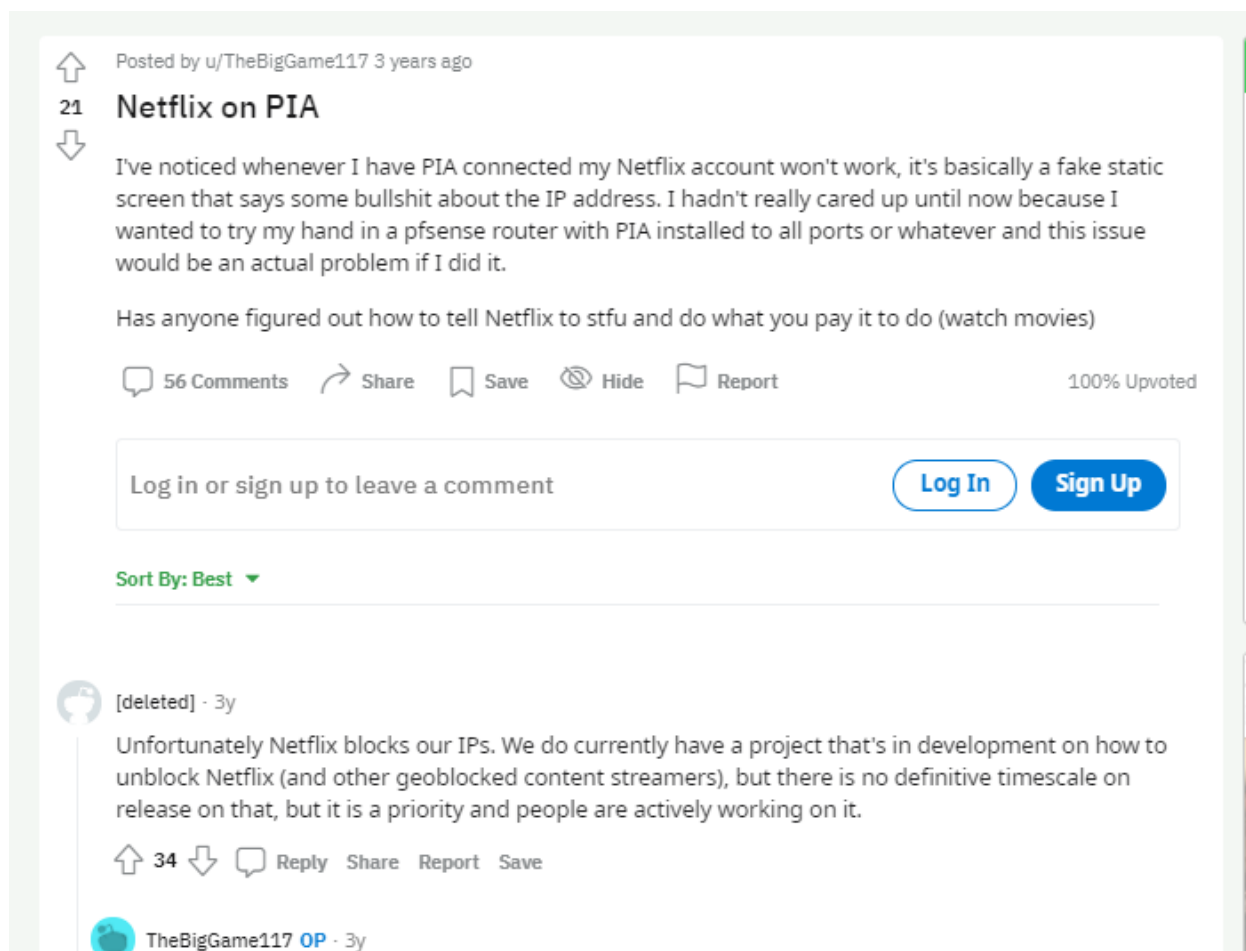
"Private Internet Access (PIA) is one of the leading VPN service providers, specializing in encrypted tunnels with several levels of security, offering an affordable alternative to pricey premium VPNs. It is fast and safe enough, allowing to unblock Netflix USA and download torrents on all the servers. Besides, it follows the no-logs policy."

125. PIA states that its VPN service "Puts An End To Geo-Restrictions On Your Favorite Content." <https://www.privateinternetaccess.com/unblock-websites-vpn> [last

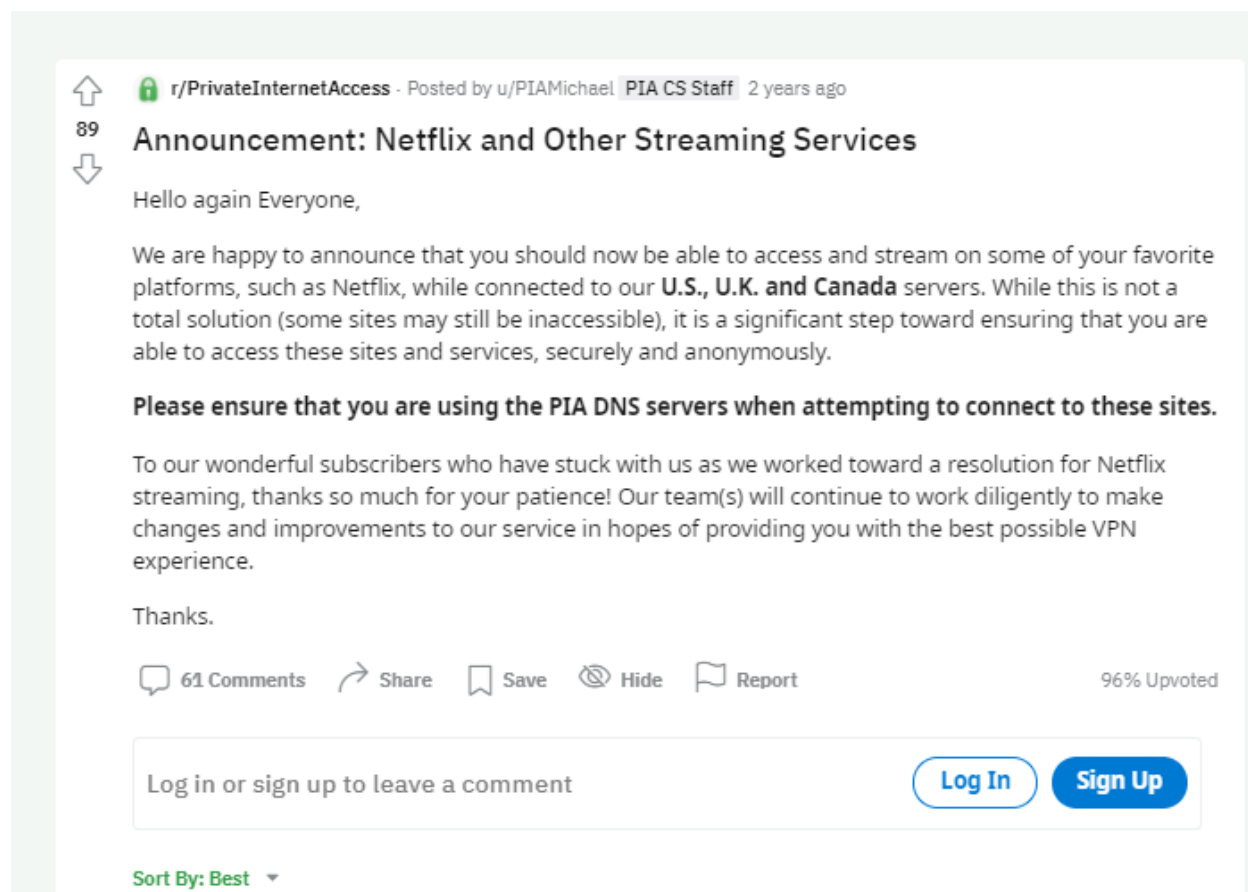
accessed on 11/4/2021].



126. PIA even stated in a Reddit forum that it was working on a project to unblock Netflix. See https://www.reddit.com/r/PrivateInternetAccess/comments/8s2z6h/netflix_on_pia/ [last accessed on 11/4/2021].



127. In 2019, PIA announced that it had secured a means for its end users to access Netflix from its “U.S., U.K. and Canada servers.” https://www.reddit.com/r/PrivateInternetAccess/comments/ddc6w4/announcement_netflix_and_other_streaming_services/ [last accessed on 11/4/2021].



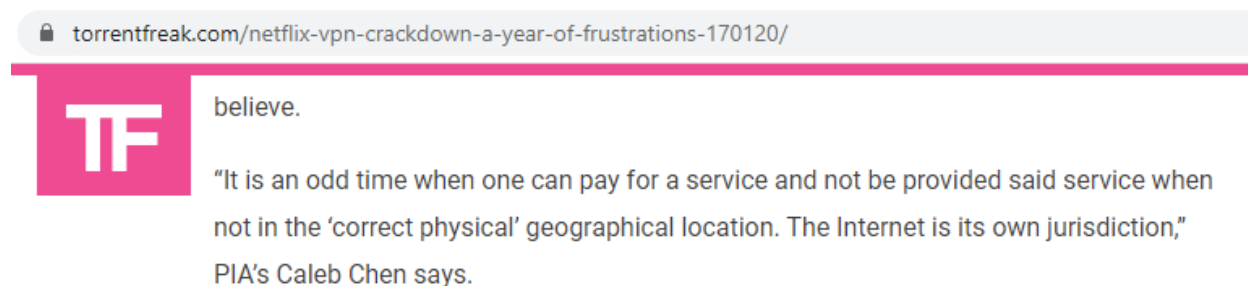
128. Defendant ExpressVPN advertises its service for allowing its end users not located in the United States to stream content restricted to United States locations to their non-United States location in violation of Plaintiffs' exclusive rights to authorize distribution, public performance and/or reproduction of their Works. See <https://www.expressvpn.com/vpn-service/netflix-vpn> [last accessed on Nov. 5, 2021].



129. Many legal platforms such as Netflix will “blacklist” IP addresses of known VPN providers to prevent violation of geographic restrictions. See Jacoby Parker, How does Netflix detect and block VPN use?, Aug. 16, 2021 <https://www.techradar.com/vpn/how-does-netflix-detect-and-block-vpn-use> [last accessed on 10/23/2021]. Accordingly, VPN providers such as Defendants have an incentive to not publicly reveal the IP addresses assigned to them so that they are not blacklisted and their end users prevented from streaming or distributing content from unauthorized regions.

130. When Netflix begin blacklisting IP addresses of VPN providers, Defendant PIA’s Caleb Chen criticized this practice and stated that “The Internet is its own jurisdiction”. <https://torrentfreak.com/netflix-vpn-crackdown-a-year-of-frustrations->

[170120/](#) [last accessed on 11/18/2021].



131. Defendants and their customers (“end users”) use BitTorrent and BitTorrent Client applications such as Popcorn Time to infringe Plaintiffs’ exclusive rights of reproduction and distribution.

132. The United States Trade Representative (“USTR”) placed Popcorn Time on a list of examples of Notorious Markets engaged in and facilitating substantial piracy. See USTR, 2020 Review of Notorious Markets, Jan. 14, 2021, pg. 26, Available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) [last accessed on March 5, 2021].

133. Defendants distribute Plaintiffs’ Works in violation of Plaintiffs’ exclusive right of distribution.

134. Defendants distribute Plaintiffs’ Works for their end users in violation of Plaintiffs’ exclusive right of distribution.

135. Defendants reproduce Plaintiffs’ Works in violation of Plaintiffs’ exclusive right of reproduction.

136. Defendants reproduce Plaintiffs’ Works for their end users in violation of

Plaintiffs' exclusive right of distribution.

1. Defendants and their end users use BitTorrent to engage in piracy.

137. BitTorrent is one of the most common peer-to-peer file sharing protocols (in other words, set of computer rules) used for distributing large amounts of data.

138. The BitTorrent protocol's popularity stems from its ability to distribute a large file without creating a heavy load on the source computer and network. In short, to reduce the load on the source computer, rather than downloading a file from a single source computer (one computer directly connected to another), the BitTorrent protocol allows users to join a "swarm" of host computers to download and upload from each other simultaneously (one computer connected to numerous computers).

139. In a report from January 2011, a survey conducted by the firm Envisional estimated that 11.4 percent of all Internet traffic involved the unauthorized distribution of non-pornographic copyrighted content via BitTorrent.

140. A more recent study by Sandvine determined that file-sharing accounts for 3 percent of global downstream and 22 percent of upstream traffic, with 97% of that traffic in turn being BitTorrent. See Sandvine, "The Global Internet Phenomena Report", October 2018, <https://www.sandvine.com/hubfs/downloads/phenomena/2018-phenomena-report.pdf> [last accessed on May 27, 2021].

141. BitTorrent is overwhelmingly used for piracy. See David Price, "NetNames Piracy Analysis: Sizing the Piracy Universe", September 2013, pg. 18, http://creativefuture.org/wp-content/uploads/2016/01/netnames-sizing_piracy_universe-FULLreport-sept2013.pdf [last accessed on Oct. 1, 2021] ("Of all unique visitors to

bittorrent portals in January 2013, it is estimated that 96.28% sought infringing content during the month...”)

2. *The Initial Seed, Torrent, Hash and Tracker*

142. A BitTorrent user that wants to upload the new file, known as an “initial seeder,” starts by creating a “torrent” descriptor file using, for example, the Client he or she installed onto his or her computer.

143. The initial user or seeder of a file used a process referred to as “ripping” to create a copy of motion pictures from either Blu-ray or legal streaming services.

144. The initial seeder often modifies the file title of the Work to include a wording such as “TGx”, “FGT”, “RARBG” or “YTS” in the title of the torrent files and file copies in order to enhance a reputation for the quality of his or her torrent files and attract users to his or her piracy website.

145. The Client takes the target computer file, the “initial seed,” here the copyrighted Work, and divides it into identically sized groups of bits known as “pieces.”

146. The Client then gives each one of the computer file’s pieces, in this case, pieces of the copyrighted Works, a random and unique alphanumeric identifier known as a “hash” and records these hash identifiers in the torrent file.

147. When another peer later receives a particular piece, the hash identifier for that piece is compared to the hash identifier recorded in the torrent file for that piece to test that the piece is error-free. In this way, the hash identifier works like an electronic fingerprint to identify the source and origin of the piece and that the piece is authentic and uncorrupted.

148. Torrent files also have an "announce" section, which specifies the URL (Uniform Resource Locator) of a "tracker," and an "info" section, containing (suggested) names for the files, their lengths, the piece length used, and the hash identifier for each piece, all of which are used by Clients on peer computers to verify the integrity of the data they receive.

149. The "tracker" is a computer or set of computers that a torrent file specifies and to which the torrent file provides peers with the URL address(es).

150. The tracker computer or computers direct a peer user's computer to other peer user's computers that have particular pieces of the file, here the copyrighted Work, on them and facilitates the exchange of data among the computers.

151. Depending on the BitTorrent Client, a tracker can either be a dedicated computer (centralized tracking) or each peer can act as a tracker (decentralized tracking.)

3. *Torrent Sites*

152. "Torrent sites" are websites that index torrent files that are currently being made available for copying and distribution by people using the BitTorrent protocol. There are numerous torrent websites including torrentgalaxy and the notorious YTS and RARBG websites.

153. The YTS and RARBG websites were noted by the USTR as examples of Notorious Markets defined as an online marketplace reportedly engaged in and facilitating substantial piracy. See USTR, 2014 Out-of-Cycle Review of Notorious Markets, Mar. 5, 2015, pg. 17, Available at <https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20->

%20Published_0.pdf [last accessed on May 7, 2021]; see also USTR, *2018 Out-of-Cycle Review of Notorious Markets*, April 2019, pgs. 24, 27 Available at https://ustr.gov/sites/default/files/2018_Notorious_Markets_List.pdf [accessed on May 7, 2021].

154. PIA recommends that individuals use VPN services such as its when using YTS to download torrent files to avoid Plaintiffs' counsel.

4. End users access the torrent sites from Sharktech IP addresses

155. End users accessed torrent sites including the YTS website to upload and download Plaintiffs' copyrighted Work from IP addresses provided by Defendants, which Defendants received from host providers such as Sharktech in Denver.

156. The IP address used by the end users then becomes a link to the infringing copies of Plaintiffs' Works.

157. End user Robert O'Brien (an end user of Defendant PIA) accessed the torrent website YTS from IP address 174.128.226.10 in Denver and downloaded torrent files for Plaintiffs' Work *Angel Has Fallen* and *Distorted*. See Decl. of Robert O'Brien at ¶¶2-3, 6.

158. End user Harry Beasor (an end user of Defendant PIA) accessed the torrent website YTS from IP address 91.207.175.82 and downloaded torrent files for Plaintiffs' Work *London Has Fallen* and *Mechanic: Resurrection*. See Aff. of Harry E. Beasor at ¶7.

159. End user Bryan Deem (an end user of Defendant PIA) accessed the torrent website YTS from IP address 193.37.252.37 and downloaded torrent files for Plaintiffs' Works *The Hitman's Bodyguard* and *The Last Full Measure*. See Decl. of Bryan Deem

at ¶2.

160. End user Brandon Brady (an end user of Defendant PIA) accessed the torrent website YTS from IP address 212.103.49.162 and downloaded torrent files for Plaintiff's Work *The Last Full Measure*. See Decl. of Brandon Brady at ¶2.

161. End user Cassandra Luker (an end user of Defendant PIA) accessed the torrent website YTS from IP address 199.116.115.143 and downloaded torrent files for Plaintiff's Work *London Has Fallen*. See Decl. of Cassandra Luker at ¶¶2-3.

162. End user Beth Wiecher (an end user of Defendant PIA) accessed the torrent website YTS from IP address 173.244.44.69 and downloaded a torrent file for Plaintiff's Work *London Has Fallen*. See Decl. of Beth Wiecher at ¶¶2-3.

163. End User Dale Powers (an end user of Defendant PIA) accessed the torrent website YTS from IP address 193.37.252.19 and downloaded a torrent file for Plaintiff's Work *Angel Has Fallen*. See Decl. of Dale Powers at ¶¶2-4.

164. End user Derek Dueker (an end user of Defendant ExpressVPN) accessed the torrent website YTS from IP address 64.20.60.59 and downloaded torrent files for Plaintiffs' Works *Olympus Has Fallen*, *London Has Fallen*, *Angel Has Fallen* and *Hunter Killer*. See Decl. of Derek Dueker at ¶¶2-4.

165. End user Andrew Grumbling (an end user of Defendant ExpressVPN) accessed the torrent website YTS from IP address 185.245.86.115 and downloaded torrent files for Plaintiffs' Works *Hellboy* and *Angel Has Fallen*. See Decl. of Andrew Grumbling at ¶¶2-3.

166. End user Tayah Durnan (an end user of Defendant ExpressVPN) accessed

the torrent website YTS from IP address 104.143.92.63 and downloaded torrent files for Plaintiff's Work *Rambo V: Last Blood*. See Decl. of Tayah Durnan at ¶¶2-3.

167. End user Cecilia Peacock (an end user of Defendant ExpressVPN) accessed the torrent website YTS from IP address 167.160.167.233 and downloaded torrent files for Plaintiff's Work *And So It Goes*. See Decl. of Cecilia Peacock at ¶¶2-3.

5. The Peer Identification

168. The BitTorrent Client will assign an identification referred to as a Peer ID to the computer so that it can share content (here the copyrighted Work) with other peers. The Peer ID incorporates the IP address of the BitTorrent swarm participant.

6. Uploading and Downloading a Work Through a BitTorrent Swarm

169. Once the initial seeder has created a torrent and uploaded it onto one or more torrent sites, then other peers begin to download and upload the computer file to which the torrent is linked (here the copyrighted Work) using the BitTorrent protocol and BitTorrent Client that the peers installed on their computers.

170. The BitTorrent protocol causes the initial seeder's computer to send different pieces of the computer file, here the copyrighted Work, to the peers seeking to download the computer file. Defendants transmit the pieces to the peers.

171. Once a peer receives a piece of the computer file, here a piece of the copyrighted Work, it starts transmitting that piece to the other peers. Defendants' end users transmit the pieces to the peers.

172. In this way, all of the peers and seeders are working together in what is called a "swarm."

173. Here, Defendants and their end users participated in a swarm and directly interacted and communicated with other members of the swarm through digital handshakes, the passing along of computer instructions, uploading and downloading, and by other types of transmissions, Plaintiffs' Works.

174. Defendant distributed their end users' transmissions to other members of the swarm.

175. In this way, and by way of example only, one initial seeder can create a torrent that breaks a movie up into hundreds or thousands of pieces saved in the form of a computer file, like the Works here, upload the torrent onto a torrent site, and deliver a different piece of the copyrighted Work to each of the peers. The recipient peers then automatically begin delivering the piece they just received to the other peers in the same swarm.

176. Once a peer has downloaded the full file, the BitTorrent Client reassembles the pieces and the peer is able to view the movie. Also, once a peer has downloaded the full file, that peer becomes known as "an additional seed," because it continues to distribute the torrent file, here the copyrighted Work.

7. The Plaintiffs' Computer Investigator Identified Defendants' IP Addresses as Participants in Swarms That Were Distributing Plaintiffs' Copyrighted Works.

177. Sharktech, Web2Objects and M247 reassigned IP addresses to Defendants.

178. Choopa reassigned IP addresses to Defendant PIA.

179. Leaseweb reassigned IP addresses to Defendant ExpressVPN.

180. Upon information and belief, DataCamp reassigned IP addresses to Defendant ExpressVPN.

181. The Plaintiffs retained Maverickeye UG (“MEU”) to identify the IP addresses that are being used by those people that are using the BitTorrent protocol and the Internet to reproduce, distribute, display or perform the Plaintiffs’ copyrighted Works.

182. MEU used forensic software to enable the scanning of peer-to-peer networks for the presence of infringing transactions.

183. MEU extracted the resulting data emanating from the investigation, reviewed the evidence logs, and isolated the transactions and the IP addresses associated therewith for the files identified by the SHA-1 hash value of the Unique Hash Number.

184. The IP addresses, Unique Hash Numbers, and hit dates contained in Exhibit “2” accurately reflect what is contained in the evidence logs.

185. The logged information such as, for example, in Exhibit “2” shows that Defendants and/or Defendants’ end users distributed copies of the Plaintiffs’ copyrighted Works identified by the Unique Hash Number.

186. Defendants and/or their end users’ computers used the IP addresses to connect to the investigative server from a computer (including one in this District at Sharktech’s Denver facility as shown in Exhibit “2”) in order to transmit a full copy, or a portion thereof, of a digital media file identified by the Unique Hash Number through networks (such as of Sharktech’s) controlled by Defendants.

187. MEU's agent analyzed each BitTorrent "piece" distributed by the IP addresses listed and verified that re-assemblage of the pieces using a BitTorrent Client results in a fully playable digital motion picture of the Works.

188. MEU's agent viewed the Works side-by-side with the digital media file that correlates to the Unique Hash Number and determined that they were identical, strikingly similar or substantially similar.

C. The Operator of the YTS website confirmed that the Defendants' end users downloaded torrent files for copying the Work from the YTS website.

189. The YTS website operator maintained records of activity of registered user accounts for IP addresses associated with data centers used by Defendant such as Choopa, M247, DataCamp, and Sharktech. See Exhibit "3" (Sharktech YTS users) at pg. 10 (Certificate of Authenticity).

190. The YTS website operator maintained records of activity of registered user accounts. See Exhibit "3" at pg. 10 (Certificate of Authenticity).

191. As shown in Exhibit "3", the records including the email address of the registered user account, the torrent files the registered account downloaded, the IP address from where the registered user accessed the YTS website, and the time.

192. The records show end users downloaded the torrent file for reproducing the Work, the same file copy MEU's agent verified that re-assemblage of the pieces using a BitTorrent Client results in a fully playable digital motion picture of the Works, from IP addresses assigned to Sharktech and in Denver, CO.

D. Defendants and their end users reproduced and distributed copies of Plaintiffs'

Works.

193. Defendants' and/or their end users distributed at least pieces of each of Plaintiffs' Works over network connections to other peers in the Swarm.

194. Defendants' and/or their end users reproduced at least pieces of each of Plaintiffs' Works within said network connections to distribute to the other peers in the Swarm.

195. End user Robert O'Brien (an end user of Defendant PIA) from IP address 174.128.226.10 in Denver distributed copies of Plaintiffs' Work *Angel Has Fallen* by the file name *Angel Has Fallen* (2019) [WEBRip] [720p] [YTS.LT] and *Distorted* by the file name *Distorted* (2018) [BluRay] [720p] [YTS.AM]. See Decl. of Robert O'Brien at ¶¶2-3, 6.

196. End user Harry Beasor (an end user of Defendant PIA) from IP address 91.207.175.82 distributed copies of Plaintiffs' Work *London Has Fallen* and *Mechanic: Resurrection*. See Aff. of Harry E. Beasor at ¶7.

197. End user Bryan Deem (an end user of Defendant PIA) from IP address 193.37.252.37 distributed copies of Plaintiffs' Works *The Hitman's Bodyguard* and *The Last Full Measure*. See Decl. of Bryan Deem at ¶2.

198. End user Brandon Brady (an end user of Defendant PIA) from IP address 212.103.49.162 distributed copies of Plaintiff's Work *The Last Full Measure*. See Decl. of Brandon Brady at ¶2.

199. End user Cassandra Luker (an end user of Defendant PIA) from IP address 199.116.115.143 distributed copies of Plaintiff's Work *London Has Fallen*. See Decl. of

Cassandra Luker at ¶¶2-3.

200. Defendant PIA exported a copy of the Work to Australia when Cassandra Luker downloaded a copy of the Work and also imported a copy of the Work to United States from Australia when Cassandra Luker distributed a copy of the Work.

201. End user Beth Wiecher (an end user of Defendant PIA) from IP address 173.244.44.69 distributed copies of Plaintiff's Work *London Has Fallen*. See Decl. of Beth Wiecher at ¶¶2-3.

202. End user Dale Powers (an end user of Defendant PIA) from IP address 193.37.252.19 distributed copies of Plaintiff's Work *Angel Has Fallen*. See Decl. of Dale Powers at ¶¶2-4.

203. Defendant PIA exported a copy of the Work to Australia when Dale Powers downloaded a copy of the Work and also imported a copy of the Work to United States from Australia when Dale Powers distributed a copy of the Work.

204. End user Derek Dueker (an end user of Defendant ExpressVPN) from IP address 64.20.60.59 distributed copies of Plaintiffs' Works *Olympus Has Fallen*, *London Has Fallen*, *Angel Has Fallen* and *Hunter Killer*. See Decl. of Derek Dueker at ¶¶2-4.

205. End user Andrew Grumbling (an end user of Defendant ExpressVPN) from IP address 185.245.86.115 distributed copies of Plaintiffs' Works *Hellboy* and *Angel Has Fallen*. See Decl. of Andrew Grumbling at ¶¶2-3.

206. End user Tayah Durnan (an end user of Defendant ExpressVPN) from IP address 104.143.92.63 distributed copies of Plaintiff's Work *Rambo V: Last Blood*. See Decl. of Tayah Durnan at ¶¶2-3.

207. Defendant ExpressVPN exported a copy of the Work to Australia when Tayah Durnan downloaded a copy of the Work and also imported a copy of the Work to United States from Australia when Tayah Durnan distributed a copy of the Work.

208. End user Cecilia Peacock (an end user of Defendant ExpressVPN) from IP address 167.160.167.233 distributed copies of Plaintiff's Work *And So It Goes*. See Decl. of Cecilia Peacock at ¶¶2-3.

209. Each IP address is a numerical identifier assigned to each device connected to a computer network that uses the Internet Protocol for communication and permits devices to be identified and interface on the Internet and provides the location of the device in the network..

210. The IP addresses Defendants provide are indexes, references, pointers, and/or hypertext links that linked swarm participant to online locations such as Sharktech's own servers in Denver and/or the end user's computers containing unauthorized copies of Plaintiffs' Works or sources for distributing Plaintiffs' Works.

E. Defendants intentionally induce piracy of copyright protected Works including Plaintiffs'.

211. Defendants obtained services such as IP addresses and servers from host providers such as Sharktech for the purpose of infringing copyright protected Works including Plaintiffs'.

212. Defendants promote their services for the purpose of infringing copyright protected Works including Plaintiffs' (i.e. – piracy).

213. Defendant PIA acknowledges that its end users use its VPN service for



piracy.

privateinternetaccess.com/helpdesk/kb/articles/why-do-i-need-a-vpn-3

Using a VPN can add the extra encryption to your cloud storage uploads and downloads so that your data is protected while it is being transmitted to and from your Cloud storage.

4. Downloading Torrents

There are as many legitimate, legal reasons for downloading torrents as there are torrent users who download pirated movies. The problem is ISPs have a very hard time distinguishing between the two. That means they sometimes block or traffic shape users who are using torrents for legitimate reasons (for example game updates and Linux ISOs).

Labels

Need VPN Why

Author

Travis

Date Created

Mar 5, 2021

214. PIA instructs its users how to *optimize* use of its VPN service for piracy.

privateinternetaccess.com/helpdesk/kb/articles/how-do-i-enable-port-forwarding-on-my-vpn-2

Help Center > Knowledgebase > Technical > Browsing and Internet > Torrents > How do I enable port forwarding on my VPN?

How do I enable port forwarding on my VPN?

TH Last updated: Mar 5, 2021 by Travis Hackbarth

The Port Forwarding option in our Windows, Mac, Linux and Android software can be used to potentially optimize torrent performance.

Enable Port Forwarding:

In order to enable port forwarding in our PIA app, first disconnect from the VPN. Right-click the PIA Tray icon and select "Settings". From within the settings, select the Network tab and check the "Request Port Forwarding" checkbox. You will now see, in the server list, the servers on which you can connect with port-forwarding enabled. Any server that is unavailable, will be blacked out. At the moment, all of our non US Servers offer port-forwarding functionality and you can find a list of all of the servers we offer, here: <https://www.privateinternetaccess.com/pages/network/>

Locating Forwarded Port

Once connected to on one of these port forwarding gateways, please open the application. From within the application you will see the forwarded port just below the VPN IP address.

Subscribe

Labels

Port Forwarding

Author

Travis

Date Created

Mar 5, 2021

215. PIA warned its end users that Plaintiffs' counsel had obtained log

information for users of the piracy website YTS after it received a subpoena in that case.

216. PIA's parent company and alter ego Kape promotes PIA's VPN service for piracy on its website.

217. Kape warns that "Risks of Torrenting in the US" include "Copyright trolls... that locate and penalize users who download copyrighted content." <https://www.vpnmentor.com/blog/downloading-torrents-in-the-u-s/> [last accessed on 11/5/2021].

What Are the Risks of Torrenting in the US

Torrenting in the US can present some serious challenges. On top of legal risks, there are various cyber threats you are vulnerable to whenever you torrent in the US. Find out more about the 3 major risks of torrenting below.

Copyright trolls

Copyright trolls are companies that locate and penalize users who download copyrighted content. They're usually third parties, hired to act on behalf of big movie studios and music labels. Copyright trolls use deep packet inspection (DPI) to track your downloads and visited sites. Once they find someone downloading illegal files, they hand out a settlement letter that can sometimes come with fines of up to \$100K. The team at vpnMentor doesn't condone illegal torrenting, but even if you didn't download copyrighted content intentionally and only did it by accident, you'd be exposing yourself to copyright trolls.

218. Kape states that PIA's kill switch is great for protecting users that want to pirate. <https://www.vpnranks.com/reviews/private-internet-access/> [last accessed on Nov. 4, 2021] ("I'd recommend users to keep the Kill Switch enabled at all times, especially if you're performing sensitive tasks like downloading torrents in a country with strict laws against online piracy").

PIA VPN Kill Switch

The PIA VPN Kill Switch disconnects your internet if you lose your VPN connection for one reason or the other. This stops your actual IP address from getting exposed to your local ISP or the site you are visiting.

I'd recommend users to keep the Kill Switch enabled at all times, especially if you're performing sensitive tasks like downloading torrents in a country with strict laws against online piracy.

The Kill Switch will ensure that your real identity remains hidden even in case of sudden connection interruptions.

Encrypted Wi-Fi

What makes PIA a standout VPN service from its competitors is its encrypted Wi-Fi feature. When you use Private Internet Access on your Wi-Fi, it protects the device through WPA protocol first. Therefore, you have to provide an authentication key before using the VPN on Wi-Fi devices, which makes your connection sessions more secure.

PIA SOCKS5 Proxy

PIA SOCKS5 proxy offers an **additional layer of authentication** as it only allows authorized users when it comes to accessing the servers. In addition, it provides an appreciable connection speed as compared to other protocols.

This makes SOCKS5 good for purposes such as downloading and streaming. The popular usage of the protocol involves downloading torrents because it usually results in faster speeds.

However, it must be remembered that if you're in a country with strict laws against torrenting, the wiser decision would be to stick to more secure protocols like OpenVPN even if it results in slightly slower speeds. This is because SOCKS5 has weaker security as compared to other VPN protocols.

219. Kape states here that "The safest way to torrent in the US is by using a VPN" and recommends Private Internet Access and ExpressVPN because each "Works with: The Pirate Bay, RARBG, 1337x, YTS, Netflix, Hulu...and more".

1. ExpressVPN — Highly Secure With Fast Speeds for Torrenting in the US




[Try ExpressVPN >](#)



- ✓ Strict zero-logs policy, military-grade 256-bit encryption, and an automatic kill switch to protect your privacy while torrenting in the US
- ✓ Unlimited data and lightning-fast speeds to torrent in the US without lag
- ✓ A vast network of P2P servers that allow you to torrent from anywhere
- ✓ 5 simultaneous device connections
- ✓ 30-day money-back guarantee
- ✓ Works with: The Pirate Bay, RARBG, 1337x, YTS, Netflix, Hulu, HBO Max, and more
- ✓ Compatible with: Windows, Mac, iOS, Android, Linux, routers, and more


4. PIA — P2P-Supporting Servers for Fast Torrenting in the US



Private Internet ACCESS®

[Try Private Internet Access >](#)

- ✓ No-logs policy, AES 256-bit encryption, and an automatic kill switch to keep you secure while you torrent in the US
- ✓ Unlimited data and decent speeds to torrent in the US without buffering
- ✓ 29,650 servers in 70 countries, with most locations offering P2P support
- ✓ 10 simultaneous device connections
- ✓ 30-day money-back guarantee
- ✓ Works with: The Pirate Bay, RARBG, 1337x, YTS, Netflix, HBO Now, and more
- ✓ Compatible with: Mac, Windows, Linux, Android, iOS, and more

 **November 2021 Update:** PIA doesn't usually have deals or discounts (it's already so affordable), but right now you can [get a new subscription for a crazy 84% off!](#)

220. PIA's parent company and alter ego Kape promotes ExpressVPN's VPN service for using the piracy app "ShowBox". See <https://www.vpnmentor.com/blog/is-showbox-safe-it-is-but-only-if-you-do-this/> [last accessed on 11/4/2021].

221. Here Defendant PIA's parent company Kape acknowledges that ShowBox is "illegal in most Western countries" and that "There is also a risk that Hollywood studios...in litigation against...Showbox could actually sue end users....You can insulate yourself from these risks by using a VPN..."

Is Showbox Legal?

Showbox, which is considered to have mostly pirated content, is **illegal in most Western countries** with strict intellectual property and copyright laws.

However, there is a gray area for users. **In many cases, streaming pirated content online is considered legal**, even if the website in question does not own the pertinent copyright or licensing. What is almost universally considered illegal is downloading pirated content to your own device.

There is also a risk that Hollywood studios or TV producers in litigation against websites offering Showbox could actually **sue end users**. Some of these websites now warn users that their **IP addresses and browsing history could be made available** to interested parties through their ISP.

You can insulate yourself from these risks by using a VPN. **VPNs prevent ISPs from being able to view your online activity or personal data** and passing it on to third parties such as studios, producers, and law firms.

VPNs also allow you to bypass the geo-restrictions that some countries use to block Showbox, allowing you to get through to the service's servers and the content you want to watch.

222. Indeed, some of the Plaintiffs in this action joined other rightsholders and filed a lawsuit against operators of the ShowBox app and websites that promoted ShowBox app in the District of Hawaii (1:18-cv-192). Plaintiffs served a subpoena on Defendant PIA concerning the operator of the ShowBox's use of PIA's VPN service.

223. Plaintiffs' investigator, Eric Smith, confirmed that Showbox can be used to download, reproduce, and distribute copies of copyright protected Works such as "I Feel Pretty" and "Hunter Killer" exactly as promoted and encouraged by Defendants.

224. Defendant PIA's parent company and alter ego Kape promotes ExpressVPN's VPN service promotes as "reliable" torrent sites: The Pirate Bay; YTS; 1337x; RARBG and Limetorrents for the user to use after the users has gotten "a reputable VPN" with "military-grade encryption and hides your IP address". The military-grade language include a link to the ExpressVPN website. <https://www.vpnmentor.com/blog/torrent-beginners-bittorrent-explained/> [last accessed

on 11/5/2021].

Step 6: Download a safe torrent

Downloading a safe torrent is crucial because the wrong one can be filled with malware. Hackers usually fill torrents with malware and disguise them to wreak havoc. Therefore, **make sure you only download torrents that have been verified for safety**.

A good place to start is to [use a trustworthy torrent site that's well established](#). **Don't download a torrent from an obscure site that you found off a Google search**, as Google often displays the URLs of fake sites.

Some reliable torrent sites include:

- The Pirate Bay
- YTS
- 1337x
- RARBG
- Limetorrents

225. Defendant PIA's parent company and alter ego Kape promotes ExpressVPN's VPN service for using the piracy apps and piracy websites such as "MoviesJoy", "Popcorn Time" "SubsMovies". See <https://www.vpnmentor.com/blog/best-alternatives-to-flixtor-get-free-movies-tv/> [last accessed on 11/4/2021].

226. Here Defendant PIA's parent company and alter ego Kape warns its readers to use a VPN to make it "nearly impossible" to get caught infringing copyrights.

Protection from Legal Consequences of Copyright Violations

It's perfectly **legal to watch a video on a website that has secured rights to distribute it.** However, if the website is not authorized to show the video, you could get pulled into legal battles over copyright infringement.

By encrypting your traffic and **masking your IP address, VPNs make it nearly impossible for anyone to trace your online activity back to you.** So even if the streaming website gets in trouble for violating copyright laws, you won't.

227. Defendant PIA's parent company and alter ego Kape explicitly promotes notorious piracy website such as YTS, 1337x, RARBG and the Pirate Bay and states that ExpressVPN can be used to "...stop you from getting in trouble for torrenting if it's banned in your country or you accidentally download copyrighted material." <https://www.vpnmentor.com/blog/best-elitetorrent-alternatives/> [last accessed on 11/4/2021].

228. Defendants pay commissions to marketing affiliates that promote their VPN services for piracy.

229. Defendant ExpressVPN also pays a marketing commission to Kape to promote its service for piracy.

230. Upon information and belief, Defendants pay these marketing affiliates a percentage of the subscription fee for each end user they refer that pays for a subscription for the VPN service.

231. Defendants' marketing affiliate "ProPrivacy" recommended PIA, CyberGhost and ExpressVPN as three of the top five VPNs "you will need to use...to torrent with YTS safely and avoid getting into trouble."

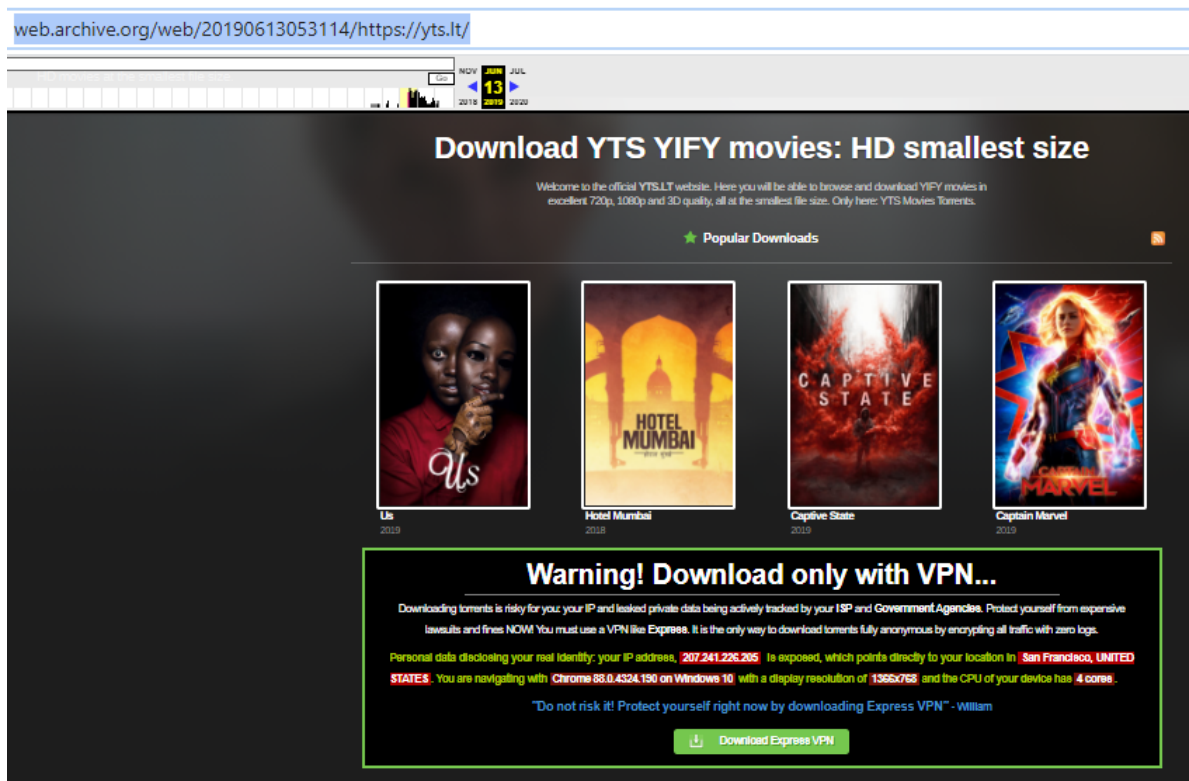
<https://proprivacy.com/comparison/vpn-yts> [last accessed on 11/4/2021].



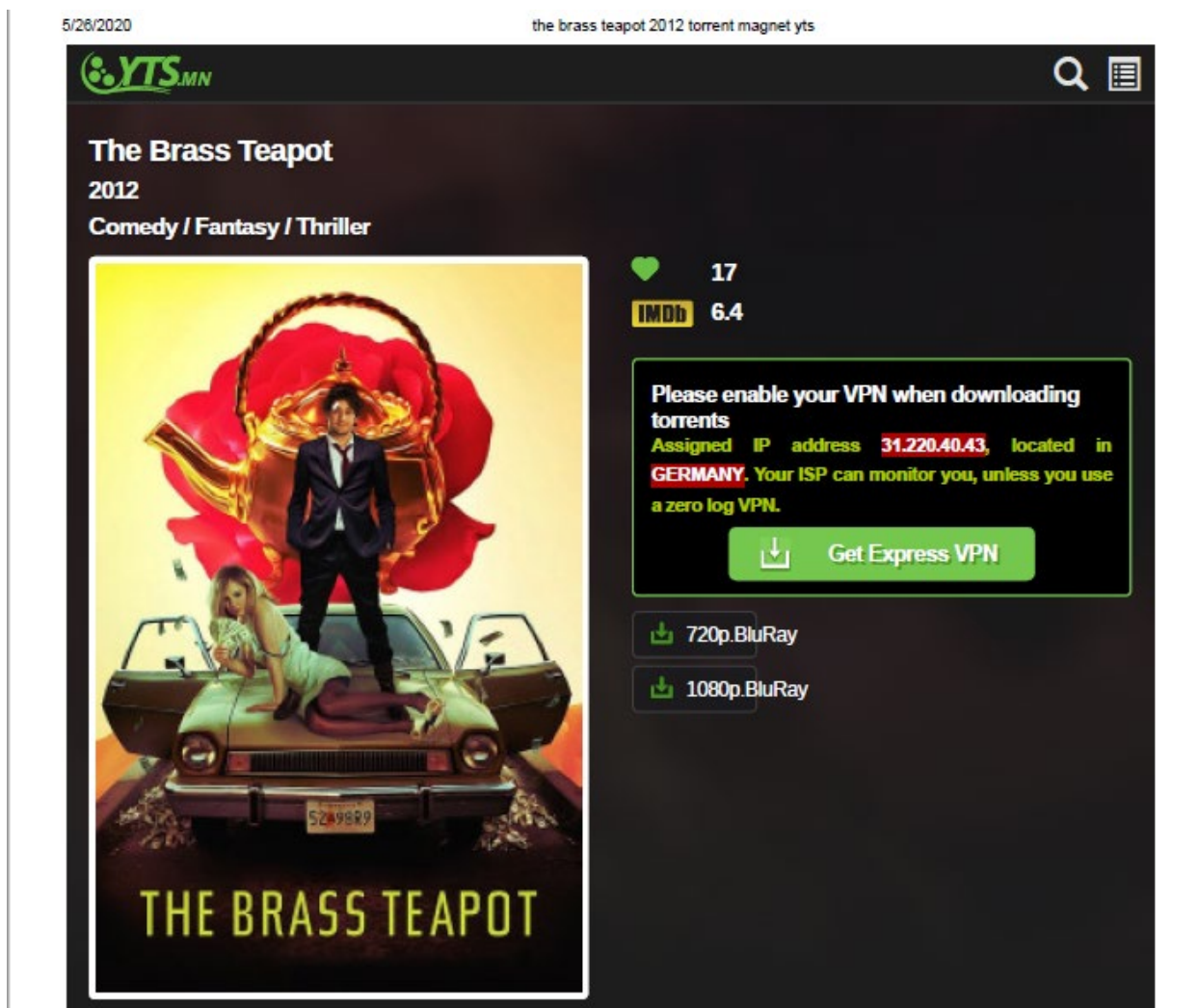
232. Upon information and belief, the operator of notorious piracy website YTS was a marketing affiliate of ExpressVPN.

233. The YTS website operator promoted Express VPN's VPN service as a tool to pirate copyright protected content without getting caught.

234. The YTS website operator promoted Express VPN's VPN service with the message, "WARNING! Download only with VPN..." and describes its VPN service as a means to, "Protect yourself from expensive lawsuits and fines NOW!"



235. The YTS website operator promotes Express VPN's VPN service next to specific movies available to be pirated.



236. The YTS website operator explicitly promotes ExpressVPN service on the piracy website YTS as an essential tool to pirate Plaintiffs' Works. See Decl. of Kessner at ¶¶4-10 (ExpressVPN promotes its VPN service for downloading torrents for *Angel Has Fallen*, *Ava*, *Disturbing the Peace*, *Tesla*, *The Second*, *The Outpost*, and *The Professor and the Madman*).

237. The YTS website operator explicitly promotes ExpressVPN service on the piracy website YTS as an essential tool to pirate *2 Guns*.



238. The YTS website operator explicitly promotes ExpressVPN service on the piracy website YTS as an essential tool to pirate *Hurricane Heist*.

239. The YTS website operator explicitly promotes ExpressVPN service on the piracy website YTS as an essential tool to pirate *And So it Goes*.

240. The YTS website operator explicitly promotes ExpressVPN service on the piracy website YTS as an essential tool to pirate *The Last Full Measure*.

241. The YTS website operator explicitly promotes ExpressVPN service on the piracy website YTS as an essential tool to pirate *Lone Survivor*.

242. The YTS website operator explicitly promotes ExpressVPN service on the piracy website YTS as an essential tool to pirate *Universal Soldier: Day of Reckoning*.

243. Defendant ExpressVPN actively promotes its VPN service for the purpose of movie piracy, including the infringing of Plaintiffs' Works.

244. ExpressVPN emphasizes that its service has "No restriction" and its end users can "Stream or download anything...with your IP address hidden..."

ExpressVPN with the push of a button.



No restrictions

Stream or download anything, from any of our servers, anywhere on Earth, with your IP address hidden from prying eyes.

245. In response to a question of whether BitTorrent and other file-sharing traffic is allowed on all ExpressVPN servers, ExpressVPN replied that "ExpressVPN allows all traffic, including BitTorrent and other file-sharing traffic (without rerouting), from all of our VPN servers." See <https://torrentfreak.com/expressvpn-anonymous-review/> [last accessed on Nov. 5, 2021].

TF: Is BitTorrent and other file-sharing traffic allowed on all servers? If not, why? Do you provide port forwarding services? Are any ports blocked?

ExpressVPN: We do not believe in restricting or censoring any type of traffic. ExpressVPN allows all traffic, including BitTorrent and other file-sharing traffic (without rerouting), from all of our VPN servers. At the moment, we do not support port forwarding.

246. End users use Defendants' VPN services exactly as explained and encouraged – to infringe copyright protected content while logged into the VPN service

so they can conceal their illicit activities.

247. Defendants promote their VPN service as a tool to engage in massive copyright infringement to entice end users to purchase their VPN service.

248. Based upon Defendants' encouragement that their VPN service can be used to "safely" operate piracy apps such as Popcorn Time and visit torrent sites such as Pirate Bay, Kickass Torrents, YTS and Extratorrents and pirate, end users purchase the VPN service, install piracy apps such as Popcorn Time on their devices and/or visit torrent sites to infringe copyright protected content including Plaintiffs' while using Defendants' VPN service.

249. Defendants have the capability to log their end users' access to their VPN service but purposely delete the logged information so that they can promote their service as a means to pirate copyright protected Works anonymously.

250. Defendants also purposely delete the logged information so that they can use their service as a means to pirate copyright protected Works anonymously.

251. Defendants interfere with standard technical measures used by copyright holders to identify or protect copyright works by purposefully deleting their and their end users' logged information. See 17 U.S.C. § 512(i)(1)(B).

252. Defendants specifically admit that they deleted their end users' logged information to protect the end users' piracy activities in promotions and advertisements. See e.g. Ernesto, "Which VPN Providers Really Take Privacy Seriously in 2021?", June 14, 2021, <https://torrentfreak.com/best-vpn-anonymous-no-logging/#tf-comments> [last accessed on Aug. 1, 2021] (In response to questions concerning BitTorrent activity, PIA

states “We do not store any logs relating to traffic, session, DNS or metadata. There are no logs kept for any person or entity to match an IP address and a timestamp to a current or former user of our service. In summary, we do not log, period.”)

253. Defendants do not have a safe harbor from liability because they have not “adopted and reasonably implemented...a policy that provides for the termination in appropriate circumstances of subscribers...who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

F. Defendants’ subscribers knew the Copyright Management Information included in the files they distributed to other peers had been removed or altered without the authority of Plaintiffs.

254. A legitimate file copy of the Work includes copyright management information (“CMI”) indicating the title.

255. The initial seeder of the infringing file copies of Plaintiff’s Work added wording to the file titles to “brand” the quality of piracy files he or she released and attract further traffic to his or her website.

256. For example, the initial seeder of the infringing file copies of *Angel Has Fallen* added the wording “YTS” to the file titles to brand the quality of piracy files he or she released and attract further traffic to the YTS website.

257. For example, the initial seeder of the infringing file copies of *The Outpost* added the wording “TGx” to the file titles to brand the quality of piracy files he or she released and attract further traffic to the torrentgalaxy website.

258. The words YTS or TGx are not included in the file title of legitimate copies

or streams of the Plaintiffs' Works. The initial seeders of the Work altered the title to falsely include the words such as "YTS" or "TGx" in the CMI.

259. The file copies Defendants distributed to other peers in the Swarm included the altered CMI in the file title.

260. Defendants' end users knew that TGx, FGT, YTS and RARBG were not the author of Plaintiffs' Works.

261. Defendants' end users knew that TGx, FGT, YTS and RARBG were not a licensed distributor of Plaintiffs' Works. Indeed, the YTS website includes a warning to this effect.

262. Defendants' end users knew that the CMI that included TGx, FGT, YTS and RARBG in the file names was false.

263. Defendants' end users knew that the file copies of the Work that they distributed to other peers in the Swarm included the altered CMI without the authority of Plaintiffs.

264. Defendants' end users knew that the CMI in the title they distributed to other peers in the Swarm included the altered CMI without the authority of Plaintiffs.

265. Defendants' end users knew that the false or altered CMI in the titles would induce, enable, facilitate or conceal infringements of the Works when they distributed the false CMI, altered CMI or Works including the false or altered CMI.

266. Namely, Defendants' end users knew that other recipients would see the file titles and use the altered CMI to go to the website such as YTS from where the torrent files originated to obtain unlicensed copies of the Work.

267. Indeed, some of Defendants' end users have registered accounts with piracy website such as YTS.

268. By providing the website information in the altered CMI to others, Defendants' end users induced, enabled and facilitated further infringements of the Work.

269. Indeed, Defendants promote their VPN services for accessing piracy website such as YTS and RARBG.

G. Defendants had knowledge that their end users were infringing Plaintiffs' Works and distributing file copies of the Works with altered CMI and that the IP addresses they provided to their end users were links to infringing activity but continued to provide service to their end users

270. Plaintiffs engaged MEU to generate Notices of infringements ("Notices") styled per 17 U.S.C. §512(c)(3) of the DMCA to be sent to service providers of IP addresses where MEU confirmed infringement of copyright protected content.

271. Each Notice included at least the name of the copyright owner, the title of the Work, the manner by which it was infringed, the infringing file name which includes the altered CMI, the IP address and port number at where infringement was confirmed and the time of infringement down to the second. See Exhibits "4" and "5" (excerpts below).

Protocol: BITTORRENT
Infringed Work: The Outpost
Infringing FileName: The.Outpost.2020.720p.GPLAY.WEBRip.900MB.x264-GalaxyRG[TGx]
Infringing FileSize: 940063994
Infringer's IP Address: 70.39.102.165
Infringer's Port: 52098
Initial Infringement Timestamp: 2021-02-10 00:11:17

Protocol: BITTORRENT
Infringed Work: The Hitmans Wives Bodyguard
Infringing FileName: The.Hitmans.Wives.Bodyguard.2021.EXTENDED.1080p.WEBRip.x265-RARBG
Infringing FileSize: 1942629641
Infringer's IP Address: 70.39.102.165
Infringer's Port: 49934
Initial Infringement Timestamp: 2021-07-25 06:10:02

272. MEU determines the proper abuse contact email address for the service provider assigned the IP addresses at issue from publicly available information from Whois records of ARIN.

273. Plaintiffs' agent sends the Notice to the abuse contact email address for the host provider associated with the IP addresses.

274. Upon information and belief, the host provider forwarded these Notices to Defendants.

275. Upon information and belief, other rightsholders had similar Notices sent to host providers concerning infringing activity at IP addresses assigned to Defendants.

276. Just between March and September of this year, Plaintiffs' agent sent thousands of Notice to Sharktech confirming infringements of the motion pictures: 211; After We Collided; Angel Has Fallen; Automata; Ava; Bedeviled (ExpressVPN only); Before I Go to Sleep; Between Worlds; Blackbird; Boyka: Undisputed IV; Criminal; Dallas

Buyers Club; Day of the Dead: Bloodline (ExpressVPN only); Dead Trigger; Distorted; Disturbing the Peace; Extremely Wicked, Shockingly Evil and Vile; Hellboy; Homefront; Hunter Killer; I Am Wrath (PIA only); I Feel Pretty; Jolt; Kill Chain; Lansky; Leatherface; London Has Fallen; Look Away; Mechanic: Resurrection; Olympus Has Fallen; Once Upon A Time in Venice; Rambo: Last Blood; Run Hide Fight; Shock and Awe; Singularity (PIA only); SKIN (PIA only); Speed Kills; Status Update (ExpressVPN only); Survivor; Tesla; The 2nd; The Expendables 3; The Hitman's Bodyguard; The Hitman's Wife's Bodyguard; The Humbling; The Outpost; The Professor and the Madman; The Protégé; and Till Death.

277. For example, just between February and September of this year, Plaintiffs' agent sent Sharktech 1151 Notices concerning infringements of *Hitman's Wife's Bodyguard* at IP addresses Sharktech reassigned to PIA.

278. Upon information and belief, Sharktech forwarded each of the Notices to dmca@privateinternetaccess.com and john@privateinternetaccess.com.

279. For example, just between March and September of this year, Plaintiffs' agent sent Sharktech 247 Notices concerning infringements of *Hitman's Wife's Bodyguard* at IP addresses Sharktech reassigned to ExpressVPN.

280. Upon information and belief, Sharktech forwarded each of the Notices to services@expressvpn.com.

281. Plaintiffs' agent sent 12 Notices to Sharktech concerning infringement of movies such as *Kill Chain*, *Hitman's Bodyguard*, *The Outpost*, *The Hitman's Wife's Bodyguard*, and *London Has Fallen* between February and March of this year at IP

address 70.39.108.195. Upon information and belief, Sharktech forwarded each of the Notices to dmca@privateinternetaccess.com and john@privateinternetaccess.com.

282. During this same period the PIA end user at IP address 70.39.108.195 shared multiple copies of these Works. For example, the end user was confirmed by MEU sharing copies of *The Hitman's Wife's Bodyguard* 21 times and *The Outpost* 14 times just between February and March of this year.

283. The host provider Choopa allocated to Defendant PIA IP addresses including 108.61.13.43; 108.61.13.44; 108.61.13.45 and 108.61.13.46 from 8/3/2012.

284. Between May 7, 2018 to the present, Plaintiffs' agent sent Choopa 247 Notices concerning infringement of Status Update; The Hitman's Bodyguard; Day of the Dead; 211; Once Upon a Time in Venice; I Feel Pretty; The Mechanic: Resurrection; Criminal; and Automata at these IP addresses that, upon information and belief, Choopa forwarded to Defendant PIA.

285. The host provider allocated to Defendant PIA IP addresses including 173.239.232.23 and 173.239.232.101.

286. Plaintiffs' agent sent hundreds of Notices to the host provider that, upon information and belief, forwarded the Notices to Defendant PIA.

287. In 2019, Defendant PIA and/or its end user distributed copies of *The Brass Teapot* and *Lost Child* from IP addresses 173.239.232.89, 173.239.232.101 and 173.239.232.23 even after Plaintiffs' agent had sent hundreds of notices to the host provider concerning this IP address.

288. Defendants failed to terminate the accounts of their end users associated

with these IP addresses or take any meaningful action in response to these Notices.

289. Defendants failed to even forward the Notices to their end users.

290. Plaintiff Venice PI, LLC served a subpoena on Defendant PIA in Civil Action No. 19-cv-169 in the District of Hawaii concerning infringing activity at IP address 91.207.175.82.

291. Plaintiff Millennium Funding, Inc. served a subpoena on Defendant PIA in Civil Action No. 20-cv-3170-PAB-NRN in the District of Colorado concerning infringing activity at IP addresses 193.37.252.19 and 194.59.251.68.

292. Defendant PIA failed to terminate the accounts of their end users associated with these IP addresses in the subpoena or take any meaningful action in response to these subpoenas.

293. In the contrary, PIA warned its end users that Plaintiffs' counsel had received log information from the notorious YTS piracy website.

294. Defendants could have taken simple measures to stop their end users from continuing to reproduce and/or distribute Plaintiffs' works but did not.

295. For example, Defendants could have temporarily "null-routed" the IP addresses to disable the link to the infringing activity and stop further piracy of Plaintiffs' works.

296. For example, Defendants could have temporarily suspended the end users' account to stop further piracy of Plaintiffs' works.

297. For example, Defendants could have blocked certain ports such as ports 6881-6889 that are used for BitTorrent.

298. If Defendants had even forwarded the Notices to their end users, the end user would likely have ceased the conduct. See Decl. of Robert O’Brien at ¶13 (“I would have immediately ceased...had I received any of these notices earlier or had my service been temporarily terminated.”); Decl. of Tayah Durnan at ¶5 (“I would have immediately stopped...had I received any warning or notices...”)

299. Defendants continued to provide service to their end users despite knowledge that their end users were using the service to engage and facilitate massive piracy of copyright protected Works including the Plaintiffs’.

300. Each of Defendants purposefully failed to do anything about its end users’ flagrant piracy including failing to even forward the Notices on to its end users because it was motivated to continue receiving payments from its end users and was concerned that its end users would cancel their service if it forwarded the notices to its end users.

H. Defendants control the conduct of their end users.

301. Each of Defendants can terminate the accounts of its’ end users at any time.

302. Upon information and belief, Defendants promptly terminates end user accounts when said end users failed to pay for the service.

303. Upon information and belief, each of Defendants blocks specific traffic it considers abusive.

I. Defendants do not have a safe harbor from liability.

304. As part of the DMCA, Congress created a safe harbor that limits the liability of a service provider for copyright infringement when their involvement is limited to, among other things, “transmitting, routing, or providing connections for, material through

a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(a). To benefit from this safe harbor, however, an ISP must demonstrate that it “has adopted and reasonably implemented...a policy that provides for the termination in appropriate circumstances of subscribers...who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

305. Defendants do not have a policy of terminating repeat infringers.

306. Plaintiffs’ agents have sent thousands of Notices to host providers such as Sharktech and Leaseweb concerning infringements at IP addresses the host providers reassigned to Defendants.

307. Despite these host providers forwarding the Notices to Defendants, each of Defendants failed to terminate the accounts and/or take any meaningful actions against its end users in response to these Notices consistent with a reasonably implemented policy for termination of subscribers and account holders of the service provider’s system or network who are repeat infringers necessary to support a safe harbor from liability (“policy”).

308. In many cases, Defendants were untruthful to the host providers when the host provider required a follow up response to the Notices.

309. For example, when Leaseweb required ExpressVPN to respond to a Notice Plaintiffs’ agent sent to Leaseweb on July 16, 2021 concerning piracy of “The Hitman’s Bodyguard” at IP Address: 154.6.19.11 and Port: 56194 at Timestamp: 2021-07-15 14:34:33, Defendant ExpressVPN replied that “The mentioned content has been removed”. However, the IP address 154.6.19.11 continues to be the source of substantial infringing activity, including piracy of *The Hitman’s Wife’s Bodyguard*.

310. Congress created a safe harbor that limits the liability of a service provider for copyright infringement "...by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider" does not have the requisite knowledge, "...responds expeditiously to remove or disable access to, the material..." and has the appropriate designated agent for receiving notices. 17 U.S.C. § 512(c)(1), (2).

311. Defendants and/or their end users use IP addresses of Defendants as links to access infringing copies of Plaintiffs' Works at Defendants' servers.

312. The thousands of Notices Plaintiffs' agent sent to Defendants' host providers concerning infringements included information such as the IP addresses that were forwarded to Defendants could have been used by Defendants to disable access to the infringing material and/or activity.

313. Defendants failed to respond and expeditiously remove or disable access to the material and/or activity in response to the thousands of Notices Plaintiffs' agent sent to their host providers such as Sharktech.

314. Defendant ExpressVPN has failed to designate and register an agent with the Copyright Office as provided by 17 U.S.C. § 512(c)(2).

315. Defendants' conduct renders them ineligible for safe harbor immunity from copyright liability under the DMCA.

J. The copyright infringements arise from Defendants' advertisements.

316. Defendants advertises that their services can be used to do whatever their end users wish since there are no logs.

317. Defendants' end users are motivated to become customers from Defendants' advertisements.

318. Defendants' end users are motivated to become customers from the knowledge of Defendants' practice of deleting logs, ignoring notices of infringements or failing to take any meaningful action.

319. The ability and availability for Defendants' end users to distribute and stream copyright protected Works including Plaintiffs from servers and IP addresses controlled by Defendants while concealing their identity is a draw for end users and at least one of their motivations to become customers of Defendant.

320. Defendants directly profits from their end users streaming and distribution of Plaintiffs' copyright protected Works without authorization.

K. Defendant PIA breached a settlement agreement with Plaintiffs.

321. On or about Sept. 1, 2021, Plaintiffs, other rightsholders and Defendant PIA entered into a settlement agreement ("Agreement") to resolve copyright claims in this action and other claims. See Exhibit "6".

322. Plaintiffs' counsel, counsel for Kape (Dr. Venetia Argyropoulou) and counsel for PIA negotiated the Agreement.

323. Counsel for PIA had authority to bind PIA.

324. Dr. Argyropoulou had authority to bind PIA.

325. The Agreement provided for PIA to make a payment to Plaintiffs and non-parties by Sept. 21, 2021.

326. In the Agreement PIA acknowledges that the Agreement "...does not give

PIA any license to distribute for commercial uses or for any other purposes whatsoever, the Works owned by Owners.”

327. The Agreement provides for being “governed by and construed in accordance with the laws of the State of Hawaii...”

328. One of the rightsholders in the Agreement is a Hawaii limited liability company.

329. On Sept. 1, 2021, the general counsel for PIA sent an email to Plaintiffs’ counsel stating, “We are sending the approved version of the final settlement agreement after [general counsel of Kape Dr.] Venetia [Argyropoulou] sent her feedback and I made a couple of small revisions.”

330. That same day, Plaintiffs’ counsel replied with a revised version that merely changed “Voltage Pictures, Inc. to LLC” and changed payment due date from 8/15/2021 to 9/21/2021. Plaintiffs’ counsel emphasized that “It is very important that the payment arrive before end of 9/30/2021.”

331. That same day, general counsel for PIA stated that he was revising to make the signing party Moran Laufer (the CFO of PIA and Kape) rather than himself and sending over for his signature.

332. That same day, Plaintiffs’ counsel replied to the general counsel for PIA “This is fine”.

333. The general counsel for PIA never stated an intention not to be bound by the Agreement absent an executed writing.

334. The Agreement is a valid, binding and enforceable contract.

335. Plaintiffs' counsel also represents Plaintiffs in Civil Action 21-cv-643 in the E. District of Virginia. In preparing a First Amended Complaint in the Virginia action to name further Defendants, Plaintiffs' counsel for the first time became aware that an intended Defendant ZenGuard is also a subsidiary of Kape. Plaintiffs' counsel promptly notified general counsel for PIA of its intentions in the Virginia action in the spirit of good faith.

336. Despite Plaintiffs and PIA agreeing to the fully enforceable Agreement, on Sept. 10, 2021 the general counsel for PIA sent a new proposed agreement to also release ZenGuard that replaced the name PIA with "Kape Technologies Plc ("Kape" which such term shall also include all of KAPE TECHNOLOGIES PLC current and prospective subsidiaries)", increased the total amount to be paid to settle claims for ZenGuard, and provided that Moran Laufer would be the signing party on behalf of Kape.

337. On Sept. 11, 2021 (Saturday) at 9:39 AM Hawaii Time, Dr. Argyropoulou suddenly emailed Plaintiffs' counsel and demanded that he sign the new proposed agreement on behalf of the Plaintiffs by the next day within less than 14 hours (less than 9 hours when taking into account time zone of some of the Plaintiffs).

338. Plaintiffs' counsel pointed out in reply that because it was Saturday morning (and afternoon in the mainland), it would be impossible to get in touch with his clients within less than 14 hours.

339. Dr. Argyropoulou threateningly replied that "...we fully intend to take all necessary legal measures to protect our brand names, if a settlement is not reached now."

340. Plaintiffs' counsel further pointed out in reply that the "current and prospective subsidiaries" language was vague and could potentially release a Defendant in other outstanding lawsuits if Kape purchased that Defendant.

341. Dr. Argyropoulou replied that she is "willing to limit this to prospective subsidiaries not based in the US".

342. Plaintiffs' counsel then pointed out to Dr. Argyropoulou that "Many of the foreign VPN providers have also agreed to be subject to jurisdiction in the US just like ZenGuard."

343. Less than two days later (Sept. 13, 2021), the news site CNet reported that Kape was purchasing ExpressVPN for \$936 million dollars. <https://www.cnet.com/tech/services-and-software/kape-technologies-buys-expressvpn-as-part-of-a-936-million-deal/> [last accessed on 11/5/2021].

344. At the time Dr. Argyropoulou demanded that Plaintiffs' counsel sign the new proposed agreement, Defendant ExpressVPN was also a Defendant in the Virginia action.

345. Upon information and belief, Dr. Argyropoulou was involved with Kape's purchase of ExpressVPN. Accordingly, Dr. Argyropoulou knew that Kape was in the process of purchasing Defendant ExpressVPN when she demanded that Plaintiffs' counsel sign the new proposed agreement within less than 14 hours.

346. PIA, through its agent Dr. Argyropoulou, breached the Agreement by attempting to deceive Plaintiffs' counsel into signing the new proposed agreement on behalf of Plaintiffs in which she had snuck in a full release for Defendant ExpressVPN

under the false pretenses of settling the PIA and ZenGuard matters.

347. PIA, through its agent Dr. Argyropoulou, breached the Agreement by attempting to strongarm Plaintiffs' counsel to sign the new proposed agreement on behalf of Plaintiffs within less than 14 hours before its parent and alter ego Kape publicly released that it was purchasing ExpressVPN.

348. Upon information and belief, ExpressVPN induced PIA to breach the Agreement and/or conspired with PIA and its alter ego Kape to deceive Plaintiffs into inadvertently releasing ExpressVPN from the Virginia Action by attempting to insert the vague language into the new agreement and pressuring Plaintiffs' counsel to sign the new agreement in less than 14 hours.

349. PIA purposefully and maliciously breached the Agreement to attempt to release its alter ego Kape's "prospective subsidiary not based in the US" Defendant ExpressVPN by attempting to sneak in vague language in a proposed new agreement and coerce Plaintiffs' counsel to sign the proposed new agreement on behalf of his clients by threatening him and giving him a ridiculous deadline of less than 14 hours on a Saturday.

350. PIA breached the covenant of good faith and fair dealing implied in the Agreement.

351. PIA acted wantonly, oppressively, or with such malice as implies a spirit of mischief or criminal indifference to its civil obligations.

352. PIA misconduct is willful and with conscious indifference to consequences.

353. Plaintiffs relied upon this Agreement to their detriment.

354. Plaintiffs sent PIA a 10-day notice to cure pursuant to ¶23 of the settlement agreement on 11/1/2021. PIA did not cure its breach.

355. Plaintiffs have substantially complied with the Agreement.

356. To the extent Plaintiffs have not complied with the Agreement, their non-compliance is excused.

357. PIA breached the Agreement by continuing to distribute, reproduce and/or publicly perform copies of Plaintiffs' Works in violation of U.S. Copyright law.

358. Plaintiffs relied upon the contract to their detriment for Defendant PIA to cease distributing, reproducing and/or publicly performing copies of Plaintiffs' Works in violation of U.S. Copyright law.

359. PIA breached the Agreement by failing to pay Plaintiffs the agreed upon amount.

360. PIA's obligation to make the agreed upon payment was not excused or relieved.

361. PIA's breaches of the agreement were substantial failures to perform that are material.

362. Plaintiffs have suffered damages as result of PIA's breach of contract.

363. For example, PIA did not make the payment by 9/30/2021 despite Plaintiffs' counsel emphasizing the importance of this date.

364. For example, PIA has directly infringed many of Plaintiffs' Works multiple times since breaching the contract.

**VII. FIRST CLAIM FOR RELIEF
(Direct Copyright Infringement)**

365. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs.

366. Plaintiffs are the registered copyright owners of the Works, each of which contains an original work of authorship.

367. Defendants actively promote their VPN service for piracy and encourage their customers (“end users”) to use their VPN service for piracy.

368. Defendants and their end users use their VPN service for piracy.

369. Defendants transmit, route, or provide connections for transmitting copies of Plaintiffs’ Works through a network under their control including servers provided by Sharktech in Denver, CO.

370. Defendants distributed at least a piece of the copyright protected Works to others.

371. Defendants make copies of said Works on said network when transmitting, routing, or providing connections for transmitting copies of Plaintiffs’ Works through said network.

372. Defendants encourage their end users to use the network to distribute and reproduce copies of Plaintiffs’ Works.

373. Defendants encourage their end users outside of the United States to access and use their servers and IP addresses in the United States to violate geographical restrictions of authorized platforms and publicly perform and/or distribute copies of the Plaintiffs’ Works outside of the United States.

374. Plaintiffs did not authorize, permit, or provide consent to Defendants to

copy, reproduce, distribute, publicly perform, or display their Works.

375. As a result of the foregoing, Defendants violated the Plaintiffs' exclusive rights to reproduce the Works in copies, in violation of 17 U.S.C. §§ 106(1) and 501.

376. As a result of the foregoing, Defendants violated the Plaintiffs' exclusive rights to distribute copies of the Works in copies, in violation of 17 U.S.C. §§ 106(3) and 501.

377. As a result of the foregoing, Defendants violated the Plaintiffs' exclusive rights to publicly perform (stream) copies of the Works in copies, in violation of 17 U.S.C. §§ 106(3) and 501.

378. Defendants encourage their end users outside of the United States to use their VPN service to access and use servers and IP addresses in the United States to publicly perform and/or distribute copies of the Plaintiffs' Works to the end users outside of the United States.

379. As a result of the foregoing, Defendants imported, without the authority of Plaintiffs, copies of the Works that have been acquired outside the United States in violation of 17 U.S.C. §602(a)(1).

380. As a result of the foregoing, Defendants imported into the United States, without the authority of Plaintiffs, pirated copies of the Works in violation of 17 U.S.C. §602(a)(2).

381. As a result of the foregoing, Defendants exported from the United States, without the authority of Plaintiffs, pirated copies of the Works in violation of 17 U.S.C. §602(a)(2).

382. Defendants' violations of 17 U.S.C. §602(a) violate Plaintiffs' exclusive right to distribute copies of the Works in violation of 17 U.S.C. §§ 106(3) and 501.

383. Defendants' infringements were committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

384. Defendants interfere with standard technical measures used by copyright holders to identify or protect copyright works by purposefully deleting their end users' log information. See 17 U.S.C. § 512(i)(1)(B).

385. The Plaintiffs have suffered damages that were proximately caused by each of the Defendants copyright infringements including, but not limited to lost sales, price erosion, and a diminution of the value of its copyrights.

**VIII. SECOND CLAIM FOR RELIEF
(Contributory Copyright Infringement based upon material contribution)**

386. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs.

387. Each of Defendants knowingly supplies the services such as IP addresses and server access to their end users despite actual and/or constructive knowledge that its end users use the machinery to infringe Plaintiffs' exclusive rights.

388. Defendants and their paid affiliates promote their service for the purpose of infringing copyright protected Works including Plaintiffs.

389. Through its activities, Defendants knowingly and intentionally took steps that are substantially certain to result in direct infringements of Plaintiffs' Copyrighted Works, and that have resulted in such direct infringements in violation of Plaintiffs' copyrights.

390. Defendants' host providers such as LogicWeb, Sharktech, Choopa, M247 and Leaseweb sent them thousands of Notices providing them with specific knowledge of their end users' ongoing infringements of Plaintiffs' Works.

391. Despite Defendants' knowledge that their end users were using their service to engage in widescale copyright infringements, Defendants failed to take simple measures or any reasonable steps to minimize the infringing capabilities of their service.

392. Despite having the ability to do so, each of Defendants refuses to even null-route the IP addresses of their end users where specific infringing activity has been identified and informed.

393. Despite having the ability to do so, each of Defendants refuses to save logs of the IP addresses of their end users where specific infringing activity has been identified and informed.

394. Despite having the ability to do so, each of Defendants refuses to block notorious piracy websites such as The Pirate Bay, YTS, RARBG and 1337 that their end use to infringe Plaintiffs' Works as promoted by Defendants.

395. Defendants are liable as a contributory copyright infringers for the infringing acts of their end users. Defendants have actual and constructive knowledge of the infringing activity of their end users. Defendants knowingly caused and otherwise materially contributed to these unauthorized distributions of Plaintiffs' Works.

396. Defendants' infringements were committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

397. By engaging in the contributory infringement alleged in this Second

Amended Complaint, Defendants deprived not only the producers of the Works from income that could have been derived when the respective film was shown in public theaters and offered for sale or rental, but also all persons involved in the production and marketing of this film, numerous owners of local theaters and retail outlets and their employees, and, ultimately, the local economy. Defendants' misconduct therefore offends public policy

IX. THIRD CLAIM FOR RELIEF (Vicarious Infringement)

398. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs.

399. Defendants are vicariously liable for the infringing acts of their end users' infringements including but not limited to their end users' direct infringements of Plaintiffs' exclusive right to distribute and reproduce copies of their Works.

400. Each of Defendants have the right and ability to supervise and control the infringing activities that occur through the use of its service, and at all relevant times has derived a direct financial benefit from the infringement of Plaintiffs' copyrights.

401. Defendants have refused to take any meaningful action to prevent the widespread infringement by their end users despite having actual knowledge. Indeed, the ability of end users to use Defendants' service to distribute copies of Plaintiffs' Works with knowledge that all log records of their activities will be deleted acts as a powerful draw for users of Defendants' service.

402. Defendants' end users are also motivated to become end users of Defendants due to their knowledge that they can use piracy apps such as Popcorn Time

and ShowBox to pirate Plaintiffs' Works without any consequence because of Defendants' policy of ignoring notices of infringement and deleting logs.

403. Defendants' end users are also motivated to become end users of Defendants due to their knowledge that they can use Defendants' service to access legal platforms such as Netflix from unauthorized regions and stream or distribute Plaintiffs' Works to these unauthorized regions.

404. Defendants are therefore vicariously liable for the unauthorized distribution of Plaintiffs' Works.

X. FOURTH CLAIM FOR RELIEF (Contributory Copyright Infringement based upon intentional inducement)

405. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs.

406. Defendants intentionally induced the infringement of Plaintiffs' exclusive rights under the Copyright Act, including infringement of Plaintiffs' exclusive rights to reproduce, publicly perform, and distribute copies of their Works.

407. As instructed and encouraged by Defendants, their end users purchase and install the VPN service to conceal their identities while engaging in movie piracy.

408. As instructed and encouraged by Defendants, their end users install piracy applications such as Popcorn Time to use on their devices while assigned IP addresses by the Defendants' VPN services to conceal their identities while pirating Plaintiffs' Works.

409. As instructed and encouraged by Defendants, their end users access servers in the United States from locations outside of the United States that are not authorized by legal platforms to stream, distribute or reproduce Plaintiffs' Works and

stream, distribute or reproduce Plaintiffs' Works.

410. As instructed and encouraged by Defendants, their end users access servers in the United States from locations outside of the United States to use BitTorrent to export copies of Plaintiffs' Works to locations outside of the United States in violation of Plaintiffs' exclusive rights to distribute their Works.

411. Defendants' end users use piracy applications to connect to sources that publicly perform and/or distribute copies of Plaintiffs' Works while anonymously connected to the Internet by Defendants' VPN services.

412. Defendants' end users connect to notorious piracy websites such as YTS to download torrent files to reproduce and distribute copies of Plaintiffs' Works while anonymously connected to the Internet by Defendants' VPN service exactly as promoted and encouraged to do by Defendants.

413. Defendants induce direct infringements of Plaintiffs' Works by encouraging the end users to use movie piracy applications such as Popcorn Time and ShowBox and to access websites such as YTS that facilitate, enable, and create direct links between their customers and infringing sources, and by actively inducing, encouraging, and promoting their VPN services as a means to "safely" use movie piracy applications for blatant copyright infringement by assuring customers that their identification information will be concealed.

414. Defendants induce direct infringements of Plaintiffs' Works by encouraging their end users to use their VPN service to access legal platforms such as Netflix to publicly perform or distribute copies of Plaintiffs' Works to unauthorized regions.

415. Defendants' intentional inducement of the infringement of Plaintiffs' rights in their Copyrighted Works constitutes a separate and distinct act of infringement.

**XI. FIFTH CLAIM FOR RELIEF
(Secondary Liability for DMCA Violations)**

416. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs.

417. Defendants encourage their end users to access torrent files for copying copyright protected Works from notorious movie piracy websites such as The Pirate Bay, Torrentgalaxy, 1337x, RARBG and YTS.

418. Defendants' end users registered for accounts with piracy websites such as YTS and RARBG.

419. Defendants' end users knowingly and with the intent to induce, enable, facilitate, or conceal infringement of the Plaintiffs' copyright protected Works, distributed copyright management information ("CMI") that included false wording such as "TGx", "RARBG", "FGT" and "YTS" in violation of 17 U.S.C. § 1202(a)(2).

420. Defendants' end users, without the authority of Plaintiffs, or the law, distributed removed or altered CMI knowing that the CMI had been removed or altered to include the wording "TGx", "RARBG", "FGT" or "YTS" without the authority of Plaintiffs and knowing, or having reasonable grounds to know, that it will induce, enable, facilitate, or conceal infringement of Plaintiffs' copyright protected Works in violation of 17 U.S.C. § 1202(b)(2).

421. Defendants' end users, without the authority of Plaintiffs, or the law, distributed Plaintiffs' Copyright protected Works knowing that the CMI had been removed

or altered to include the wording “TGx”, “RARBG”, “FGT” or “YTS”, and knowing, or having reasonable grounds to know, that it will induce, enable, facilitate, or conceal infringement of the copyright protected Works in violation of 17 U.S.C. § 1202(b)(3).

422. Particularly, Defendants’ end users knew that the CMI in the file names of the pieces had been altered to include the wording “TGx”, “RARBG”, “FGT” or “YTS”.

423. Particularly, Defendants’ end users distributed the file names that included CMI that had been altered to include the wording “TGx”, “RARBG”, “FGT” or “YTS”.

424. Defendants’ end users knew that the wording “TGx”, “RARBG”, “FGT” or “YTS” originated from notorious movie piracy websites which Defendants themselves promoted to them and to which the end users have registered accounts.

425. Defendants’ end users’ acts constitute violations under the Digital Millennium Copyright Act, 17 U.S.C. § 1202.

426. Defendants are secondarily liable for the DMCA violations of their end users.

427. Defendants have actual and constructive knowledge of their end users’ DMCA violations.

428. Defendants knowingly caused and otherwise materially contributed to these DMCA violations.

429. Defendants are vicariously liable for the DMCA violations of their end users.

430. Defendants have the right and ability to supervise and control the DMCA violations that occur through the use of their service, and at all relevant times has derived a direct financial benefit from the DMCA violations complained of herein. Defendants have

refused to take any meaningful action to prevent the widespread DMCA violations by their end users. Indeed, the ability of Defendants' end users to distribute torrent files from torrent websites such as YTS and the Pirate Bay that Defendants and their affiliates themselves promote and obtain file copies of the Works with altered CMI and distribute said copies while concealing their activities acts as a powerful draw for Defendants' end users. Defendants are therefore vicariously liable for the DMCA violations.

431. Plaintiffs are entitled to an injunction to prevent Defendants from continuing to contribute to violations of 17 U.S.C. § 1202.

432. Plaintiffs are entitled to recover from Defendants the actual damages suffered by Plaintiffs and any profits Defendants have obtained as a result of its wrongful acts that are not taken into account in computing the actual damages. Plaintiffs are currently unable to ascertain the full extent of the profits Defendants have realized by their violations of 17 U.S.C. § 1202.

433. Plaintiffs are entitled to elect to recover from Defendants statutory damages for its violations of 17 U.S.C. § 1202.

434. Plaintiffs are further entitled to costs and reasonable attorneys' fees.

XII. SIXTH CLAIM FOR RELIEF (Breach of Contract against PIA only)

435. Plaintiffs re-allege and incorporate by reference the allegations contained in each of the foregoing paragraphs.

436. On or about Sept. 1, 2021, Plaintiffs, other rightsholders and Defendant PIA entered into a settlement agreement ("Agreement") to resolve the copyright claims and other claims.

437. The Agreement is a valid, binding and enforceable contract.

438. Plaintiffs substantially complied with their part of the contract.

439. Plaintiffs are excused from performance of their part of the contract that was not performed.

440. Plaintiffs relied upon this contract to their detriment.

441. PIA breached the Agreement by continuing to distribute, reproduce and/or publicly perform copies of Plaintiffs' Works in violation of U.S. Copyright law.

442. PIA breached the Agreement by failing to pay Plaintiffs the agreed upon amount.

443. PIA's obligation to make the agreed upon payment was not excused or relieved.

444. PIA's obligation to not distribute, reproduce and/or publicly perform copies of Plaintiffs' Works in violation of U.S. Copyright law was not excused or relieved.

445. PIA's breaches of the Agreement were substantial failures to perform that are material.

446. Plaintiffs have been damaged as result of PIA's breach of contract in an amount to be proven at trial and is entitled to injunctive relief to prevent any further breaches and damages.

447.

Plaintiffs are also entitled to attorneys' fees arising from PIA's breach of contract and interest of 10 percent a year as provided in §478-2 of the Hawaii Revised Statutes.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request that this Court:

(A) enter permanent injunctions enjoining Defendants from infringing and contributing to infringements of the Plaintiffs' copyrighted Works and contributing to DMCA violations;

(B) enter permanent injunctions ordering Defendants to stop interfering with standard technical measures by deleting end user log information;

(C) order Defendants to adopt a policy that provides for the prompt suspension of end users for which it receives more than three unique notices of infringements of copyright protected Works and/or DMCA violations unless within 72 hours unless said end users makes a counter notification;

(D) order Defendants to adopt a policy of storing logs of end user access for at least two years to comply with the legal requirement not to interfere with standard technical measures used by copyright holders to identify or protect copyright works;

(E) order Defendants to block end users from accessing notorious piracy websites of foreign origin including those listed in the annual trade report of Notorious Foreign Markets published by the United States Government such as (a) YTS; (b) Piratebay; (c) Rarbg; (d) 1337x; and (e) Popcornime on networks under their control to prevent further pirating of Plaintiffs' Works;

(F) enter an order pursuant to 17 U.S.C. §512(j) and/or 28 U.S.C §1651(a) that any service provider subject to US jurisdiction providing service for Defendants including but not limited to Leaseweb, Choopa and Sharktech which Defendants use to infringe Plaintiffs' Works immediately cease said service upon notice;

(G) award the Plaintiffs their actual damages from the copyright infringements and Defendants' profits in such amount as may be found; alternatively, at Plaintiffs' election, for statutory damages pursuant to 17 U.S.C. § 504(a) and (c);

(H) award the Plaintiffs actual damages from Defendants' contribution to DMCA violations and Defendants' profits in such amount as may be found; or, in the alternative, at Plaintiffs' election, for statutory damages per DMCA violation pursuant to 17 U.S.C. § 1203(c) for violations of 17 U.S.C. § 1202;

(I) award the Plaintiffs actual and punitive damages pursuant to Hawaii law for Defendant PIA's willful breach of the settlement agreement with malice aforethought;

(J) award the Plaintiffs their reasonable attorneys' fees and costs pursuant to 17 U.S.C. § 505 and/or 17 U.S.C. § 1203(b)(5);

(K) award the Plaintiffs their reasonable attorneys' fees and costs against Defendant PIA pursuant to Hawaii law for PIA's breach of the settlement agreement;

(L) grant the Plaintiffs any and all other and further relief that this Court deems just and proper.

The Plaintiffs hereby demand a trial by jury on all issues properly triable by jury.

DATED: Kailua-Kona, Hawaii, Nov. 18, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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DATED: Kailua-Kona, Hawaii, November 18, 2021.

CULPEPPER IP, LLLC

/s/ Kerry S. Culpepper
Kerry S. Culpepper
Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:21-cv-01961-RM-SKC

Millennium Funding, Inc. *et al*,

Plaintiffs,

v.

Private Internet Access, Inc., *et al*,

Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO
DISMISS [DOC. #70]**

Plaintiffs oppose Defendant Private Internet Access, Inc.'s ("PIA") Rule 12(b)(6) Motion to Dismiss [Doc. #70] the Second Amended Complaint ("SAC") [Doc. #59]. On the outset, PIA's motion should be denied because its counsel failed to confer with Plaintiffs' counsel as required by Civ. Practice Standard IV.N.2.a to determine whether the purported deficiencies in the SAC could be corrected by amendment. Counsel for PIA's own certification of compliance makes clear that he only conferred with Plaintiffs' counsel concerning the *First Amended Complaint*. See Mot. at pg. 24.

I. INTRODUCTION

Defendants PIA, EXPRESS VPN INTERNATIONAL LTD (a BVI Limited Company) and EXPRESS VPN INTERNATIONAL LTD (an Isle of Man Limited Company) (both ExpressVPN entities collectively referred to as "ExpressVPN"; PIA and ExpressVPN collectively, "Defendants") promote their Virtual Private Network ("VPN") services as an

essential tool for piracy by emphasizing that they provide their end users “anonymous” usage by, for example, deleting end users’ log access records so that their identities cannot be disclosed to copyright owners. See SAC at ¶¶2. Defendants are secondarily liable for copyright infringement because their end users use their VPN services exactly as instructed by Defendants with Defendants’ knowledge to pirate Plaintiffs’ Works with the assurance from Defendants that their identities will never be revealed thanks to Defendants’ policy of deleting log records. Defendants purposefully ignore thousands of notices they receive from rightsholders informing them of their end users’ piracy. See *Id.* at ¶¶386-415. Conceding the strength of the allegations of the secondary liability claims, PIA does not argue that Plaintiffs failed to plead them in its motion to dismiss.

Defendants directly infringe Plaintiffs’ exclusive distribution and public performance rights including their exclusive right to export their Works 17 U.S.C. §602(a)(2) by “unblocking” their servers in the United States to allow their end users to use their VPN services to violate the geographic restrictions of legal content distribution platforms such as Netflix or Hulu (“unblock”) and download or stream copies of Plaintiff’s Works to unauthorized locations outside of the United States. Defendants do not hide their actions. Rather they advertise on their websites that getting around Netflix restrictions is a reason to sign up for their services and pay marketing affiliates who make similar promotions and refer them new customers. Legal content distribution platforms such as Netflix or Hulu engage in a game of cat and mouse with Defendants, promptly black listing IP addresses of Defendants’ servers when they determine that they are being used to export Plaintiffs’ Works in violation of the law and Defendants reshuffling and

revealing new IP addresses to its end users in response. See SAC at ¶¶124-130.

Defendants engage in the same conduct as their users and use the VPN service to pirate Plaintiffs' Works. PIA's employees *brag* on its website how they use VPN services to stream content in violation of regional restrictions and what "a damn good idea" it is to use a VPN to pirate content from the notorious piracy website YTS. One of PIA's employees even assisted in operation of the notorious piracy website The Pirate Bay. See *Id.* at ¶¶92-93 and 96.

PIA seeks to dismiss Plaintiffs' direct infringement claims for purported lack of volitional conduct without even addressing Plaintiffs' allegations concerning its "unblocking" of Netflix and other legal platforms for its end users in unauthorized regions outside of the United States. Rather, PIA focuses on purported lack of "fixation" when its end users use BitTorrent to pirate Plaintiffs' Works on its servers while ignoring Plaintiffs' allegations that PIA and its end users streamed and distributed complete copies of the Works and that PIA instructs its end users to use its server (SOCK5) for configuring their BitTorrent Client applications for *unencrypted* transmissions. See *Id.* at ¶218 (screenshot of Kape discussing PIA's SOCKS5 proxy: "...SOCKS5 has weaker security as compared to other VPN protocols."). Defendants' end users feel so safe to pirate thanks to Defendants' advertisements of its evidence deletion policy that they carefreely seed Plaintiffs' Works and distribute complete copies (all the pieces) continuously from PIA servers over periods of weeks or even months in some cases.¹

1 . See, for example, rows 25-26 and 38-39 of Exhibit "2" [Doc. #59-2] showing the movie was distributed for *weeks* from the IP address as discussed in detail later.

Against this backdrop of devastating evidence of PIA's participation in widescale piracy, PIA's general counsel and Plaintiffs' counsel agreed to a final settlement agreement on September 1, 2021 after extensive negotiations. However, its parent company Kape seized what it viewed as a chance to sneak in a "free" release for its soon to be subsidiary ExpressVPN, and *on a Saturday morning Hawaii time* suddenly demanded that Plaintiffs' counsel suddenly sign a new settlement agreement on behalf of all his clients releasing PIA, Kape and Kape's *prospective* subsidiaries within less than 9 hours in flagrant breach of the final settlement agreement. See *Id.* at ¶¶337-346. Accordingly, Plaintiffs allege that PIA is liable for breach of the final settlement agreement.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A plausible claim is one that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). While courts must accept well-pled allegations as true, purely conclusory statements are not entitled to this presumption. *Id.* at 678, 681. Therefore, so long as the plaintiff pleads sufficient factual allegations such that the right to relief crosses "the line from conceivable to plausible," she has met the threshold pleading standard. *Twombly*, 550 U.S. at 556, 570. When deciding a motion to dismiss, a court usually does not consider facts unsupported by documents outside of the pleadings. See *Miller v. Glanz*,

948 F.2d 1562, 1565 (10th Cir. 1991). The court, however, may consider documents that are central to the plaintiff's claims and to which the plaintiff refers in the complaint. See *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997).

III. ARGUMENT

A. The SAC provides adequate notice of Plaintiffs' claims against PIA.

Defendant PIA makes the meritless argument that the SAC should be dismissed entirely merely because Plaintiffs did not repeat counts 1-5 twice for PIA and ExpressVPN, which are represented by the same counsel. Sharktech, although mistakenly identified once as a Defendant in the first paragraph, is specifically identified as a non-party thereafter. See SAC at ¶¶98; Notice of Errata [Doc. #76]. In comparison to only effectively two Defendants in the present action, in the case of *Jacobs v. Credit Suites First Bos.* relied on by PIA, the Plaintiff's claims were "reflexively asserted against large numbers of Defendants, even when there is no apparent reason for certain Defendants to be named in those claims." *Jacobs v. Credit Suisse First Bos.*, Civil Action No. 11-cv-00042-CMA-KLM, 2011 U.S. Dist. LEXIS 112967, at *20, (D. Colo. Sep. 30, 2011). In *Jacobs*, the Plaintiffs asserted claims against effectively at least five groups of Defendant and there was "only a single specific factual averment mentions Wells Fargo". *Jacobs*, 2011 U.S. Dist. LEXIS 112967, at *5. In comparison, the SAC includes specific allegations concerning PIA such as specific instances in which PIA was served with subpoenas (¶¶118-119 and 121), screenshots from its website and official posts on social media (¶¶90, 124-127), quotations from its employees (¶¶92-93, 96, 130-206), identifications of specific Internet Protocol ("IP") addresses assigned to PIA where the

Works were directly infringed (¶¶195-206) and descriptions of notices that were sent to Sharktech concerning infringements at Sharktech IP addresses assigned to PIA that provide more than adequate notice to PIA for the basis of the claims.

PIA further complains that the re-allegation and incorporation by reference in successive counts of the SAC renders it an improper “shotgun pleading”. Mot. at pg. 4. However, just as in the case of *Southwell v. Allstate Prop. & Cas. Co* cited by PIA, in the SAC Plaintiffs set “...forth enough of the general conduct at issue to allow Defendant to then identify the more specific “incorporated by reference” allegations that apply to that claim.” *Southwell v. Allstate Prop. & Cas. Co.*, Civil Action No. 20-cv-01272-PAB-KMT, 2020 U.S. Dist. LEXIS 132318, at *7-8 (D. Colo. July 27, 2020). For example, with respect to the breach of contract claim, Plaintiffs allege that Plaintiffs and PIA entered into a valid, binding and enforceable settlement agreement, that Plaintiffs complied with and relied on the agreement, that PIA breached the agreement and that Plaintiffs have been damaged. See SAC at ¶¶436-447. Further, just as in the case of *Southwell*, all of Plaintiffs claims “largely appear to have the same factual underpinning; thus, “[t]his is not a case where incorporating prior allegations makes it impossible to understand [the] claims.”” *Southwell*, 2020 U.S. Dist. LEXIS 132318, at *8 (D. Colo. July 27, 2020)(quoting *Churchill Med. Sys., Inc. v. Rubacha*, No. 19-cv-0226-WJM-STV, 2019 U.S. Dist. LEXIS 195870, 2019 WL 5894132, at *4 (D. Colo. Nov. 12, 2019). Moreover, the First Amended Complaint [Doc. #27] also included the same format of the SAC where each count incorporated by reference the contents of previous paragraphs, yet PIA did not raise this as a deficiency during their meet and confer. See Exhibit “1”. This fact undercuts any assertion by PIA

that it has not been provided with fair notice of the factual and legal basis for each claim. Accordingly, the SAC provides PIA with fair notice as required by Rule 8(a).

Defendants have already agreed to permit Plaintiffs the option to file a Third Amended Complaint albeit with limitations. See Decl. of Culpepper at ¶¶4-6. Accordingly, should the Court determine that the SAC does not provide fair notice, the Court should grant Plaintiffs leave to amend so that the allegations in each count can be repeated for each Defendant and the incorporations by reference deleted.

B. Plaintiffs have adequately plead a claim for breach of contract.

Defendant PIA asserts that Plaintiffs' counsel did not include a "true and accurate" copy of the settlement agreement as unredacted Exhibit "6" [Doc. #66]. A Microsoft word version of document can be viewed or printed as clean or a marked-up version until the changes are "accepted". Accordingly, the Exhibit "6" was a true and accurate copy of the clean version. Plaintiffs did not include the marked-up version so that the parties' confidential discussion of sensitive terms would remain confidential. Defendant, on the other hand, filed a version of Exhibit "6" that includes not only the parties' sensitive terms but some of the exact information this Court agreed with Plaintiffs should be redacted such as the names of rightsholder not parties to the present action. See Order [Doc. #65] (Granting Plaintiffs' Motion [Doc. #61] where Plaintiff argued that an "unredacted copy of this Agreement revealing these rightsholders' names would possibly do irreparable harm to their ongoing business."). Further, the extensive markup history *supports* Plaintiffs' position that the agreement was a final document arrived at after multiple iterations. See Exhibit "2" [Doc. #70-2] to Mot. at pg. 2 (PIA's general counsel John Arsenault states "so

I made some of those changes for this *final* version”). PIA’s circular argument that because it *breached* the final settlement agreement by demanding Plaintiffs sign a *new* agreement to release its parent Kape and all Kape’s subsidiaries somehow establishes that no final settlement agreement existed is also meritless. See Mot. at pg. 19.

1. Defendant PIA has waived any arguments against the settlement agreement being invalid under Colorado law.

Although the parties negotiated the final settlement agreement to resolve allegations in the present case in the District of Colorado, Defendant PIA did not even discuss the enforceability or validity of the settlement agreement under Colorado law. However, the law of the state where a contract is made is controlling on questions of the contract’s validity. *Carlson v. Boryla*, 490 P.2d 700, 702 (Colo. App. 1971) (citing *Wolf v. Burke*, 18 Colo. 264, 32 P. 427 (1893)). Because his agreement was made in and in the context of a case pending in Colorado, Colorado law applies on the issue of formation. Accordingly, PIA has waived any arguments against the enforceability or validity of the agreement per Colorado law. See *White v. Chafin*, 862 F.3d 1065, 1067 (10th Cir. 2017) (party “waived this contention by waiting to present it for the first time in his reply brief”).

2. Under Colorado law Plaintiffs have adequately pled that the parties entered into a settlement agreement.

Defendant PIA argues that the settlement agreement is not enforceable merely because it was not executed. However, “It is established that a signature is not always necessary to create a binding agreement.” *City & County of Denver v. Adolph Coors Co.*, 813 F.Supp. 1476, 1480 (D.Colo.1993) (internal citation omitted). It is equally true that

“the purpose of a signature is to demonstrate mutuality of assent which could as well be shown by the conduct of the parties.” *Id.* (citations omitted).

Although a party is not bound by an oral agreement if it does not intend to be bound until a formal document is executed, “the party arguing that the parties intended not to be bound until the execution of a formal writing has the burden of proving ‘either that both parties understood they were not to be bound until the executed contract was delivered, or that the other party should have known that the disclaiming party did not intend to be bound before the contract was signed.’” *Id.* at 1481 (citing *PDL Vitari Corp. v. Olympus Industries, Inc.*, 718 F.Supp. 197, 206 (S.D.N.Y.1989)).

In *Adolph Coors Co*, this Court adopted the four factors of *Olympus Industries* for determining whether the enforcing party should have known the other party did not intend to be bound: (1) whether the parties have stated an intention not to be bound absent an executed writing, (2) whether one party has performed partially and the other party has accepted such performance, (3) whether there are no issues left to be negotiated such that the signing of the contract is merely ministerial, and (4) whether the agreement concerns complex business matters such that a written agreement would be the norm, not the exception and concluded “Although the agreement was not formally executed, there is insufficient evidence demonstrating that the execution of a written document was a condition precedent to settlement.” *Id.* at 1481-1482 (quoting *Schaap v. Executive Industries, Inc.*, 760 F.Supp. 725 (N.D.Ill.1991)). PIA has not argued any of the four *Olympus* factors. Rather, PIA has merely (a) argued that there is no agreement because it was not executed and (b) incorrectly asserted that an email Plaintiffs’ counsel sent to

PIA on Sept. 9, 2021 (Exhibit “3” [Doc. #70-3]) is an admission that the settlement was not yet final. As pointed out above, under Colorado law execution is not necessary for an enforceable agreement to exist. Moreover, when Plaintiffs’ counsel referred to “finalize the agreement with PIA so that this case can be closed”, Plaintiffs’ counsel was clearly referring to getting the executed copies and payment so that the notice of dismissal could be filed. Even in the same email chain PIA’s general counsel John Arsenault states he “made some of those changes for this **final** version...that [he] will send over [to PIA’s CFO Moran Laufer] upon your approval...” to which Plaintiffs’ counsel responded “This is fine” to give his approval. *Id.* Accordingly, in the present case the agreement became final (as stated by Mr. Arsenault) and there were no issues left to be negotiated. Thus, the signing of the agreement was merely ministerial.

Defendant also argues that the settlement agreement violates Hawaii’s statute of frauds. Mot. at pgs. 20-21. However, Colorado’s statute of frauds applies here just as Colorado law applies to determining whether a valid agreement exists. See *Carlson*, 490 P.2d at 702 (Colo. App. 1971) (concluding that the Colorado statute of frauds applied since the “place where the contract was made was Denver, Colorado”). Under Colorado’s statute of frauds, the agreement “need not have been in signed written form”. *Id.*

Accordingly, under Colorado law Plaintiffs have adequately pled that the parties entered into a settlement agreement, thus the count for breach of contract should be sustained². PIA can still attempt to persuade a jury that there is not an agreement. See

² This Court can summarily enforce the settlement agreement if it is undisputed that a settlement exists. See *Corey v. Profl Rodeo Cowboy Ass’n*, 506 F. Supp. 3d 1106, 1113 (D. Colo. 2020).

I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882, 887 (Colo. 1986) (Whether there is an agreement between the parties is a question of fact).

3. Even under Hawaii law Plaintiffs have adequately pled that the parties entered into a settlement agreement.

Assuming *arguendo* that Hawaii law applies for determining whether an agreement existed, a valid agreement was still sufficiently pled. Like Colorado, in Hawaii a written signature is not necessary to establish the existence of a valid agreement. “The Court acknowledges that in some circumstances, a written and signed contract is not necessary to state a breach of contract claim.” *Dairy Road Partners v. MAUI GAS VENTURES LLC*, Civ. No. 16-00611 DKW-KJM (D. Haw. Mar. 9, 2018). Moreover, Hawaii law favors the resolution of controversies through compromise or settlement rather than by litigation. See *Sylvester v. Animal Emergency Clinic*, 72 Haw. 560, 566, 825 P.2d 1053, 1056 (1992). Accordingly, in *Sylvester* the Hawaii Supreme Court found even an *oral* settlement agreement to be valid and enforceable. See *Id.* Here, not only do Plaintiffs plead a settlement agreement, but they have provided a copy of the final settlement agreement. Even the marked-up version [Doc. #70-3] PIA provides shows that the parties engaged in detailed negotiations involving extensive changes to terms to arrive at the “final version” of the settlement agreement as stated by PIA’s general counsel.

PIA distorts what Plaintiffs allege (the existence of a final settlement agreement) by citing the Hawaii District Court decision of *Shorter v. G4S Secure Sols. United States Inc.*, No. 13-00470 JMS-RLP, 2014 U.S. Dist. LEXIS 119064, at *9 (D. Haw. Aug. 5, 2014) for its proposition that drafts exchanged between counsel shows that the Parties

“intended only to be bound upon the execution of a written, signed agreement and did not mutually intend to be bound...” Mot. at pg. 20. Even PIA’s own Exhibit 3 shows that the parties agreed on final and detailed settlement agreement described by PIA’s own general counsel as the “final version” rather than a draft. Moreover, even the Court in *Shorter* stated that “if material facts concerning the existence of an enforceable settlement agreement are in dispute, the parties must be allowed an evidentiary hearing.” *Shorter*, 2014 U.S. Dist. LEXIS 119064, at *9 (D. Haw. Aug. 5, 2014) (citing *Russell v. Puget Sound Tug & Barge Co.*, 737 F.2d 1510, 1511 (9th Cir. 1984)); see also *Moran v. Guerreiro*, 97 Haw. 354, 37 P.3d 603, 620 (Haw. Ct. App. 2001). Accordingly, the issue of whether the settlement agreement is valid should be permitted to proceed to trial.

PIA also argues that the agreement is invalid for violating Hawaii’s statute of frauds because paragraph 10 of the agreement includes a 10 year covenant not to sue. However, the settlement agreement also includes a severability clause:

Severability. If any provision or application of this Agreement shall be held invalid or unenforceable then any such provision shall be deemed severed from this Agreement and the remaining provisions and applications of this Agreement shall not be affected, but rather shall remain valid and enforceable.

Unredacted Exhibit “6” to the FAC [Doc. #66] at pg. 8. When an agreement is divisible, if some portions are not covered by the statute of frauds, those portions are enforceable. See *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 800 (9th Cir. 1991) (quoting *Landes Constr. Co. v. Royal Bank*, 833 F.2d 1365, 1370 (9th Cir. 1987)). The 10 year covenant not to sue is divisible. Accordingly, assuming *arguendo* that the 10 year covenant not to sue violates Hawaii’s statute of frauds, paragraph 10 can be severed from the settlement agreement

and its validity preserved.

Moreover, Plaintiffs disagree that there was no signature sufficient for satisfying Hawaii's statute of frauds. Hawaii's statute of frauds provides that "No action shall be brought and maintained...Upon any agreement that is not to be performed within one year...unless the ...agreement, upon which the action is brought, *or some memorandum or note thereof, is in writing, and is signed by the party to be charged therewith, or by some person thereunto by the party in writing lawfully authorized.*" H.R.S. §656-1 (emphasis added). When PIA's general counsel John Arsenault sent a copy of the final settlement agreement as an attachment to the email, the email itself was a memorandum of the last changes which he signed "Best, John". See Exhibit "3" [Doc. #70-3] at pg. 2. Accordingly, there is "some memorandum or note thereof, is in writing, and is signed by the party to be charged therewith, or by some person thereunto by the party in writing lawfully authorized" as required by Hawaii's statute of frauds.

Finally, Plaintiffs respectfully assert that Hawaii courts do not apply the statute of frauds to in-court settlement agreements. Rather, the Hawaii Supreme Court directs that Courts should look at the purpose of the statute which "...is to prevent perpetration of frauds by securing the enforcement of contracts that were never in fact made; it is not to prevent performance of oral contracts that have in fact been made." *Nelson v. Boone*, 78 Haw. 76, 81, 890 P.2d 313, 318 (1995); *Wakefield v. Bardellini*, 148 Haw. 360, 476 P.3d 773 (Ct. App. 2020) ("...Hawai'i courts have recognized various exceptions to the strict application of the Statute of Frauds"). Since this settlement agreement was negotiated in the context of the present case, Hawaii would not apply the statute of frauds.

C. Plaintiffs have adequately pled direct infringement.

To establish copyright infringement, a plaintiff must show “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1138 (10th Cir. 2016) (internal quotation marks omitted) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)). “Copied” in this context is a short-hand reference for any use of protected materials that infringes on the copyright holder’s exclusive rights in those materials as set forth in the Copyright Act. *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 832, n.6. (10th Cir. 1993). The exclusive rights set forth in 17 U.S.C. § 106 include the exclusive rights to distribute, publicly perform and reproduce.

1. Defendant PIA does not even argue that Plaintiffs failed to plead that it infringes their public performance and (non-BitTorrent) distribution rights.

PIA only argues that Plaintiffs have failed to plead that it directly infringes the Works when its end users use its VPN service for “file-sharing transmissions”. Mot. at pg. 8. However, direct infringements arising from its end users “file-sharing” are not the only direct infringements pled. Defendant PIA “unblocks” streaming platforms like Netflix to allow its end users outside of the United States to use Netflix in violation of geographic restrictions. See, e.g., ¶127. Accordingly, Plaintiffs also allege that PIA directly infringes Plaintiffs’ public performance rights in violation of 17 U.S.C. §§ 106(3) and 501 when PIA and its end users stream copies of Plaintiffs’ Works from unauthorized regions outside of the United States when PIA “unblocks” streaming platforms. See SAC at ¶377. Further, Plaintiffs allege that when PIA and its end users access PIA servers in the United States

to download copies of Plaintiffs' Works from unauthorized regions outside of the United States using streaming platforms "unblocked" by PIA, PIA directly infringes Plaintiffs' distribution rights by exporting from the United States, without the authority of Plaintiffs, pirated copies of the Works in violation of 17 U.S.C. §602(a)(2)³. See SAC at ¶¶379-385. PIA only argues that Plaintiffs failed to allege sufficient volition and fixation for direct infringement by file-sharing transmissions via *BitTorrent software*. Accordingly, PIA has waived arguments that Plaintiffs failed to adequately plead direct infringement of its public performance and distribution rights when PIA "unblocks" legal streaming platforms. To the extent "volitional conduct" is required, it is satisfied by Plaintiffs' allegation of PIA's "unblocking". The unauthorized copy is "fixed" on PIA's server when the end user streams or downloads a copy from the PIA server in the US to the unauthorized region. PIA's misguided argument that "if the VPN service were removed...the exact same file transfers would have occurred..." (Mot. at pg. 10) clearly fails because the legal streaming platform would block the end users in the unauthorized location from streaming or downloading the Work without PIA's intervention to conceal their end users' true IP addresses (and thus geographic location) from being visible to the legal streaming platform.

2. Defendant PIA failed to even address Plaintiffs' allegation that PIA itself infringes their Works.

Defendant PIA argues that Plaintiffs have failed to allege volitional conduct and that any direct infringements are committed only by its end users. See Mot. at pg. 6. To

³ For example, the SAC includes multiple verified allegations of individuals in Australia accessing Defendants' servers in the US to pirate Works. See SAC at ¶¶200, 203, 207.

support this misguided argument, Plaintiffs falsely assert that “Plaintiffs admit that is the individual users who are allegedly directly infringing Plaintiffs’ copyrights.” Mot. at pg. 8. However, Plaintiffs clearly assert that “PIA engages in the same conduct as its end users and is thus liable for direct copyright infringement.” SAC at ¶¶90. Further, Plaintiffs allege in, for example, paragraphs 185-186 that “The logged information such as, for example, in Exhibit “2” shows that **Defendants** ... distributed copies of the Plaintiffs’ copyrighted Works identified by the Unique Hash Number” and “**Defendants** ... used the IP addresses to ...transmit a full copy, or a portion thereof, of a digital media file identified by the Unique Hash Number through networks ... controlled by Defendants.” To put it clearly, Plaintiffs allege that not just PIA’s end users, but that **PIA** also pirates the Works. In support of this assertion, Plaintiffs give examples of open advocacy for piracy by PIA’s employees such as Caleb Chen and Rick Falkvinge. See Id. at ¶¶90-96. For example, Mr. Falkvinge admits that he uses a VPN (Hola Better Internet) while in Sweden to fake as if he is in the United States and access content from Pandora in violation of geographic restrictions. See Exhibit “2” at pg. 1.⁴ Caleb Chen states that “it seems like a pretty damn good idea” to use a VPN to pirate from the piracy website YTS. Id. at ¶¶96. Further, Plaintiffs have identified multiple instances of IP addresses controlled by PIA where their Works were infringed. See, e.g., ¶¶283-287. PIA is certainly aware of these allegations because it moved to strike them. See Motion to Strike [Doc. #71] at pg. 13. Having failed to even argue that the allegations of PIA’s own piracy do not suffice for establishing volitional

⁴ Exhibit 2 can be considered in opposition to PIA’s motion without converting it to a motion for summary judgment because it is merely a printout of the complete article referred to in paragraph 93 of the SAC.

conduct, PIA has waived this argument.

3. Plaintiffs have adequately plead direct infringement when PIA acts on behalf of its end users.

PIA argues that to establish the “copying” Plaintiffs must allege that the infringement was proximately caused by PIA’s volitional act. See Mot. at pg. 5. However, the Tenth Circuit has not held whether such conduct is an element of a direct infringement. *Tomelleri v. Zazzle, Inc.*, No. 13-CV-02576-EFM-TJJ, 2015 U.S. Dist. LEXIS 165007, at *54 (D. Kan. Dec. 9, 2015). Tacitly admitting this fact, PIA asks this Court to adopt the Ninth Circuit’s logic of *Perfect 10, Inc. v Giganews*, 847 F.3d 657 (9th Cir. 2017) and *VHT, Inc. v. Zillow Group*, 918 F.3d 723 (9th Cir. 2019) that has been criticized by prominent commentators. See David Nimmer, *Volition in Violation of Copyright*, 43 Colum. J. L&Arts 1, 22-23, 26 (2019) (describing *Giganews* as running “afoul of governing law”, “contradicts prior case law within the Ninth Circuit” and “erroneous, and *Zillow* as “ignore...and contravene the statutory scheme” adopted by congress).

However, the Court need not consider this proposition because the Supreme Court’s decision in *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 134 S. Ct. 2498 (2014) clearly sets forth that there is no volitional requirement although in the context of the public performance right. The Defendant in *Aereo* sold a service that allowed its end users to watch television programs over the Internet at about the same time as the programs were broadcast over the air. The end users selected the show to watch from a menu on *Aereo*’s website. See *Id.* at 431. The Supreme Court concluded that “when *Aereo* merely supplies equipment that allows others [to transmit copyright works,] the Act is unmistakable: An

entity that engages in activities like Aereo’s performs.” *Id.* at 438-439. PIA’s assertion that “every circuit court in which this issue has been addressed has held that volitional conduct by the defendant is a required element” is flatly wrong. *Mot.* at pg. 5. In grappling with a similar issue, the DC Circuit rejected the logic of *Giganews* and determined that *Aereo* “forecloses [Defendant’s] argument that the automated nature of its video-on-demand system or the end users’ role in selecting which content to access insulates it from Copyright Act liability.” *Spanski Enterprises v. Telewizja Polska*, 883 F.3d 904, 911 (D.C. Cir. 2018). The DC Circuit explicitly stated, “Our court has yet to decide whether to read such a volitional conduct or proximate cause requirement into the Copyright Act, and we need not do so today.” *Id.* at 912. PIA’s involvement in the piracy is even more than in *Aereo* and *Spanski* because it promotes its VPN service for the purpose of infringement, deletes log records, instructs its end users how to set up specific ports for pirating and to “unblock” Netflix. See SAC at ¶¶96, 124-127, 213-219. Particularly, PIA provides its end users a PIA SOCK5 proxy server for providing an additional layer of authentication and higher speed “for downloading and streaming.” *Id.* at ¶218. PIA instructs its users how to setup their BitTorrent Client to use its “port forwarding option...to...optimize torrent performance.” SAC at 214. PIA deletes its end users log information in violation of the prohibition against interference with standard technical measures provided by 17 U.S.C. § 512(i)(1)(B). *Id.* at ¶249. Even PIA admits that it “encrypts and changes certain IP address metadata associated with the transmissions that the users make...” *Mot.* at pg. 10. PIA argues that “if the VPN service were removed from the process...the exact same file transfers would have occurred...” *Id.* However,

not only is this argument outside of the pleadings, but it is unsupported by any evidence. In the contrary, this assumption is contrary to PIA's warning to use a VPN while pirating and PIA's parent Kape's affirmation that PIA's VPN service "Works with: The Pirate Bay, RARBG, 1337x, YTS...". SAC at ¶¶96, 219.

PIA also argues that Plaintiffs have failed to allege "fixation" because "...the user's BitTorrent Client reassembles pieces only after the transmission is complete." Mot. at pg. 10. Here, PIA is again making an argument based upon information outside of the pleadings. Nonetheless, although BitTorrent breaks a file into pieces, Plaintiffs allege that Defendants and/or their end users' computers used the IP addresses shown in Exhibit "2" of the SAC to connect to the investigative server from a computer in order to transmit **a full copy, or a portion thereof**...through networks...controlled by Defendants. SAC at ¶¶185-186. Plaintiffs have also made verified allegations that PIA subscribers distributed copies (not pieces) of Plaintiffs Works from IP addresses controlled by PIA. Id. at ¶¶195-202. That is, Plaintiffs determined that PIA had distributed complete copies (all the pieces) of the Works. The time duration for which the infringing copies of Plaintiffs' Works resided on PIA's servers is a fact intensive issue that should be the subject of discovery rather than on a motion on the pleadings. For example, just rows 25-26 and 38-39 of Exhibit "2" [Doc. #59-2] to the SAC show that the Work *Ava* was distributed by the altered file name "Ava (2020) [1080p] [WEBRip] [5.1] [YTS.MX]" from the IP address for nearly 20 days (9/7/2020 to 9/27/2020) which is clearly longer than an ephemeral transmission. Nonetheless, Plaintiffs point out that the SAC alleges that PIA advises its subscribers to use *ports at PIA's servers* for their subscriber's activities, provides its end

users a PIA SOCK5 proxy server for providing an additional layer of authentication and higher speed “for downloading and streaming” and instructs its users how to setup their BitTorrent Client to use its “port forwarding option...to...optimize torrent performance.” Id. at ¶¶212-214. Thus, assuming PIA’s subscribers followed PIA’s guidance and set their BitTorrent Client to use PIA’s port and server, the reassembling of the pieces as well will likely also happen on and be “fixed” on PIA’s SOCK5 proxy server.

C. Plaintiffs have adequately plead secondary liability for DMCA violations.

1. Secondary liability for DMCA violations is widely established.

Despite PIA’s arguments to the contrary, it is widely established that the principals of secondary liability apply for DMCA violations. For example, in *Gordon v. Nextel Commc'ns & Mullen Adver., Inc.*, 345 F.3d 922, 925-926 (6th Cir. 2003), the Sixth Circuit held that a party may be vicariously liable for others’ § 1202 DMCA violations when “(1) a defendant has the right and ability to supervise the infringing conduct and (2) the defendant has an obvious and direct financial interest in the infringement”. This Court approvingly cited *Gordon* in the Report and Recommendation of *Stockart.com, LLC v. Engle*, Civil Action No. 10-cv-00588-MSK-MEH, 2011 U.S. Dist. LEXIS 20470, at *27 (D. Colo. Feb. 18, 2011)(R&R adopted on 4/11/2011) (“To prove a 1202(b)(3) violation, the plaintiff must prove that the defendants - or those for whom they are vicariously liable - possessed actual knowledge of the unauthorized change to the copyright management information”). *Gordon*’s holding of secondary liability for §1202 DMCA violations has been cited with approval by: the District of Massachusetts in *Rosenthal v. E. MPC Computs., LLC*, 493 F. Supp. 2d 182, 190 (D. Mass. 2007); the Northern District of

Georgia in *Atlanta Photography, LLC v. Ian Marshall Realty, Inc.*, No. 1:13-CV-2330-AT, 2014 U.S. Dist. LEXIS 188894, 2014 WL 11955391, at *4 and 11 (N.D. Ga. Mar. 7, 2014)(“....the Court is satisfied that Plaintiff’s allegations state a valid claim of vicarious liability against Defendant Marshall for § 1202 violations.”); and the Eastern District of North Carolina in *Koenig v. Dowdy*, No. 5:15-CV-00347-RN, 2017 U.S. Dist. LEXIS 163850, at *22 (E.D.N.C. Sep. 28, 2017). The Eastern District of Virginia recently adopted a Report and Recommendation holding a Defendant contributorily and vicariously liable for its subscribers’ DMCA violations. See *Millennium Funding v. Doe*, Civil Action No. 1:21-cv-282 (RDA/TCB), 2021 U.S. Dist. LEXIS 220120, at *21-23 (E.D. Va. Oct. 15, 2021) (R&R adopted on 1/20/2022) (attached as Exhibit “5”).

2. Plaintiffs have adequately pled that PIA has knowledge of the DMCA violations.

PIA attempts to argue that Plaintiffs have failed to adequately plead “knowledge” for secondary liability for DMCA violations. See Mot. at pg. 16. Here PIA slyly attempts to import a double scienter for *direct* DMCA violations to secondary liability and construct a *quadruple* scienter requirement for secondary liability. However, as discussed above, this Court agreed with the Sixth Circuit’s opinion of *Gordon* in *Stockart.com* when adopting requirements similar to vicarious infringement to establish secondary liability for DMCA violations. Notably, PIA has not argued against Plaintiffs’ counts for secondary liability based upon intentional inducement, material contribution and vicarious infringement. PIA has adequate knowledge of the DMCA violations just like it has of the direct infringements – from the thousands of Notices that were forwarded to its from host providers such as Sharktech informing it that its end users were pirating the Works with

altered file titles. See SAC at ¶¶271 (altered to include RARBG and GalaxyRG). Further, PIA had knowledge of its' end users DMCA violations from a demand letter that it received from Plaintiffs' counsel. See Exhibit "3" at pg. 5 ("...nearly all of the file titles of the infringing copy had the ...CMI... such as the title of the Work modified or altered to falsely include reference to piracy website.")⁵. Moreover, information from torrent sites and trackers is publicly available. See SAC at ¶¶149-152. Accordingly, PIA could view the infringing activity with altered file names at its IP addresses just as a BitTorrent Client automatically does to confirm the piracy. See, e.g. Decl. of Culpepper at ¶13.

PIA argues that because a BitTorrent Client app breaks the pirated file copy into pieces, and that PIA encrypts these pieces before transmitting them, it could not have knowledge of the altered file names. See Mot. at pg. 15. However, PIA improperly relies on evidence outside the pleadings to assert that all the "pieces" or "packets" were encrypted and that it is technically infeasible to inspect the packets even if they were not encrypted. As discussed above, PIA provides its end users a proxy server for providing an additional layer of authentication and higher speed "for downloading and streaming." Id. at ¶218. The SOCKS5 proxy server does not encrypt user transmissions. See, e.g., Id. (screenshot of Kape discussing PIA's SOCKS5 proxy: "...SOCKS5 has weaker security as compared to other VPN protocols."). Further, when an end user configures her BitTorrent Client app to use PIA's proxy server as instructed by PIA, the pieces would

⁵ Exhibit "2" can be considered in response to Defendant PIA's motion without converting it to a summary judgment motion because it is an example of one of the "notices of infringement" ignored by PIA as mentioned in paragraph 318 of the SAC, and references case 1:20-cv-3170 (D.Col.) discussed on paragraphs 121 and 291 of the SAC, references case 1:19-cv-169 (D.Haw.)(referred to as "a lawsuit in Hawaii against the operator of the notorious movie piracy website YTS") discussed on paragraphs 119 and 290 of the SAC and attached two of the notices referred to in paragraph 270 of the SAC.

be recombined into the pirated file copy on PIA's SOCKS5 proxy server. Accordingly, it is premature to conclude that PIA had no way of knowing in real time that it was distributing file copies with altered CMI. Plaintiffs should be permitted to proceed with discovery to investigate the configurations of PIA's servers. Moreover, assuming *arguendo* that all transmissions are encrypted, PIA did this itself so it cannot take advantage of the fact that it disabled itself from knowing of the DMCA violations. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003).

3. Plaintiffs have adequately pled that PIA's end users commit DMCA violations

PIA argues that the SAC fails to plead direct DMCA violations for which it can be secondarily liable. However, Plaintiffs allege that "a legitimate file copy of the Work includes...CMI...indicating the title". SAC at ¶254. See *Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, L.P.*, 948 F.3d 261, 267 (5th Cir. 2020) (holding that file names constitute CMI); *Hunter Killer Productions, Inc., et al. v. Sabrina Boylan*, 3:20-cv-00306-FM, Doc. #20 (W.D. Tx 2021) ("A file name containing a work's title fits squarely within the definition of CMI conveyed with a copy of a work.") (Attached as Exhibit "5"). Plaintiffs allege that the initial seeders of the infringing file copies of Plaintiffs' Works used a process referred to as "ripping" to create a copy of motion pictures from either Blu-ray or legal streaming services and modify the file title to include a wording such as "FGT", "RARBG" or "YTS" of the file copies in order to enhance a reputation for the quality of her torrent files and attract users to her piracy website. See SAC at ¶¶255-257. Plaintiffs further allege that the file copies PIA distributed to other peers in the Swarm included the altered CMI in the file title. See *Id.* at ¶259. Accordingly, contrary to Defendant's

assertions, Plaintiffs have plausibly plead relevant CMI.

Plaintiffs allege that PIA's end users register for accounts with piracy websites such as YTS and RARBG. See *Id.* at ¶¶267, 418. Plaintiffs' allegations here are verified by declarations from PIA's own end users that admit to sharing copies of Plaintiffs' Works with file names modified to include the notorious piracy website "YTS". See *Id.* at ¶¶195-203. Plaintiffs allege that the websites YTS and RARBG are so notorious for piracy that they have been identified by the USTR as examples of Notorious Markets defined as an online marketplace reportedly engaged in and facilitating substantial piracy and that the website YTS even includes warnings. See *Id.* at ¶¶153, 261. Accordingly, PIA's end users *knew* that the file copies they were getting with, for example, "YTS" were altered file titles and thus altered CMI because they were getting pirated copies of the Works. See *Id.* at ¶¶260-262; *Eve Nevada, LLC, et al. v. Michelle Derbyshire*, 2:21-cv-00251-LK, Doc. #36 at 6-7 (W.D. Wash 2022) (Exhibit "7"). Even PIA warned its end users on its website that it was "a pretty damn good idea" to use a VPN to pirate from the piracy website YTS. *Id.* at ¶96. PIA argues that having a title of Plaintiffs' Works tagged with the weblink to a notorious piracy website where Plaintiffs' Works are pirated are "trivial additions" that could not "in themselves, induce, enable, facilitate or conceal infringement". *Mot.* at pg. 14. A recipient can look at the altered CMI to go to YTS or RARBG to obtain infringing copies of the Works thus inducing, enabling and facilitating infringement. That is the reason the initial seeder added her website address to file title so she can attract further traffic to her website. See SAC at ¶255. Moreover, Defendant's argument fails when viewed in the context of the title of 17 U.S. Code § 1202 "**Integrity** of copyright

management information”. The integrity of the CMI of Plaintiffs’ Works was certainly destroyed when, for example, the initial seeders modified the CMI to including the piracy website “YTS.LT”. SAC at ¶195. Thus, the CMI has been altered as provided in §1202(b) and is also false as provided in §1202(a) because YTS.LT was not the author of the Work.

Accordingly, Defendant is secondarily liable for its subscribers’ DMCA violations for the same reasons it is secondarily liable (material contribution and vicarious infringement) for its subscribers’ direct copyright infringements.

IV. CONCLUSION

In view of the foregoing, the Defendant PIA’s Motion to Dismiss the SAC should be denied. However, should PIA’s Motion be granted, Plaintiffs request leave to submit a Third Amended Complaint correcting the deficiencies since Defendants have already consented.

DATED: Kailua-Kona, Hawaii, Feb. 1, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

A. John Peter Mancini jmancini@mayerbrown.com,
4680105420@filings.docketbird.com, ajpmancini@aol.com,
jmarsala@mayerbrown.com

Paul Matthew Fakler pfakler@mayerbrown.com,
7018781420@filings.docketbird.com, jmarsala@mayerbrown.com

DATED: Kailua-Kona, Hawaii, Feb. 1, 2022.

CULPEPPER IP, LLLC

/s/ Kerry S. Culpepper
Kerry S. Culpepper
Attorney for Plaintiffs

Exhibit 2

From: Kerry Culpepper <kculpepper@culpepperip.com>
Sent: Tuesday, October 19, 2021 4:24 PM
To: Fakler, Paul
Cc: jmancini@mayebrown.com
Subject: 1:21-cv-01261 Millennium Funding, Inc. et al v. Sharktech, Inc. et al ; FW: PIA final settlement agreement - FRE 408 COMMUNICATION
Attachments: 20210901 Settlement Agreement JA FINAL.docx

****EXTERNAL SENDER****

Rule 408 Communication

Paul/John,

See attached and below email I had received on 9/1/2021 with the final settlement. I replied same day telling him I approved.

Regards – KSC

--

Kerry S. Culpepper, Esq.
Culpepper IP, LLC
75-170 Hualalai Road
Suite B204
Kailua-Kona, Hawaii 96740
US Tel 1-808-464-4047
US Tel 1-202-621-0218

This message is intended only for the use of the entity to which it is addressed and may contain confidential and privileged information.

If the reader of this message is not the intended recipient, kindly delete this message and notify the sender.

From: John Arsenault <john.arsenault@kape.com>
Sent: Wednesday, September 1, 2021 12:24 PM
To: Kerry Culpepper <kculpepper@culpepperip.com>
Subject: Re: PIA final settlement agreement - FRE 408 COMMUNICATION

Kerry,

I was fine with the changes but I also noticed Venetia had some changes in there in the “comments” part of tracked changes she wanted but I didn’t integrate into what I sent you so I made some of those changes for this final version. Just so you know I:

1. Made the release mutual
2. Added a representation that the owners are the owners of the films and have the full rights to enter into the Agreement.
3. Changed the Section 10 title from "Term" to Covenant not to sue over future infringements and also added a concern Venetia had about a passively stored or cached copy exception (against direct infringement). To address a potential concern you might have I suggested that it only apply when outside the direct control of PIA.
4. Made the signing party the CFO who is Moran Laufer.

That is about it. Please let me know if you have any questions. I will send over upon your approval also.

Best,
John

> On Sep 1, 2021, at 2:56 PM, Kerry Culpepper <kculpepper@culpepperip.com> wrote:

>

> <20210901 Settlement_Agreement_master_KSC_20210901.docx>

SETTLEMENT & RELEASE AGREEMENT

RE: Allegations of Copyright Infringement
Reference No.: 20-023UA; 21-cv-1261-SKC (“The ~~Litigation~~Legal Action”)
Private Internet Access, Inc. (“PIA”) and Owners/Beneficial Owners of Motion
Pictures (“Owners”) shown in Schedule “A” and below:

MOTION PICTURES/TRADEMARK	PARENT/CONTROLLING ENTITY
Homefront; Before I go To Sleep; Criminal; London Has Fallen; Automata; Survivor; The Humbling; Septembers of Shiraz; The Mechanic: Resurrection; Hitman's Bodyguard; Hunter Killer; Boyka: Undisputed IV; The Bleeder FKA chuck; Stoic fka Acts of Vengeance; Day of the Dead; Hellboy; Rambo 5; Leatherface; Angel Has Fallen; The Outpost	MILLENNIUM MEDIA, INC.
2nd, The; Adam; After We Collided; Armed Response; Ava (fka Eve); Bedeviled; Birdcatcher, The; Boo!; Burning At Both Ends; Burying the Ex; Charlie Countryman, The Necessary Death of; Cobbler, The; Colossal; Company you Keep, The; Cruel Peter; Dallas Buyers Club; Distorted; Disturbing the Peace; Don Jon; Elizabeth Harvest; Escape Room; Extremely Wicked Shockingly Evil; Family Man, A f/k/a Headhunter's Calling, The; Fathers & Daughters; Fun Mom Dinner; Good Kids; Good Kill; Haunting of Sharon Tate, The; Her Smell; Hurt Locker, The; I Feel Pretty; I.T.; Keep Watching; Killer Joe; Lady Bloodfight; LBJ; Look Away; Mermaid's Tale, A; Midnight Man; Murder of Nicole Brown Simpson, The; Once Upon A Time in Venice f/k/a Going Under; One Last Heist fka The hatton garden job; Pay the Ghost; Pony With A Broken Wing; Professor and the Madman, The; Redemption Day; Revolt f/k/a Prisoners of War; Serpent; Seventh Day, The; Singularity; SKIN; Sniper: Special Ops; Status Update; Super, The; Welcome Home; Wind River; Zero Theorem, The	VOLTAGE PICTURES, LLC.
I am Wrath Tokarev USS Indianapolis: Men of Courage Vengeance: A Love Story Larceny Rumble	HANNIBAL PICTURES, INC.
Kill Chain I Spit On Your Grave	CINETEL FILMS, INC.

The Last Full Measure The Hurricane Heist Blind And So It Goes Lone Survivor 2 Guns Universal Soldier: Day of Reckoning Flypaper The Ledge Universal Soldier: Regeneration The Other Story Beyond a Reasonable Doubt Captivity	SCREEN MEDIA VENTURES, LLC
Hope Lost 2047 Sights of Death All Roads Lead to Rome In Dubious Battle Rupture This Beautiful Fantastic Future World Finding Steve McQueen Arctic Justice Bent Beyond the Sun Lamborghini Trading Paint Black Butterfly Best Day of My Life In Search of Fellini (Screenplay), Film Pending The Music of Silence	AMBI DISTRIBUTION CORP.
Queen of the Desert Cell	BD&P COMPANY LLD dba BENAROYA FILMS
Mr. Church	CINELOU FILMS, LLC
The Brass Teapot Tatterdemalion aka The Lost Child	LAUNDRY FILMS, INC.
Infidel, The Brass Medallion	American Cinema International, Inc.
RARBG, YTS and Popcorn Time trademarks	42 Ventures, LLC

THIS SETTLEMENT & RELEASE AGREEMENT (the "Agreement") is entered into as of June 8, 2021 ("Effective Date"), by and between Owners and Private Internet Access Inc., an Indiana corporation limited liability company with its business address at ("5555 DTC Parkway Suite 360 Greenwood Village, CO 80111 (PIA" which term shall also include PIA's subsidiaries and affiliates)PIA (collectively "Parties").

RECITALS

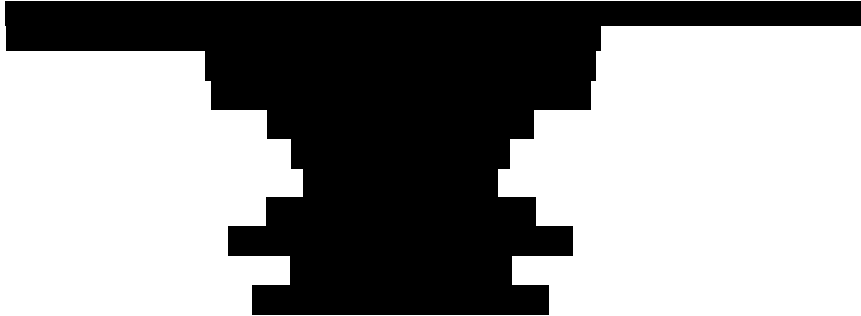
- A. Whereas, some of the Owners have ~~made a demand filed a lawsuit~~ against PIA identified as 1:21-cv-01261-SKC in United States District Court for the District of Colorado based upon (a) alleged inducement of, and contribution to copyright infringement of their motion pictures ("Works") by PIA subscribers that distribute Owners' motion pictures via the BitTorrent Protocol; (b) alleged direct copyright infringement for distributing said copies of the motion pictures via the BitTorrent Protocol; and (c) alleged contribution to trademark infringement by said subscribers who distribute Owners' motion pictures using trademarks owned by Owner 42 Ventures LLC (hereinafter "Litigation Action")~~;~~
- B. Whereas, PIA denies the allegations made by Owners and PIA argues that PIA's actions do not give rise to a claim for direct or contributory or vicarious copyright infringement and that it is and has been fully compliant as a 512(a) provider under the Digital Millennium Copyright Act and is, inter alia, afforded a legal shield against liability for copyright infringement, and that PIA's actions do not give rise to a claim for direct or contributory or vicarious copyright infringement, and
- C. Whereas, in order to avoid the cost, disruption, and inconvenience of further dispute, the Parties desire to achieve an amicable settlement of as set forth below.

NOW, THEREFORE, in consideration of the foregoing recitals and covenants, for the good and valuable consideration of the promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties enter into the following agreement:

1. **Confidentiality** (a) Both parties agree: that they will keep the terms of this Settlement Agreement confidential; agree and warrant that they will not discuss the terms of this Settlement Agreement with any person or entity not a party to this Settlement Agreement, exclusive of their counsel, unless so ordered by a court of competent jurisdiction, however, notwithstanding the foregoing, they may disclose the terms of the Settlement Agreement, only to the extent necessary and reasonable, to their attorneys, financial planners or consultants, accountants and bookkeepers, banks or insurers, so long as those third parties agree to maintain such terms in confidence. (b) Further notwithstanding the foregoing, in the event of any legal action or proceeding or asserted requirement under applicable law or government regulations requesting or demanding disclosure of this Agreement or the terms hereof, the parties shall forthwith notify the Other via their attorney in writing of such request per the Notice Section, prior to any disclosure, so that the Other may seek an appropriate protective order or take other protective measures within 10 business days of said notification. (c) ~~Further notwithstanding the foregoing, the Owners can disclose on a limited basis that the identification information of certain host providers was provided by PIA "other VPN companies" in a legal proceeding seeking relief against host providers and/or downstream users.~~ Neither Party shall make any public statement regarding this Settlement Agreement. In response to any inquiries from third parties regarding the Settlement Agreement or any dispute between the Parties, either Party may only state that the matter has been amicably resolved.

2. **Settlement Money**. In exchange for the consideration set forth herein, **PIA** shall pay to **Owners** the total sum of [REDACTED] (the “**Settlement Money**”). The Settlement Money shall be paid according to the following payment schedule (time is of the essence):

[REDACTED]
[REDACTED]



Postmark date shall be considered compliance with the Settlement Payment Due Date.

Disclosure of IP address block assignments. ~~A) Within ten (10) days of the execution of this Settlement Agreement, PIA agrees to disclose to counsel for the Owners the United States Internet Protocol (“IP”) address blocks assigned to it between 6/1/2017 through the present along with a certification of business records to the extent such information is still in its possession or control.~~

Disclosure of Host Providers. ~~B) Within ten (10) days of the execution of this Settlement Agreement, PIA agrees to disclose the names of the host providers that provided the IP addresses to PIA from 6/1/2017 to the present. Within 30 days from disclosure of said host providers, PIA further agrees to provide Owners’ counsel information concerning whether certain notices styled per the Digital Millennium Copyright Action (“DMCA notices”) that owners’ agent sent to the host provider were forwarded on to PIA, and communications from the host providers concerning said DMCA notices, particularly whether the host provider took any disciplinary actions against PIA in response to said DMCA notices. PIA shall provide a certification of business records for said copies of communications provided to owners’ counsel.~~

Ongoing Disclosure of Customer Information. ~~C) PIA agrees to disclose available customer identification information for customers that used certain email addresses from IP addresses assigned to PIA at specific dates at which Owners’ agent has evidence of infringement of motion pictures along with a certification of business records. Specifically, PIA agrees to accept service of subpoenas, including but not limited to subpoenas issued pursuant to 17 U.S.C. § 512(h), requesting said customer identification information and respond to said subpoenas without objections provided that said subpoenas are limited to no more than 150 IP addresses/email addresses per month. The Parties agree that a 10 day response deadline for said subpoenas is appropriate, absent extraordinary circumstances.~~

3. **CompromiseNo Admission of Liability and Compromise.** This Agreement is the result of a compromise and shall not be construed as an admission by the Parties of any liability, wrongdoing, or responsibility on their part or on the part of their predecessors, successors, parents, subsidiaries, affiliates, attorneys, officers, directors, customers or employees. ~~Indeed, the parties expressly deny any such liability, wrongdoing or responsibility. No Party to this Agreement admits any liability to the other Party with respect to any such claim or any other matter. Each Party expressly denies liability as to every claim, which may be asserted by the other Party. Therefore, this Agreement is not to be and shall never be construed or deemed an admission or concession by any of the Parties hereto of liability or culpability at any time for any purpose concerning any claim being compromised, settled, and released, or any other matter.~~

4. **Mutual Releases of All Claims.**

(a) Fully conditioned and contingent upon **PIA** paying the Settlement Money in full by the Settlement Payment Due Date and fulfilling all of **PIA's** obligations herein and further upon all of **PIA's** covenants, representations and warranties hereunder being true, **Owners** shall release, acquit, satisfy and forever discharge **PIA** and its officers, agents, shareholders, affiliates listed by name below, successors, predecessors, agents, representatives, administrators, fiduciaries, directors, employees, members, insurers, assigns, attorneys, and other representatives and anyone else acting on **PIA's** behalf of ~~all charges, claims, actions, rights, demands, debts, obligations, damages or accountings of whatever nature, in law or in equity, based upon any actual, potential or attempted inducement, direct and contributory copyright infringement or trademark infringement of the any Works or trademarks owned by Owners from all, and all manner of all charges, claims, actions, rights, demands, debts, obligations, damages or accountings of whatever nature, in law or in equity, based upon any events, claims, actions or inactions that occurred prior to the Effective Date and of and from any actions, suits, debts and sums of money, claims and demands whatsoever, in law or equity, known or unknown, which they ever had, now have or may have or claim to have against Owners, for and/or by reason of any matter, cause or thing relating in any way to or arising in any way from the allegations of copyright infringement or which could have been the subject of the Lawsuit or a Lawsuit as outlined in the Legal Action litigation and above, and any infringement of any Works occurring prior to the Effective Date, prior to the Effective Date.~~

(b) **Non-Release of PIA's customers and host providers.** This mutual release shall not apply to customers of PIA and host providers of colocation, server and/or IP addresses to PIA who are not subsidiaries or affiliates of PIA as provided above. For the avoidance of doubt, the Parties agree that the Owners can pursue any available legal remedies against PIA's host providers and downstream users of PIA's service for *inter alia* direct and contributory copyright infringement occurring prior to the effective date of this agreement as well as ongoing and future infringement.

(c) Fully conditioned and contingent upon **Owners'** covenants, representations and warranties hereunder being true, **PIA**, shall release, acquit, satisfy and forever discharge the **Owners** and their officers, agents, shareholders, subsidiaries, affiliates, successors, predecessors, agents, representatives, administrators, fiduciaries, parents, directors, employees, members, insurers, assigns, attorneys, and other representatives and anyone else acting on **Owners'** behalf of and from all, and all manner of all charges, claims, actions, rights, demands, debts, obligations, damages or accountings of whatever nature, in law or in equity, based upon any events, claims, actions or inactions that occurred prior to the Effective Date and of and from any actions, suits, debts and sums of money, claims and demands whatsoever, in law or equity, known or unknown, which they ever had, now have or may have or claim to have against **Owners**, for and/or by reason of any matter, cause or thing relating in any way to or arising in any way from the allegations of copyright infringement or which could have been the subject of the Lawsuit or a Lawsuit.

8. **Owners' Counsel's Representation.** Owners' counsel represents that he has authority to settle on behalf of the Owners. Owners' counsel also represents that this agreement resolves all possible claims all of his clients have against PIA.

9. **Owner's Representation.** Owners represent that they have the full and unencumbered rights, ownership, title, and authority (by ownership, license, or otherwise) to all of the Works described herein and to enter into this Agreement on the terms and conditions herein.

Commented [1]:

This is a representation by Culpepper, but what is needed is a rep by the Owners that they have all right title and interest in the Works

~~**Term Right to Cure for Future Infringing Activity.** The Term of this release Agreement wherein Owners agree not to file a claim for inducement of copyright infringement, indirect copyright infringement, or any trademark infringement claims against PIA shall be for a single ten (10) year term starting from the Effective Date. The Parties understand that this term does not apply to Subsequent to the Effective Ddate of this agreement for 6 months (until 12/31/2021), should owner's counsel or Oowners find evidence of a deficiency of PIA's obligations such as (a) promotion of a notorious movie piracy websites/apps as described in the United States Trade Reports on a website owned or affiliated with PIA; or (b) failure of PIA to terminate the PIA accounts of subscribersrepeat infringers for which owners have sent more than three DMCA Notices ("contributory infringement"), Owners shall first give Notice to PIA of allegations of contributory infringement based upon said evidence to counsel for PIA at Notice below, and PIA shall have 3010 business days to cure said deficiency and notify Oowners' counsel of said cure before Owners can seek legal relief consistent with the provisions below. PIA will be entitled to one ten Rights to Cure per this paragraph.claims for direct copyright infringement and does not give PIA any license to distribute for commercial uses or for any other purposes whatsoever, the Works owned by Owners.~~

~~**10. Certification Enforcement of Agreement and Pre-Filing Covenant.** Covenant not to Sue over Future Infringements. Owners agree not to file any claims for inducement of copyright infringement, indirect copyright infringement (including direct copyright infringement involving the passive storing or caching occurring outside the direct control of PIA), or any trademark infringement claims against PIA for a single ten (10) year term starting from the Effective Date. The Parties understand that this term does not apply to claims for direct copyright infringement (except as stated above) and does not give PIA any license to distribute for commercial uses or for any other purposes whatsoever, the Works owned by Owners. PIA agrees to provide to PlaintiffsOwners a certification from the company Chief Technology Officer or the equivalent thereof During the right to cure period extending until 12/31/2021, if any party to this Agreement brings an action to enforce her, his or its rights hereunder, the prevailing party shall be entitled to recover her, his or its costs and expenses, including court costs and attorney's fees, if any, incurred in connection with such action. No action shall be filed unless and until each party at least 30 days prior to the filing of any action, or any amended or supplemental cause of action therein, notifies in writing the other party of the claims, and the facts and basis supporting the same, therein and provides the other party an opportunity to cure, correct, remedy or resolve such claims. Notice shall be forwarded to the current email addresses of each party, and current attorneys, with the subject line of "PREFILING NOTICE OF CLAIMS." In the event the plaintiff in such an action fails to recover judgment in excess of the pre-suit offer by which to cure, correct, remedy or resolve the claim, the plaintiff shall not recover attorney's fees and cost and shall be liable to the defendant for attorney's fees and costs, acknowledging that they do not interfere with standard technical measures and take swift actions to terminate repeat infringers on the network when informed by copyright owners such as PlaintiffOwners.~~

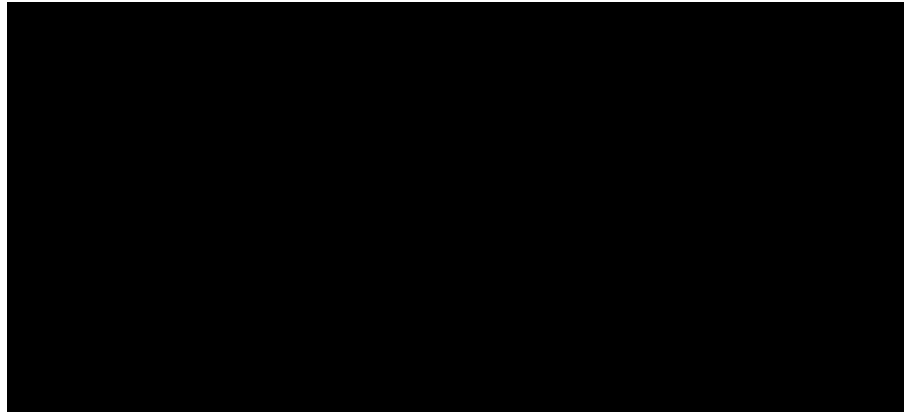
~~**11. Waiver of California Civil Code.** Owners and PIA hereby expressly waive the provision of California Civil Code Section 1542 which provides as follows:~~

~~A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which is known by his must have materially affected his settlement with the debtor.~~

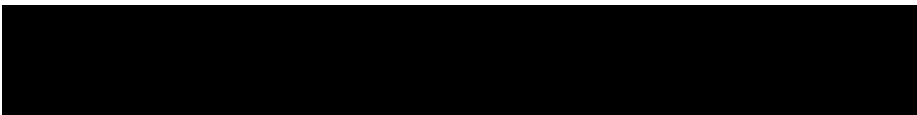
The Parties agree as a further consideration and inducement for this compromise and release of claims that the releases contained in this Agreement shall apply to all unknown and unanticipated injuries and damages resulting from said accident, as well as those now disclosed.

12. Dismissal of Litigation. Within no more than ten (10) days after receipt of the Settlement Payment, Owners and their counsel shall take any necessary actions to ensure that the Litigation is dismissed in its entirety as to PIA, with prejudice and without costs or fees. DefendantPIA will cooperate with Plaintiff Owners and their counsel in securing the dismissal of the Litigation as appropriate.

1.



21. **Jurisdiction and Venue:** This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Hawaii, and any disputes related to this Settlement Agreement shall be brought by in either: (1) the United States District Court for the District of Hawaii, and the parties consent to jurisdiction therein; or (2) the Hawaii State Circuit or District Court of the Third Circuit North and South Kona Division if Federal Jurisdiction is lacking. Further, the interest calculation for this agreement shall be 10 percent a year as provided in §478-2 of the Hawaii Revised Statutes in the event of a breach. However, should the Owners pursue legal remedies against customers and downstream users of PIA for *inter alia* copyright infringement occurring prior to the effective date of this agreement or thereafter, Owners can pursue said legal remedies against said customers in different jurisdictions and/or Courts of law.



23. **Notices.** For Owners – Kerry S. Culpepper, 75-170 Hualalai Rd, Suite B204, Kailua Kona, HI 96740, kculpepper@culpepperip.com; For PIA - ~~John-Arsenault; Moran Laufer~~ ~~[Need-Arsenault]~~ ~~Physical Address~~ ~~5555 DTC Parkway Suite 360 Greenwood Village, Colorado 80111~~, legal@privateinternetaccess.com ~~john@privateinternetaccess.com~~.

24. **Recitals.** The above recitals are made a part of this agreement.

25. **Authority.** Each of the undersigned signatories hereby represents and warrants that he or she has the authority to bind the entity on whose behalf he or she is signing this Agreement.

IN WITNESS WHEREOF, this Settlement Agreement has been duly executed by the Parties hereto on the dates appearing below.

<p>Kerry S. Culpepper as to Form:</p> <p>By: _____ Date: _____</p> <p>Title: Authorized Agent and Attorney for Owners</p>	<p>Moran Laufer as to Form:</p> <p>By: _____ Date: _____</p> <p>Title: CFO for PIA</p>
<p>Kerry S. Culpepper For Owners</p> <p>By: _____ Date: _____</p> <p>Title: Authorized Agent and Attorney for Owners</p>	<p>Moran Laufer for PIA</p> <p>By: _____ Date: _____</p> <p>Title: Authorized Officer of PIA</p>

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:21-cv-01261-RM-SKC

Millennium Funding, Inc. *et al*,

Plaintiffs,

v.

Private Internet Access, Inc. *et al.*,

Defendants.

DEFENDANT PRIVATE INTERNET ACCESS, INC.’S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Private Internet Access, Inc. (“PIA”), by and through its counsel, Mayer Brown LLP, respectfully moves to dismiss Plaintiffs’ Second Amended Complaint (“SAC”) for failure to state a claim.

INTRODUCTION

Although lengthy and full of sound and fury, when it comes to actual facts that—if true—could plausibly support their legal claims against PIA, the allegations in Plaintiffs’ SAC signify nothing. The SAC is overloaded with sweeping conclusory statements tailored to various legal elements and irrelevant allegations regarding conduct of persons and entities other than PIA. The pleading fails, however, to allege facts sufficient to plausibly satisfy the pleading standards applicable to any of the claims directed at PIA.

First, Plaintiffs’ repeated use throughout the SAC of the collective term “Defendants” to include all defendants, including former party Sharktech, Express VPN International LTD (a BVI Limited Company) and Express VPN International LTD (an Isle of Man Limited Company)

along with PIA, renders many of the allegations in the SAC insufficient to place PIA on notice of the specific claims against it.

Second, Plaintiffs' broad, conclusory allegations in the SAC are insufficient to plead a claim for direct copyright infringement. The SAC fails to allege any volitional act by PIA that proximately caused the copying or distribution of the specific movies at issue in the case, and have not plausibly alleged that any copies were sufficiently fixed by PIA to engender liability.

Third, Plaintiffs fail to state a claim against PIA for violation of Section 1202 because they have not plausibly alleged that any Content Management Information was actually altered or deleted, or that PIA had actual knowledge that the filenames had been altered or that the altered filename itself was likely to cause or conceal specific additional infringements. Given the manner in which torrent technology works, the original seed file with the allegedly altered filename is broken into small pieces by the torrent client well before any of those pieces are encrypted and sent through the VPN. Moreover, the entire VPN process is automated. Thus it is not plausible that PIA had actual knowledge of any modifications made to the filename. Nor does the SAC plausibly allege that PIA had actual knowledge that adding a small number of characters to the end of a filename would, in itself, likely cause additional infringements or conceal those infringements.

Lastly, Plaintiffs fail to state a claim for breach of contract under Hawaii law, because no enforceable contract exists. Plaintiffs' SAC recounts settlement negotiations and the exchange of draft settlement agreements between the parties, which by Plaintiffs' own admission continued long after the date they claim the "final" settlement was reached—but fails to plausibly allege that the parties ever entered into a binding agreement. In addition, the un-signed settlement

agreement Plaintiffs attach as an exhibit to their SAC fails to satisfy Hawaii’s statute of frauds—further barring Plaintiffs’ claim.

ARGUMENT

I. DISMISSAL IS PROPER UNDER RULE 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is plausible where it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at 679 (citation omitted). “A plaintiff must ‘nudge [his] claims across the line from conceivable to plausible’ in order to survive a motion to dismiss.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Twombly*, 550 U.S. at 570).

And while courts must “‘assume the truth of the plaintiff’s well-pleaded factual allegations and view them in the light most favorable to the plaintiff.’ . . . [C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.’” *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009) (cleaned up). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. Under Rule 12(b)(6), it is “*facts*, not conclusions, that must be pled; ‘the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,’ including ‘legal conclusion[s]

couched as a factual allegation.”” *Jacobs v. Credit Suisse First Bos.*, No. 11-CV-00042-CMA-KLM, 2011 WL 4537007, at *1 (D. Colo. Sept. 30, 2011) (quoting *Iqbal* 556 U.S. at 678).

Although Plaintiffs’ SAC is voluminous, most of the specific factual allegations are directed towards the alleged acts of non-parties or other entities unrelated to PIA. When it comes to the facts necessary to meet the legal standards for the claims against PIA, Plaintiffs resort to conclusory assertions devoid of any specific fact that could plausibly support those claims. In some instances, other portions of Plaintiffs’ own pleading renders the conclusions implausible. For the reasons set forth below, Plaintiffs’ SAC should be dismissed.

A. Plaintiffs’ Repeated Use of the Collective Term “Defendants” Provides Insufficient Notice of the Specific Allegations Against PIA

Throughout their Complaint, Plaintiffs levy broad, conclusory allegations against “Defendants” – even though Sharktech (which is no longer a party), the Express VPN Defendants, and PIA are separate companies. The Complaint refers to “Defendants” collectively, without specifying what acts by which defendant could provide factual underpinnings for the broad assertions pled. This alone warrants dismissal for failure to state a claim against PIA. *See Jacobs*, 2011 WL 4537007, at *2 (Where all but one “reference to Wells Fargo in the Amended Complaint occurs collectively, with Wells Fargo being listed among numerous other Defendants in largely conclusory assertions of misconduct, divorced from any specific factual allegations describing Wells Fargo’s own conduct,” dismissal was warranted under Rule 12(b)(6) because “the Amended Complaint is precisely the sort of ‘formulaic recitation of the elements of a cause of action,’ or ‘legal conclusion couched as a factual allegation’ that *Twombly* and *Iqbal* prohibit.”).

Plaintiffs’ improper use of “Defendants” is rendered even more confusing by their use of

“shotgun pleading” in the SAC’s six counts, each of which re-alleges and incorporates by reference all previous paragraphs. SAC ¶¶ 365, 386, 398, 405, 416, and 435. *See Southwell v. Allstate Prop. & Cas. Co.*, No. 20-CV-01272-PAB-KMT, 2020 WL 4287194, at *2 (D. Colo. July 27, 2020) (collecting authority that it is inappropriate for a plaintiff to incorporate by reference all prior allegations into each of its claims and noting that this court has previously found “shotgun pleading” to be a “defect” contributing to an award of sanctions). Such a shotgun pleading “foists off one of the pleading lawyer’s critical tasks—sifting a mountain of facts down to a handful of those that are relevant to a given claim—onto the reader.” *Id.* at *2 (citations omitted).

B. Plaintiffs Fail to State a Claim for Direct Copyright Infringement

To state a claim for direct copyright infringement, a Plaintiff must allege (1) ownership of a valid copyright, and (2) copying by the defendant of protected components of the copyrighted material. *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 831 (10th Cir. 1993). To establish the second prong of this standard, Plaintiffs must establish that the alleged direct infringement was proximately caused by PIA’s volitional act. Indeed, every circuit court in which this issue has been addressed has held that volitional conduct by the defendant is a required element. *See, e.g., VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666-669 (9th Cir. 2017); *BWP Media USA, Inc. v. T&S Software Assocs.*, 852 F.3d 436, 442-44 (5th Cir. 2017); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 387 (3d Cir. 2016); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131-132 (2d Cir. 2008); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004).

Although not limited to such circumstances, the volitional act requirement is particularly important where the claims arise from the defendant's provision of a product or system that is used by others for alleged infringement. In such cases, "there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." 3 Patry on Copyright § 9:5.50 (2021) (quoting *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)). In the context of internet transmissions, when a defendant's online system is alleged to have been used by a third party to infringe, there must be some element of "volition or causation" by the defendant to establish direct infringement by the defendant service provider. *CoStar Grp.*, 373 F.3d at 549; *Religious Tech. Ctr.*, 907 F. Supp. at 1370. The volitional conduct requirement recognizes the principle that when a user hits a button commanding the defendant's content-neutral online system to perform an automated function, the defendant service provider is not directly liable because the *user*—not the defendant—was the proximate cause of the infringement. "[D]irect liability must be premised on conduct that can reasonably be described as the *direct cause* of the infringement." *VHT*, 918 F.3d at 731.

In the context of any automated system that may be employed by third-party users to commit infringement, "the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine." *See Cartoon Network*, 536 F.3d at 131. As an apt example, "a cache server, placed to facilitate ready access to all communications, is no more voluntarily copying infringing works transmitted through the server than AT&T is with its

telephone lines. For the volitional act to be meaningful in copyright law, the defendant must have chosen to engage with a particular work.” 3 Patry on Copyright § 9:5.50 (2021).

Where a defendant such as PIA provides a service that merely processes content at the direction of its users, the lack of volitional conduct by the service provider precludes a finding of direct liability. *See Cartoon Network*, 536 F.3d at 131-132 (noting that “volitional conduct is an important element of direct liability” and holding that “we are not inclined to say that Cablevision, rather than the user, ‘does’ the copying produced by the RS–DVR system.”); *VHT*, 918 F.3d at 731 (plaintiff failed to provide evidence that Zillow selected material for upload, download, transmission, or storage, or instigated copying, storage, or distribution; Zillow acted passively, at the request of its users).

Additionally, to constitute actionable infringement of the reproduction or distribution rights, the volitional act by the defendant must proximately cause the creation of an infringing copy that is *fixed*; *i.e.*, embodied in a tangible medium of expression and sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. *See Grady v. Iacullo*, No. 13-CV-00624-RM-KMT, 2016 WL 1559134, at *5 (D. Colo. Apr. 18, 2016) (citing 17 U.S.C. § 101). Because Plaintiffs fail to allege *either* volitional action or fixation by PIA, their direct infringement claim fails.

1. Plaintiffs Have Not Plausibly Pled Any Volitional Act by PIA

Plaintiffs acknowledge that PIA provides a “virtual private network” or “VPN” service to its customers. SAC at ¶ 73. As Plaintiffs explain it, “VPN providers provide their end users ‘anonymous’ usage by, for example, deleting end users’ log access records, assigning their end users IP addresses that are simultaneously shared among many users, and/or encrypting traffic.”

Id. at ¶ 74. This explanation of how a VPN functions is key to understanding why Plaintiffs have not, and cannot, state a claim against PIA.

As the Complaint acknowledges time and time again, the allegedly infringing file-sharing transmissions made on PIA’s servers and which form the entire basis of Plaintiffs’ claims are initiated and completed by third-party end users, using third-party BitTorrent software and technology – not by PIA. *See, e.g., id.* at ¶¶ 131, 137–38, 142–52, 168–76. Indeed, Plaintiffs admit that it is the individual users who are allegedly directly infringing Plaintiffs’ copyrights. *See, e.g., id.* at ¶ 372 (“Defendants encourage their end users to use the network to distribute and reproduce copies of Plaintiffs’ Works.”).

In contrast to these detailed allegations regarding how individual users’ volitional conduct causes infringing copies to be made and distributed, Plaintiffs only make sweeping, conclusory allegations of direct infringement by PIA itself, merely repeating in one form or another that Defendants “distribute” and “reproduce” Plaintiffs’ motion pictures from a certain IP address. *See, e.g., SAC* at ¶¶ 131–36, 174, 193–95, 370–71. In such cases, the conclusory allegations are equivocal as to whether Defendants themselves have even committed these acts. *See id.* at ¶¶ 193–95 (alleging that “Defendants’ [sic] and/or their end users” distributed or reproduced “at least pieces of each of Plaintiffs’ Works.”).

These allegations are the very kind of conclusory legal assertions that are not afforded a presumption of truth on a motion to dismiss. Additionally, these conclusory statements fail to plausibly allege that PIA acted *volitionally* in reproducing or distributing the works in question. Under the applicable legal standard, Plaintiffs have not, and cannot, plausibly allege that PIA itself has engaged in any volitional act that caused the alleged infringement of Plaintiffs’ motion

pictures. In ¶¶ 142–51 and 169–71 of the SAC, Plaintiffs describe how *individual users* utilize BitTorrent client software to send and receive transmissions of files. In ¶ 176, Plaintiffs describe how the BitTorrent application re-assembles the small pieces of the file it has received from various sources in the swarm. As alleged by Plaintiffs in these paragraphs and throughout the Complaint, it is *individual users* who hit the button to transmit and receive movie files that they have selected. PIA merely provides software and a fully automated system to encrypt those users’ volitional transmissions and to change the IP addresses associated with the transmission in order to provide privacy and data security for users. As explained on PIA’s website:¹

[t]he VPN works by establishing an encrypted tunnel between your computer and our server. Essentially, what happens is your ISP provides you with an internet connection. Our service then encrypts this connection, making it anonymous and secure. Your ISP cannot see what you are downloading, because of the encryption used by our service. Other people online cannot see who you really are, because our server acts as a middle-man between you and any connections you are establishing, so all anyone sees when you connect to something is our server. This then makes it appear to the internet that your IP Address is the IP address of our server.

<https://www.privateinternetaccess.com/helpdesk/kb/articles/how-does-the-vpn-work>.²

In other words, PIA’s VPN provides only the encrypted, private technical infrastructure through which transmissions selected by end users are sent. *See* SAC at ¶ 74. PIA itself takes no role in selecting what content is transmitted through the VPN’s “tunnels,” and thus exercises no volition. PIA does not even provide internet access to its subscribers. Instead, the VPN merely

¹ Because Plaintiffs reference and rely upon portions of PIA’s website in their Complaint (*see, e.g.*, SAC at ¶¶ 13, 125, 213–14), the true and accurate content of that website is appropriately considered on a Motion to Dismiss. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (“[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff’s claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.”).

² For the convenience of the Court, PIA also attaches a copy of this webpage as Exhibit 1 to this Motion.

encrypts and changes certain IP address metadata associated with the transmissions that the users make using their own internet service providers. Thus, if the VPN service were removed from the process, the exact same file transfers would have occurred at exactly the same time. It is the BitTorrent software and internet access—none of which is provided by PIA—that are necessary for the copying and distribution to happen.

2. Plaintiffs Have Not Plausibly Pled Fixation by PIA

Plaintiffs have also failed to plausibly allege that PIA has “fixed” any copies of Plaintiffs’ movies. Fixation occurs where a work is (1) recorded or otherwise embodied in a medium such that it can be perceived or reproduced from that medium, and (2) remains so embodied for a period of more than transitory duration. *See Grady*, 2016 WL 1559134, at *6.

Here, fixation has not been alleged. To the contrary, Plaintiffs acknowledge that before any transmission is sent through the VPN, the BitTorrent software breaks the movie file uploaded by the initial seeder into many tiny pieces, from which the movie could not possibly be viewed, and then transmits them in a “swarm” from multiple seed users to the recipient user, and those pieces are reassembled by the user’s BitTorrent client software only after the transmission is complete. *See SAC* at ¶¶ 142–47.

These individual packets of data may be encrypted by PIA’s VPN service and transmitted by the users while using the VPN service. Plaintiffs do not plausibly allege, however, that the transmission of these tiny individual packets of data actually creates any sufficiently fixed copy of Plaintiffs’ movies made by PIA to engender direct infringement liability. *CoStar Grp.*, 373 F.3d at 550–51. (“[When an electronic infrastructure is designed and managed as a *conduit* of information and data that connects users over the Internet, the owner and manager of the conduit

hardly ‘copies’ the information and data in the sense that it fixes a copy in its system of *more than transitory duration*. Even if the information and data are ‘downloaded’ onto the owner’s RAM or other component as part of the transmission function, that downloading is a temporary, automatic response to the user’s request, and the entire system functions solely to transmit the user’s data to the Internet.”); *IMAPizza, LLC v. At Pizza Ltd.*, 965 F.3d 871, 877 (D.C. Cir. 2020) (“The Copyright Act defines ‘copies’ as ‘material objects . . . in which a work is fixed’ and considers a work ‘fixed’ in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. 17 U.S.C. § 101. . . [T]his definition of copy does not include ‘ephemeral transmission of a picture across the internet.’ Instead, the copy becomes ‘fixed’ when the picture is reproduced for a viewer.”).

C. Plaintiffs Fail to Plausibly Allege Violations of Section 1202 of the DMCA

The Copyright Act prohibits (1) knowingly providing or distributing false “copyright management information” (“CMI”) with the intent to induce, enable, facilitate, or conceal infringement (17 U.S.C. § 1202(a)), or (2) intentionally removing or altering CMI, or distributing works knowing that CMI has been removed or altered, if the defendant knows, or has reasonable grounds to know, that the removal or alteration will induce, enable, facilitate, or conceal an infringement (17 U.S.C. § 1202(b)). Both sections 1202(a) and 1202(b) contain a “double scienter” requirement that must be met in order to satisfy the knowledge and intent prongs of the statute. *See Krechmer v. Tantaros*, 747 F. App’x 6, 9 (2d Cir. 2018) (interpreting § 1202(a)); *see also Stevens v. Corelogic, Inc.*, 899 F.3d 666, 674 (9th Cir. 2018) (interpreting § 1202(b)). Under § 1202(a), a plaintiff “must plausibly allege that defendant knowingly provided false copyright

information *and* that the defendant did so with the intent to induce, enable, facilitate, or conceal an infringement.” *Krechmer*, 747 F. App’x at 9 . Likewise, under § 1202(b), not only does the statute require the defendant to *intentionally* remove or alter CMI, or distribute works knowing that CMI has been removed or altered, but it also requires “the defendant to possess the mental state of *knowing, or having a reasonable basis to know*, that his actions ‘will induce, enable, facilitate, or conceal’ infringement.” *Stevens*, 899 F.3d at 673 (emphasis added).

The double scienter requirement of § 1202 serves an important function. In the legislative history of § 1202 Congress clearly indicated its intent that liability for those provisions “do not apply to those who act innocently. . . Liability for the removal or alteration of information requires the actor to know or have reason to know that his acts ‘will induce, enable, facilitate or conceal’ infringement.” *Id.* at 675 (quoting WIPO Copyright Treaties Implementation Act, and Online Copyright Liability Limitation Act: Hearing Before the H. Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. 51 (1997) (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States)).

Thus, to prevail on their § 1202 claims, Plaintiffs must plausibly allege “that the Defendants . . . possessed actual knowledge of the unauthorized change to the copyright management information” *Gordon v. Nextel Commc’ns. & Mullen Advert., Inc.*, 345 F.3d 922, 926-27 (6th Cir. 2003); *see also Stockart.com, LLC v. Engle*, No. 10-CV-00588-MSK-MEH, 2011 WL 10894610, at *9 (D. Colo. Feb. 18, 2011). To meet this burden, Plaintiffs must prove a mental state that has “a more specific application than the universal possibility of encouraging infringement; specific allegations as to how identifiable infringements ‘will’ be affected are necessary. . . [T]he plaintiff must provide evidence from which one can infer that

future infringement is likely . . . to occur as a result of the removal or alteration of CMI.”

Stevens, 899 F.3d at 674–75; *see also Brittney Gobble Photography, LLC v. Sinclair Broad. Grp., Inc.*, No. CV SAG-18-03384, 2021 WL 5359671, at *27 (D. Md. Nov. 17, 2021) (finding no reasonable jury could find the double scienter requirement satisfied where, even if the defendants distributed CMI while knowing that CMI had been removed or altered without authority, the plaintiff could not show that the defendants also knew that such distribution would induce, enable, facilitate, or conceal an infringement). The mere possession by a defendant on its servers of content containing altered CMI is insufficient to establish actual knowledge or intent to facilitate future infringement. *See generally Sid Avery & Assocs., Inc. v. Pixels.com, LLC*, No. CV1810232CJCJEMX, 2020 WL 6114918 (C.D. Cal. Aug. 18, 2020).

Plaintiffs’ § 1202 claims are based on bald assertions that unspecified individuals characterized as “initial seeders” – who are not alleged to necessarily even be PIA’s *subscribers* in every instance – have added a short string of characters to file names associated with copies of Plaintiffs’ motion pictures (SAC at ¶¶ 256–58) and that PIA had “actual and constructive knowledge” of such violations and “knowingly caused or otherwise materially contributed to” those violations. SAC at ¶¶ 426–28. But beyond regurgitating the elements of a § 1202 claim against end users, Plaintiffs provide no specific factual allegations that could plausibly support those elements. Plaintiffs certainly provide no factual allegations that could satisfy the double scienter requirement as to PIA.

Plaintiffs allege that initial seeders who made infringing movie files available via BitTorrent added certain short character strings at the end of the filename. *See* SAC at ¶¶ 255–58. This is the only type of CMI modification alleged. The allegedly altered filenames still

contain the original CMI, *i.e.*, the entire title for each movie, and the only alleged “alteration” is the *addition* of a short string of letters at the end of the filename. The full title of the movie remains intact. Consequently, as the allegations of the SAC demonstrate, the CMI was not actually even altered or deleted. Moreover, Plaintiffs do not allege any facts plausibly supporting how such trivial additions to the end of file names could, in themselves, induce, enable, facilitate, or conceal infringement. Notably, given that the allegedly altered filenames still contain the entire title for each movie, Plaintiffs were able to identify allegedly infringing transmissions made with those altered filenames and were able to include them in their infringement notices—undercutting their claims that the additions to those filenames somehow impede tracking. *See* SAC at ¶¶ 270–71 and Exs. 4 and 5. In analogous contexts, courts have found no liability under § 1202. *See, e.g., Stevens v. Corelogic, Inc.*, 194 F. Supp. 3d 1046 (S.D. Cal. 2016), *aff’d* 893 F.3d 648 (9th Cir. 2018) (holding copyright owners failed to show how the absence of CMI in the digital files led to infringement of their copyrights, how the presence of CMI would have prevented the infringement, or that software developer knew or had reason to know that removal of CMI would lead to copyright infringement).

Even if Plaintiffs had alleged facts sufficient to plead alteration of CMI by PIA’s end users, ***nothing*** in the conclusory pleadings makes it plausible that PIA itself (1) had actual knowledge that CMI was altered by its end users, or (2) knowingly distributed files with altered CMI with the intent to induce, enable, facilitate, or conceal infringement or knowing that future infringement was likely to occur “as a result” of the alteration. *See Stevens*, 899 F.3d at 675. *First*, Plaintiffs acknowledge that the movie files at issue are broken into tiny pieces by the BitTorrent software client prior to one or more of those pieces being encrypted and transmitted

through PIA's VPN service, and are not reassembled into a copy of the original file by the BitTorrent client until after the pieces are received by the user. SAC at ¶¶ 142–51, 169–76. Given that only the encrypted data packets containing the individual pieces—and not the original file itself—have any contact with the VPN, Plaintiffs have not plausibly pled any way that PIA could have had knowledge of the allegedly altered filenames. *Second*, PIA's VPN service is automated. Even if the data packets transmitted through the VPN were not encrypted and contained the altered filenames, it is not plausible to infer that PIA actually inspects the contents of every data packet that is transmitted by its subscribers. In addition to being technologically infeasible, such data-snooping would be completely at odds with the very data privacy protections that VPNs were created to afford.

Tacitly acknowledging that PIA cannot itself be liable for § 1202 violations, Plaintiffs attempt to fashion their claims as ones for secondary liability under § 1202. Notably, § 1202 itself does not provide for secondary liability of any type. The clear language of § 1202 requires knowledge and intent, both as to alteration or distribution, and as to the fostering or inducement of future infringement in order for liability to apply. 17 U.S.C. §1202(a)-(b). A claim under § 1202 is fundamentally different from a claim for copyright infringement in this regard. Unlike § 1202, copyright infringement is a strict liability tort and has no scienter requirement whatsoever for basic liability. *See CoStar Grp.*, 373 F.3d at 548. Thus, common law secondary liability principles applied to strict liability copyright infringement claims do not apply to the distinct statutory § 1202 claims. To hold a defendant vicariously liable for § 1202 violations committed by its end users would, in effect, impose a lower scienter threshold for a secondary liability claim than exists for a direct liability claim under § 1202. This would be inconsistent with the

legislative intent of § 1202, which the drafters made clear should not “apply to those who act innocently . . . Liability for the removal or alteration of information requires the actor to know or have reason to know that his acts ‘will induce, enable, facilitate or conceal’ infringement.” *Stevens*, 899 F.3d at 675 (quotation marks and citation omitted).

While Plaintiffs attempt to satisfy the pleading requirement by baldly stating conclusions that defendants generally had knowledge, those conclusions are not supported by any facts from which the Court could plausibly infer the specific, actual knowledge required by § 1202. *See* SAC at ¶¶ 426–28. *See, e.g., Stevens v. Corelogic*, 194 F. Supp. 3d at 1046; *Sid Avery & Assocs*, 2020 WL 6114918. Consequently, Plaintiffs’ § 1202 claims against PIA cannot survive.

D. Plaintiffs Fail to State a Claim for Breach of Contract

In their newly amended pleading, Plaintiffs have added a claim for breach of contract against PIA. This claim arises out of the Parties’ settlement negotiations—which never resulted in an actual settlement—and the exchange of drafts of a settlement agreement which was never executed, but which Plaintiffs nonetheless seek to enforce.

As a preliminary matter, the document attached as Exhibit 6 to the SAC (and subsequently filed in unredacted form at ECF No. 66) is not a “true and accurate” copy of the document sent to Plaintiffs’ counsel, as Plaintiffs’ counsel represents. *See* Decl. of Kerry Culpepper, ECF No. 59-8 at ¶ 3. On September 1, 2021, in-house counsel for PIA sent a draft agreement, with voluminous edits tracked in “redline” form, to Plaintiffs’ counsel, reflecting many material changes to the proposed agreement. Counsel for Plaintiffs subsequently forwarded that email to the undersigned counsel when he identified this draft agreement as the basis for Plaintiffs’ claim that a final settlement was reached. A copy of that email chain, and an accurate copy of the attached redline

(with redactions only to conceal terms that are not relevant to the substance of this Motion and are the same as those in the altered version of the document submitted by Plaintiffs), are annexed hereto as Exhibit 2. It appears that, to create the document they submitted to this Court, counsel for Plaintiffs eliminated all of the many tracked changes in an effort to hide the obvious fact that the document was far from a final execution copy of a settlement agreement. *Compare* FAC Exhibit 6 and ECF 66 *with* Exhibit 2.

Moreover, the draft settlement agreement specifies that Hawaii law is to govern, and that any disputes related to the agreement must be brought in Hawaii state or federal courts. *See* ECF 66 at p. 7, paragraph 21. This alone should preclude Plaintiffs from seeking enforcement in this court. But the agreement is not binding, and Plaintiffs' contract claims fail on their face. Plaintiffs cannot establish that the parties ever reached a final agreement, and Plaintiffs' attempt to enforce an unsigned draft agreement is further barred by the statute of frauds.

1. Plaintiffs cannot establish a final, enforceable agreement

Under Hawaii law, to state a claim for breach of contract, a Plaintiff must show "(1) the contract at issue; (2) the parties to the contract; (3) whether Plaintiff performed under the contract; (4) the particular provision of the contract allegedly violated by Defendants; and (5) when and how Defendants allegedly breached the contract." *Dairy Road Partners v. Maui Gas Ventures LLC*, CIV. NO. 16-00611 DKW-KJM, 2018 WL 1244147, at *13 (D. Haw. Mar. 9, 2018) (quotation marks and citation omitted).

To establish the existence of a binding contract, a plaintiff must show "mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract." *Dairy Road Partners*, 2018 WL 1244147, at *14 (quotation marks and citation omitted). *See also*

Sung v. Hamilton, No. 09–00212 DAE–KSC, 676 F. Supp. 2d 990, at 999–1001 (D. Haw. Dec. 22, 2009) (“The terms proposed in an offer must be met exactly, precisely, and unequivocally for its acceptance to result in the formation of a binding contract.”) (quotation marks and citation omitted). “No such mutual assent is evident” where a complaint “describes a chronology that cannot be mistaken for an implied agreement.” *Dairy Road Partners*, 2018 WL 1244147, at *14.

Where the existence of an enforceable contract cannot be established, claims for breach of contract must be dismissed. *See id.* at *15. In *Dairy Road Partners*, the court dismissed breach of contract claims, noting that Plaintiffs’ proffer of an unsigned draft Term Sheet and Letter of Intent, an unsigned and undated Loan Modification Agreement failed to establish “the existence of ‘the contract at issue’ or any ‘particular provision of the contract allegedly violated’ that may be enforced by the Court.” *Id.* at *13 (citation omitted).

In the context of settlement negotiations, an email between counsel indicating that the parties have generally reached an agreement on settlement terms is not a binding agreement. *See Shorter v. G4S Secure Sols. (USA) Inc.*, No. CIV. 13-00470 JMS, 2014 WL 4216498, at *4 (D. Haw. Aug. 5, 2014), *report and recommendation adopted*, No. CIV. 13-00470 JMS, 2014 WL 4216998 (D. Haw. Aug. 25, 2014) (“Defendant argues that a binding settlement agreement was created on May 13, 2014, when Plaintiff’s counsel accepted the terms of Defendant’s settlement offer by email. Plaintiff argues that no settlement was reached because Plaintiff did not sign a written settlement agreement. Based on the evidence submitted by the parties, the Court finds that no binding settlement agreement existed between the parties because the parties intended only to be bound upon the execution of a written, signed agreement.”). Notably, the very email exchange Plaintiffs seek to rely on clearly shows that PIA’s General Counsel did not expect there

to be a final settlement until after he circulated a clean final execution copy, which he would not do until *after* various open terms were finally agreed. *See* Ex. 2 (email describing various changes to agreement and stating “Please let me know if you have any questions. I will send over upon your approval also.”).

Plaintiffs’ pleadings do not demonstrate any unequivocal assent between the Parties, as would be required to find the existence of a binding contract. To the contrary, Plaintiffs’ own pleadings show that the Parties continued to negotiate the terms of a possible settlement well past the September 1, 2021 date on which Plaintiffs claim such a final agreement was reached. Specifically, Plaintiffs admit that after PIA learned that Plaintiffs had also sued another subsidiary of PIA’s parent company, the parties began negotiating a totally new potential settlement that would include not only PIA but also any other subsidiary of parent Kape Technologies Ltd.. *See* SAC at ¶¶ 336–42; *see also* SAC at ¶ 346 (acknowledging that these continued negotiations were meant to cover both PIA and ZenGuard). This clearly shows that even Plaintiffs knew that there was no final settlement with PIA. Had there been such a settlement, there would have been no need to negotiate a deal for all of the Kape Technologies subsidiaries, including PIA.

Moreover, while Plaintiffs selectively and misleadingly quote and characterize cherry-picked sections of the parties’ settlement communications, they purposely omitted one such communication that is fatal to their claim. On September 9, 2021, having not received any final execution copy of a settlement agreement or any other communications from PIA, Plaintiffs’ counsel sent an email to PIA, following up on his September 1 email and admitting that the settlement was not yet final: “Following up on this. . . . I would like to finalize the agreement

with PIA so this case can be closed.” A true and correct copy of this September 9 email is attached as Exhibit 3. The document may be considered on a motion to dismiss because it reflects communications incorporated by reference in the SAC. *See GFF Corp.*, 130 F.3d at 1384.

Plaintiffs have altogether failed to establish the existence of a binding contract. As in *Shorter*, 2014 WL 4216498, at *5, Plaintiffs’ own proffer of misleadingly cherry-picked correspondence and drafts exchanged between counsel shows that the Parties “intended only to be bound upon the execution of a written, signed agreement and did not mutually intend to be bound by . . . email correspondence, and as such, no enforceable settlement agreement exists.” *Id.* Plaintiffs have wholly failed to establish “the existence of ‘the contract at issue’ or any ‘particular provision of the contract allegedly violated’ that may be enforced by the Court.” *Dairy Road Partners* 2018 WL 1244147, at *13 (dismissing with prejudice breach of contract claims that were premised upon Plaintiffs’ proffer of an unsigned draft Term Sheet and Letter of Intent, an unsigned and undated Loan Modification Agreement.).

2. The unsigned draft agreement violates the Statute of Frauds

Even if the redlined draft agreement relied upon by Plaintiffs had constituted a final agreement, it would be unenforceable because it violates the applicable statute of frauds. Hawaii’s statute of frauds bars actions for breach of contracts that cannot be fully performed within one year, unless that contract is in a signed writing: “[n]o action shall be brought and maintained . . . upon any agreement that is not to be performed within one year from the making thereof” unless the agreement “is in writing, and is signed by the party to be charged therewith.” Haw. Rev. Stat. Ann. § 656-1 (West); *see also Waianae Co. v. Hawaiian Bell Tel. Co.*, 6 Haw.

589, 593 (1885) (A contract contemplating a continuance of the service for years is within the statute of frauds.); *Collins v. Wassell*, 435 P.3d 1080 (Haw. Ct. App. 2019), cert. dismissed, No. SCWC-15-0000434, 2019 WL 2006007 (Haw. May 7, 2019) (“an oral contract that was not to be performed within one year from the making thereof. . . is unenforceable under the statute of frauds.”).

Hawaii’s statute of frauds unequivocally bars Plaintiffs’ attempt to enforce the unexecuted settlement agreement because that agreement, by its terms, could not be fully performed within one year. As shown in ECF 66, Paragraph 10 of the draft settlement agreement provides that Plaintiffs “agree not to file any claims . . . against PIA for a single ten (10) year term starting from the Effective Date.” ECF 66 at p. 6, Paragraph 10. Given that there is no way that Plaintiffs could perform this essential term—a ten-year covenant not to sue—within one year, Plaintiffs cannot enforce this alleged agreement unless the agreement had been “in writing, and . . . signed by the party to be charged.” Haw. Rev. Stat. Ann. § 656-1; *see also Collins*, 435 P.3d 1080. Plaintiffs cannot make such showing. They have provided no document signed by PIA—the party to be charged. *See Fyffe v. Hue*, 310 P.3d 1050 (Haw. Ct. App. 2010) (A document not signed by the party sought to be charged does not satisfy the statute of frauds.). Nor can the email attaching the marked-up draft agreement satisfy the signature requirement. As a preliminary matter, that email expressly states that PIA expected to circulate a clean, final execution copy at a later time, and only after the remaining open terms were agreed to. *See Ex. 2*. Moreover, email correspondence between the Parties’ counsel is insufficient to satisfy the signature requirement of Hawaii’s statute of frauds because “[a]lthough it is in writing, it is merely [a] recounting of the agreement . . . purportedly made,” and is “not, as required by the

statute of frauds, a writing signed by the party to be charged.” *Parish Farms, Inc. v. Dialysis Newco, Inc.*, NO. 14-00495 KSC, 2015 WL 12670501, at *3-4 (D. Haw. Oct. 30, 2015).

Plaintiffs make a meager attempt to plead around the statute of frauds by vaguely alleging that they performed under the settlement agreement. *See* SAC ¶ 355 (“Plaintiffs have substantially complied with the Agreement.”); *id.* at ¶ 438 (“Plaintiffs substantially complied with their part of the contract.”). But Plaintiffs provide no specifics as to what acts they took that could possibly constitute such performance. Certainly, Plaintiffs have not identified *a single action* that they took and that is “unequivocally referable to the alleged parole agreement, and cannot be explained without reference to the agreement.” *Baham v. Ass’n of Apartment Owners of Opua Hale Patio Homes*, No. 13–00669 HG–BMK, 2014 WL 2761744, at *13 (D. Haw. June 18, 2014). Plaintiffs have failed to allege any part-performance that would provide an exception to the statute of frauds. Accordingly, their claim is barred.

II. LEAVE TO AMEND SHOULD BE DENIED

Plaintiffs should not be permitted to amend their Complaint again because Plaintiffs have been given prior opportunities to remedy the defects identified in this Motion with respect to all of the claims other than the new breach of contract claim added in the SAC, and with respect to the direct infringement, DMCA § 1202, and breach of contract claims no amendment could cure their infirmities. As the 10th Circuit has held, “[w]hile Rule 15 provides that leave to amend a complaint shall be freely given when justice so requires, a district court may refuse to allow amendment if it would be futile.” *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013). And “[a] proposed amendment is futile if the complaint, as amended, would be subject to dismissal.” *Bradley v. Val–Mejias*, 379 F.3d 892, 901 (10th Cir.2004); *see also Brown*

v. United States, No. 07-CV-00717-MSK-KMT, 2008 WL 4211116, at *4 (D. Colo. Sept. 11, 2008). (“[W]here the plaintiff can prove no set of facts in support of his amendment that would entitle him to relief,” amendment would be futile, and leave to amend should be denied.)

Here, Plaintiffs cannot plead any facts in good faith under Rule 11 that would show that PIA—a provider of an automated online system that responds to the prompts of its users to transmit encrypted data packets from one user to another—acts volitionally or fixes any copies of Plaintiffs’ copyrighted works. And as demonstrated above, given the manner in which Plaintiffs acknowledge BitTorrent technology works, Plaintiffs could never plausibly allege that PIA had specific knowledge that CMI was altered by its users, or that such altered CMI would actually induce, facilitate, or conceal infringements. Lastly, as established *supra*, Plaintiffs’ contract claims are fatally defective because they are barred by the statute of frauds, and because Plaintiffs’ own admissions in the SAC demonstrate that no enforceable contract ever existed in the first place.

Additionally, PIA previously raised each of the defects identified in this Motion—other than those for the newly-added breach of contract claim—with Plaintiffs during a pre-motion conference prior to filing a similar motion with respect to the same defects in Plaintiffs’ First Amended Complaint. During that process, Plaintiffs agreed to amend the complaint to address these issues and on that basis PIA consented to the filing of the SAC. But while certain defects in the First Amended Complaint were at least facially addressed, the defects addressed in this motion were not. Plaintiffs have engaged in the same tactics in similar cases filed in other courts, leading to dismissal with prejudice. *Millennium Funding, Inc., et al. v. 1701 Mgm’t LLC et al.*, No. 21-cv-20862-BLOOM/Otazo-Reyes, 2021 WL 5882999 at *18 (S.D. Fla. Dec. 13, 2021)

(dismissing similar claims with prejudice where Plaintiffs previously amended complaint and failed to cure deficiencies). Under these circumstances, PIA should not be forced to engage in a protracted game of “whack-a-mole” with Plaintiffs’ serially-deficient pleadings. *See TV Commc’ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir. 1992) (dismissing claims with prejudice where plaintiff was given prior opportunity to amend and failed to cure deficiencies).

III. COMPLIANCE WITH CIV. PRACTICE STANDARD IV.N.2.a

Pursuant to Civ. Practice Standard IV.N.2.a, counsel for PIA conferred by telephone and email with counsel for Plaintiffs prior to filing this motion seeking to resolve or narrow the issues presented. This included such conferral in connection with the First Amended Complaint, after which Plaintiffs agreed to amend to address the issues raised by PIA and PIA consented to such amendment. While the SAC narrowed some of the pleading issues previously identified by PIA, it did not resolve the issues identified in this Motion and added new deficiencies, including those related to Plaintiffs’ new breach of contract claim. The parties continued to confer after the filing of the SAC, but were unable to resolve the remaining issues presented in this Motion.

CONCLUSION

For the foregoing reasons, PIA respectfully requests that this court dismiss Plaintiffs’ First, Fifth, and Sixth claims against PIA with prejudice, and the remaining claims without prejudice.

DATED: December 23, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the date below, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:21-cv-01261-RM-SKC

Millennium Funding, Inc. *et al*,

Plaintiffs,

v.

Private Internet Access, Inc. *et al.*,

Defendants.

DEFENDANT PRIVATE INTERNET ACCESS, INC.’S MOTION TO STRIKE

Pursuant to Fed. R. Civ. P. 12(f), Defendant Private Internet Access, Inc. (“PIA”), by and through its counsel, Mayer Brown LLP, respectfully moves to strike paragraphs 48, 77–84, 86–92, 95–96 and portions of paragraph 4 of Plaintiffs’ Second Amended Complaint (SAC).

INTRODUCTION

In their Second Amended Complaint (the “SAC”) in this case, Plaintiffs bring six causes of action purporting to sound in copyright infringement, violations of the Digital Millennium Copyright Act, and breach of a purported settlement agreement. The totality of these claims boils down to whether a VPN service can be held liable for the alleged illegal file sharing of its users or the alleged alteration by third parties of copyright management information associated with those shared files, and whether the exchange of a redlined, draft settlement agreement that was never reduced to final form, never signed by any party, and where the parties thereafter

continued to negotiate new settlement terms that were never agreed to, constitutes an enforceable settlement agreement with Plaintiffs.¹

Despite the relatively narrow scope of these claims, the SAC's 447 numbered paragraphs include numerous allegations that are irrelevant to those causes of action and that instead relate to the conduct and statements of persons and entities other than the actual defendants in the case and that are not related to copyright infringement at all. In such paragraphs, Plaintiffs discuss inflammatory topics as far afield as hacking, stalking, bomb threats, political assassinations, child pornography, and anonymous online message board posts full of hate speech and appearing to encourage violence and murder. In other places, Plaintiffs discuss the personal political views or activities of alleged VPN employees outside the scope (or time) of their role with those VPN companies, or comment on long-discontinued service offerings of non-party corporations. These allegations are all *completely irrelevant* to any of the legal issues raised in Plaintiffs' SAC. They serve no purpose in putting PIA on notice of the claims against it. Instead, they serve only to inflame emotions in a misguided attempt to prejudice the Court and the public against the defendants by false association with the non-parties whose conduct is described in these paragraphs of the SAC. Such allegations are clearly improper and must be stricken.

ARGUMENT

I. LEGAL STANDARD

Under Rule 12(f) of the Federal Rules of Civil Procedure, a court may strike “redundant, immaterial, impertinent, or scandalous matter” from a pleading. Fed. R. Civ. P. 12(f). The

¹ Contemporaneous with this Motion, PIA is filing a Motion to Dismiss various counts of the SAC that fail to state a claim.

purpose of Rule 12(f) is “to save the time and money that would be spent litigating issues that will not affect the outcome of the case.” *Holderness v. Birner Dental Mgmt. Servs. Inc.*, No. 12-CV-1391-WJM-MJW, 2013 WL 618162, at *1 (D. Colo. Feb. 19, 2013) (quoting *Kimpton Hotel & Restaurant Group, LLC v. Monaco Inn, Inc.*, 2008 WL 140488, at *1 (D. Colo. Jan. 11, 2008)).

For the purposes of a motion under Rule 12(f), matter “is immaterial if it has no essential or important relationship to the claim for relief pleaded.” *Ctr. For Native Ecosystems v. U.S. Fish & Wildlife Serv.*, No. CIV.A.08-CV-2744, 2010 WL 2035580, at *2 (D. Colo. May 20, 2010). Immaterial matter also comprises “a statement of unnecessary particulars in connection with that which is material.” *Webster v. Nations Recovery Ctr., Inc.*, No. CIV.A. 09-CV-01685-W, 2009 WL 2982649, at *2 (D. Colo. Sept. 15, 2009) (quoting *Dean v. Gillette*, No. Civ.A.04–2100JWL–DJW, 2004 WL 3202867, at *1 (D. Kan. June 8, 2004)). Similarly, matter “is impertinent if it does not pertain and is not necessary to the issues in question in the case.” *Ctr. For Native Ecosystems*, 2010 WL 2035580, at *2. And allegations are scandalous “if they degrade defendant’s moral character, contain repulsive language, or detract from the dignity of the court.” *Id.* Scandalous matter also “includes allegations that cast a cruelly derogatory light on a party or other person.” *Glaser v. Jordan*, No. CIV09CV01758REBMJW, 2010 WL 1268151, at *2 (D. Colo. Mar. 30, 2010) (citation omitted).

Under Rule 12(f), immaterial, impertinent or scandalous allegations that are prejudicial to the moving party and unrelated to the plaintiffs’ claims are appropriately stricken. *See Holderness v. Birner Dental Mgmt. Servs. Inc.*, No. 12-CV-1391-WJM-MJW, 2013 WL 618162, at *1 (D. Colo. Feb. 19, 2013) (The Court may grant a motion to strike “when (1) the allegations

have no bearing on the controversy and (2) the movant can demonstrate prejudice caused by the allegations.”). Under this standard, “[p]rejudice occurs when the challenged pleading or allegation confuses the issues or is so lengthy and complex that it places an undue burden on the responding party.” *Webster*, 2009 WL 2982649, at *2 (quoting *Dean*, 2004 WL 3202867, at *1); *see also Holderness*, 2013 WL 618162 at *2 (“allowing the challenged paragraphs to remain in the Complaint would prejudice Defendant. . . were these allegations to remain in the Complaint, Defendant would be forced to litigate these unrelated events, which would add to the burden on both parties during this case.”).

Under these principles, courts properly strike allegations that someone has engaged in bad acts unrelated to the causes of action pled. *See, e.g., Holderness*, 2013 WL 618162, at *2 (granting a motion to strike where “[t]he Complaint makes no attempt to link the allegedly unethical events to Plaintiff’s termination, his age, or the general conditions of his employment. There is no indication that any of the actors in the allegedly unethical events were decision-makers with respect to Plaintiff’s employment. There is no allegation that either the unlicensed dentist or the misuse of Plaintiff’s DEA number were at all related to Plaintiff’s termination. Thus, the Court has little difficulty concluding that the challenged paragraphs contain gratuitously impugning allegations which are not remotely relevant to this action.”); *McPherson v. Bachus & Schanker, LLC*, No. 10-CV-01768-CMA-KMT, 2011 WL 2415003, at *2 (D. Colo. June 10, 2011) (finding that, in FLSA action, “Plaintiffs’ allegations concerning assault or abuse of employees, gender discrimination, and questionable business practices are irrelevant and scandalous because they unnecessarily cast Defendants as abusive employers and supervisors and, therefore, those allegations must be stricken.”).

Similarly, courts properly strike allegations where, for example, such allegations seek to paint a party in a disparaging light by discussing that party's association with individuals who are unrelated to the litigation and who are portrayed as being generally unsavory characters. *See Glaser*, 2010 WL 1268151, at *2 (“[P]laintiff accuses defendant Jordan’s son of drug and alcohol abuse in the complaint. Those allegations are wholly unrelated to the substance of the complaint, *i.e.*, that defendant Jordan apparently allegedly stole personal property from plaintiff. . . . not only are the subject allegations irrelevant, they are also scandalous by irrelevantly casting defendant Jordan’s son as a drug and alcohol abuser and, thus, those allegations must be stricken.”).

And courts have found that allegations regarding a party's subjective wants, or regarding that party's opinion of the legal system, are properly stricken as impertinent to establishing liability under objective legal standards. *See Masters v. Allstate Prop. & Cas. Ins. Co.*, No. 20-CV-01213-DDD-NYW, 2020 WL 9424371, at *3 (D. Colo. July 7, 2020), report and recommendation adopted, No. 20-CV-01213-DDD-NYW, 2020 WL 9424265 (D. Colo. Aug. 21, 2020) (“Paragraphs 21–25, regarding Allstate’s intentions, are simply impertinent to the claims . . . which turn on whether or not Allstate had an obligation to pay benefits under the language of the applicable policy and whether or not Allstate discharged its duties in a reasonable and appropriate manner. Allstate’s subjective ‘wants’ do not factor into that analyses. In addition, Allstate’s opinion—to the extent one even exists—regarding the fairness of Colorado juries alleged in Paragraph 26, does not have any tendency to make any fact of consequence to the determination of the action more or less probable.”).

Likewise, allegations that purport to inform the court of alleged criminal acts that are immaterial to the outcome of the civil case at hand are properly struck under Rule 12(f). *See Andrew v. Cty. of Gilpin*, No. 10-CV-01456-PAB-KMT, 2010 WL 3341208, at *1-2 (D. Colo. Aug. 23, 2010) (“Plaintiff purports to inform the court. . . of crimes allegedly committed by Defendants in connection with a letter they sent to him on July 13, 2010. Defendants seek to strike this document. . . As Plaintiff’s ‘Mandatory Judicial Notice and Criminal Complaint against Defendants and Each of Them’ is redundant, immaterial, impertinent, and scandalous, and will not affect the outcome of this case, it is hereby stricken.”).

Lastly, where an allegation consists of “a statement of unnecessary particulars,” even in connection with a statement that is material, a court will similarly strike such material. *See Webster*, 2009 WL 2982649, at *3 (“Paragraphs 121–170 constitute redundant and tedious pleadings, consistent with the standard for immateriality encompassed by Rule 12(f). . . Plaintiff’s paragraph 120 states ‘NRC has been sued 23 times in the U.S. District Court(s) for alleged FDCPA violations between January 1, 2007 and July 14, 2009.’ . . . This allegation succinctly summarizes the foundation for paragraphs 178, 179, and 183. The following fifty paragraphs detailing each of the twenty-three lawsuits embody exactly a ‘statement of unnecessary particulars.’ The prejudice to Defendants lies in their undue burden of having to respond to such lengthy and excessive pleadings.”).

II. PARAGRAPHS 48, 77-84, 86-92, 95-96, AND CERTAIN ALLEGATIONS IN PARAGRAPH 4 MUST BE STRICKEN UNDER RULE 12(F)

The paragraphs of the SAC identified below present the very sort of immaterial, impertinent and scandalous allegations against which Rule 12(f) protects. These paragraphs are brimming with inflammatory and prejudicial allegations that have *nothing* to do with any of the

causes of action alleged, and enumerate many unnecessary particulars that will have no bearing on the ultimate adjudication of the merits of this action.

In many places, Plaintiffs recount horrific acts or offensive statements—all unrelated to copyright infringement—allegedly committed by third parties who happen to use VPN services. Elsewhere, Plaintiffs seek to impugn PIA by the personal statements or views of its employees or those of other VPN services or to muddy the waters with irrelevant allegations regarding prior trade names and product offerings of other companies that have nothing at all to do with copyright infringement. Each of these allegations is properly stricken under Rule 12(f).

A. Allegations Enumerating the Bad Acts of VPN Users, Unrelated to Copyright Infringement or Piracy Improperly Attempt to Prejudice the Court Against PIA

Plaintiffs spend many paragraphs of their SAC recounting horrific acts or offensive statements—all unrelated to copyright infringement—allegedly committed by third parties who allegedly happen to use VPN services. Such allegations are clearly prejudicial, because each of these allegations “confuses the issues,” and together they help make the SAC “so lengthy and complex that it places an undue burden on the responding party.” *Webster*, 2009 WL 2982649, at *2 (quoting *Dean*, 2004 WL 3202867, at *1); *see also Holderness*, 2013 WL 618162 at *2 (“allowing the challenged paragraphs to remain in the Complaint would prejudice Defendant. . . were these allegations to remain in the Complaint, Defendant would be forced to litigate these unrelated events, which would add to the burden on both parties during this case.”).

In Paragraph 77 of the SAC, Plaintiffs set the stage for this slew of irrelevant and inflammatory allegations they will later introduce, summarizing them as follows:

77. Emboldened by Defendants’ promises that their identities cannot be disclosed, Defendants’ end users use the VPN services not

only to engage in widespread movie piracy, but other outrageous criminal conduct such as sharing child pornography, harassment, illegal hacking and murder.

The very framing of this paragraph shows that it, and each subsequent paragraph elaborating on each bad act mentioned (*i.e.*, sharing child pornography, harassment, illegal hacking and murder), have ***nothing*** to do with the alleged piracy occurring on VPN services. The very language of the paragraph admits that these are activities that have allegedly happened ***in addition*** to the only relevant bad act that VPN users are alleged to have committed—copyright infringement.

Plaintiffs themselves characterize the conduct discussed in these paragraphs as “outrageous.” *Id.* at ¶ 77. But allegations of posting racist messages, sharing child pornography, encouraging murder and committing murder not only have *nothing to do* with PIA or even its users (and, in the case of murder, nothing to do with VPN technology at all). Such allegations also, and more importantly, have no bearing on whether copyrighted films were infringed or copyright management information associated with those films was modified.

The subsequent paragraphs 78–84 elaborate on these irrelevant and scandalous allegations. Each such paragraph—discussed in more detail below—is nothing more than “a statement of unnecessary particulars,” which would merit striking even were such particulars alleged in connection with a statement that is material. *See Webster*, 2009 WL 2982649, at *3 (“Paragraphs 121–170 constitute redundant and tedious pleadings, consistent with the standard for immateriality encompassed by Rule 12(f). . . Plaintiff’s paragraph 120 states ‘NRC has been sued 23 times in the U.S. District Court(s) for alleged FDCPA violations between January 1, 2007 and July 14, 2009.’ . . . This allegation succinctly summarizes the foundation for paragraphs

178, 179, and 183. The following fifty paragraphs detailing each of the twenty-three lawsuits embody exactly a ‘statement of unnecessary particulars.’ The prejudice to Defendants lies in their undue burden of having to respond to such lengthy and excessive pleadings.”). Here, since the unnecessary particulars relate to completely irrelevant and impertinent matter, they are even more appropriately stricken.

1. Allegations regarding PIA’s statements on acts of alleged hacking and stalking have no bearing on Plaintiffs’ copyright and contract claims

In Paragraphs 78–81, Plaintiffs make allegations about the bad acts of non-parties Ross M. Colby and Preston McWaters, whom Plaintiffs allege were users of PIA’s VPN.

78. On June 6, 2018, Ross M. Colby was convicted of two felonies for using PIA VPN service to hack into the computer systems of the company Embarcadero.

79. The same PIA IP addresses that were used to access Mr. Colby’s personal email and Facebook accounts was used for the illegal hacking. Upon information and belief, Mr. Colby was a PIA end user.

80. Between December 2015 and March 2016, Preston McWaters used PIA’s VPN service to make false bomb threats to schools and stalk a former female co-worker under a fake email address and Twitter accounts he created under the name of her boyfriend. When a search warrant was executed on Mr. McWater’s home, a mobile phone including the PIA mobile app was found. Upon information and belief, Mr. McWaters was a PIA end user.

Plaintiffs allege that PIA “boasted that it had no logs to disclose to law enforcement concerning these serious crimes of Ross M. Colby and Preston McWaters.” SAC at ¶ 81. But Plaintiffs in no way tie either the acts by these two VPN users or PIA’s statements regarding the resulting investigations to any infringement of their purported copyrights or to the breach of any

purported settlement agreement. Nor could they, as hacking, stalking and bomb threats (all allegedly committed by third parties) are completely unrelated to any of these causes of action. These allegations would serve only to prejudice the Court against PIA, and VPN providers generally, and must be struck. *See Holderness*, 2013 WL 618162, at *2 (granting a motion to strike allegations where “[t]here is no indication that any of the actors in the allegedly unethical events were decision-makers with respect to Plaintiff’s employment. There is no allegation that either the unlicensed dentist or the misuse of Plaintiff’s DEA number were at all related to Plaintiff’s termination. Thus, the Court has little difficulty concluding that the challenged paragraphs contain gratuitously impugning allegations which are not remotely relevant to this action.”).

2. Allegations regarding ExpressVPN’s statements on a political assassination in Turkey have no bearing on Plaintiffs’ copyright and contract claims

In Paragraphs 82–83, Plaintiffs allege that “[a]n unknown Express VPN subscriber used the VPN services to hide details concerning the assassination of the Russian Ambassador to Turkey, Andrei Karlov in 2017” and that ExpressVPN discussed this incident in an interview in which it said:

[n]ot storing any sensitive information also protects user privacy and security in the event of law enforcement gaining physical access to servers. This was proven in a high-profile case in Turkey in which law enforcement seized a VPN server leased by Express VPN but could not find any server logs that would enable investigators to link activity to a user or even determine which users, or whether a specific user, were connected at a given time.

SAC at ¶¶ 82–83 (quoting <https://torrentfreak.com/expressvpn-anonymous-review/>).

Notably, the discussed allegations of criminal wrongdoing—assassination—have nothing to do with copyright infringement or copyright management information. Plaintiffs’ allegations are, in essence, that information relating to that assassination was placed on the servers of an entirely different VPN—ExpressVPN—by some user (not necessarily the assassin). Despite the obvious lack of relevance to Plaintiffs’ claims, Plaintiffs nonetheless seek to use the specter of this horrific act to taint both PIA and ExpressVPN with a killing committed by an individual who is a stranger to this case. Nor do Plaintiffs make any connection between this sensationalized incident and any harm to them. These irrelevant and highly prejudicial allegations must be stricken. *See Holderness*, 2013 WL 618162, at *2; *Cty. of Gilpin*, 2010 WL 3341208, at *1–2 (Allegations, in a civil matter, which purport to inform the court of unrelated crimes allegedly committed are “redundant, immaterial, impertinent, and scandalous, and will not affect the outcome of this case, it is hereby stricken.”); *see also Syed v. Mohammad*, No. 1:15-CV-01332, 2016 WL 8731783, at *5 (E.D. Va. Apr. 1, 2016) (striking portions of counterclaim that painted the plaintiff and his father as “thugs and murderers” and noting that the plaintiff’s father “is a stranger to the disputes at issue in this case” with “no involvement in any of the facts alleged in the Complaint or Counterclaim. Further, Defendant fails to tie any of his sensational allegations to any harm suffered by him.”).

3. Allegations that an ExpressVPN user utilized a VPN to download child pornography are immaterial, impertinent, and scandalous

In Paragraph 84, Plaintiffs allege that “Express VPN subscriber Franke Beyer admitted to using the VPN service in connection with the disgusting act of downloading sexual videos of prepubescent children.”

The very choice of words here—referencing Mr. Beyer’s “disgusting act”—serves to show that this paragraph fits the very definition of “scandalous,” as it casts “a cruelly derogatory light” on PIA by attempting to (falsely) associate PIA with an individual who committed horrific acts. *See Glaser*, 2010 WL 1268151, at *2 (citation omitted). This paragraph, which unnecessarily delves into stomach-churning subject matter, contains “repulsive language” and “detract[s] from the dignity of the court.” *See Ctr. For Native Ecosystems*, 2010 WL 2035580, at *2.

And horrific as Mr. Beyer’s alleged actions are, they are also completely irrelevant to any of the legal claims actually pled. *See Glaser*, 2010 WL 1268151, at *2 (striking allegations as scandalous where “plaintiff accuses defendant Jordan’s son of drug and alcohol abuse in the complaint. Those allegations are wholly unrelated to the substance of the complaint, *i.e.*, that defendant Jordan apparently allegedly stole personal property from plaintiff. . . not only are the subject allegations irrelevant, they are also scandalous by irrelevantly casting defendant Jordan’s son as a drug and alcohol abuser.”); *see also Bernath v. Extreme Seal Experience, LLC*, No. 2:16CV185, 2016 WL 11671369, at *3 (E.D. Va. July 12, 2016) (striking a copyright plaintiff’s allegations that the defendants were “associated with and publishers on a publication which hosts child pornography and advocates child pornography” as scandalous and prejudicial to defendants).

B. Allegations Regarding the Personal View or Criminal Acts of Alleged VPN Employees Outside the Scope of Their Role at the VPN, or Regarding Prior Trade Names of Non-Party Affiliates, Are Irrelevant and Prejudicial

In addition to seeking to smear defendants with the horrific acts of VPN users generally, Plaintiffs plead many additional and irrelevant allegations regarding political views or bad acts

of alleged VPN employees—all of which are completely unrelated to the copyright infringements alleged in this case or to whether PIA entered into and breached a settlement agreement. Plaintiffs also seek to introduce irrelevant allegations regarding long-discontinued trade names and product offerings of non-party Kape Technologies. But these allegations, too, are irrelevant to copyright infringement and breach contract. They serve only to paint the VPN industry as a whole as unethical or bad actors – in ways that are unrelated to copyright law at all. Such allegations would be clearly prejudicial, and to spend time adjudicating them would unnecessarily consume the resources of the parties and the Court. Such allegations must be struck.

1. Statements made and opinions held by an alleged former PIA employee in his personal capacity are irrelevant to the claims against PIA

In Paragraph 4, Plaintiffs add unnecessary particulars to their initial allegations regarding PIA, seeking to poison the Court’s view of PIA with the irrelevant accusation that “employees of Defendant PIA explicitly advocate use of its service for piracy—one is even a member of ‘The Pirate Party’ – and participate in the operation of the notorious website The Pirate Bay.” Plaintiffs elaborate on these irrelevant and inflammatory allegations in Paragraphs 90–92, which discuss the political views and affiliations of Rick Falkvinge, whom they characterize as PIA’s Head of Privacy, and recount statements Mr. Falkvinge made in his personal capacity years before he worked with PIA and therefore obviously not in connection with his alleged employment with PIA. Specifically, Plaintiffs allege that “PIA proudly employs as its head of ‘Privacy’ Rick Falkvinge, the founder of the first ‘Pirate Party’ whose aim is to abolish intellectual property laws.” SAC at ¶ 90. On that same point, Plaintiffs further allege that:

92. Rick Falkvinge and his Pirate Party begin hosting the notorious piracy website “The Pirate Bay” in 2010 after an injunction was obtained by several movie studios against the previous host provider. *See* <https://torrentfreak.com/the-pirate-party-becomes-the-pirate-bays-new-host-100518/> [last accessed on 11/6/2021] (““Today, on 18 May, the Swedish Pirate Party took over the delivery of bandwidth to The Pirate Bay,” says the Party’s Rick Falkvinge in a statement. “We got tired of Hollywood’s cat and mouse game with the Pirate Bay so we decided to offer the site bandwidth,” he adds. “It is time to take the bull by the horns and stand up for what we believe is a legitimate activity.””)

SAC at ¶ 92.

These allegations improperly attempt to impute Mr. Falkvinge’s personal views and political affiliations on his employer, PIA, despite the fact that those views were expressed by Mr. Falkvinge in a role entirely separate from his employment at a time long before he had any association with PIA.

Notably, there is no attempt to connect these views to any act by PIA that could bear on the claims of copyright infringement or breach of contract. Indeed, nowhere do Plaintiffs so much as allege that PIA itself had any part in any such acts—only that Mr. Falkvinge generally holds views Plaintiffs find objectionable. *See Holderness*, 2013 WL 618162, at *2 (granting a motion to strike allegations of generally unethical practices at Defendant’s business where “[t]here is no indication that any of the actors in the allegedly unethical events were decision-makers with respect to Plaintiff’s employment. There is no allegation that either the unlicensed dentist or the misuse of Plaintiff’s DEA number were at all related to Plaintiff’s termination. Thus, the Court has little difficulty concluding that the challenged paragraphs contain gratuitously impugning allegations which are not remotely relevant to this action.”).

Mr. Falkvinge’s stated opinions are irrelevant to this action—not only because he is not alleged to have any actual involvement in the alleged acts giving rise to the specific claims of infringement or breach of contract in this case, but also because those opinions do not tend to make any fact relevant to Plaintiffs’ causes of action more or less probable and thus are immaterial. *See Masters*, 2020 WL 9424371, at *3 (“Paragraphs 21–25, regarding Allstate’s intentions, are simply impertinent to the claims . . . which turn on whether or not Allstate had an obligation to pay benefits under the language of the applicable policy and whether or not Allstate discharged its duties in a reasonable and appropriate manner. Allstate’s subjective ‘wants’ do not factor into that analyses. In addition, Allstate’s opinion—to the extent one even exists—regarding the fairness of Colorado juries alleged in Paragraph 26, does not have any tendency to make any fact of consequence to the determination of the action more or less probable.”).

Plaintiffs also allege—*non sequitur*—that, “[a]s head of the ‘Pirate Party’, Rick Falkvinge has pushed for legalization of possession of child pornography.” SAC at ¶ 91. This allegation is completely irrelevant to copyright infringement or copyright management information—and can serve only to smear PIA with the specter of a scandalous topic. *See McPherson*, 2011 WL 2415003, at *2 (finding that “Plaintiffs’ allegations concerning assault or abuse of employees, gender discrimination, and questionable business practices are irrelevant and scandalous because they unnecessarily cast Defendants as abusive employers and supervisors and, therefore, those allegations must be stricken.”). In analogous circumstances, similar allegations raised in copyright infringement actions have been found scandalous and prejudicial, warranting striking under Rule 12(f). *See Bernath*, 2016 WL 11671369, at *3 (striking a copyright plaintiff’s allegations that the defendants were “associated with and

publishers on a publication which hosts child pornography and advocates child pornography” as scandalous and prejudicial to defendants).

2. Prior trade names used by non-party Kape Technologies are irrelevant to the claims against PIA

In Paragraph 48, when discussing non-party Kape Technologies, Plaintiffs allege that “Kape was previously known as Crossrider until it changed its name change in 2018 to disassociate from its prior business of distributing malware that infects users’ devices to effectively hijack a browser session and insert advertisements when a partnered website is visited.”

These allegations—which are not even directed at PIA or any party to this proceeding—have no bearing on any of the causes of action and are completely immaterial and impertinent. Plaintiffs’ claims have nothing to do with malware or hacking. Plaintiffs make no attempt to link this allegation to any harm to their copyright interests. These irrelevant allegations just falsely paint Kape—and, by association, PIA—as unethical. This could serve only to prejudice PIA and bog down the adjudication of this action with irrelevant matters. *See Holderness*, 2013 WL 618162, at *2 (striking allegations of unethical business practices where “the alleged ‘unethical events’ have nothing to do with Plaintiff’s ADEA claim. The Court will not permit this age discrimination case to get bogged down by irrelevant claims about ‘unethical practices.’”); *see also McPherson*, 2011 WL 2415003, at *2 (striking irrelevant allegations concerning assault or abuse of employees, gender discrimination and questionable business practices).

3. The alleged hacking crimes of an employee of ExpressVPN, occurring prior to his employment at ExpressVPN are irrelevant to the claims in this case

Next, in Paragraphs 86–89, Plaintiffs discuss the settlement of alleged criminal activities of one employee of co-defendant ExpressVPN—activities that have nothing whatsoever to do with copyright infringement or the settlement agreement Plaintiffs allege PIA entered into and breached. Specifically, Plaintiffs allege that defendant ExpressVPN “proudly employs as its chief information officer Daniel Gericke, an individual that has admitted to using VPN services to hack into devices of American residents on the behalf of a foreign government.” SAC at ¶ 86. Plaintiffs elaborate that:

87. On Sept. 7, 2021, Mr. Gericke entering into a deferred prosecution agreement (“DPA”) requiring him to make a payment of \$335,000 to resolve a Department of Justice investigation regarding violations of U.S. export control, computer fraud and access device fraud laws.

88. In the DPA, Mr. Gericke admitted to: (1) knowingly and willfully conspiring, in violation of Title 18, United States Code, Section 371, to violate the Arms Export Control Act (“AECA”) and the International Traffic in Arms Regulations (“ITAR”); and (2) knowingly conspiring, in violation of Title 18, United States Code, Section 371, to commit access device fraud, and computer fraud and abuse, in violation of Title 18 United States Code, Sections 1029 and 1030. <https://www.justice.gov/opa/press-release/file/1432621/download> [last accessed on 11/6/2021].

89. Despite admitting to using a VPN to hack into the device of Americans on behalf of a foreign government, on Sept. 27, 2021 ExpressVPN released an official statement stating that “...Daniel fits into our mission as a company, past, present, and future.” <https://www.expressvpn.com/blog/daniel-gericke-expressvpn/> [last accessed on 11/6/2021].

SAC at ¶¶ 87–89.

Again, Plaintiffs make no attempt to connect these allegations to any harm to their copyright interest or any breach of the alleged settlement agreement Plaintiffs claim to have reached with PIA. Indeed, the settlement described in the documents cited by Plaintiffs expressly involve conduct occurring before—and unrelated to—Mr. Gericke’s employment by ExpressVPN. *See* <https://www.justice.gov/opa/press-release/file/1432621/download> at Ex. A, ¶ 29 (stating that the relevant conduct occurred between January 2016 and November 2019, and that Mr. Gericke’s involvement therein occurred between January 2016 and November 2018); <https://www.expressvpn.com/blog/daniel-gericke-expressvpn/> (noting that ExpressVPN hired Mr. Gericke in December of 2019). Notably, nothing in the Department of Justice announcement cited by Plaintiffs mentions the use of a VPN at all, let alone by Mr. Gericke specifically. *See* <https://www.justice.gov/opa/press-release/file/1432621/download>. These allegations, which purport to inform the Court of completely irrelevant criminal activity, are immaterial, impertinent and scandalous—and thus must be struck. *See Cty. of Gilpin*, 2010 WL 3341208, at *1–2.

CONCLUSION

For the forgoing reasons, PIA respectfully requests that the Court strike Paragraphs 48, 77–84, 86–92, 95–96, and the above-quoted portions of paragraph 4 of the SAC, pursuant to Rule 12(f).

DATED: December 23, 2021.

Respectfully submitted,

s/A. John P. Mancini

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CERTIFICATE OF SERVICE

I hereby certify that, on the date below, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

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DATED: New York, New York, December 23, 2021

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:21-cv-01261-RM-SKC

Millennium Funding, Inc. *et al*,

Plaintiffs,

v.

Private Internet Access, Inc., *et al*.,

Defendants.

**STIPULATION FOR DISMISSAL OF DEFENDANTS EXPRESS VPN
INTERNATIONAL LTD (a BVI Limited Company) and EXPRESS VPN
INTERNATIONAL LTD (an Isle of Man Limited Company) WITH PREJUDICE
PURSUANT TO FED. R. CIV. P. 41**

Plaintiffs MILLENNIUM FUNDING, INC., VOLTAGE HOLDINGS, LLC, LHF PRODUCTIONS, INC., OUTPOST PRODUCTIONS, INC., AFTER II MOVIE, LLC, MILLENNIUM MEDIA, INC., WONDER ONE, LLC, HITMAN TWO PRODUCTIONS, INC., MILLENNIUM IP, INC., I AM WRATH PRODUCTIONS, INC., KILLING LINK DISTRIBUTION, LLC, VENICE PI, LLC, RAMBO V PRODUCTIONS, INC., MON, LLC, NIKOLA PRODUCTIONS, INC., BODYGUARD PRODUCTIONS, INC., YAR PRODUCTIONS, INC., DALLAS BUYERS CLUB, LLC, SF FILM, LLC, SCREEN MEDIA VENTURES, LLC, SPEED KILLS PRODUCTIONS, INC., LAUNDRY FILMS, INC., CINELOU FILMS, LLC, BADHOUSE STUDIOS, LLC, HANNIBAL CLASSICS INC., and JUSTICE EVERYWHERE PRODUCTIONS LLC (“Plaintiffs”) and Defendants EXPRESS

VPN INTERNATIONAL LTD (a BVI Limited Company) and EXPRESS VPN INTERNATIONAL LTD (an Isle of Man Limited Company) (both ExpressVPN entities collectively referred to as “ExpressVPN”), through their counsel, hereby file this joint stipulation for dismissal with prejudice of all claims asserted herein by Plaintiffs against ExpressVPN.

Plaintiffs and ExpressVPN do not seek an award of attorney’s fees and/or costs.

No claims, including any counterclaim, cross-claim, or third-party claim, would remain between Plaintiffs and ExpressVPN following dismissal.

This Stipulation has been executed by counsel for Plaintiffs and counsel for ExpressVPN.

Note that this action does not terminate the matter as claims remain against Defendant PRIVATE INTERNET ACCESS, INC.

DATED: March 12, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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DATED: Kailua-Kona, Hawaii, March 12, 2022.

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