

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

MALIBU MEDIA, LLC,	)	
	)	
Plaintiff,	)	Civil Case No.: 3:13-cv-01579-TJC-PDB
	)	
v.	)	
	)	
CURT VANDENHEUVEL,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT’S, CURT VANDENHEUVAL REPLY TO PLAINTIFF’S
RESPONSE TO DEFENDANT’S MOTION FOR PROTECTIVE ORDER**

CURT VAN DEN HEUVEL (“Defendant”), by and through the undersigned counsel and pursuant to Order Local Rule 3.01(c) and (d), hereby files this Reply to MALIBU MEDIA, LLC’s (“Plaintiff”) Memorandum in Opposition (Doc. 87) to CURT VAN DEN HEUVEL’s Motion for Protective Order and Motion to Quash (Doc. 82), and states in support thereof:

I. INTRODUCTION

Plaintiff’s Memorandum is riddled with categorical contradictions, repugnant to both the premise of their case, and the need to drag in Defendant’s daughter, whose only verifiable flaw is liking too many things on her Facebook page. Amongst the distorted recitations of fact proffered by Plaintiff’s Counsel giving assurance that the evidence is in place firmly linking the named Defendant to the infringements at issue. Simultaneously, Plaintiff suggests that Defendant is probably covering for the real infringer, or at least won’t cooperate in narrowing down Plaintiff’s proverbial pin the tail on the infringer.

II. FACTS.

Plaintiff sites and interprets their finding of the documents provided by the Internet Service Provider (“ISP”), in this instance Comcast, as a basis to characterize Defendant and his family. Regardless of who Plaintiff desires to depose, the Plaintiff omits two of the most important realizations that have come as a result of their discover requests: 1) None of the 270 DMCA notices, nor the five (5) CAS notices had anything to do with Malibu’s alleged copyrighted works; 2) After turning over every device requested by Plaintiff, nothing was found on the devices proving which if any device may have been associated with the IP addresses at issue, or the alleged downloading or sharing of Malibu’s works. Therein lies the reason Malibu must continue its fishing expedition. As described below,

“Defendant is one of the most egregious copyright infringers undersigned has ever encountered and his feigned ignorance of the infringement in this case is both offensive and appalling. To explain, defendant’s ISP recently produced two hundred seventy (270) Digital Millennium Copyright Act (“DMCA”) notices of infringement and five (5) Copyright Alert System (“CAS”) notices that were sent to Defendant between 2012 and 2014. Every notice produced pertained to unlawful BitTorrent use and, of the first

29 notices, 23 were for infringement of adult content similar to Plaintiff’s. There is no question that Plaintiff is suing the right person.”

The irony is that Plaintiff’s entire basis for deposing Defendant’s daughter is ascertain The Plaintiff is wrong. Had the Plaintiff bothered to examine the notices, they would have quickly realized that the IP tracking system that sends notices to Comcast has produced egregious errors. A review of notices reveals that Comcast was noticed with 381 alleged violations. However, 350 of these are duplicates of the same six (6) files, in many cases with the same ID numbers

and exactly the same timestamp. It appears here that the culprit is an IP tracking outfit by the name of Rightscorp. The tracking software that Rightscorp uses is obviously fatally flawed, and therefore the alleged violations sent to Comcast are highly suspect. Again, this should have been obvious to the Plaintiff had they spent more than five minutes examining the data supplied by Comcast.

Rightscorp is not the only culprit sending spurious notices. Twentieth Century Fox Film Corporation also sent two duplicate notices, both with the same ID and timestamp. Of the 23 notices for adult content, 17 of them took place on a weekend. Defendant had previously noted that his house was frequently occupied by a number of friends of his children, all of whom had their own laptops that were connected (unmonitored and unsupervised) to his network. Thus, instead of the '270' notices that the Plaintiff claims, there are in fact no more than 36, once the duplicates are removed. The CAS notices are also suspect. Of the five notices, three are duplicates of the same file (*Kevin Rudolf - Welcome to the World (feat. Kid Cudi) [Single] [2009]- Sebastian[Ub3r]*). One (Incident ID# - 449672) was not delivered due to an email failure. None of the notices establish a basis to depose Defendant's daughter, as none of the notices related any of the 29 works that Plaintiff claims Defendant infringed upon. There are other clear misstatements and mischaracterizations presented in Plaintiff's Memorandum as addressed below:

A. Plaintiff's Statements Deliberately Mischaracterize Defendant's testimony during deposition.

" Defendant's false deposition testimony claiming he "believe[s] [he received] only about two or three." Depo., p. 22:19-21. Defendant testified that the last notice he received was "in March of 2013, and there was nothing after that." Depo., Case 3:13-cv-01579-PDB Document

87 Filed 01/26/16 Page 2 of 13 Page ID 4813 p.27:20-21. This testimony is also false. 263 notices were sent between March 2013 and 2014..."

No basis is proffered to suggest that Defendant had a belief that was contrary to what he stated under oath. As has already been noted, no more than 36 notices were sent. In addition, Defendant erroneously stated that he received the last notice in March of 2013. That was an error. Defendant meant to say "March of 2014", which is factually true. As these notices were delivered to a mailbox that the Defendant did not monitor, many of the notices were lost and subsequently purged by Comcast. Thus, the defendant's statement that he "believe[s] [he received] only about two or three." is accurate to the best of his knowledge.

B. Plaintiff States Defendant and His Family Are the Only Possible Infringers

This is again incorrect. As the Defendant has pointed out on numerous occasions, to include the deposition and responses to interrogatories that several of his children's friends were often over at the house playing computer games on the network. Plaintiff has knowledge of this testimony, but deliberately misrepresents the statements. Defendant's home was occupied by numerous persons throughout 2013, all of whom had unsupervised access to his network. Any one of these persons could have been the infringer (assuming, that is, that the infringer even exists). The continued determination of the Plaintiff to ignore this situation speaks to the fact that they realize that it fatally undermines their (already weak) case.

C. Plaintiff States Defendant's Daughter Had a "Torrents" Folder on Defendant's Computer

Plaintiff claims that there existed a directory called "Users\Amber\Downloads\Torrents\Music". Since this file was found in system 'slack' space,

and *not* the NTFS Master File Table (MFT), its provenance is unknown. Defendant notes that since Plaintiff's expert did not find any indication of a user 'Amber' in the system SAM registry file, either as a regular or a deleted key, the possibility that there once existed a user 'Amber' is unlikely. Essentially, the string “\Users\Amber\Downloads\Torrents\Music” could have originated from anyplace, and is **not** evidence that the directory once existed. Further, this entire line of reasoning is irrelevant. This case involves the alleged download of 29 pornographic titles. Neither the Defendant, nor any of his family are currently being sued for downloading any other works. The Plaintiff is therefore attempting to muddy the waters by introducing irrelevant data. Defendant's Expert clearly addressed the faulty findings. “No user profile named Amber nor any reference to Amber being a user on the SSD-EVO250 hard drive was located.” Defendant's Expert Report, page 3. A closer look at the Mr. Page's expert report never identifies what specific device was used for infringement, on an IP address that was allegedly used.

D. Plaintiff states it has a list of Third Party BitTorrent Infringements which Implicates Defendant's Daughter.

The Plaintiff's 'additional evidence' is utterly spurious. It has not been verified, and, in fact, there exists no method by which it may be verified. Its introduction into evidence is therefore improper. Plaintiff essentially demands that this Court relying on evidence that is neither submitted to record, has any record's custodian to authenticate it, nor given any association or connection to the 29 files that Plaintiff alleges were downloaded or shared via BitTorrent.

E. Two statements are all that really control the “Expert's” findings.

As soon as one reviews the Expert report, it states in Sec. B, para 10 & 11:

“10. I rely on Michael Patzer’s declaration as a basis for my opinion that Excipio’s infringement detection system recorded and logged direct evidence of infringement of Plaintiff’s works (the “Infringed Works”) and third party works (the “Additional Evidence”).

11. In addition to my test of Excipio’s system convincing me that its system works, I have also found evidence of Malibu’s Works on other defendant’s computers in other cases using Excipio’s data.”

First, all of the Expert’s opinion is relying on Mr. Patzer. When Defendant sought to depose Mr. Patzer, Plaintiff’s counsel refused to disclose his location, refused to provide photo identification, and when the deposition was postponed to such circumstances, Mr. Patzer became unavailable for the entire months of February and March due to “traveling abroad”. Mr. Patzer’s illisiveness aside, it is clear that all of Plaintiff’s Expert testimony is proffered under the lenses of the Plaintiff’s assumptions. Second, the Expert actual states that he was first required to use the Excipio data in other cases, and that they convinced him it works. In contrast, Defendant’s expert received the devices and drew his own conclusions. The findings could not be any more contrary to the “FACTS” alleged by Plaintiff. However, the Court needn’t make a finding of fact. The relief sought is based upon whether the Defendant has demonstrated good cause to keep his daughter from being harassed by a Porn company, who is seeking to prove that the Defendant was downloading and sharing Malibu’s (or X-Art) content.

III. LEGAL STANDARD

Rule 26(b) 'has never been a license to engage in an unwieldy, burdensome, and speculative fishing expeditions, and the district courts are trusted and empowered to guard against abusive discovery. Carr v. State Farm Mut. Auto. Ins., 2015 U.S. Dist. LEXIS 163444 (N.D. Tex. Dec. 7, 2015). Plaintiff's daughter possesses no knowledge of whether her father, nor any other member of his household, downloaded any of the Plaintiff's pornographic works.

The Plaintiff has attempted to muddy the waters by introducing numerous irrelevant materials in an effort to oppose the Motion for Protective Order. The Plaintiff's attempt to depose Defendants daughter, is the exact "[a]nnoyance, embarrassment, oppression, or undue burden or expense", that Fed. R. Civ. P. 26 (c) is intended to prevent and protect, especially from a professional litigator, who after naming a party by name in their infringement lawsuit filed in December 2013, is still looking for someone to blame for the infringement. Now that the Plaintiff's expert has verified that none of the Plaintiff's 29 files have no trace on the devices due to spoliation. As a result, their only recourse now is to ratchet up the harassment of the Defendant and his family in an attempt to extort a settlement.

IV. ARGUMENTS.

A. What possible relevant information about the claims and defenses associated with this case does Amber possess?

There is no abundant evidence linking Amber to any BitTorrent use, nor did Defendant acknowledge his daughter "may have relevant information" since she can testify about her father or she ever downloaded porn. This does not distinguish Amber as a witness from anyone else that has ever met Defendant. Perhaps a deposition is in order for Defendant's entire office building. At this point whether Amber used the Computer or not, whether she downloaded a "data sanitizing utilities" has no probative value to the case because: 1) There is no indication that such utilities were used. See Defendant Expert Report pgs 3-4; 2) Plaintiff has already had an expert examine all device, 3) Plaintiff has alleged advised the Court that they have enough evidence to both identify the Defendant, and link him to the device, and 4) Just because Amber used the computer doesn't mean that anyone in the house, or anyone who ever used that device / computer could have downloaded a data sanitation utility. If there is an issue of evidence

spoliation, then Plaintiff should've addressed that by now. The notion that Amber may say something contrary to her father's testimony is also neither probative nor unique to Amber. The Plaintiff's Expert alleges the CCleaner was used on the Flash Drive and Dane Flash Drive on November 2015, which again has nothing to do with Amber, the Gateway she allegedly used, nor whether she has unique knowledge regarding the alleged porn sharing. It is also important to note that Amber was off to college during the "*8 days prior to imaging the devices.*" Plaintiff's Expert Report, pp.4-7.

B. Good Cause is clear under the 11th Circuit's standard, but Plaintiffs choose to pretend it doesn't exist.

Even if Amber had downloaded a rap song or an episode of Friends, it does not warrant or validate Plaintiff's efforts to subject her to a series of question and interrogations about whether she download porn, or ever witnessed her father downloading porn. NONE of the DMCA notices are related to Plaintiff's works, and only a fraction of them (that aren't duplicates) have anything to do with graphic content such as porn. Plaintiff has adamantly affirmed that Defendant was the infringer, and that they have the proof to boot. The evidence showing what Amber may have downloaded via BitTorrent is validation that she wasn't using it to download porn, and there is no indication through her Facebook likes that she was a fan of X-Art or Malibu. At the time of these alleged downloads via BitTorrent, Defendant had testified that the family had and presently has Netflix, Amazon Prime, and other programs that provide license to download and/or stream content. There is nothing presented by Plaintiff to suggest that Amber may have downloaded their content (emphasis added), or that she was the only one in the family downloading content.

C. Defendant's Motion was Timely.

Whatever inference may be drawn by VII(B) of the Middle District Discovery (2015), it is unclear how this acts as a missed suspense. Defendant's counsel moved for the relief sought as soon as possible. Plaintiff cites the submission of a deposition emailed on January 4, 2016, but ignores the exchange that took place after that submission, wherein Defendant's counsel informed Plaintiff's Counsel that Amber was unavailable. Plaintiff was also on notice that should Amber be served, that it would be challenged. However, by Plaintiff's Counsel admission, he deliberately served Amber after being advised that she was represented, advised that she was unavailable, and advised that there were objections to the deposition, with less than a two (2) week window between the subpoena and the deposition.

V. Conclusion

Plaintiff's fail to establish that there is any basis for deposing Amber other than tactical harassment and embarrassment. Nothing presented in Plaintiff's Memorandum or Supplemental filing (which was filed without leave or permission), provides indication that Amber was the infringer downloading and sharing pornography, nor that she used the same device that was used for the infringement. Which device is that? No one knows, because Plaintiff's expert never identifies which device was the

See if maybe she tells them something interesting or contrary to Defendant's testimony. Under close examination, the Memorandum presented is a hodge-podge guilt and association by inference. Amber may have seen her Dad download porn. Amber may have used BitTorrent. Amber lived in the house and used a computer the same time as the infringement took place. But keep in mind, we know it was the Defendant and we have all the proof we need to know it was him.

Request for Oral Arguments

The undersigned counsel for CURT VAN DEN HEUVEL requests that time be allotted for each respective counsel of record to present oral arguments and merits related to same.

Dated: February 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, a true and correct copy of the foregoing document was served via U.S. Mail and/or email to the following:

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