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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**

17 LIBERTY MEDIA HOLDINGS, LLC, a
California Corporation,
18 Plaintiff
19 vs.

20 FF MAGNAT LIMITED d/b/a/ ORON.COM;
21 MAXIM BOCHENKO a/k/a/ ROMAN
ROMANOV; and JOHN DOES 1 - 500.
22 Defendants.

Case No. CV 2:12-cv-01057 GMN-RJJ

**DEFENDANT FF MAGNAT LIMITED'S
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION AND
APPOINTMENT OF RECEIVER**

Hearing: August 9, 2012
Time: 1:30 PM
Judge: Hon. Gloria M. Navarro
Courtroom: 7D

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1 Defendant FF Magnat Limited dba Oron.com (“Oron”) hereby responds to the Court’s Order
2 to Show Cause and opposes Plaintiff Liberty Media Holdings LLC’s (“Plaintiff”) motion for
3 preliminary injunction and appointment of a receiver.¹

4 **I. INTRODUCTION**

5 Oron is a Hong Kong based computer file storage company that provides worldwide “cloud”
6 services to private individuals, businesses, and professional users. Its website, Oron.com, is strictly
7 governed by its extensive Terms of Service to which each user or guest must agree. Oron is fully
8 compliant with laws such as the Digital Millennium Copyright Act (discussed below), the
9 Communications Decency Act (DCA), and similar worldwide legislation.

10 Plaintiff is a producer of hard core gay pornographic material, some of which third persons
11 have allegedly stored on Oron’s servers without Plaintiff’s permission. When compared to the total
12 amount of third party files stored on Oron’s servers, the amount of Plaintiff’s material is
13 infinitesimal, comprising less than one tenth of one percent (0.1%).

14 Plaintiff is not seeking an injunction against Oron’s allegedly infringing activity. It
15 obviously knows that any such motion would be doomed to fail. Rather, Plaintiff applies for a
16 preliminary injunction to continue freezing Oron’s assets and to shut down its payment processors so
17 that Oron cannot generate any new revenue from anywhere in the world, even though the
18 overwhelming percentage of Oron’s revenue is generated from users outside of the United States. If
19 granted, the injunction will put Oron out of business, and the massive amount of legitimate data that
20 innocent users have stored with Oron will be irretrievably lost. In fact, the effect of the TRO has
21 been to effectively shut Oron down even before there was a hearing on the preliminary injunction.

22
23
24 ¹ In filing this opposition, Oron does not intend to waive any defenses based on lack of personal
25 jurisdiction, venue or improper service of the summons and complaint. Consequently, Oron is
26 specially appearing. Oron does not intend to submit to this Court’s jurisdiction or to waive any right
27 to challenge jurisdiction and/or improper service. To the contrary, Oron expressly reserves its right
under the Federal Rules of Civil Procedure to challenge personal jurisdiction and service by way of a
preliminary injunction motion under circumstances such as those present here does not constitute a
waiver. *See, e.g., Hendricks v. Bank of America, N.A.*, 408 F.3d 1127, 1135 (9th Cir. 2005).

1 Plaintiff also requests the appointment of a receiver. If the injunction is granted, there will be
2 no business over which a receiver could preside. In any event, the very high barrier for appointment
3 of a receiver has not been met and there is no basis for any such order. The preliminary relief sought
4 by plaintiff should be denied for a number of independent, dispositive reasons.

5 1. The proposed injunction would be improper. Legally, the United States Supreme
6 Court has made it clear that asset-freezing injunctions are not available to ensure that assets remain
7 in place to satisfy a plaintiff's monetary damage claim. They are only available to keep in place
8 particular assets that may become the subject of a permanent injunction if the plaintiff prevails. Yet
9 the injunction here is sought as to all of Oron's assets and is not tied in any way to any specific
10 assets to which Plaintiff may be entitled. That is not lawful.

11 2. The Court does not have personal jurisdiction over Oron. Oron is a Hong Kong
12 company and Plaintiff has not alleged any legally sufficient contacts that Oron has had with the State
13 of Nevada other than the fact that Oron operates a website that can be accessed from anywhere in the
14 world. Less than 15% of Oron's business is with users in the United States. Under such
15 circumstances, case law makes clear that this Court does not have personal jurisdiction over Oron.
16 Oron will establish this in its motion to dismiss, but for present purposes, Plaintiff has not
17 demonstrated that it is likely to prevail in establishing that jurisdiction exists.

18 3. Plaintiff is not likely to prevail on its copyright claims. Congress has enacted specific
19 legislation to provide a safe harbor for internet hosts like Oron on which third parties post infringing
20 materials. The Digital Millennium Copyright Act ("DMCA") provides that if an internet host
21 promptly removes infringing material when it becomes aware of it, the host is not liable for the
22 infringement. That is what happened here. Since 2001, Oron has had a detailed program to deal with
23 the removal of allegedly infringing content and it is entitled to the safe harbor protection afforded by
24 the DMCA. Yet Plaintiff has essentially ignored the DMCA and the fact that it cannot maintain its
25 substantive copyright infringement claims against Oron.

26 Moreover, even if Oron did not qualify for the DMCA safe harbor (which it does), Plaintiff
27 has failed to allege facts demonstrating that Oron has violated the copyright laws. In addition,

1 Plaintiff's claims for conspiracy and unfair business practices are simply derivative of the copyright
2 claims, and they fail as well. Moreover, given Plaintiff's inability to prove its substantive copyright
3 claims, this Court should consider carefully Plaintiff's focus on collection, enforcement, and the
4 freezing of Oron's assets. This focus on Oron's mechanism of worldwide payment, rather than the
5 merits of Plaintiff's claims, belies Plaintiff's true goal – the complete destruction of Oron's business.

6 4. Plaintiff has not demonstrated irreparable harm. Plaintiff concedes that its
7 copyrighted material has been removed by Oron from its website. Thus, Plaintiff's claim is one
8 simply for money damages for past infringement. No injunction is appropriate for that. Plaintiff
9 nevertheless maintains that it will be irreparably harmed by Oron "hiding" its assets so that Plaintiff
10 will not be able to recover its damages if it prevails. That theory fails both factually and legally.
11 Factually, the Court must scrutinize the "evidence" that Plaintiff proffers. It consists of a single
12 email, apparently hacked from Oron's email by an unidentified "third party," showing a transfer of
13 funds from Oron's PayPal account in the United States to Oron's bank in Hong Kong. (Declaration
14 of Marc J. Randazza in Support of Motion for Temporary Restraining Order (Dkt. 4) ("Randazza
15 Decl."), ¶ 4 & Ex. C). PayPal is one of Oron's payment processors. Oron is a Hong Kong business
16 and maintains its bank accounts there. Transfers of funds from PayPal to Oron's Hong Kong banks
17 are part of the company's ordinary course of business. The funds in the PayPal account that were
18 transferred converts to US \$109,890, a normal business transaction, and not a particularly large one
19 considering the income the company had at the time. (Declaration of Davidoglov Stanislav in
20 Opposition to Motion for Preliminary Injunction, ("Stanislav Decl."), ¶ 19).

21 5. The balance of hardships does not and cannot favor Plaintiff. At most, Plaintiff has a
22 very limited damage claim for some past infringement of its pornographic films. By contrast, if this
23 injunction is granted, Oron's multimillion dollar business will be destroyed and all of the data stored
24 by innocent users on Oron's service will be irretrievably lost.

25 For all of these reasons, it is respectfully submitted that Plaintiff's requests for preliminary
26 injunction and for the appointment of a receiver should be denied. If for some reason the Court is
27 inclined to order injunctive relief, it should be limited to assets of Oron to which Plaintiff might

1 ultimately be found entitled on equitable grounds (not damages), should be fashioned in a way that
2 will allow Oron to continue to conduct its business and defend itself until proven to have done
3 something wrong, and should be conditioned upon the posting of a bond sufficient to compensate
4 Oron for the losses it will have suffered if Plaintiff does not prevail.

5 **II. BACKGROUND**

6 **A. Factual Background**

7 **1. The Parties**

8 Oron is a legitimate business located in Hong Kong. Oron is a file storage company that
9 provides data storage services accessible on the internet throughout the world to private individuals,
10 businesses and professional users. Oron owns the domain name, Oron.com, which was registered in
11 2001. (Stanislav Decl., ¶ 2). Like well-known “cloud services” offered by such companies as Apple
12 (“iCloud” and apple.me), Amazon, Google, Hewlett Packard and DropBox, Oron offers its users the
13 ability to upload and store large amounts of data on secure, remote servers. The users have complete
14 control over their stored data and decide whether to share their data with others. (*Id.*).

15 Plaintiff is the parent company of and does business as CORBIN FISHER®. Although the
16 complaint alleges that Plaintiff “produces, markets and distributes adult-oriented audiovisual works,”
17 that description understates Plaintiff’s business. More accurately, Plaintiff is “a distributor of
18 lawful, albeit hardcore pornography.” *Liberty Media Holdings, LLC vs. Swarm Sharing Hash File et*
19 *al*, 821 F.Supp.2d 444, 447 n.2 (D. Mass. 2011). Plaintiff and CORBIN FISHER® have been
20 described as “America’s most litigious . . . porn studio,” and is a producer and distributor of “gay
21 hard core pornography.”² A simple internet search reveals that Plaintiff has filed numerous “mass
22 defendant” lawsuits alleging copyright infringement against a host of companies as well as hundreds
23 of individuals, including many of Plaintiff’s own customers. Plaintiff is developing a reputation as a
24 “troll litigator” in the arena of copyright infringement, whose business plan is to pursue large
25 monetary recoveries through litigation involving questionable claims of infringement.

26
27 ² See <http://www.queerty.com/did-americas-favorite-bareback-studio-spend-500k-on-gay-xxx-just-to-block-it-20111007/>.

2. The Oron.com Website and Oron's Efforts to Stop Infringement

Oron runs its business through its website, Oron.com. Oron allows free storage and access to data on its website but charges a flat fee for its premium service, which allows faster uploading and downloading and longer storage. (Stanislav Decl., ¶ 3). Contrary to the allegation that that Oron's "largest contingent of users are from the United States," publicly available information, such as WHOIS domain tools, demonstrates that only 14.3% of visitors to Oron's website come from the United States. (See Site Profile, <http://whois.domaintools.com/oron.com>). The majority of Oron's users are from Europe and Asia and the overwhelming percentage of its revenue is derived from users outside of the United States. (*Id.* ¶ 4).

In fact, Plaintiff's files are a miniscule part of Oron's website. It is estimated that Plaintiff's files constitute significantly less than one-tenth of one percent of the data stored on Oron.com. That figure comprises only material not yet taken down, either after notice from Plaintiff or, as discussed below, as a result of Oron's copyright enforcement program. Thus, more than 99.9% of Oron's customers, none of whom have been alleged to infringe anyone's intellectual property rights, will lose access to their stored data files if the preliminary injunction is granted. (*Id.* ¶ 5).

If a subscriber wishes to use Oron's file sharing services, he or she uploads material to the www.oron.com website, where it is stored on various servers that Oron leases from an independent, well-known hosting service, LeaseWeb. Oron creates a unique URL which allows that subscriber to access and download the material. While a subscriber may choose to share that URL with others so that they can also access the subscriber's material, Oron is not involved in any such decisions. Oron does not operate a "peer to peer" system like Napster or Grokster, which have been held to run afoul of the copyright laws. Oron plays no active role in the uploading or sharing of material on its website and it does not "publish" anything, contrary to the allegations of the Complaint. (*Id.* ¶ 6).

Oron strictly maintains the privacy of its users. It does not index the materials that are uploaded and it maintains no catalogue or search function to locate or access data. Given the massive amount of data stored on its servers, it is impossible for Oron to continually search its users'

1 private data for infringing material other than through the use of MD5 hash algorithms³ provided to
 2 Oron by the copyright owner. Indeed, Oron would not know whether any particular material is
 3 infringing, unless a copyright holder reports the abuse. For example, a subscriber may have legally
 4 purchased a movie and uploaded it to the site so that he can later watch it while traveling. Although
 5 the material may be protected by copyright, the subscriber has done nothing illegal. (*Id.* ¶ 7).

6 Oron is and for years has been extremely diligent in establishing safeguards to deal with
 7 potential copyright infringement. Since 2001, Oron has had a program in place under the DMCA by
 8 which a copyright owner can report copyright infringement on Oron’s website. A copyright owner
 9 need only go to the front page of the website to the “report abuse” link, and the offending material
 10 will be deleted. (*Id.*, ¶ 8 & Exs. A, B). In addition, Oron’s Terms of Service, which are also
 11 available on the front page of the website, expressly set forth how to report suspected copyright
 12 infringement, and provide an additional link to “report abuse.” (*Id.*, ¶ 9 & Ex. C, at ¶ 8.4.2 (16)).

13 On June 15, 2011, Oron registered a specified agent with the United States Copyright Office
 14 pursuant to the DMCA. While Plaintiff argues that this shows Oron did not have a DMCA program
 15 in place prior to 2011, that argument is misleading at best. It is undisputed that Oron had an agent
 16 registered with the Copyright Office prior to the initiation of this lawsuit. Moreover, other than the
 17 addition of the agent’s physical address, and the inclusion of limitation of liability and choice of
 18 law/venue provisions, Oron’s Terms of Service have been in place since 2001. (*Id.*, ¶ 10). Since
 19 2001, Oron has removed infringing material pursuant to the DMCA whenever it received notice of
 20 abuse, including DMCA notices from Plaintiff sent prior to Oron formally registering its agent with
 21 the Copyright Office. (*Id.*, ¶ 11 & Exs. D, E). In fact, Plaintiff concedes that “Defendants have
 22 removed the majority of the videos listed in Exhibit 10 of the Complaint...” (Motion at 6:6-7).
 23 Thus, although it did not have an agent registered with the U.S. Copyright Office until 2011 – more
 24

25 ³ “The MD5 Message-Digest Algorithm is a widely used cryptographic hash function that produces a
 26 128-bit (16-byte) hash value. Specified in RFC 1321, MD5 has been employed in a wide variety of
 27 security applications, and is also commonly used to check data integrity. . . . MD5 digests have been
 28 widely used in the software world to provide some assurance that a transferred file has arrived
 intact.” (See <http://en.wikipedia.org/wiki/MD5>).

1 than a year before this lawsuit was filed – copyright holders, including Plaintiff, have had the means
2 to report copyright abuse, and Oron has immediately acted upon such reports by taking down the
3 infringing material. Moreover, this motion for an injunction seeks prospective relief, and there is no
4 dispute that Oron has a fully implemented DMCA program in place to deal with any future copyright
5 infringement on its website, including an agent registered pursuant to the DMCA.

6 In addition to its policy of responding to DMCA take-down notices, Oron has also assisted
7 others – again, including Plaintiff – with their efforts to monitor Oron.com for potential copyright
8 infringement. For example, on January 13, 2011, Plaintiff notified Oron that it had appointed the
9 organization Porn Guardian to submit DMCA notices on its behalf. (*Id.*, ¶ 12 & Ex. F). In
10 response, Oron granted Porn Guardian access to a removal tool that enables it to directly take down
11 infringing material from Oron’s website with impunity. (*Id.*, ¶ 13 & Ex. G). When Porn Guardian
12 had difficulty removing some content (e.g., content located within folders), Oron.com offered to
13 process those folders manually. (*Id.*, ¶ 14 & Ex. H). Further, prior to allowing final deletion of any
14 material taken down by Porn Guardian, Oron has automated the running of MD5 Hash algorithms on
15 all such material, thus blocking any such material from ever being uploadable again on Oron’s
16 servers. (*Id.*, ¶ 15). The latter two technical means have effectively blocked third parties from
17 uploading repeat infringing content to Oron’s servers. (*Id.*)

18 Importantly, Oron has had a strict “termination of repeat infringer” policy in place since
19 2001, and has on many occasions terminated subscribers due to repeated illegal activities of which
20 Oron became aware. (*Id.*, ¶ 16 & Ex. C, at ¶ 8.4.3). In addition, Oron has a process whereby a
21 copyright holder can provide Oron with an MD5-Hash identifier (a unique identification of
22 copyrighted material, similar to fingerprint) and Oron will search its system to see if any such
23 material has been uploaded, and if so, will block it. (*Id.*, ¶ 17).

24 Plaintiff’s aspersions that Oron is a “child pornography” site and its attempts to label Oron a
25 “criminal” are beyond unfounded. Oron’s extensive Terms of Service, to which every user must
26 agree to comply, specifically address the issue of “child abuse content.” (*Id.*, ¶ 18 & Ex. C, ¶ 8).
27 Oron has always maintained a relationship with the National Center for Missing & Exploited

1 Children’s CyberTipLine. Oron has developed and implemented certain key word filters to detect
2 the uploading of child abuse content to its servers. Oron is also one of the few cloud hosting
3 providers that is a member of the Internet Watch Foundation (“IWF”), the UK hotline for reporting
4 criminal online content with a primary focus on protecting children. Acceptance into the IWF
5 includes a rigorous review process by the members of the IWF. Oron has implemented a specific
6 action plan to mitigate the risks with or exposure to any child abuse content. (*Id.*, ¶ 18).

7 **B. Procedural History**

8 On June 20, 2012, Plaintiff filed its complaint in this action, and at the same time filed its
9 Emergency Motion for Ex Parte Temporary Restraining Order, Order for Seizure, and Appointment
10 of Receiver, and Order to Show Cause Re Preliminary Objection. Plaintiff sought ex parte relief,
11 without notice to Oron, based on bare allegations that Defendants had “already taken affirmative
12 steps to move assets beyond the court’s reach in order to frustrate any order the court may issue.”
13 (Motion at 10:11-14). However, Plaintiff has presented the Court with no admissible evidence to
14 support its motions. Plaintiff relies upon a declaration of its litigation counsel, based upon
15 information and belief rather than personal knowledge. The only “evidence” that Plaintiff presented
16 was a single email obtained from an unspecified third party of a single legitimate transfer of Oron’s
17 funds in the amount of HKD 852,278.58, from its PayPal account to its bank in Hong Kong.⁴ There
18 is nothing nefarious or improper about a Hong Kong company transferring funds from its PayPal
19 provider to its bank in its domicile. Indeed, the amount transferred, which converts to US \$109,890,
20 is not particularly large given the company’s income at the time of the transfer. (*Id.*, ¶ 19).

21 On June 21, 2012, the Court entered an Order (e-Docket 11) freezing all of Defendants’
22 assets pending the hearing on Plaintiff’s request for a preliminary injunction, including all assets in
23 any U.S. bank or financial institution, and any funds held for Oron by PayPal, Inc., CCBill, LLC,
24

25 ⁴ Oron strongly believes that the Plaintiff through this unidentified third party hacked Oron’s emails
26 or its PayPal account to obtain this email. Furthermore, Oron has just learned that Plaintiff filed an
27 earlier action against only “Doe Defendants” and used that action to serve subpoenas regarding
28 Oron, without any notice whatsoever to Oron. Oron requests that this Court obtain from Plaintiff a
full accounting of all related actions and prior related discovery, as no related actions were disclosed
to this Court pursuant to the requirements of LR 7-2.1.

1 and AlertPay, the companies that processed payments for Oron before the court's TRO stopped
2 them. The Court further enjoined Defendants "from disgorging or dissipating any funds, property,
3 domain names, or other assets until further notice."⁵ See TRO at 2-3. The Court made a limited
4 modification to the TRO on June 26, 2012 to allow for the disbursement of \$100,000 to Oron to
5 defend against the TRO. (Dkt. 19). Subsequently, the Court denied in part a second emergency
6 motion to allow for further funds to be disbursed from Oron's PayPal account to pay LeaseWeb for
7 the lease of Oron's servers, although the court did allow Oron's payments processor PayPal to accept
8 funds from Oron's customers subject to the TRO. (Dkt. 27).

9 Plaintiff has also instituted legal proceedings against Oron in Hong Kong, by which it
10 obtained a temporary restraining order freezing "up to US\$3,000,000." (Stanislav Decl. ¶ 20 & Ex.
11 D). That order expressly allows Oron to pay legal fees and business expenses, but Oron's bank in
12 Hong Kong nevertheless refused Oron access to its funds for as long as the order is in place. (*Id.*, ¶
13 21 & Ex. I). However, due to the bank's uncertainty as to the effect of the Hong Kong court's order,
14 the bank has refused to transfer any funds under any circumstances, thus leaving Oron without
15 access to any funds in any country of any sort. (*Id.*)

16 Despite the Court's subsequent modifications, the harsh reality is that as of August 1, 2012,
17 Oron will not be able to meet its legitimate business expenses, including the payments to LeaseWeb.
18 Its hosting provider will shut down Oron's servers, which are the life blood of any file sharing
19 business such as Oron's, and Oron's customers will no longer be able to access any of their data or
20 files. Oron's payment processors will not do business with Oron. Effectively, Oron's worldwide
21 multimillion dollar company will be shut down and out of business. (*Id.*, ¶22).

22 III. ARGUMENT

23 A. A Preliminary Injunction Would Be Improper Here

24 A court may, in appropriate cases, use its equitable power to issue a preliminary injunction to

25
26 ⁵ The Court stated that the Order "does nothing more than prohibit Defendants from fraudulent
27 transfers and compels that they unwind those in which they have already engaged." However, the
28 broad language that Defendants may not dissipate any funds, read literally, goes further and prevents
Defendants from spending any money for any legitimate purpose.

1 maintain the status quo in a way that will allow a permanent injunction to be enforced. However, the
2 United States Supreme Court held in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,*
3 *Inc.*, 527 U.S. 308 (1999) that a district court has no authority to issue a preliminary injunction
4 freezing a defendant's assets in connection with a claim for money damages, which is what Plaintiff
5 seeks through this motion. The *Grupo Mexicano* Court stressed the historical principle that an
6 unsecured creditor has no legal or equitable prejudgment rights in the property of a debtor. *Id.* at
7 328-330. As the Supreme Court explained:

8 The remedy [of a preliminary injunction freezing assets] sought here could
9 render Federal Rule of Civil Procedure 64, which authorizes use of state
10 prejudgment remedies, a virtual irrelevance. Why go through the trouble of
11 complying with local attachment and garnishment statutes when this all-
12 purpose prejudgment injunction is available?

13 *Id.* at 330-331. The Court warned against allowing creditors to race to the courthouse to freeze
14 assets in a way that could prove "financially fatal" to debtors. *Id.* at 331. That is what has indeed
15 happened since the TRO has been "financially fatal" to Oron.

16 The preliminary injunction sought here is also inappropriate because it is not limited to funds
17 or property that will be subject to permanent equitable relief if Plaintiff ultimately prevails. Rather,
18 Plaintiff seeks a preliminary injunction to freeze all of Oron's assets, whatever they may be and
19 wherever they may be located, with no evidence that such assets are in any way involved in this
20 case. As indicated above, less than one-tenth of one percent of the files stored on Oron's servers are
21 possibly Liberty Media's materials. The remaining 99.9% plus of Oron's business involves users
22 whose files have nothing to do with Liberty Media and for whom no allegations of copyright
23 infringement have or can be made. The Ninth Circuit has made clear that a district court "cannot
24 issue a preliminary injunction to freeze assets of a defendant that are unrelated to the case to ensure
25 the defendant will have money to pay a future judgment." *In re USA Commercial Mortgage Co.*,
26 397 Fed. Appx. 300, 306 (9th Cir. 2010) (citing *Grupo Mexicano*, 527 U.S. at 333).

27 Even in cases where a preliminary injunction to freeze assets might be proper in order to
28 maintain the status quo so that the court can afford final injunctive relief, the barrier to obtaining
such an injunction is a high one that has not been met here:

1 Even under the more lenient standard for claims seeking equitable
2 relief...[the plaintiff] would have to show a ‘likelihood of dissipation of the
3 claimed assets, or other inability to recover monetary damages, if relief is
4 not granted. Courts have construed this standard narrowly, only exercising
5 their inherent authority to freeze assets where there is considerable evidence
6 of likely asset dissipation. . . . Certainly, every creditor would like to freeze
7 its alleged debtor’s assets before proving its claims, increasing leverage in
8 settlement negotiations and the chances of collecting any judgment. In the
9 typical case, however, such an imposition on the alleged debtor and the
10 courts is not justified.

11 *Allstate Insurance Co. v. Baglioni*, No. CV 11–06704 (DDP), 2011 WL 5402487, *2 (C.D. Cal.,
12 November 8, 2011) (citations omitted). The *Allstate* court denied a preliminary injunction even
13 though there was a transfer of property that was “quite possibly fraudulent.” *Id.* Here, on the other
14 hand, the only “evidence” that has been provided to the Court is a copy of a hacked email that
15 reflects a transfer of funds from Pay Pal to Hong Kong – where Oron is domiciled. (*See* Randazza
16 Decl., ¶ 4, Ex. C; Stanislav Decl., ¶ 19). There is no evidence that this transfer, if it occurred, was
17 anything other than a transfer made in the ordinary course of Oron’s business, and it certainly does
18 not justify the extraordinary relief of freezing all of Oron’s assets. (*See* Stanislav Decl., ¶ 19).

14 **B. This Court Lacks Personal Jurisdiction Over Defendant**

15 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the
16 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
17 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
18 *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). As the Supreme Court has explained, a
19 preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing
20 that the plaintiff is entitled to such relief.” *Id.* at 22, 32.

21 Here, Plaintiff cannot establish that it is likely to succeed on the merits of the claim because
22 it cannot establish one of the fundamental prerequisites to its lawsuit, personal jurisdiction over
23 Oron. Plaintiff bears the burden of demonstrating that personal jurisdiction exists over each of the
24 defendants in an action as of the date the complaint was filed. *Doe v. Unocal Corp.*, 248 F.3d 915,
25 922 (9th Cir. 2001); *Porche v. Pilot & Associates, Inc.*, 2009 WL 688988 (9th Cir. 2009). “Personal
26 jurisdiction over a nonresident defendant is tested by a two-part analysis.” *Chan v. Soc’y*
27 *Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994). “First, the exercise of jurisdiction must satisfy

1 the requirements of the applicable state long-arm statute.” *Id.* “Second, the exercise of jurisdiction
2 must comport with federal due process.” *Id.* at 1404-05.

3 Plaintiff contends that this Court has personal jurisdiction over Oron under Nevada's long-
4 arm statute, which extends jurisdiction to the limits of what due process allows. Plaintiff also asserts
5 personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), the federal long arm statute.⁶
6 Under this Rule, Plaintiff must establish that 1) the claim arises under federal law; 2) the Oron is not
7 subject to jurisdiction of any state’s court of general jurisdiction; and 3) the court’s exercise of
8 jurisdiction comports with due process. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1159 (9th Cir.
9 2006). Under either Nevada’s long arm statute or Rule 4(k)(2), the principal question is whether the
10 exercise of personal jurisdiction here comports with due process.

11 Due process requires that a nonresident defendant have sufficient minimum contacts with the
12 forum state so that the exercise of jurisdiction does not offend traditional notions of fair play and
13 substantial justice. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Applying the
14 “minimum contacts” analysis, a court may obtain either general or specific jurisdiction over a
15 defendant. General jurisdiction is available where the foreign defendant’s activities in the forum are
16 substantial, continuous and systematic, even if the subject of the suit is unrelated to his or her
17 contacts to the forum. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 (1952).
18 “The standard for establishing general jurisdiction is ‘fairly high,’ ... and requires that the
19 defendant’s contacts be of the sort that approximate physical presence....Factors to be taken into
20 consideration are whether the defendant makes sales, solicits or engages in business in the state,
21 serves the state’s markets, designates an agent for service of process, holds a license, or is
22 incorporated there.” *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082, 1086 (9th
23 Cir. 2000). In fact, the Ninth Circuit has “regularly ... declined to find general jurisdiction even
24

25 _____
26 ⁶ Plaintiff also alleges that “[a]s a foreign defendant, Oron is subject to jurisdiction in any district.”
27 Complaint, ¶ 22 (citing 28 U.S.C. § 1391). That statute, however, is a venue provision, and does not
28 in any way create personal jurisdiction over Oron. *See, e.g., Weinstein v. Norman M. Morris Corp.*,
432 F.Supp. 337, 339 (E.D. Mich. 1977) (“Section 1391(d), as its title indicates, is a venue statute
and not a statute creating personal jurisdiction in federal district courts.”).

1 where the contacts were quite extensive.” *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1
2 F.3d 848, 850, n 3 (9th Cir. 1993).⁷

3 A court may exercise specific jurisdiction over a foreign defendant if his or her less
4 substantial contacts with the forum give rise to the cause of action before the court. The question is
5 “whether the cause of action arises out of or has a substantial connection with that activity.” *Hanson*
6 *v. Denckla*, 357 U.S. 235, 250-253 (1958). The Ninth Circuit uses a three part test for specific
7 jurisdiction: “(1) the defendant has performed some act or consummated some transaction within the
8 forum or otherwise purposefully availed himself of the privileges of conducting activities in the
9 forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the
10 exercise of jurisdiction is reasonable.” *Bancroft & Masters*, 223 F.3d at 1086. Plaintiff cannot
11 establish either general or specific jurisdiction over Oron.

12 First, this Court does not have general jurisdiction over Oron, a Hong Kong corporation that
13 primarily does business with internet users from Europe, Asia and Russia. (Stanislav Decl. ¶ 4).
14 Contrary to the allegations of the complaint, only 14.3% of Oron’s online traffic is from the United
15 States, and Plaintiff has not shown *any* particular contacts that Oron has had with the State of
16 Nevada. (*Id.*). None of Oron’s employees, officers, directors or owners is a United States resident.⁸
17 (*Id.*, ¶ 23). The website oron.com is not registered with any registrar within Nevada; in fact, it is
18 registered outside of the United States.⁹ (*Id.*, ¶ 24). Oron has not entered into any contracts with
19 vendors in Nevada, does not have a registered agent to accept service of process in Nevada or the
20 United States, does not advertise or solicit its business in Nevada or the United States, and is not
21 incorporated in Nevada or the United States. (*Id.*, ¶ 25).

22 _____
23 ⁷ In *Amoco Egypt Oil Co.*, *supra*, 1 F.3d 848, 851, n.3, the Ninth Circuit noted that the non-resident
24 corporate defendant’s lack of a license to do business in the forum state, its lack of offices, property,
or employees in the state, and an absence of advertising or business solicitation in the state suggested
that the defendant’s contacts were inadequate to support the exercise of general jurisdiction.

25 ⁸ The complaint alleges that defendant Maxim Bochenko is a resident of Florida and Colorado who
26 is a “director/controlling party” of Oron. That is false. Mr. Bochenko is not an employee, officer,
director, managing agent or owner of Oron. (*See* Stanislav Decl., ¶ 23).

27 ⁹ In any event, registering a domain name with a U.S. company is insufficient to support personal
28 jurisdiction over a website operator. *See Graduate Mgmt. Admission Council v. Raju*, 241 F. Supp.
2d 589, 590 (E.D. Va. 2003).

1 Plaintiff nonetheless suggests that because the www.oron.com website is accessible to
2 residents of Nevada, minimum contacts are established. However, it has been held that a website
3 that permits Nevada residents, among all others in the world, to purchase products on-line is not
4 sufficient to subject Oron to general jurisdiction. *See, e.g., Mavrix Photo, Inc., v. Brand*
5 *Technologies, Inc.*, 2011 WL 3437047, *6 (9th Cir. 2011) (holding that occasional sales to forum
6 residents by a nonresident defendant do not suffice to establish general jurisdiction, and that
7 “Brand’s operation of an interactive website – even a ‘highly interactive’ website – does not confer
8 general jurisdiction.”). Plaintiff simply cannot meet the rigorous standards enunciated by the Ninth
9 Circuit for establishing general jurisdiction over Oron. *See Bancroft & Masters, Inc. v. Augusta*
10 *Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (general jurisdiction requires that defendant’s
11 contacts be so continuous and systematic that they approximate physical presence).

12 Second, this Court does not have specific jurisdiction over Oron. Plaintiff cannot meet the
13 first two prongs of the personal jurisdiction test because (1) Oron has not conducted any business
14 or had any contacts in Nevada; and (2) even if Oron had some insignificant contacts with Nevada,
15 Plaintiff’s claims do not “arise out of” those forum related contacts. Notably, Plaintiff’s
16 complaint does not identify any specific conduct by Oron occurring in Nevada, other than the
17 vague allegation that Oron’s website is accessible by residents of Nevada. However, courts have
18 been careful “in resolving questions of personal jurisdiction involving online contacts to ensure
19 that a defendant is not haled into court simply because the defendant owns or operates a website
20 that is accessible in the forum state, even if that site is ‘interactive.’” *Be2LLC v. Ivanov*, 642 F.3d
21 555, 558-559 (7th Cir. 2011). Moreover, the fact that Oron operates a website that is accessible
22 by Nevada residents does not establish specific jurisdiction because Plaintiff’s claims do not arise
23 out of that activity – there are no allegations in the complaint that the allegedly infringing material
24 was loaded onto Oron.com by a resident of Nevada.

25 Significantly, Plaintiff has made – and lost – the exact same argument in an identical case
26 filed against another file sharing company, SunPorno. In *Liberty Media Holdings LLC v. Serge*
27 *Letyagin d/b/a Sunporno.com*, Case No. 11-62107-CV-WILLIAMS (S.D. Fla. 2011), Plaintiff

1 initially sought a TRO to freeze assets and prevent the transfer of defendant's domain names to a
2 third party, although at the hearing it sought only an injunction concerning the domain names. (*See*
3 Request for Judicial Notice, filed herewith, Ex. A, at 2). The allegations against SunPorno were
4 essentially identical to the allegations that Plaintiff makes here. (*Id.*, Ex. A at 1-2). The district
5 court denied the injunction, in part because the Plaintiff had not shown that SunPorno's conduct
6 could, "in line with the Constitution, subject it to jurisdiction." The court rejected the Plaintiff's
7 argument – the same argument raised here – that Sunporno's "considerable" web traffic originating
8 from the United States (15% of its total traffic) was sufficient to establish jurisdiction. There was
9 also no showing that Sunporno's website directly targeted users in Florida.¹⁰ (*Id.*, Ex. A at 7-10).

10 The situation and arguments for the exercise of jurisdiction in this case are identical,
11 although Oron's users from the United States are even less than in SunPorno. There is no evidence
12 that Oron has specifically targeted users from Nevada or that any user from Nevada has infringed
13 Plaintiff's copyrights. Oron could not reasonably anticipate being "haled into court in Nevada"
14 based on its operation of a worldwide hosting, file sharing website

15 Finally, Plaintiff cannot establish specific jurisdiction over Oron by relying on the "effects
16 test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984). For *Calder* to apply, the plaintiff must
17 allege facts sufficient to meet a three-prong test: (1) the defendant must have committed an
18 intentional tort; (2) the defendant must have expressly aimed his tortious conduct at the forum state;
19 and (3) the defendant must have caused harm that the defendant knows is likely to be suffered in the
20 forum state. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004).

21 Plaintiff has not satisfied the elements of the *Calder* effects test. Although Oron is alleged to
22 have engaged in copyright infringement, it cannot be said that Nevada was the focal point of the
23 alleged tortious activity in the sense that the tort was "expressly aimed" at Nevada. The express
24 aiming requirement is satisfied when defendant is alleged to have engaged in wrongful conduct

25 _____
26 ¹⁰ The SunPorno court also rejected Liberty's arguments that its "business model is premised on
27 operating and broadcasting pirated works into the United States and that Defendant has "established
28 several jurisdictions" in the United States through unidentified advertising and contracting activity.
(*See* Request for Judicial Notice, , Ex. A, at 8, n.5).

1 individually targeted at a plaintiff whom the defendant knows to be a resident of the forum state.
 2 *See Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). As
 3 discussed in more detail below, there is no evidence that Oron had actual knowledge that allegedly
 4 infringing material had been uploaded onto its website, or that the party claiming to have exclusive
 5 rights to the copyrighted material was a resident of Nevada. And in any event, without individual
 6 targeting, mere knowledge that a plaintiff resides in the forum state is not necessarily sufficient to
 7 confer jurisdiction, even if harm occurs in the forum state. *Schwarzenegger*, 374 F.3d at 807.

8 Plaintiff has failed to meet its burden of establishing minimum contacts under either the
 9 Nevada long arm statute or Rule 4(k)(2), and thus cannot demonstrate that this Court has personal
 10 jurisdiction over Oron. As such, Plaintiff cannot establish that it is not likely to prevail in this case.

11 **C. Plaintiff Cannot Show a Likelihood of Success on the Merits of Its Claims**

12 Not only will Plaintiff be unable to establish personal jurisdiction, but its complaint will also
 13 fail because it cannot establish that it has any valid claims against Defendants. Consequently, it has
 14 no “likelihood of success” on its claims, and its motion for preliminary injunction should be denied.

15 **1. Copyright Infringement**

16 **a) Oron Is Entitled to the Safe Harbor Protection of the DMCA**

17 Oron cannot be held liable for copyright infringement since it falls under the safe harbor
 18 provision of the DMCA, 17 U.S.A. § 512 and as such, Plaintiff cannot show a likelihood of success
 19 with respect to the copyright claims which are at the heart of its complaint. Oron meets the
 20 requirements of Section 512(c) of the DMCA, and thus as a “service provider” it has no liability for
 21 “infringement of copyright by reason of the storage at the direction of a user of material that resides
 22 on a system or network controlled or operated by or for the service provider...” 17 U.S.A. §
 23 512(c)(1). This safe harbor provision limits liability for both direct and secondary copyright
 24 infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1175 (9th Cir. 2007).¹¹

25 _____
 26 ¹¹ Plaintiff alleges in its complaint that while a web hosting company could normally take advantage
 27 of the safe harbor provisions of the DMCA, Oron is not entitled to such protection because the
 28 alleged infringements took place prior to the Defendant registering a DMCA agent. (*See* Complaint,
 Para 46). Thus, Plaintiff’s only argument that the DMCA does not protect Oron appears to rest on

b) Oron Has Met the Conditions of Section 512(c)(1)

To qualify for safe harbor protection of the DMCA, a service provider must meet the three requirements delineated in section 512(c)(1):

- a. It must not have actual knowledge of the infringing material or activity on the network; or, in the absence of such knowledge, it must not be aware of facts from which the infringing activity is apparent; or upon obtaining such knowledge or awareness, acts expeditiously in removing or disabling access to the material;
- b. It does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control the activity; and
- c. Upon notification of claimed infringement (as described in section 512(c)(3)), it responds expeditiously in removing or disabling access to the material claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1)(A), (B), (C). Oron meets all three conditions.

First, with respect to the “knowledge” element, the Ninth Circuit has made clear that knowledge or awareness of the infringement must be specific and actual, because the copyright holder, rather than the service provider, is in a better position to know whether material is infringing:

Copyright holders know precisely what materials they own, and are thus better able to efficiently identify infringing materials they own, and are thus better able to efficiently identify infringing copies than service providers....who cannot readily ascertain what material is copyright and what is not. ...

[A] [service] provider could not be expected, during the course of its brief cataloguing visit, to determine whether [a] photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.

UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 667 F.3d 1022, 1037 (9th Cir. 2011) (citing S.Rep. No. 105-190, at 48 and H.R. Rep. No. 105-551, pt. 2, at 57-58). Here, Plaintiff has presented no evidence of Oron’s actual knowledge or awareness of any infringement of Plaintiff’s copyrighted

the timing of registration of the agent. However, as set forth below, the timing of Oron’s registration does not “save” Plaintiff’s claim or support its request for a preliminary injunction. To the contrary, Plaintiff has acknowledged that Oron has taken down the allegedly infringed materials (and has not specified any allegedly infringing material that still resides on the site). An injunction may only act prospectively, and cannot enjoin that which is moot.

1 material other than that which was reported to Oron and which Oron then removed.

2 Plaintiff appears to rely on the notion that merely because Oron's users are able to upload
3 copyrighted material, Oron must know of that infringement. But that is not enough. As the Ninth
4 Circuit has held, "if merely hosting [potentially protected] material . . . with the general knowledge
5 that one's services could be used to share unauthorized copies of copyrighted material, was
6 sufficient to impute knowledge to service providers, the § 512(c) safe harbor would be rendered a
7 dead letter: § 512(c) applies only to claims of copyright infringement, yet the fact that a service
8 provider's website contained copyrightable material would remove the service provide from § 512(c)
9 eligibility." *UMG Recordings*, 667 F.3d at 1036-37.

10 In addition, the three prongs of Section 512(c)'s "knowledge" requirement must be read as a
11 whole. "Under § 512(c)(1)(A), knowledge or awareness of infringement alone does not disqualify
12 the service provider from safe harbor protection, rather, the provider that gains knowledge of
13 infringing activity retains safe-harbor protection if it 'acts expeditiously to remove, or disable access
14 to, the material.'" *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2nd Cir. 2012). Plaintiff
15 concedes that Defendants have removed the majority of the allegedly protected materials identified
16 in the Complaint, and offers no evidence that allegedly infringing materials remain online, or that
17 Oron has not expeditiously removed such infringed materials once given notice.

18 Oron also meets the second element of the safe harbor provision relating to control. Oron
19 does not have the ability to control all of the infringing activity that may take place on its site. It
20 would be a "practical impossibility" for Oron to "ensure that no infringing material is ever uploaded
21 to its site, or to remove unauthorized material that had not yet been identified" to Oron as infringing.
22 *UMG Recordings, Inc.*, 667 F.3d at 1041. When a subscriber uploads material to the website, Oron
23 creates a unique URL which allows the subscriber, not Oron to provide access to the uploaded
24 material. (*See* Stanislav Decl., ¶6). There is nothing in this system that gives Oron the right and
25 ability to control the allegedly infringing conduct. There is no index of materials, and the database is
26 not readily searchable. (*Id.*, ¶ 7). In fact, it would be essentially impossible to "search" video files
27 for allegedly infringing content without actually viewing them. Even if it could, Oron would not

1 know whether any uploaded material was being used without the copyright holder’s permission.
 2 Only the subscribers control whether they infringe copyrights by sharing their URL so that others
 3 have access to copyrighted material. (*Id.*) As such, Oron does not “possess the ‘needed powers ... or
 4 needed resources’ to be ‘competen[t] in’ exercising the sort of ‘restraining domination’ that §
 5 512(c)(1)(B) requires for denying safe harbor eligibility.” *Id.* “A service provider’s general right
 6 and ability to remove materials from its services is, alone, insufficient.” *Id.* at 1043.

7 Nor does Oron directly benefit financially from the allegedly infringing activity. A “direct
 8 financial benefit” is one in which the service provider derives “a direct financial benefit from the
 9 infringement and ha[s] the right and ability to supervise the infringing activity.” *Perfect 10, Inc. v.*
 10 *CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007)(quoting *Ellison v. Robertson*, 357 F.3d 1074, 1078
 11 (9th Cir. 2004)). Hosting a website, sometimes for a fee – as Oron does here – is insufficient to
 12 show that the infringing activity was a “draw” for subscribers, and not just an added benefit, as is
 13 required. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d at 1117-1118.

14 Oron also satisfies the third safe harbor condition of Section 512(c)(1). As Plaintiff
 15 concedes, once a DMCA notice is submitted to Oron, the infringing material is taken down. (TRO
 16 Motion at 6:6-7). Plaintiff fails to provide any evidence that Oron has knowledge of any material of
 17 Plaintiffs that Oron has refused to take down. Moreover, for more than 18 months, Oron has given
 18 Plaintiff’s own agent, Porn Guardian, unprecedented access to Oron’s servers to directly remove any
 19 infringing material that belongs to Plaintiff. (*See* Stanislav Decl., ¶ 13 Ex. 13).

20 **c) Defendant Has Also Met the Conditions of section 512(i)**

21 In addition to satisfying Section 512(c)(1), to qualify under the safe harbor provision a
 22 service provider must also meet the requirements of section 512(i), namely, that it:

- 23 a. Has adopted and reasonably implemented a termination policy
 24 of repeat infringers, and informs subscribers and account
 25 holders of the same; and
 26 b. Accommodates and does not interfere with standard technical
 27 measures.

28 17 U.S.C. §§ 512(i)(A), (B).

1 Oron has satisfied both requirements. First, Oron has adopted a strict termination policy
 2 against repeat infringers. Paragraph 8.4.3 of the terms of service agreement (which terms
 3 subscribers must agree to before entering the site) provides that: “We have a policy of terminating,
 4 without notice and without recourse, accounts of subscribers or account holders who are repeat
 5 infringers of copyright based upon a suspicion on our part or a notice we receive regardless of any
 6 proof of infringement.” Oron has rigorously implemented this policy. When there are repeat
 7 infringers, their accounts are blocked and terminated. (*See* Stanislav Decl., ¶¶ 16 & Ex. C).

8 Second, Oron accommodates and does not interfere with standard technical measures.¹² To
 9 the contrary, Oron gave Plaintiff (through its agent Porn Guardian), direct access to Oron’s servers to
 10 search for and take down infringing material. (*Id.*, ¶ 12-14).

11 **d) Defendant Has Met the Conditions of section 512(c)(2)**

12 Under the DMCA, a service provider is also supposed to designate an agent to receive
 13 notifications of claimed infringement. The contact information is to be made available to the public
 14 on its website, and provided to the U.S. Copyright Office. 17 U.S.C. § 512(c)(2).

15 Here, Oron has had a DMCA program in place since 2001, and the “report abuse” and “terms
 16 of service” links, visible on the first page of the website, clearly identify how and to whom to report
 17 incidents of copyright infringement. (*See* Stanislav Decl., ¶¶ 8, 9 & Exs. A-C). While Oron
 18 formally designated an individual agent with the Copyright Office on June 15, 2011 (*id.*, ¶ 10), the
 19 absence of a registered agent prior to that time did not in any way impede Plaintiff’s ability to send
 20 DMCA notices to Oron – it is undisputed that Plaintiff sent DMCA Notices to Oron prior to June
 21 15, 2011, and those Notices were quickly acted upon. (*Id.*, ¶ 11 & Exs. D, E). Oron also gave
 22 Plaintiff’s agent Porn Guardian access to Oron’s servers to search for and remove infringing material
 23 well before Oron designated its agent with the Copyright Office. (*Id.*, ¶¶ 12-14),

24 _____
 25 ¹² The “term ‘standard technical measures’ means technical measures that are used by copyright
 26 owners to identify or protect copyrighted works and -- (A) have been developed pursuant to a broad
 27 consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry
 28 standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and
 (C) do not impose substantial costs on service providers or substantial burdens on their systems or
 networks.” 17 U.S.C. § 517(i)(2).

1 Because Oron is afforded the protections under the DMCA safe harbor provision, it cannot
2 be held liable for monetary damages for copyright infringement or permanently enjoined. Thus, an
3 injunction freezing Oron's assets based upon claims of copyright infringement would be completely
4 inappropriate because Plaintiff is not likely to succeed on the merits of its claims.

5 **e) Plaintiff Cannot Show a Substantial Likelihood of Success on its**
6 **Direct Copyright Infringement Claim**

7 Even if the DMCA safe harbor provision did not apply (which it does), Plaintiff has not
8 demonstrated that it is likely to succeed on the merits of its various copyright infringement claims.

9 To establish a case of direct copyright infringement, a plaintiff must show that 1) it owns the
10 copyright for the allegedly infringing material, and 2) that defendant violated at least one of the
11 exclusive rights of the copyright holder. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159
12 (9th Cir. 2007). In addition, a "plaintiff must also show volitional conduct on the part of the
13 defendant in order to support a finding of direct copyright infringement." *Field v. Google, Inc.*, 412
14 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (citing to *Religious Tech. Ctr. v. Netcom On-Line Commc'n*
15 *Servs., Inc.*, 907 F.Supp. 1361, 1369-70 (N.D. Cal. 1995)); *see also CoStar Group, Inc. v. LoopNet,*
16 *Inc.*, 373 F.3d 544, 547 (4th Cir. 2004) (holding that because the defendant, "as an Internet service
17 provider, is simply the owner and manager of a system used by others who are violating [plaintiff's]
18 copyrights and is not an actual duplicator itself, it is not directly liable for copyright infringement.")

19 **(1) Plaintiff Has Not Presented Valid Copyright Registrations**
20 **or Applications Thereto**

21 Before bringing a copyright infringement action, a plaintiff must have either obtained a
22 federal registration for its alleged copyright, or applied for a registration. *See* 17 U.S.C. 411(a);
23 *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 621 (9th Cir. 2010).

24 Here, Plaintiff has not shown that it obtained U.S. copyright registrations for all of the
25 alleged copyrighted material, or applied for any such registrations. Plaintiff attached as Exhibit 10
26 to its Complaint a list of approximately 124 movies allegedly registered with the U.S. Copyright
27 Office. The chart purports to identify the "Title of Original Work" and the corresponding
28 "Copyright Registration Number." Yet a quick review on the Copyright Office's website establishes

1 that Plaintiff does not have a copyright for any of the listed titles, and has misidentified copyrights
2 that it purports to have registered.

3 For example, Plaintiff identified Copyright Registration Number PA 1-167-385 for the work
4 entitled, “Trey.” (*See* Ex. 10 to Plaintiff’s Complaint, attached as Ex. B to Request for Judicial
5 Notice (“RJN”), at page 1, first row). However, that copyright registration (PA0001167385) belongs
6 to a work of music entitled, “Clinging to the vine.” (*See* RJN, Ex. C). Similarly, Plaintiff identifies
7 Copyright Registration Number PA 1-610-794 for the work entitled, “Dylan II”. (*See* Ex. 10, page
8 1, second row (RJN, Exh. B). Yet the copyright registration (PA0001610794) belongs to a motion
9 picture work entitled, “Corbin Fisher’s Amateur College Men Presents Dylan.” (*See* RJN, Ex. D).
10 As yet another example, Plaintiff identifies Copyright Registration Number PA 1-782-555 for the
11 work entitled, “Carter Fucks Austin.” (*See* Ex. 10, page 14, last row (RJN, Exh. B). But that
12 copyright registration (PA0001782555) belongs to a motion picture work entitled, “Corbin Fisher
13 Amateur College Men Carter Fucks Austin” (*See* RJN, Ex. E).¹³

14 These are but a few examples. Having failed to identify any valid copyright registrations for
15 its allegedly infringed material, Plaintiff cannot maintain its copyright claim against Oron, and
16 certainly cannot establish a likelihood of success on the merits of that claim.

17 **(2) Plaintiff Cannot Demonstrate the Requisite Volitional**
18 **Conduct**

19 Nor can Plaintiff establish that Oron acted with the volition required for direct infringement
20 liability. For example, there is no evidence that Oron chose or personally posted any of the
21 infringing material. Oron does not index or organize the allegedly infringing content in any fashion.
22 Oron has given Plaintiff direct access to its server through Plaintiffs’ agent to remove infringing
23 material. Because there is no showing of volitional conduct, Plaintiff cannot establish that it is
24 likely to prevail on its claim for direct copyright infringement.

25 **f) Plaintiff Cannot Show a Substantial Likelihood of Success on its**

26 ¹³ Oron apologizes for the need to include profanity in its brief. In order to defend itself here against
27 an attack on its viability as an ongoing business concern, however, Oron must use the actual titles of
28 the works at issue to demonstrate a lack of compliance here with basic copyright allegations.

Contributory Copyright Infringement Claim

1 Plaintiff's effort to establish a claim for contributory infringement will be equally unavailing.
 2 A defendant "is a contributory infringer if it (1) has knowledge of a third party's infringing activity,
 3 and 2) 'induces, causes, or materially contributes to the infringing conduct.'" *Perfect 10, Inc. v. Visa*
 4 *Int'l Serv. Assoc.*, 494 F.3d 788, 795 (9th Cir. 2007) (citation omitted). In an Internet context, "a
 5 computer system operator can be held contributorily liable if it 'has *actual* knowledge that *specific*
 6 *infringing material is available using its system,*'... and can 'take simple measures to prevent further
 7 *damage' to copyrighted works, . . . yet continues to provide access to infringing works."* *Perfect 10,*
 8 *Inc. v. Amazon.com*, 508 F.3d at 1172 (italics in original) (citations omitted).

9 Here, there is no evidence that Oron had actual knowledge of the infringing material (other
 10 than when it was reported to Oron and taken down). Oron has no way of knowing, for example, if a
 11 subscriber who may have uploaded one of Plaintiff's videos was going to view the uploaded material
 12 for himself, or share it with others. *See, e.g., UMG Recordings*, 667 F.3d at 1037. There is simply
 13 no evidence that Oron somehow induced, caused or materially contributed to the infringing conduct.
 14

g) Plaintiff Cannot Show Likelihood of Success on its Vicarious Liability Claim

15 To establish a claim for vicarious liability for copyright infringement, a plaintiff must
 16 establish that the "defendant profits directly from the infringement and has a right and ability to
 17 supervise the direct infringer even if the defendant initially lacks knowledge of the infringement."
 18 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, n 9 (2005). A "defendant
 19 exercises control over a direct infringer when he has both a legal right to stop or limit the directly
 20 infringing conduct, as well as the practical ability to do so." *Perfect 10, Inc. v. Amazon.com*, F.3d at
 21 1173. "For vicarious liability to attach ... the defendant must have the right and ability to *supervise*
 22 and *control* the infringement, not just affect it" *Perfect 10 v. Visa*, 494 F.3d at 805.
 23

24 Here, Oron does not have the right or ability to supervise the direct infringement of
 25 Plaintiff's material. Rather, it is the subscriber who uploads material to the website, and controls
 26 access to that material via the URL generated by Oron. There is nothing in that system that gives
 27 Oron the right and ability to supervise allegedly infringing conduct.
 28

1 Second, as set forth above, Plaintiff has failed to establish that Oron profits directly from the
2 infringement. Oron charges a fixed fee for services – it does not charge for specific uploads.
3 Regular services are free. Plaintiff has offered no evidence of any connection between infringing
4 activity and Oron’s profits, and thus cannot satisfy this element of its claim.

5 **h) Plaintiff Cannot Show a Substantial Likelihood of Success on its**
6 **Inducement of Copyright Infringement Claim**

7 To establish a claim for inducement of copyright infringement, Plaintiff must establish that
8 Oron provided a service “with the object of promoting its use to infringe copyright, as shown by
9 clear expression or other affirmative steps taken to foster infringement....” *Grokster*, 545 U.S. at
10 936-937. There must be evidence of “active steps ... taken to encourage direct infringement...such
11 as advertising an infringing use or instructing how to engage in an infringing use, show an
12 affirmative intent that the product be used to infringe, and a showing that infringement was
13 encouraged....” *Id.* at 936. “[M]ere knowledge of infringing potential or actual infringing uses
14 would not be enough ... to subject [a defendant] to liability.” *Id.* at 937. “The inducement rule,
15 instead, premises liability on purposeful, culpable, expression and conduct, and thus does nothing to
16 compromise legitimate commerce or discourage innovation having a lawful promise.” *Id.*

17 Here, Plaintiff has provided no evidence that Oron actively promoted its service to commit
18 copyright infringement, or that the service has no other legitimate use. As such, it cannot establish a
19 likelihood of success on this claim

20 **i) Plaintiff cannot show a likelihood of success with respect to its**
21 **claim for Civil Conspiracy**

22 Although the Complaint includes a claim for civil conspiracy (Complaint, ¶ 105), Plaintiff
23 does not rely on that claim as a basis for the requested preliminary injunction. In any event, Plaintiff
24 cannot establish that it is likely to succeed on that claim. There is no federal common law claim for
25 conspiracy to violate the copyright laws. In addition, “[u]nder Nevada law, to establish a civil
26 conspiracy claim, a plaintiff must show (1) the commission of an underlying tort; and (2) an
27 agreement between the defendants to commit that tort.” *Boorman v. Nevada Memorial Cremation*
28 *Society, Inc.*, 772 F.Supp.2d 1309, 1315 (D. Nev. 2011). As noted above, Plaintiff cannot establish

1 that Oron is liable for copyright infringement, and thus it cannot prove a state law conspiracy claim.

2 Even if it could, such a claim would be preempted by Section 301(a) of the Copyright Act,
 3 17 U.S.C. §301(a). The Ninth Circuit applies a two-part test to determine whether the Copyright Act
 4 preempts a state law claim. *See Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir.
 5 1998). Preemption occurs when (1) the rights granted under state law are equivalent to those
 6 protected by the Act; and (2) the work involved comes within the subject matter of copyright. *Id.*
 7 Here, Plaintiff alleges a conspiracy claim that seeks to protect the same rights covered under his
 8 copyright infringement claims for works which are within the subject of the Copyright Act. Federal
 9 courts have held that such claims for conspiracy to infringe a copyright claim are preempted. *See,*
 10 *e.g., Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1193-94 (C.D. Cal. 2001) (finding claim for
 11 relief for civil conspiracy was a restatement of a “conspiracy to infringe copyright” claim and was
 12 preempted because it sought liability “for the same conduct challenged under copyright”); *RDF*
 13 *Media Ltd. v. Fox Broad. Co.*, 372 F.Supp.2d 556, 565–66 (C.D.Cal.2005) (civil conspiracy claim
 14 based on copyright infringement preempted because it did not contain extra elements beyond the
 15 basic elements of copyright and did not protect rights qualitatively different from those protected by
 16 copyright); *Irwin v. ZDF Enters. GmbH*, No. 04-8027, 2006 WL 374960, at *3-5 (S.D.N.Y. Feb. 16,
 17 2006) (finding “the nature of the misconduct that conspiracy law seeks to redress is not qualitatively
 18 different from that addressed by contributory and vicarious infringement” and finding conspiracy
 19 claim preempted). Plaintiff cannot establish a likelihood of success on its civil conspiracy claim.

20 **j) Plaintiff cannot show a likelihood of success with respect to its**
 21 **claim of Unfair Competition**

22 As with its civil conspiracy claim, Plaintiff does not argue that it has a likelihood of success
 23 on its unfair competition claim. Even if it did, it could not show a likelihood of success.

24 First, the Complaint fails to allege the basis for Plaintiff’s unfair competition claim.
 25 Although identified as an “Unfair Competition Law” claim, Plaintiff does not cite any statutory
 26 authority as the basis for its claim. There is no common law unfair competition claim under either
 27 federal law or Nevada law. Given that Plaintiff has not even adequately pled its claim for “unfair

1 competition,” it cannot be heard to argue that it is likely to prevail on the merits of that claim.

2 Second, even if there were some statutory or common law basis for this claim, it is premised
3 entirely on Plaintiff’s copyright infringement claims and, as explained above, Plaintiff cannot
4 establish a likelihood of success on its copyright claims. In addition, the Ninth Circuit has held that,
5 in the context of California’s unfair competition law, that state unfair competition claims are
6 preempted by the Copyright Act. *See Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1211-13 (9th
7 Cir. 1998); *see also Videotronics, Inc. v. Bend Electronics*, 564 F. Supp. 1471, 1476 (D. Nev. 1983)
8 (noting that “property which is subject to protection under federal patent or copyright law cannot
9 also obtain the benefit of protection under either state unfair competition or misappropriation law for
10 the same reasons”). Under the same analysis, the result in Nevada should be no different

11 **D. While Plaintiff Will Not Be “Irreparably Harmed” Absent the Requested Relief,
12 Entry of The Proposed Injunction Would Put Oron Out Of Business**

13 Even if Plaintiff could show a likelihood of success on the merits (which it cannot),
14 “plaintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is
15 likely to result in the absence of the injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
16 1127, 1135 (9th Cir. 2011); *Winter v. National Res. Defense Council, Inc.*, 550 U.S. 7, 22 (2008).
17 Irreparable harm requires an inadequacy of legal remedies. *Los Angeles Mem’l Coliseum Comm’n v.*
18 *Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 2001). Thus, the threat of lost revenue or lost
19 sales, alone, will not warrant the issuance of a preliminary injunction. *Id.*; *Kerr Corp. v. North*
20 *America Dental Wholesalers*, 2011 WL 2269991, *4 (C.D. Cal. 2011).

21 Although Plaintiff suggests that irreparable harm in copyright cases is presumed, that is not
22 the law in this circuit. To the contrary, the Ninth Circuit has confirmed that irreparable harm is no
23 longer presumed in copyright infringement cases. *See e.g., Perfect 10, Inc. v. Google, Inc.*, 653 F.3d
24 976, 981 (9th Cir. 2011) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006)); *see*
25 *also Skinvisible Pharm., Inc. v. Sunless Beauty, Ltd.*, 2012 WL 1032549, * 2-3 (D. Nev. 2012).

26 Apparently relying on that non-existent presumption, Plaintiff has not presented any evidence
27 to support its claim of irreparable harm. Specifically, Plaintiff has not established by any admissible
28

1 evidence that it has and/or will suffer any damages other than a monetary loss from alleged
2 copyright infringement that occurred in the past. That is not enough to establish irreparable injury.
3 *See e.g., Rent-a-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th
4 Cir. 1991) (finding that “economic injury alone does not support a finding of irreparable harm,
5 because such injury can be remedied by a damage award”). Moreover, Plaintiff waited months and
6 years after the alleged infringement to bring suit. Such a long delay undercuts Plaintiff’s ability to
7 prove irreparable harm. *See e.g., McDermott v. Amersand Pub., LLC*, 593 F.3d 950, 964-65 (9th
8 Cir. 2010) (no irreparable harm found given long delay in seeking injunction).

9 Plaintiff’s only argument that it will be irreparably harmed is its unsubstantiated claim that
10 Oron will transfer all of its funds offshore in order to “hide them” from Plaintiff and the Court.
11 First, that argument is factually incorrect. The only “evidence” that Plaintiff identifies of immediate
12 and irreparable is an email, obtained through nefarious means, indicating that PayPal transferred
13 funds to an account for Oron. Plaintiff has proffered no evidence that this transaction was anything
14 but in the normal course of business, let alone that it was part of some nefarious effort to conceal
15 funds. (*See Stanislav Decl.*, ¶ 19). Moreover, as discussed above, the United States Supreme Court
16 has ruled that a court may not grant preliminary injunction to freeze assets to be available for a
17 monetary damage award. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527
18 U.S. 308 (1999). Nor has Plaintiff met its burden of demonstrating immediate threatened injury as a
19 prerequisite to preliminary injunctive relief. *Los Angeles Mem.’l Coliseum*, 634 F.2d at 1201. The
20 mere possibility of future harm does not establish an immediate threat of irreparable harm. *See*
21 *Midgett v. Tri-Country Metro. Trans. Dist. of Oregon*, 254 F.3d 846, 850-851 (9th Cir. 2001).

22 **E. The Balance of the Equities Favors Denial of Plaintiff’s Motion**

23 Plaintiff cannot obtain a preliminary injunction unless it can establish that the balance of
24 equities is in its favor. *Winter*, 555 U.S. at 20. Balancing the equities requires consideration of the
25 relative inconvenience or hardship to the parties resulting from a decision to grant or deny injunctive
26 relief. *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Here, however, there is no evidence that Plaintiff
27 faces “irreparable harm” if the injunction is not entered. By contrast, the potential harm to Oron –

1 having its business shut down without any finding of infringement on its part – is significant.

2 **F. Plaintiff Has Not Shown That An Injunction Is In The Public Interest**

3 This case involves a commercial dispute between private parties, and is not one in which a
4 public interest is prominent. *Stormans v. Selecky*, 568 F.3d 1109, 1139 (9th Cir. 2009). In any
5 event, the public interest is not served by permitting a plaintiff to drive a lawful worldwide entity out
6 of business based on nothing more than the unproven allegations of a complaint. A defendant’s right
7 to due process is undoubtedly entitled to more weight. Nor is the public interest served by causing
8 thousands of innocent users to irretrievably lose the data they have stored on Oron.com solely to
9 protect the copyright of Plaintiff’s pornographic material. Indeed, that interest is already met by
10 Oron’s ongoing adherence to the DMCA.

11 **G. Even If The Court Finds That Preliminary Relief Is Warranted, The Proposed
12 Injunction Should Be Modified**

13 Even if the Court were to find that Plaintiff is entitled to a preliminary injunction, it should
14 not enter an injunction in the form requested.

15 The law in the Ninth Circuit and elsewhere addressing asset freezing injunctions amply
16 supports giving Oron access to its funds in order to pay for its ongoing business expenses and its
17 legal defense. For example, in *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988),
18 the Ninth Circuit upheld a preliminary injunction enjoining the Marcoses from disposing of any of
19 their assets. In balancing the relative hardships to determine the propriety of the injunction, the
20 Court relied upon the fact that the district court had provided that the Marcoses could use their assets
21 “to cover normal living expenses and legal fees.” *Id.* at 1362; *see also Johnson v. Couturier*, 572
22 F.3d 1067, 1085-86 (9th Cir. 2009) (upholding asset freezing injunction where limited to defendant’s
23 assets in which plaintiffs had equitable interest, and where injunction allowed assets to be used for
24 “normal living expenses and legal fees”); *Securities and Exchange Commission v. Hickey*, 322 F.3d
25 1123, 1131 (9th Cir. 2003) (injunction allowing payment of corporate business expenses); *Fidelity
26 Nat’l Title Ins. Co. v. Castle*, 2011 WL 5882878 (N.D. Cal., Nov. 23, 2011) (asset freezing
27 injunction allowed defendant to use personal funds to cover living expenses); *United States v.*

1 *Brown*, 988 F. 2d 658 (6th Cir. 1993) (affirming injunction allowing defendant to pay business
2 expenses but remanding to ensure only funds that plaintiff might ultimately recover were frozen).¹⁴

3 Accordingly, if the Court were to grant Plaintiff's motion, the Court should tailor the
4 injunction to the harm Plaintiff has alleged and, at a minimum, allow Oron sufficient funds to pay its
5 legal costs, both here and in Hong Kong, and its reasonable business expenses.

6 **H. If the Court Grants Plaintiff's Motion and Enters a Preliminary Injunction,
7 Plaintiff's Bond Should Be Increased Significantly**

8 Under the Federal Rules of Civil Procedure, "no restraining order or preliminary injunction
9 shall issue except upon the giving of security by the applicant ..." Fed.R.Civ.P. 65(c). Although
10 the amount of the bond lies in the court's discretion, failure to require a bond upon issuing injunctive
11 relief is reversible error. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th
12 Cir. 1999). "When setting the amount of security, district courts should err on the high side . . . [A]n
13 error in the other direction produced irreparable injury, because the damages for an erroneous
14 preliminary injunction cannot exceed the amount of the bond." *Mead Johnson & Co. v. Abbot Lab.*,
15 201 F.3d 883, 888 (7th Cir. 2000). As shown above, entry of the requested injunction would have a
16 devastating impact on Oron and its business. Accordingly, if the Court were to grant Plaintiff's
17 motion for preliminary injunction, Plaintiff should be required to post a bond of at least \$3,000,000.

18 **I. Plaintiff Is Not Entitled to Appointment of a Receiver**

19 Under federal law, appointing a "receiver is an extraordinary equitable remedy," which
20 should be applied with caution. *Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 844 (9th Cir.
21 2009) (citation omitted). As the Ninth Circuit has recognized, a variety of factors are relevant to
22 determining whether to appoint a receiver, including: (1) "whether [the party] seeking the
23 appointment has a valid claim"; (2) "whether there is fraudulent conduct or the probability of
24 fraudulent conduct," by the defendant; (3) whether the property is in imminent danger of "being lost,

25 _____
26 ¹⁴ While there is authority that, in appropriate cases, a district court has discretion to forbid or limit
27 payment of attorneys' fees out of frozen assets, *see, e.g., Commodity Futures Trading Commission v. Noble Metals International, Inc.*, 67 F.3d 766 (9th Cir. 1995), the cases so holding have involved
28 circumstances going far beyond those presented in this case, and are thus inapposite.

1 concealed, injured, diminished in value, or squandered”; (4) whether legal remedies are inadequate;
2 (5) whether the harm to plaintiff by denial of the appointment would outweigh injury to the party
3 opposing appointment; (6) “the plaintiff’s probable success in the action and the possibility of
4 irreparable injury to plaintiff’s interest in the property”; and, (7) “whether [the] plaintiff’s interests
5 sought to be protected will in fact be well-served by receivership.” *Id.* (citations omitted).

6 Evaluating those factors here, there is no basis for appointing a receiver. Plaintiff has no
7 valid claims against Oron, and cannot establish either a likelihood of success on the merits or the
8 possibility of irreparable harm. The legal remedies sought by Plaintiff – money damages – are
9 adequate. In addition, contrary to Plaintiff’s unsupported suggestion that Oron has attempted to
10 “fraudulently transfer” funds to Hong Kong, the evidence shows that those transfers were made in
11 the ordinary course of business for a Hong Kong company. (*See* Stanislav Decl., ¶ 19). Finally,
12 there is no evidence that denying the request for a receiver would harm Plaintiff, let alone that such
13 harm would outweigh the injury to Oron if it were to lose control of its business. Indeed, Plaintiff
14 offers no evidence that there is any immediate need for appointment of a receiver here.

15 Finally, the mere fact that Plaintiff has “worked with” the proposed receiver on other cases is
16 not a substitute for an analysis of the factors above, and does not counsel in favor of appointing a
17 receiver here. To the contrary, that prior relationship between Plaintiff and the proposed receiver is
18 irrelevant to the question of whether a receiver is appropriate under the facts of this case. Because
19 the factors above weigh heavily in Oron’s favor, the request to appoint a receiver should be denied.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Oron respectfully requests that the Court deny Plaintiff’s motion
22 for entry of a preliminary injunction and appointment of a receiver.

23 Dated: July 31, 2012

Krieg, Keller, Sloan, Reilley & Roman LLP

24
25 By: /s/Kenneth E. Keller
KENNETH E. KELLER
26 Attorneys for Defendant FF MAGNAT LIMITED