

**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 RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION TO FILE  
A THIRD AMENDED COMPLAINT**

COMES NOW, CURT VAN DEN HEUVEL (“Defendant”), by and through the undersigned counsel, hereby files this Response in Opposition to Plaintiff’s Motion to File a Third Amended Complaint {Doc. 94}, and states in support thereof:

**I. INTRODUCTION**

Plaintiff has moved to amend their First Amended Complaint to add a claim for contributory copyright infringement. There are two distinct doctrines under which a person who is not a direct infringer may be held liable for the infringing acts of others: vicarious liability and contributory infringement.<sup>1</sup> The Plaintiff contend that Defendant’s was a contributory infringer, under the premise that Defendant had knowledge through DMCA notices that went to a Comcast email account assigned to Defendant, who allegedly never took action to prevent or mitigate the infringement. Defendant challenges the Motion for Leave to file Plaintiff’s Third Amended Complaint for the following reasons:

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<sup>1</sup> No discussion or explanation is offered as to why the knowledge of a family member’s infringement would or would not constitute vicarious liability, in lieu of contributory infringement by a parent or spouse.

## II. DISCUSSION

### A. . Leave to Amend is Discretionary

Determining whether to grant leave to amend a pleading is an exercise in the Court's discretion. *State Distributors, Inc. v. Glenmore Distilleries, Co.*, 738 F.2d 405, 416 (10th Cir. 1984); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (granting or denying the "opportunity to amend is within the discretion of the District Court"). In making its decision, the Court must consider that the purpose of granting leave to amend is two fold: (1) to facilitate a decision on the merits, and (2) to ensure that all issues related to a specific transaction or occurrence are before the Court. *Filmtec Corp. v. Hydranautics*, 67 F.3d 931, 935 (Fed. Cir. 1995); 3 Moore, Federal Practice (3d ed. 2009), § 15.14[1]; *see also Minter v. Prime Equip. Co.*, 451 F.3d 1196 (10th Cir. 2006). In the present action, granting Plaintiffs' leave to amend their complaint to add a count for contributory copyright infringement is unnecessary to facilitate a decision on the merits, to wit: whether the Defendant infringed on the Plaintiff's works. Note that none of the DMCA notices, even if Defendant had received them (duplicates and all), notified Defendant of infringement on Plaintiff's works.<sup>2</sup> The "voluminous notices are associated with only an IP address, leaving Defendant in the same boat as the Plaintiff, insofar as not knowing who was associated with that IP address. The issue of diligence on the part of the Plaintiff is questionable at best, as it was pled by the Plaintiff that it already possessed the necessary technology in their Second Amended Complaint {Doc. 45}, para. 5, 6, 22, and 28:

5. Plaintiff used proven IP address geolocation technology which has consistently worked in similar cases to ensure that the Defendant's acts of copyright infringement occurred using an Internet Protocol address ("IP address") traced to a physical address located within this District, and therefore this Court has personal jurisdiction over the Defendant because (i) Defendant committed the tortious conduct alleged in this Complaint in this State, and (ii) Defendant resides in this

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<sup>2</sup> None of the notices related to or notice possible infringement on X-Art or Malibu Media works.

State and/or (iii) Defendant has engaged in substantial and not isolated business activity in this State.

6. Based upon experience filing over 1,000 cases the geolocation technology used by Plaintiff has proven to be accurate to the District level in over 99% of the cases.

22. IPP International UG connected, over a course of time, with Defendant's IP address for each hash value as listed on Exhibit A. The most recent TCP/IP connection between IPP and the Defendant's IP address for each file hash value listed on Exhibit A is included within the column labeled Hit Date UTC. UTC refers to Universal Time which is utilized for air traffic control as well as for computer forensic purposes.

28. By using BitTorrent, Defendant copied and distributed the constituent elements of each of the original works covered by the Copyrights-in-Suit.

Plaintiff's Third Amended Complaint is both a contradiction and indictment of their technology, wherein it is now established that the Plaintiff must 1) Inspect the devices to connect the IP address to the potential defendant, and 2) receive the DMCA notices and other evidence from the Internet Service Provider, before it knows who may have been involved with the infringement. Even then, it is only by inference. The repugnance and contradiction that Defendant is an egregious infringer, but perhaps is merely hiding who the real culprit / infringer is, cannot be reconciled, nor is justifiable 24 months into a lawsuit, post discovery, where a Plaintiff alleges it has fail-proof technology to identify the proper party.

#### **B. Leave Should Not Be Granted Automatically**

Although leave to amend is freely granted, such leave is not automatic and the court should consider certain factors that would preclude amendment, such as bad faith and dilatory motive. *First City Bank, N.A. v. Air Aircraft Sales, Inc.*, 820 F.2d 1127, 1132 (10th Cir. 1987) (citing *Foman v. Davis*, 371 U.S. 178); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986) (delay and prejudice may preclude automatic granting of amendment). The case at bar is an

action that highlights the reasons for limitations to amendment of the pleadings. As proposed, the Third Amended Complaint is not offered to cure any deficiency related to the sufficiency of claims, jurisdictional defects, or otherwise. Principally, the Third Amended Complaint is offered to add a cause of action due to the lack of evidence existing to support the first claim.. In fact, the likely outcome of permitting the Plaintiff to amend their Complaint, 23 months later, is protracted litigation, motion practice (such as a Motion to Dismiss), burdensome discovery, and considerable additional expense by all parties.

### **C. Factors for Judicial Consideration on Motion for Leave to Amend Pleadings**

According to the landmark case on this topic, *Foman v. Davis*, 371 U.S. 178, the Court may deny a motion to amend for the following reasons: (1) undue delay, (2) bad faith or dilatory motive by the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party, (5) and futility of the amendment. *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971). Subsequent federal cases, in multiple circuits, regarding amendments to pleadings have identified another factor for consideration, judicial economy. *Chitimacha Tribe of La. V. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) (“In keeping with the purposes of the rule, the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation”); *Perrian v. O’Grady*, 958 F.2d 192, 195 (7th Cir. 1992) (justification for denying leave includes prejudice to judicial system and public’s interest in prompt resolution of disputes, even if there is no prejudice to the opposing party). In the action before the Court, at least four factors are present that justify denial of Plaintiffs’ motion for leave to amend their Complaint.

### **1. Undue Delay**

First, permitting amendment to add a count to contributory undue delay in meeting and sustaining the requirements of Rule 23, or the good cause required. Further, the discovery of DMCA notices, does not constitute proof of infringement, as everyone in a potential swarm receives the notice, and none of the notices are related to Plaintiff's works. Rather than address whether Defendant had knowledge of infringement on Plaintiff's works, the Plaintiff skirts the issue by saying that Defendant should have known there was general infringement, and failed to cut internet upon receiving the DMCA notices. If Plaintiff felt that the DMCA notices that it seeks to find in almost all of the thousands of cases it files across the country, would in some way result in vicarious or contributory liability, it should have asked for an extension and amendment to the Scheduling Order. So why didn't they? Because they were betting that they would have sufficient evidence after their discovery to move for Summary Judgment, as is usually the case. Since that turned out to not be the case, and there is nothing connecting the Defendant to the geographically targeted IP address touted as the smoking gun of infringement, all that is left to show a remnant of good faith in their efforts to go after the named Defendant is that he had knowledge of infringement activities, the actually infringer being summarily omitted. The cherry picked cases cited by Plaintiff to justify the such as *Nobles v. Rural Cmty. Ins. Services*, 303 F. Supp.2d 1279, 1284 (M.D.Ala.2004), related to the Amendment of a Scheduling Order, not leave to Amend a Complaint. The relief sought in Plaintiff's Motion does not address the Scheduling Order.

### **2. Undue Prejudice to Defendant**

Second, without exception, the addition of count for contributory infringement would cause undue delay as stated above, drastically increase the scope of discovery, contribute to additional

and protracted litigation expense, and result in an exponential increase in attorneys' fees. *See e.g. Ruotolo v. City of New York*, 514 F.3d 184, 192 (2d Cir. 2008) (in order to gauge prejudice, the Court should consider, among other things, whether amendment would require the opponent to expend significant additional resources to conduct discovery and prepare for trial, or would significantly delay resolution of the dispute). In this instance, Defendant would have to expend substantial resources and discovery to prove what the Plaintiff has yet to prove, which is that he had no part or direct knowledge of the infringement activities directly related to Plaintiff's works. Plaintiff's failure to identify the infringer, and the nature of the relationship of the infringer to the Defendant, is prejudicial. Further discussion of the prejudicial aspects of the Second Amended Complaint are provide under No. 4 "Harms and Prejudices" provided herein.

### **3. Futility of Amendment**

Third, permitting amendment to add a count for contributory infringement would be futile as presented. Plaintiff provides no indication or proof of who the actual infringer was, and that party, though indispensable to the adjudication of such a claim, is not added to the Third Amended Complaint. Instead, there is a composite of inferences provided by the Plaintiff such as "unfettered access", If the only individuals with access were in the household, why is it that none of them are added to the Complaint? The Plaintiff instead suggests that the Defendant had knowledge of the infringement, but doesn't go as far to suggest who the infringer was, therein making it impossible to connect the Defendant to his efforts to stop infringer. However, the suggestion of unfettered access is categorically false, and contrary to the evidence, which showed that Defendant had a password protected wifi, and internet access, along with conversations with his family advising them not to download content illegally. The significance of knowing who the infringer was, directly relates to the liability of the Defendant, as there is a completely different

standard for parents of minors who may have downloaded content without license, as opposed to an adult. If the infringer was Defendant's spouse, then there are additional considerations for to include privilege and knowledge. Contributory infringement requires that a defendant who is not a direct infringer may also be held liable if he knowingly "induces, causes or materially contributes to" the infringement." See *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Furthermore, In addition, the Supreme Court has declined to allow contributory infringement liability based on constructive knowledge of potential infringement when the material provided has substantial non-infringing uses. See *Celerio v. Google, Inc.*, 2013 U.S. Dist. LEXIS 152304 (N.D. Fla. Sept. 29, 2013), discussing that in addition to showing knowledge to establish contributory infringement liability, the patentee must show that there are no substantial non-infringing use for the supplied component. *Toshiba Corp. v. Imation Corp.*, 681 F. 3d 1358, 1362 (Fed. Cir. 2012). In this instance the only thing Defendant may have provided was access to the internet that may have been used for by the spouse or children for educational and other purposes.

General knowledge is all that is inferred by the allegations of the Third Amended Complaint. General knowledge of the possibility of copyright infringement, however, is not sufficient to bring liability. See *Adobe v. Canus*, 173 F.Supp.2d at 1056, wherein the receipt of a letter referring to "possible sales of [infringing] products" at a computer show was not sufficient to establish knowledge of subsequent infringing activity at the show. However, there is nothing proffered in Plaintiff's Third Amended complaint that even suggests any inducement, cause, or material contribution to having a member of his family download any of the pornographic works at issues. In actuality, Plaintiff is pleading a cause for vicarious liability. Either way, the identity of the infringer is necessary to establish which, if any, would be the appropriate cause of action,

and would directly affect the nature of the claim and/or defenses before the court. Absent the Third Amended Complaint addressing the dynamic of parental or spousal liability, the Third Amended Complaint is as futile as it is prejudicial.

#### **4. Judicial Economy**

Fourth, permitting amendment to add a count for contributory copyright infringement will not serve judicial economy. The objective of the judicial process is “to secure the just, speedy, and inexpensive determination of every action.” *See* Fed. R. Civ. P. 1. In consideration of the foregoing, the amendments proposed by the Plaintiff is contrary to the purposes and objectives of the Rules of Civil Procedure, as well as fundamental principles of jurisprudence. Adding the additional count would equally require reopening all pleadings, to include the discovery process and, answers and affirmative defenses, and involvement of whoever the actual infringer was, especially since there is no suggestion as to who actually infringed and what device the infringer used. The Third Amended Complaint also requires the Court to rehash a factual record that already explains: 1) The Defendant and Defendant’s spouse regularly had friends of the children over at the house, 2) Defendant addressed the issues of improper downloading with his family after receiving only a few notices over an extended period of time, and 3) The password was changed on the internet to mitigate others from using it improperly. However, the distorted recitation of the record requires the adjudication of the absence of facts to the contrary, as there is no indication or evidence even reference in the Motion for Leave, nor the Complaint, that Defendant did nothing to mitigate or stop possible infringement.

#### **5. Balancing of Harms and Prejudices**

Fifth, full consideration of whether to permit amendment of the Complaint by the Plaintiffs requires the Court to balance the prejudice to the Defendant if leave to amend is granted against



the harm to the Plaintiffs if leave to amend is denied. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) (in consideration of the *Foman* factors, the court may weigh the prejudice to the non-movant if leave is granted against the harm to the movant if leave is denied). The Defendants have identified at least four grounds for which the Plaintiffs' motion for leave should be denied. The Plaintiffs, however, only identify two principal reasons to grant amendment: (1) discovery of DMCA notices that the Defendant may have received; and (2) the Plaintiffs are acting in good faith. Additionally, Plaintiffs expressly admit that the proposed Amended Complaint does not involve any change in the law applicable to this case" and it does not involve any change in Plaintiffs' legal and factual claims. *see also Chitimacha Tribe of La. V. Harry L. Laws Co.*, 690 F.2d 1157, 1163 ("the court should consider whether the amendment adds substance to the original allegations, and whether it is germane to the original case of action"). As such, amending the complaint to add a count of contributory infringement is inconstant with the theory and premise of Plaintiff's Complaint that the named Defendant is the infringer. To quote Plaintiff's recent pleadings, the Defendant is identified as "the most egregious" copyright infringer they know of, See pg 1. of Plaintiff's Memorandum in Opposition to Defendant's Motion for Protective Order {Doc. 87}. Therefore, the amendment is contrary and unnecessary to the purpose of the civil rules, namely, to secure just, speedy and inexpensive determination of legal actions.

However, the greatest prejudicial aspect of the amendment, is that another party is directly involved in the cause of action, and not so much as a John Does is added. The Plaintiff's doesn't even attempt to add the party they allege was responsible for the infringement or whom Defendant contributed to. This is mostly because they have no proof of who the actual party is, only that the

Defendant has failed to tell them, or failed to provide them the proof they were hoping to find when they filed the original and First Amended, Complaint.

### **III. CONCLUSION**

Given the unique nature of this case, and the parties associated with same, the Motion for Leave to Amend asks this Court to essentially hit reset, allowing Plaintiff to take another bit at the apple in hope of pinning some culpability to the IP Address allegedly used for downloading Plaintiff's content. In addition to being highly prejudicial, it fails to present to articulate whose infringement the Defendant contributed to (an indispensable party). The recitation of the record provided as a justification for such gaping holes in the pleading is that it must have been someone around the house for an extended period of time, by process of elimination. Such logic is presented in the absence of any proof associating the geotargeted IP address with anyone in Plaintiff's family, and connecting the possible of use of BitTorrent technology with the infringement alleged by Plaintiff.

WHEREFORE, the Defendant respectfully request the Court to DENY Plaintiffs' Motion for Leave to File a Third Amended Complaint.

Dated: February 24, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 24, 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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