

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DENIECE WAIDHOFER, an individual; MARGARET MCGEHEE, an individual; and RYUU LAVITZ, LLC, a Massachusetts limited liability company,

Plaintiffs,

v.

CLOUDFLARE, INC., a Delaware corporation; BANGBROS.COM, INC., a Florida corporation; SONESTA TECHNOLOGIES, INC., a Florida corporation; MULTI MEDIA LLC, a California limited liability company; CRAKMEDIA INC., a Canadian corporation; and JOHN DOES 1-21, as-yet unidentified individuals,

Defendants.

Case No. 2:20-cv-06979-FMO-AS

**PLAINTIFFS' RESPONSE TO
DEFENDANT CLOUDFLARE'S
MOTION TO DISMISS (DKT 84)**

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Judge: Hon. Fernando Olguin

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1 Plaintiffs Deniece Waidhofer (“Waidhofer”), Margaret McGehee
2 (“McGehee”), and Ryuu Lavitz LLC (“Lavitz”) (collectively, “Plaintiffs”) submit
3 this response to the motion to dismiss (Dkt 84) the First Amended Complaint (the
4 “Complaint”) filed by Defendant Cloudflare, Inc. (“Cloudflare”).¹
5

6 INTRODUCTION

7 Thothub was a pirate site devoted to illegally copying works published by
8 OnlyFans.com and Patreon.com creators on the creators’ paid subscriber accounts.
9 At its peak, Thothub received about one million visitors each day and had over 1.1
10 million “members.” Cloudflare is an Internet service provider (ISP) that enabled
11 Thothub’s distribution of infringing works to millions of users. As a service
12 provider for Thothub, Cloudflare distributed copies of Plaintiffs’ works to Thothub
13 users across the United States, stored copies for extended periods on its servers,
14 and even made selection decisions about works to copy. Cloudflare also largely
15 ignored numerous infringement notices from Plaintiffs and other complainants,
16 while continuing to provide infringement-enabling services to Thothub.

17 Cloudflare easily could have limited Thothub’s infringement simply by
18 terminating service, or by not delivering URLs that it had already been notified
19 contained infringing content. But Cloudflare stood behind Thothub instead, as it
20 does regularly for pirates everywhere. Indeed, Cloudflare has made a cottage
21 industry out of indulging pirates. Not by accident, according to a recent European
22 Commission report, 62% of the world’s top 500 infringing domains, about 40% of
23 all pirate sites, and about 44.7% of all copyright-infringing URLs reported to
24 Google in 2019, were using Cloudflare’s services. The Complaint identifies nearly
25 two dozen other pirate sites—all Cloudflare clients—that are Thothub copycats,
26 including one called Thothub.ru that is nearly a direct clone. Cloudflare
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28 ¹ Cloudflare’s memorandum in support of its motion is referenced herein as “Cl. Br.”

1 distinguishes itself from more scrupulous competitors by making clear to pirates
2 through words and actions that it is a willing facilitator of piracy.

3 As such, the Complaint well pleads claims of direct and contributory
4 infringement. Regarding direct infringement, the Complaint alleges that Cloudflare
5 made copies other than at the users' direction, selected works to copy or not copy,
6 and continued copying works after notice of infringement—all showing volitional
7 conduct under Ninth Circuit law. *Cf. DISH Network LLC v. Jadoo TV, Inc.*, 2020
8 WL 5816579, *6 (N.D. Cal. Sept. 30, 2020). Regarding contributory infringement,
9 Cloudflare repeats the same arguments this Court rejected in *ALS Scan, Inc. v.*
10 *Cloudflare, Inc.*, No. 2:16-cv-05051, Dkt 60 (C.D. Cal. Oct. 24, 2016). As in *ALS*
11 *Scan*, Cloudflare's CDN and security services materially expanded the scale of
12 infringement on Thothub, and Cloudflare concedes that the knowledge requirement
13 is adequately pled. Thus, here too, Cloudflare's motion should be denied.

14 LEGAL STANDARDS

15 A complaint must contain "sufficient factual matter, accepted as true, to state
16 a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
17 (2009) (citing *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility
18 means "the plaintiff pleads factual content that allows the court to draw the
19 reasonable inference that the defendant is liable for the misconduct alleged." *Id.*
20 "When there are well-pleaded factual allegations, a court should assume their
21 veracity and then determine whether they plausibly give rise to an entitlement to
22 relief." *Id.* at 679. Assessing plausibility is "a context-specific task that requires the
23 reviewing court to draw on its judicial experience and common sense." *Id.*

24 PROCEDURAL ISSUES

25 Plaintiff Waidhofer filed the original complaint on August 3, 2020. (Dkt 1).
26 The original complaint asserted claims on behalf of Waidhofer alone against
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1 Cloudflare, Inc.; BangBros, Inc.; Multi Media, LLC; Thothub.tv; and certain John
2 Doe operators of Thothub. On October 14, 2020, Cloudflare and the Advertiser
3 Defendants (BangBros and MultiMedia) filed motions to dismiss. (Dkts 57 & 59).
4 On November 4, 2020, Waidhofer amended the complaint once as a matter of
5 right, pursuant to Rule 15(a)(1)(B), within twenty-one (21) days of the Defendants’
6 filing of the motions to dismiss. (See Dkt 68). Among other changes, the amended
7 complaint added two additional plaintiffs (McGehee and Lavitz) and two
8 additional defendants (Sonesta Technologies, Inc. and CrakMedia Inc.) and
9 removed Thothub.tv (now believed not to be a legal person) as a defendant.

10 Cloudflare contends, in a footnote only (Cl. Br. at 2, n.4), that the amended
11 complaint required leave of court under Rule 15(d). Cloudflare cites no authority
12 that restricts allegations permitted in a Rule 15(a)(1) amendment of right. And
13 courts typically find that amendments that otherwise require leave do not when
14 made under Rule 15(a)(1). *See, e.g., In re Cathode Ray Tube (CRT) Antitrust*
15 *Litig.*, 2014 WL 1305040, *4 (N.D. Cal. Mar. 28, 2014) (holding that Rule
16 15(a)(1), not Rule 21, governs joinder when done through amendment as a matter
17 of right); *Peguese v. PNC Bank, N.A.*, 306 F.R.D. 540, 545–46 (E.D. Mich. 2015)
18 (collecting cases). This interpretation is consistent with the principle that specific
19 rules control over more general ones. *See Hellon & Assocs., Inc. v. Phoenix Resort*
20 *Corp.*, 958 F.2d 295, 297 (9th Cir. 1992); *cf. Matthews Metal Prods., Inc. v. RBM*
21 *Precision Metal Prods., Inc.*, 186 F.R.D. 581, 583 (N.D. Cal. 1999) (holding that
22 Rule 21 “can correctly be viewed as a general provision dealing with adding and
23 dropping parties, while Rule 15(a) is a more specific provision dealing with the
24 particular means by which a party may do so by an amendment to the pleadings”).
25 Here, because the amendment was made as a matter of right under Rule 15(a)(1),
26 Plaintiffs did not need to seek leave.
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1 This interpretation also accords with the broad mandate of Rule 1, which
2 directs that the Federal Rules “shall be construed and administered to secure the
3 just, speedy, and inexpensive determination of every action.” Fed. R. Civ. P. 1; *see*
4 *also A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006)
5 (“[a]ll discovery and federal litigation generally, is subject to Rule 1”). Even if
6 Cloudflare’s view of Rule 15 were right, the point is immaterial because both the
7 letter and spirit of the Rules provide that the “court should freely give leave when
8 justice so requires.” Fed. R. Civ. P. 15(a)(2); *see also DCD Programs, Ltd. v.*
9 *Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (“[R]ule 15’s policy of favoring
10 amendments to pleadings should be applied with extreme liberality.”). Although
11 Cloudflare vaguely suggests that “certain issues” could “profitably have been
12 explored on a Rule 15(d) motion” (Cl. Br. at 2 n.4), it does not object to the joinder
13 of parties effectuated by the Complaint, nor does it move to strike anything.
14

15 Cloudflare’s argument amounts to “empty formalism” that cuts against the
16 Rules’ purpose “to minimize technical obstacles to a determination of the
17 controversy on its merits.” *United States v. Reiten*, 313 F.2d 673, 674 (9th Cir.
18 1963) (reversing dismissal of amended complaint containing allegations post-
19 dating original complaint where appellees did not identify any prejudice); *see also*
20 *Stinson v. BNSF Ry. Co.*, 2014 WL 12843826, *2 (C.D. Cal. Nov. 24, 2014)
21 (“Supplemental pleadings are generally favored because they promote judicial
22 economy and convenience by permitting courts to dispose of related claims and
23 issues in one matter.”). Here, the amended complaint was an efficient way to
24 accomplish the joinder of parties consistent with copyright law and the Rules.
25 Cloudflare raises no substantive objection to the joinder of parties. The Court
26 should disregard Cloudflare’s not-really-asserted, footnoted point of procedure.
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MERITS ISSUES

I. The Complaint Plausibly Alleges Direct Infringement.

Cloudflare insists that it merely operates a “pass-through” service (Cl. Br. at 1), “acts strictly as an intermediary” (*id.* at 4), and takes only “automated, non-volitional actions in response to requests from Internet users” (*id.* at 13). Based on these disputed facts, Cloudflare argues it lacked “volitional conduct” for direct infringement. Cloudflare’s brief ignores the allegations that it made and stored additional, unrequested copies for lengthy periods not at the direction of users (Compl. ¶¶ 195–97, 200); that it selected, via a non-automated process, which works would be copied and stored on its systems after notice of infringement (*id.* ¶¶ 223–28); and that it has “carved out a competitive niche by serving illegal pirate sites” that other large CDNs would not, and thereby established itself for business reasons as the go-to CDN for copyright pirates (*id.* ¶¶ 208–15, 229–33). These and other allegations plausibly show volition under the Ninth Circuit’s cases.

To show direct copyright infringement, a plaintiff must establish ownership of copyrighted material and that the defendant “copied” this material. *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019) (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)); *see also SOS, Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n. 3 (9th Cir. 1989) (“The word ‘copying’ is shorthand for the infringing of any of the copyright owner’s five exclusive rights” under 17 U.S.C. § 106). Cloudflare does not dispute that the Complaint well pleads Plaintiffs’ ownership of registered copyrights and that Cloudflare copied these works in servicing Thothub. (*See* Compl. ¶¶ 194–207, describing services).

Instead, Cloudflare bases its argument on what is “commonly referred to as the ‘volitional-conduct requirement.’” *VHT*, 918 F.3d at 731 (quoting *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657 (9th Cir. 2017)). “The so-called ‘volition’

1 element of direct infringement is not a judicially-created element of intent or
2 knowledge; it is a basic requirement of causation.” *Giganews*, 847 F.3d at 666. As
3 this Court put it, “*direct* liability must be premised on conduct that can reasonably
4 be described as the *direct* cause of the infringement.” *Perfect 10, Inc. v. Giganews,*
5 *Inc.*, 2014 WL 8628034, *7 (C.D. Cal. Nov. 14, 2014). “After all, the purpose of
6 any causation-based liability doctrine is to identify the actor (or actors) whose
7 ‘conduct has been so significant and important a cause that [he or she] should be
8 legally responsible.’” *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d
9 121, 132 (2d Cir. 2008) (quoting Keeton *et al.*, PROSSER & KEETON ON TORTS § 42,
10 at 273 (5th ed. 1984)). In short, the “question is *who* made this copy.” *Id.* at 130.²

11 The volitional conduct requirement arose out of the law’s long recognition
12 that rote application of classical copyright doctrine to the workings of the Internet
13 threatens “unreasonable liability” for ISPs, an especially salient concern in the pre-
14 DMCA era before safe harbors were enacted. *See Rel. Tech. Center v. Netcom On-*
15 *Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995); *see also*
16 *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 454 (2014) (Scalia, J., dissenting)
17 (discussing potential liability of “a defendant who does nothing more than operate
18 an automated, user-controlled system”). For decades, courts have wrestled with the
19 vexing question of what constitutes “volitional conduct” for purposes of finding
20 that an ISP directly “caused” an infringing copy to be made. *See, e.g., BWP Media*
21 *USA, Inc. v. Polyvore, Inc.*, 922 F.3d 42 (2d Cir. 2019).³

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24 ² *But see* Robert C. Denicola, “Volition and Copyright Infringement,” 37 CARDOZO L. REV.
25 1259, 1273 (2016) (“There is no rule of copyright law that would preclude the imposition of
26 direct liability on both parties [*i.e.*, ISP and user]”); S. Rep. No. 94-473, at 162 (1975)
(legislative history of the original 1976 Copyright Act: “where the work was infringed by two or
more tortfeasors, the bill would make them jointly and severally liable”).

27 ³ Reflecting the unsettled state of the law, the Second Circuit’s recent decision in *BWP Media*
28 fractured into three separate concurring opinions. However, as explained below, all three judges
agreed that the defendant ISP in that case could be liable for direct infringement. *Id.* at 44.

1 Under Ninth Circuit law, “[t]o demonstrate volitional conduct where the
2 defendant operates an automated, user-controlled system, the plaintiff must show
3 that the defendant exercised control by either ‘selecting material for upload,
4 download[,] transmission, or storage’ or by ‘instigating any copying, storage, or
5 distribution’ of the copyrighted material.” *DISH Network LLC v. Jadoo TV, Inc.*,
6 2020 WL 5816579, *5–6 (N.D. Cal. Sept. 30, 2020) (quoting *VHT*, 918 F.3d at
7 732). This approach distinguishes pass-through automated systems that act strictly
8 as intermediaries, from those where the system operator selects works or makes
9 copies not at the direction of users. *Compare Giganews*, 847 F.3d at 668 (finding
10 no volitional act where defendant was “‘passively storing material *at the direction*
11 *of users* in order to make that material available to other users *upon request*”)
12 (quoting *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004))
13 (emphases added), *with Jadoo, supra* (denying motion to dismiss where
14 “infringing transmissions [] were not ‘instigated by’ JadooTV users but instead
15 were provided at [defendant’s] direction” and defendant’s “failure to remove
16 infringing content from a website [was] a ‘conscious choice that amounts to
17 volitional conduct””) (quoting *VHT*, 918 F.3d at 733–34); *Polyvore*, 922 F.3d at 44
18 (reversing summary judgment where defendant “created multiple copies of
19 [plaintiff’s] photos that were not requested by [] users”); *EMI Christian Music*
20 *Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 96 (2d Cir. 2016) (affirming direct-
21 infringement finding where defendant’s “system retrieved a copyrighted item *that*
22 *a user did not request*”) (emphasis added).

24 Applying these principles here, the Complaint adequately pleads volitional
25 conduct by Cloudflare based on three primary sets of factual allegations.

26 First, the Complaint alleges that Cloudflare itself instigated the copying and
27 storage of copyrighted works, not at the direction of users, when it made *additional*
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1 copies on its servers for *other* users after delivering a single copy at a *different*
2 user's request. *See Polyvore*, 922 F.3d at 50–51 (Walker, J., concurring) (“ISPs
3 that provide additional unrequested copies of copyrighted material in response to a
4 user's request for a single copy ... may be liable for direct infringement.”); *cf. Fox*
5 *Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1067 (9th Cir. 2014) (finding no
6 volitional act for direct infringement because defendant's “program creates the
7 copy *only in response to the user's command*”) (emphasis added).

8 According to the Complaint's allegations, “where a user sought Thothub
9 content not already stored on Cloudflare's servers, Cloudflare retrieved the content
10 from Thothub's servers then provided it to the user.” (Compl. ¶ 200). Then, after
11 serving as a “pass-through” conduit for that original user, Cloudflare made
12 *additional* copies that “remained on Cloudflare's servers.” (*Id.*) “If another user
13 requested the [same] content, Cloudflare delivered it directly without having to
14 retrieve the content from Thothub again.” (*Id.*) These additional copies were stored
15 “for extended periods on [Cloudflare's] servers across the country.” (*Id.* ¶ 195). As
16 a result, “[a]t all or nearly all times that Cloudflare provided services for Thothub,
17 the most commonly accessed pages—such as the homepage, the A-Z glossary, and
18 the infringing content (including Plaintiffs' works) that appeared on Thothub's
19 main and featured pages—were stored on Cloudflare servers.” (*Id.* ¶ 197).

20 These additional copies—in contrast to the single copy that Cloudflare
21 delivered to the original user—were not requested by the original user.
22 Cloudflare's initial act of “simply serv[ing] as a ‘conduit’” and, “[a]t the user's
23 direction ... simply display[ing] the image its user directed it to display,” may not
24 have been volitional because “the user, who selected the item to be copied, and not
25 [Cloudflare], ‘caused the copy to be made.’” *See Polyvore*, 922 F.3d at 51 (Walker,
26 J., concurring) (quoting *Cartoon Network*, 536 F.3d at 131). But, as in *Polyvore*,
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1 Cloudflare then “made additional unrequested copies.” *Id.* at 51–52. Cloudflare’s
2 additional “copying, like the copying in *MP3tunes*, was triggered regardless of
3 whether the user knew about, let alone asked for, the additional images.” *Id.* at 52
4 (citing *MP3tunes, LLC, supra*, finding direct infringement because defendant’s
5 “system retrieved a copyrighted item that a user did not request”). On these facts, a
6 Second Circuit panel held unanimously that “the district court’s grant of summary
7 judgment to Polyvore on the direct infringement claim was error because there
8 [was] a dispute of material fact regarding whether Polyvore created multiple copies
9 of [plaintiff’s] photos that were not requested by Polyvore users.” *Id.* at 44.

10 So, too, here. Cloudflare’s creation of additional, *unrequested* copies
11 constitutes “instigating any copying, storage, or distribution” of copyrighted
12 works, which the Ninth Circuit’s test recognizes as a volitional act. *See VHT*, 918
13 F.3d at 732; *Jadoo TV, supra*, at 6. Rather than simply being like a brick-and-
14 mortar copy shop that makes a copy for a customer on request, Cloudflare is akin
15 to a copy shop that secretly makes numerous additional copies for its own uses and
16 then distributes those copies to *other* persons unknown to the person who
17 requested the first copy. The unwitting user who requested only a single copy for
18 his own personal use did not cause these additional copies. Cloudflare did.

19
20 Second, the Complaint alleges that, after receiving notice of infringement,
21 Cloudflare deliberately deleted, through a non-automated process, some infringing
22 works from its servers and continued to make infringing copies. (Compl. ¶¶ 223–
23 28). In particular, the Complaint alleges that, on or about July 10, 2020,
24 Waidhofer, through her attorneys, “notified Cloudflare in writing about Thothub’s
25 ongoing infringement of her copyrights” and “other facts showing that Thothub
26 was a pirate site that existed for the express purpose of committing copyright
27 infringement.” (*Id.* ¶¶ 223, 97). After receiving this notice, “on or about July 29,
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1 2020,” Cloudflare “intentionally deleted” stored copies of Waidhofer’s works from
2 its own servers “through a non-automated process.” (*Id.* ¶ 225). Cloudflare then
3 falsely claimed in a letter to Waidhofer (as it does here) that it only “provides
4 services ‘on a pass-through basis.’” (*Id.* ¶ 226). Although it deleted copies of
5 Waidhofer’s works from its servers (and apparently also disabled caching for those
6 works), “Cloudflare continued to enable the infringement by delivering the same
7 content from the same URLs to users via its proxy service.” (*Id.* ¶ 227).

8 These allegations of deliberate, *non-automated* conduct in selecting works to
9 copy, as well as the allegations of *continued copying* after notice, are fatal to
10 Cloudflare’s volition argument. In marked contrast to these facts, the cases that
11 Cloudflare relies on involved defendant ISP systems that operated entirely
12 “without any human intervention.” *See Netcom*, 907 F. Supp. at 1369; *Parker v.*
13 *Google, Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006) (“[w]hen [an ISP]
14 automatically and temporarily stores data *without human intervention* ... the
15 necessary element of volition is missing”) (emphasis added); *Giganews*, 2013 WL
16 2109963, at *8 (“An allegation that Defendants control the content on their servers,
17 *without a good-faith allegation specifying how Defendants exercised that control*
18 *to directly create copies*, cannot alone create an inference that Defendants engaged
19 in a volitional act directly causing infringement.”) (emphasis added).

20 Cloudflare’s purposeful conduct in selecting works to store is similar to the
21 allegations in *Jadoo*, which the Northern District of California held months ago (in
22 reliance on the Ninth Circuit’s recent guidance in *VHT*) were sufficient to defeat a
23 motion to dismiss. 2020 WL 5816579, *5–6 (N.D. Cal. Sept. 30, 2020). In that
24 case, plaintiff DISH alleged that Jadoo and its founder infringed copyrights in
25 certain television channels. *Id.* at 1. Rejecting defendant’s argument that it merely
26 “set[] up a server that responds to user requests,” the court relied on allegations of
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1 defendant’s “‘conscious decision’ not to remove Protected Channels from Jadoo
2 set-top boxes after DISH sent infringement notices.” *Id.* at 5–6 (quoting
3 complaint). The court explained that “failure to remove infringing content from a
4 website is a ‘conscious choice that amounts to volitional conduct.’” *Id.* at 6
5 (quoting *VHT*). Therefore, the court held, “DISH plausibly alleged that
6 [defendant’s] actions satisfy the volitional requirement of a direct infringement
7 claim.” *Id.*; *see also Amazon.com*, 508 F.3d at 1172 (explaining that “a service
8 provider’s knowing failure to prevent infringing actions could be the basis for
9 imposing contributory liability”).

10 Similarly, here, the Complaint alleges that, on a particular date, Cloudflare
11 “intentionally deleted copies of Waidhofer’s [works] on Thothub after receiving
12 Waidhofer’s letter [notifying Cloudflare of infringement] in order to conceal the
13 true nature of its activities and services with respect to Thothub.” (Compl. ¶ 226;
14 *see also id.* ¶ 97). Even as to intentionally deleted works, “Cloudflare continued to
15 enable infringement by delivering the same infringing content from the same URLs
16 to users via its proxy service.” (*Id.* ¶ 227). Moreover, the Complaint alleges that
17 Cloudflare also received notice from McGehee, Lavitz, and hundreds of others
18 regarding infringement on Thothub. (*Id.* ¶¶ 113–15, 122–23, 219–22). Despite
19 having received these notices, Cloudflare “continued to make and distribute
20 unlawful copies of the works identified in those notices” as well. (*Id.* ¶ 222).

21 Cloudflare’s *non-automated selection* of material to store on its servers, as
22 well as its *continuation of copying* even after notice about infringement, constitutes
23 “select[ing] any material for upload, download, transmission, or storage,” another
24 type of volitional conduct recognized by the Ninth Circuit. *See VHT*, 918 F.3d at
25 732. This “deliberate” conduct—“choos[ing] copyrighted content”—“transform[s]
26 [Cloudflare] from a passive provider of a space in which infringing activities
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1 happened to occur to an active participant in the process of copyright
2 infringement.” See *Cap. Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 656–57
3 (S.D.N.Y. 2013), *aff’d* 910 F.3d 649 (2d Cir. 2018) (citing *Arista Records LLC v.*
4 *Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009)). Cloudflare’s selection of
5 specific works to copy raises a plausible inference of its volition.

6 Third, the Complaint alleges that Cloudflare deliberately markets to pirate
7 sites, provides vital (infringing) content-delivery services for most of the world’s
8 leading pirate sites, and is a “key player in the piracy ecosystem” due to its blatant
9 disregard for copyrights and willingness to serve plainly illegal pirate sites “that
10 other leading CDNs would not.” (Compl. ¶¶ 10, 208–15, 229–33). Stunningly,
11 according to a recent European Commission report, “[o]ut of the top 500 infringing
12 domains based on global Alexa rankings, 62% (311) are using Cloudflare’s
13 services,” as are “approximately 40% of the pirate websites in the world” and
14 “approximately 44.7% of all copyright-infringing URLs reported to Google” in
15 2019. (*Id.* ¶¶ 209, 212, citing the report). The Complaint also discusses a “non-
16 exhaustive list” of other obvious pirate sites “similar to Thothub”—each a
17 Cloudflare customer—that infringe Plaintiffs’ copyrighted works. (*Id.* ¶¶ 229–33).
18 Moreover, it alleges that Cloudflare continues to serve these pirate sites, despite
19 having notice of their rampant ongoing infringement. (*Id.* ¶¶ 234–41).

21 Courts have left open that “one’s contribution to the creation of infringing
22 copies may be so great that it warrants holding that party directly liable for the
23 infringement.” *Cartoon Network*, 536 F.3d at 133; *see also Fox*, 747 F.3d at 1067
24 (positing that activities that do not themselves “establish that [defendant] made the
25 copies” may nevertheless be “relevant” to direct infringement) (citing *Cartoon*
26 *Network*); *Usenet*, 633 F. Supp. 2d at 148–49 (finding direct infringement due to
27 the extent of defendant ISP’s involvement). Classical tort doctrine supports that
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1 liability attaches where defendant’s “conduct has been so significant and important
2 a cause that [he or she] should be legally responsible.” Keeton *et al.*, PROSSER &
3 KEETON ON TORTS § 42, at 273 (5th ed. 1984) (quoted in *Cartoon Network*, 536
4 F.3d at 132); *see also* Dobbs, THE LAW OF TORTS § 1, at 2 (2000) (explaining that
5 “torts are traditionally associated with wrongdoing in some moral sense”).

6 In this case, the Complaint alleges that Cloudflare routinely made additional
7 copies not requested by users, selected works to copy, continued to infringe even
8 after being notified many times by aggrieved copyright holders (including
9 Plaintiffs), obstructed Plaintiffs’ and others’ efforts to protect their rights, and
10 misrepresented the nature of its services to obscure its role. Cloudflare did this all
11 for its “paying customer.” (Compl. ¶ 189). And by catering to such pirates that
12 other CDNs will not, Cloudflare occupies a profitable niche. *See Grokster*, 545
13 U.S. at 940 (explaining that evidence that “the commercial sense of [defendant]’s
14 enterprise turns on high-volume use, which the record shows is infringing ... alone
15 would not justify an inference of unlawful intent, but viewed in the context of the
16 entire record its import is clear”); *Columbia Pictures Industries, Inc. v. Fung*, 710
17 F.3d 1020, 1036–37 (9th Cir. 2013) (in finding intent, relying on evidence
18 regarding defendant’s business interests in infringement).⁴

20 Cloudflare’s claim that Plaintiffs’ theory would expose “the owner of *any*
21 computer connected to the Internet ... to unlimited liability” (Cl. Br. at 12) is
22 beyond hyperbole. Cloudflare’s conduct does not remotely resemble one who
23 merely “participates in the ordinary, technically necessary routing of information”

24 _____
25 ⁴ In a related context, the legislative history of the DMCA states that the term “repeat infringer”
26 refers to those “who repeatedly or flagrantly abuse their access to the Internet through disrespect
27 for the intellectual property rights of others.” S. Rep. 105-190, at 52 (1998); H.R. Rep. 105-
28 551(II), at 61 (1998); *see also In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003)
(explaining that “repeat infringer” refers to persons who are “ignorant or more commonly
disdainful of copyright”).

1 (*id.*) on the Internet, or even ISPs that make reasonable efforts to follow the law. It
2 is no accident that so many pirates the world over have decided to do business with
3 Cloudflare. If this record does not show “volitional conduct” and “proximate
4 causation,” those concepts have become totally unmoored from their doctrinal
5 foundation in tort. Because the Complaint adequately pleads specific volitional acts
6 demonstrating that Cloudflare is a significant and direct cause of infringement, the
7 Court should deny Cloudflare’s motion on direct infringement.

8 **II. The Complaint Plausibly Alleges Contributory Infringement.**

9 Cloudflare rolls out the same arguments it previously made and lost in this
10 Court under nearly identical circumstances. *See ALS Scan, Inc. v. Cloudflare, Inc.*,
11 No. 2:16-cv-05051, Dkt 60 (C.D. Cal. Oct. 24, 2016) (Wu, J). (“*ALS Scan*”)
12 (denying Cloudflare’s motion to dismiss contributory claim). In particular, it
13 argues that “Plaintiffs fail to plausibly allege that Cloudflare could have taken
14 simple measures, or that it *failed* to take available simple measures, to ‘prevent
15 further damage to Plaintiffs’ copyright works”⁵; and that “nothing in Plaintiffs’
16 allegations plausibly suggests that Cloudflare materially contributed” to
17 infringement. (Cl. Br. at 14–17). These arguments did not carry the day in *ALS*
18 *Scan*, nor do they here.⁵

20 The elements of contributory infringement are that defendant (1) had
21 knowledge of infringing conduct and (2) “induce[d], cause[d], or materially
22 contribute[d] to the infringing conduct.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508
23 F.3d 1146, 1171 (9th Cir. 2007) (citing *Gershwin Publ’g Corp. v. Columbia Artists*
24 *Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). As applied to ISPs, “a computer
25 system can be held contributorily liable if it has actual knowledge that specific
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27 ⁵ As in *ALS Scan*, Cloudflare does not dispute the sufficiency of allegations that it had
28 knowledge about infringement of Plaintiffs’ works. (*See* Compl. ¶¶ 97–98, 113–15, 122–23,
223–28).

1 infringing material is available using its system and can take simple measures to
2 prevent further damage to copyrighted work, yet continues to provide access to
3 infringing works.” *Id.* at 1158 (citations and quotations omitted). The Ninth Circuit
4 has held that “services or products that facilitate access to [infringing] websites
5 throughout the world can significantly magnify the effects of otherwise immaterial
6 infringing activities,” and therefore such services or products can be “material
7 contributions.” *Id.* at 1172 (quotations and citations omitted).

8 The allegations against Cloudflare—and attendant legal analysis—in *ALS*
9 *Scan* are mirror images of this case. In *ALS Scan*, the owner of adult-oriented
10 works alleged that Cloudflare provided services to certain infringing websites.
11 According to the plaintiff’s complaint in that case, Cloudflare’s CDN “allows
12 consumers seeking to access a website of Cloudflare’s client to retrieve the website
13 from the closest Cloudflare data center, rather than accessing the site from the
14 primary host,” and this “results in a client’s website loading twice as fast for its
15 visitors, regardless of where they are located.” The plaintiff also alleged that
16 “Cloudflare’s DNS service ‘allows pirate sites and their hosts to conceal their
17 identity from copyright owners’ and that Cloudflare ‘refuses to disclose the
18 identity of the primary host and site owner,’ thereby ‘act[ing] as a firewall
19 protecting pirate sites and their hosts from legal recourse by copyright owners.’”
20 Plaintiff also alleged “it sent numerous notices to Cloudflare of infringement of its
21 copyrighted works by Cloudflare clients,” yet Cloudflare “continued to offer its
22 CDN and related services to these clients, despite the infringement notifications.”
23 *ALS Scan, supra*, at 3.

24
25 This Court found that plaintiff “sufficiently alleged contributory liability
26 against Cloudflare pursuant to a material contribution theory.” *Id.* The Court’s
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1 analysis is quoted at length because it is equally applicable here (and for
2 convenience because the opinion can be found only on the Court’s docket):

3 Unlike the credit card companies in *Visa* [494 F.3d 788 (9th Cir.
4 2007)], which did not help consumers access infringing websites,
5 **Plaintiff alleges that Cloudflare’s CDN service makes it faster and**
6 **easier ... for consumers across the world to access infringing**
7 **websites and load infringing images from any location. Moreover,**
8 **Plaintiff alleges that consumers seeking access to infringing**
9 **websites retrieve the website and load the infringing images from**
10 **the closest Cloudflare data center, rather than from the primary**
11 **host. These allegations are sufficient to state a claim for material**
12 **contribution under Ninth Circuit precedent.** [citing *Amazon.com*,
13 508 F.3d at 1172; *Louis Vuitton Malletier, S.A. v. Akonic Solutions,*
14 *Inc.*, 658 F.3d 936, 943 (9th Cir. 2011); *Ellison v. Robertson*, 357 F.3d
15 1072, 1078 (9th Cir. 2004); *A&M Records, Inc. v. Napster, Inc.*, 239
16 F.3d 1004, 1022 (9th Cir. 2001); *Netcom*, 907 F. Supp. at 1375] ...

17 In addition, with respect to Cloudflare’s DNS service, **Plaintiff alleges**
18 **that Cloudflare ‘allows pirate sites and their hosts to conceal their**
19 **identity from copyright owners,’ thereby preventing copyright**
20 **holders from stopping the pirate sites’ infringing activities. These**
21 **allegations also support a material contribution claim. ...**

22 Cloudflare contends that it cannot be liable for material contribution
23 because there are no ‘simple measures’ Cloudflare could take to
24 prevent further damage to Plaintiff’s copyrighted works. Cloudflare
25 argues that ‘there are no measures of *any* kind that Cloudflare could
26 take to prevent this alleged infringement, because the termination of
27 Cloudflare’s CDN services would have no impact on the existence and
28 ability of these allegedly infringing websites to continue to operate.’
However, a defendant may still be liable for material contribution
regardless of whether it is able to completely halt infringing
activity, so long as it is able to take measures to ‘prevent further
damage’ to the copyrighted works. See *Amazon.com*, 508 F.3d at
1172. Here, terminating Cloudflare’s services would likely have at
least [had] some impact on the infringing activity of Cloudflare’s
clients, in that it would take users twice as long to access and load
the infringing images. ...

1 In sum, because Plaintiff has alleged that Cloudflare’s services facilitate
2 access to its clients’ infringing websites, the Court would find that
3 Plaintiff has sufficiently alleged material contribution.

4 *Id.* at 7–9 (emphases added; some citations omitted); *see also Mon Cheri Bridals,*
5 *LLC v. Cloudflare, Inc.*, 2019 WL 3245740, *1 (N.D. Cal. July 11, 2019)
6 (Chhabria, J). (denying Cloudflare’s motion to dismiss due to “[a]llegations that
7 Cloudflare knew its customer-websites displayed infringing material and continued
8 to provide those websites with faster load times and concealed identities”).

9 For obvious reasons, Cloudflare does not even try to distinguish *ALS Scan*,
10 instead simply asserting, without explanation, that this case “presents an easier
11 question than the motion to dismiss the district court denied” in *ALS Scan*. (Cl. Br.
12 at 15).⁶ On this Plaintiffs agree, although not (one supposes) in the sense that
13 Cloudflare intended. In fact, this case presents an *even stronger complaint* than
14 *ALS Scan* because it includes the same type of allegations as *ALS Scan*, plus
15 additional factual allegations that show in even more stark relief Cloudflare’s
16 material contributions to the rampant copyright infringement on Thothub.

17 As in *ALS Scan*, the Complaint details Cloudflare’s central role in
18 facilitating infringement for its client site, including that Cloudflare “stored much
19 of Thothub’s site, including pages featuring Plaintiffs’ copyrighted works, for
20 extended periods on its servers across the country” (Compl. ¶¶ 195, 197);
21 “retrieved the content from Thothub’s servers then provided it to the user” or

22 ⁶ Cloudflare deflects by misleadingly quoting a line from *Cobbler Nevada, LLC v. Gonzales* that
23 “[n]othing in [plaintiff]’s complaint alleges, or even suggests, that [defendant] actively induced
24 or materially contributed to the infringement through purposeful, culpable expression and
25 conduct.” 901 F.3d 1142, 1148 (9th Cir. 2018) (quotation omitted). Out of context, this confuses
26 the standards for induced infringement (which requires showing intent) versus material
27 contribution (which does not). *See VHT Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 745–46 (9th Cir.
28 2019). *Cobbler* also involved *very* different facts, turning on “whether the bare allegation that a
defendant is the registered subscriber of an Internet Protocol (‘IP’) address associated with
infringing activity is sufficient to state a claim for direct or contributory infringement.” 901 F.3d
at 1144.

1 “delivered it directly without having to retrieve the content from Thothub” (*id.*
2 ¶ 200); and “received all user requests to access or view Thothub,” including for
3 Plaintiffs’ works (*id.* ¶ 201–02). Absent these services, “Thothub would not have
4 been able to operate effectively, and certainly not on such a large scale.” (*Id.*
5 ¶ 196). In addition, the Complaint alleges that, “[b]y interposing itself between
6 copyright holders and Thothub, Cloudflare inhibited copyright enforcement.” (*Id.*
7 ¶¶ 210–19). And Cloudflare disregarded the flood of infringement notices received
8 from Plaintiffs and hundreds of other creators. (*Id.* ¶¶ 219–23). Such allegations
9 are aligned with, and substantially similar to, those in *ALS Scan*.

10 Above and beyond those allegations, the Complaint here also alleges that
11 Cloudflare offloaded heavy data traffic from Thothub’s servers, without which
12 those servers would have “overrun and crashed” (*id.* ¶ 196); that “[u]sers could not
13 access Thothub except through Cloudflare” due to the Argo Tunnel service, which
14 ensured that the “only way in or out of Thothub’s server(s) was via Cloudflare,
15 except one port (Port 8443) reserved for administrators” (*id.* ¶¶ 203–06); and that a
16 Cloudflare engineering executive testified under oath that Cloudflare’s CEO
17 “decided to kick [a customer] off the Internet” because he was “in a bad mood”
18 and thought they were “assholes” (*id.* ¶¶ 216, 241). Given these specific facts, the
19 Complaint plausibly alleges that, “[i]f Cloudflare had ‘closed’ the Thothub tunnel
20 (and ceased delivering Thothub content that Cloudflare already had stored on its
21 servers), as a practical matter, Thothub would no longer have been available on the
22 Internet.” (*Id.* ¶ 207).⁷ These allegations knock down a purported factual pillar of
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25 ⁷ Consistent with these allegations, Cloudflare states that “Cloudflare’s CDN network is key to
26 its security services, including its DDoS mitigation services”; that “a DDoS (‘Distributed Denial
27 of Service’) attack occurs when a malicious attacker uses *multiple computers simultaneously to*
28 *request information from a website*”; and that “[i]f done on a large enough scale, the requests
overwhelm the website, take the victim server offline, and render the site inaccessible.” (Cl. Br.
at 5–6, quoting *Raisly v. U.S.*, 2016 WL 1117944, *1 (D.N.J. Mar. 22, 2016)) (emphases added).

1 Cloudflare’s defense: the faulty idea that “the customer’s website remains online
2 and fully accessible to users,” even if Cloudflare terminates service. (Cl. Br. at 5).

3 Even if this pillar could stand as a factual matter, it cannot bear the weight
4 Cloudflare puts on it. Indeed, this Court rejected the very same argument by
5 Cloudflare in *ALS Scan*. There, as here, Cloudflare argued that it could not be held
6 liable because (it claimed) the “infringing activity would continue to exist without
7 Cloudflare’s services.” *ALS Scan*, at 7, n. 5 (citing Cloudflare’s brief). The Court
8 rejected this “misplaced” theory as contrary to Ninth Circuit law. The Court noted
9 that, “[i]n *Amazon.com*, the infringing websites would clearly have continued to
10 exist even without Google’s services”; even still, “the Ninth Circuit held that
11 Google’s services made it ‘faster and easier’ for users to access infringing images,
12 thereby making [Google] liable for material contribution.” *Id.* As the Court
13 explained, the “defendant may still be liable for material contribution regardless of
14 whether it is able to completely halt infringing activity, so long as it is able to take
15 measures to ‘prevent further damage’ to the copyrighted works.” *Id.* (citing
16 *Amazon.com*, 508 F.3d at 1172). The same applies in this case.

17
18 Setting aside the underlying factual disputes (which must favor Plaintiffs at
19 this stage), Cloudflare’s all-or-nothing theory ignores that “services or products
20 that facilitate access to websites throughout the world can significantly magnify the
21 effects of otherwise immaterial infringing activities.” *Amazon.com*, 508 F.3d at
22 1172 (citing *Napster*, 239 F.3d at 1022; *Netcom*, 907 F. Supp. at 1375). And it
23 contravenes the Supreme Court’s and Ninth Circuit’s practical admonition that
24 “copyright holders cannot protect their rights in a meaningful way unless they can
25 hold providers of such services or products accountable for their actions.” *Id.*
26 (citing *MGM, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005)). Here,
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1 Cloudflare enabled Thothub to be operated securely on a vast scale. The law
2 recognizes this as a material contribution that, with knowledge, creates liability.

3 Although intent is not a required element of a material contribution theory,
4 actual or circumstantial evidence of intent may be relevant to contributory liability.
5 See *Grokster*, 545 U.S. at 934–35 (explaining that courts should not “ignore
6 evidence of intent if there is such evidence” and should apply “rules of fault-based
7 liability derived from the common law”). In *Grokster*, the Supreme Court
8 identified three types of “evidence of intent” that are “particularly notable” in
9 evaluating liability for contributory infringement. *Id.* at 939–40. Each type applies
10 here (though at this stage only well-pled allegations, not evidence, are needed).

11 First, the Court cited evidence that defendant “showed itself to be aiming to
12 satisfy a known source of demand for copyright infringement.” *Id.* at 939. Here,
13 the Complaint alleges that Cloudflare is a singular world leader in supporting
14 online piracy and “specifically markets” to pirates. (Compl. ¶¶ 208–12, 214, 231–
15 33). Second, the Court cited evidence that defendant did not “attempt[] to develop
16 filtering tools or other mechanism to diminish the infringing activity using their
17 [service].” 545 U.S. at 939. Here, the Complaint alleges that Cloudflare “does not
18 have reasonably adequate protocols, policies, or metrics for addressing repeat
19 infringement by its customers,” “takes no steps to prevent the infringing content
20 from continuing to be copied and distributed on its servers even after notice,” and
21 has “*never* voluntarily terminated services ... to a customer for repeat copyright
22 infringement.” (Compl. ¶¶ 239–41). Third, the Court cited evidence that “the
23 commercial sense of [defendant’s] enterprise turn[ed] on high-volume use.” 545
24 U.S. at 939–40. Here, the Complaint alleges that Cloudflare “has carved out a
25 competitive niche by serving illegal pirate sites that other large CDN companies”
26 do not, and that its fees are usage-based. (Compl. ¶¶ 190, 205; see also *id.* ¶¶ 255–
27 28

1 58). Such facts “alone would not justify an inference of unlawful intent, but viewed
2 in the context of the entire record its import is clear.” *Grokster*, 545 U.S. at 940.

3 As for simple measures, Cloudflare could have simply terminated service to
4 Thothub. *Cf. ALS Scan, supra*, at 6 (finding that “terminating Cloudflare’s services
5 would likely have at least [had] some impact on the infringing activity of
6 Cloudflare’s clients”) (citing *Napster*, 239 F.3d at 1021–22). Or it could have
7 stopped serving requests for noticed infringing URLs. *Cf. Mon Cheri Bridals*, 2019
8 WL 3245740, at 1 (holding that “[a]llegations that Cloudflare knew its customer-
9 websites displayed infringing material and continued to provide those websites
10 with faster load times and concealed identities are sufficient to state a claim”)
11 (citing *Giganews*, 847 F.3d at 67). “In any event, the extent to which reasonable
12 measures exist for Cloudflare to prevent further damage to Plaintiff[s]’ copyrighted
13 works appears to be a factual issue to be resolved at a later stage in these
14 proceedings.” *ALS Scan, supra*, at 7; *see also Amazon.com*, 508 F.3d at 1172–73
15 (remanding to district court to resolve “factual disputes over whether there are
16 reasonable and feasible means for Google to refrain from providing access to
17 infringing images”).
18

19 Because the Complaint adequately alleges that Cloudflare knowingly and
20 materially contributed to infringement of Plaintiffs’ works on Thothub in much the
21 same way courts deemed sufficient under Ninth Circuit law to state contributory
22 claims against Cloudflare in *ALS Scan* and *Mon Cheri Bridals*, the Court should
23 deny Cloudflare’s motion to dismiss the contributory infringement claim.

24 **CONCLUSION**

25 The Court should deny Cloudflare’s motion to dismiss in its entirety.⁸
26

27 ⁸ However, if the Court finds that any part of Cloudflare’s motion should be granted, it should
28 grant Plaintiffs leave to amend the Complaint to allege additional facts that may cure any
perceived defects. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

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CERTIFICATE OF SERVICE

I hereby certify that the above document will be served at the time of filing on all counsel of record via the Court’s electronic filing system.

/s/ _____

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