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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

MALIBU MEDIA, LLC,

Plaintiff,

vs.

[REDACTED],

Defendant.

Case Number: 3:15-cv-04152-WHA

MOTION TO STRIKE AFFIRMATIVE DEFENSES

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

Plaintiff Malibu Media, LLC ("Plaintiff"), by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 12(f), moves for the entry of an order striking the affirmative defenses asserted by Defendant [REDACTED] ("Defendant"), and states:

I. INTRODUCTION

Defendant's Answer contains eight affirmative defenses, each of which is either foreclosed by law or is factually unsupportable and inadequately alleged. Consequently, to streamline the litigation and discovery process and avoid prejudicing Plaintiff by needlessly

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increasing the duration and expense of litigation, Plaintiff moves to strike Defendant's affirmative defenses.

II. ARGUMENT

A. Legal Standard

"The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Striking affirmative defenses is an important and valued mechanism in federal court litigation because it helps "avoid the expenditure of time and money that must arise from litigating spurious [affirmative defenses] by dispensing with those issues prior to trial." *Frazier v. City of Rancho Cordova*, No. 2:15-cv-00872, 2016 WL 374567, at *2 (E.D. Cal. Feb. 1, 2016). Affirmative defenses that are insufficient as a matter of law—because they are not adequately alleged or otherwise—"should be stricken to eliminate the delay and unnecessary expense from litigating the invalid claim." *E.g.*, *Estee Lauder, Inc. v. Fragrance Counter, Inc.*, 189 F.R.D. 269, 272 (S.D.N.Y. 1999); *see also Coach, Inc. v. Kmart Corps.*, 756 F. Supp.2d 421, 426 (S.D.N.Y. 2010) ("[I]nclusion of a defense that must fail as a matter of law prejudices the plaintiff because it will needlessly increase the duration and expense of litigation.").

B. First Affirmative Defense: Unclean Hands

Defendant's first affirmative defense is unclean hands, an equitable defense that is "recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action." *Dream Games of Arizona Inc. v. PC Onsite*, 561 F.3d 983, 990–91 (9th Cir. 2009). The defense only "prevents the copyright owner from asserting infringement and asking for damages *when the infringement occurred by his dereliction of duty*." *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1408 (9th Cir. 1986) (emphasis added); *Oracle Am., Inc. v. Terix Computer Co.,*

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Inc., No. 5:13-cv-03385, 2015 WL 1886968, at *5 (N.D. Cal. April 24, 2015) (same); *see also Dream Games*, 561 F.3d at 990–91 (even "fraudulent content is not a basis for denying copyright protection," nor is "illegal use or operation of a work by the copyright owner" a sufficient basis to support an unclean hands defense. Instead, the defense is recognized "when plaintiff misused the process of the courts by falsifying a court order or evidence, or by misrepresenting the scope of his copyright to the court and opposing party"). Controlling precedent further holds that "the alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has personally been injured by the plaintiff's conduct." *Dream Games*, 561 F.3d at 990. "If the defendant can do no more than show that the complainant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy and leave the punishment of the offender to other forums." *Id.*

Here, Defendant does not allege that Plaintiff has falsified evidence or engaged in any wrongdoing related to Defendant's infringement. Instead, Defendant simply (and erroneously) alleges that Plaintiff engaged in some legal offense affecting the public at large due to its "failure to comply with Federal, State, and local laws, regulations, and ordinances." CM/ECF 29 at p. 7. As a matter of law, this is insufficient and Defendant's first affirmative defense cannot survive a motion to strike. *Accord, e.g.*, *Malibu Media v. Doe*, No. 13-11432, 2014 WL 2616902, at *3 (E.D. Mich. June 12, 2014) (striking unclean hands affirmative defense under similar circumstances); *Malibu Media, LLC v. Lee*, No. 12–03900, 2013 WL 2252650, *9 (D. N.J. May 22, 2013) (same): *Malibu Media, LLC v. Batz*, No. 12-cv-01953, 2013 WL 2120412, at *5 (D. Colo. April 5, 2013) (same).

C. Second Affirmative Defense: Implied License

Defendant's second affirmative defense of implied license likewise fails. In the Ninth

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Circuit, "an implied license is granted when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work." *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 754–55 (9th Cir. 2008); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990); *Techsavies, LLC v. WDFA Mktg. Inc.*, No. C10-1213, 2011 WL 589809, at *4 (N.D. Cal. Feb. 10, 2011).

Here, Defendant fails to plead the foregoing requisite elements to support a viable implied license defense. Not only does Defendant fail to allege the necessary elements, but she repeatedly and unambiguously disclaims "sufficient knowledge or information" about Plaintiff and the copyrighted works in dispute. *See generally* CM/ECF 29. Therefore, an implied license affirmative defense is foreclosed since Defendant's Answer confirms (1) that Defendant never requested the creation of Plaintiff's copyrighted works, (2) that Plaintiff neither made its copyrighted works for—nor delivered its works to—Defendant, and (3) that Plaintiff never intended for Defendant to copy and distribute its works.

D. Third Affirmative Defense: Laches

Defendant's third affirmative defense is that Plaintiff's claim is barred by the doctrine of laches since "Plaintiff waited more than 2 years" to institute this action. CM/ECF 29 at p. 7. This affirmative defense fails as a matter of law pursuant to unambiguous Supreme Court precedent, which teaches that, in the context of copyright infringement, the equitable defense of laches fails when the copyright holder plaintiff commences its infringement action within the applicable three-year statute of limitations. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1972–73 (2014) (explaining that a laches or statute of limitations defense cannot be invoked to preclude a copyright infringement claim if the claim is brought within the Copyright Act's three-year limitations period). Here, Plaintiff commenced this action by filing its

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complaint on September 11, 2015 [CM/ECF 1], and so a laches defense is viable only to the extent Defendant's infringements occurred prior to September 11, 2012. *See Petrella*, 134 S.Ct. at 1972–73. Yet every single one of Defendant's infringements is alleged to have occurred between July 23, 2013 and July 15, 2015 (*i.e.*, after September 11, 2012 and well within the applicable limitations period).

E. Fourth Affirmative Defense: Failure to State a Claim

Defendant's fourth affirmative defense asserts that "Plaintiff's Amended Complaint fails to allege that Defendant downloaded a full copy of each of the relevant works, alleging only that Defendant copied and distributed the 'constituent elements' of each of the original works…." CM/ECF 29 at p. 8. "Because Malibu Media fails to allege [that] Defendant has downloaded [complete copies of its movies], it has failed to state a cognizable legal claim for copyright infringement." *Id.* Defendant's fourth affirmative defense may—and should—be rejected outright, as it is based on either an oversight or a misrepresentation. A review of Plaintiff's Amended Complaint plainly and unambiguously alleges that "Defendant downloaded, copied, and distributed a ***complete copy of Plaintiff's movies*** without authorization." CM/ECF 18 at ¶ 20 (emphasis added).

Although no further analysis is necessary since Defendant's fourth affirmative defense is premised upon a misreading of Plaintiff's unambiguous allegations, the Court might note *sua sponte* that Plaintiff has sufficiently alleged *prima facie* direct copyright infringement. To adequately allege such a claim, a plaintiff must plead only two elements: (1) ownership of a valid copyright and (2) unauthorized copying of original elements of the copyrighted work. *See Clifton v. Houghton Mifflin Harcout Publ'g Co.*, No. 3:15-cv-03985, 2015 WL 9319402, at *2 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). In its complaint, Plaintiff clearly set forth these requisite elements, alleging: "Defendant is a persistent online

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infringer of Plaintiff's copyrights. … Plaintiff is the registered owner of the copyrights set forth on Exhibit B. … Defendant downloaded, copied, and distributed a complete copy of Plaintiff's movies without authorization as enumerated on Exhibit A. … By using BitTorrent, Defendant copied and distributed the constituent elements of each of the original works covered by the Copyrights-in-Suit. Plaintiff did not authorize, permit or consent to Defendant's distribution of its works." CM/ECF 18. And, to the extent Defendant's fourth affirmative defense is intended to be a Rule 12(b)(6) motion to dismiss, Defendant's request is not compelling because such a motion requires the Court to assume as true Plaintiff's allegations and the reasonable inferences arising therefrom. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Notably, no court has ever dismissed Plaintiff's allegations as implausible under Rule 12(b)(6).

F. Fifth Affirmative Defense: Unconstitutionally Excessive Damages

Defendant's fifth affirmative defense asserts, without any supporting facts or analysis, that "[t]he measure of damages sought by Plaintiff is unconstitutionally excessive." CM/ECF 29 at p. 8. Not only is Defendant's vague challenge to Plaintiff's request for damages not a cognizable affirmative defense, but in this case Plaintiff has elected to recover per-work statutory damages pursuant to the Copyright Act, 17 U.S.C. § 504(a) and (c). *See* CM/ECF 18 at p. 6. The statutory damages promulgated by the Legislature and set forth under the Copyright Act have already been deemed constitutional. The one court that attempted to undermine Congress by finding that entry of statutory damages might be unconstitutionally excessive was reversed on appeal. *See Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 496 (1st Cir. 2011) (reversing ruling that statutory damages were excessive and reinstating original $675,000.00 ($22,500.00 per work) award, expressly finding same to be constitutional and not excessive). Indeed, courts that have considered Defendant's fifth affirmative defense have universally rejected it, and the Ninth Circuit has made clear that "[a] statutory damages award

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within the limits prescribed by Congress is appropriate even for uninjurious and unprofitable invasions of copyright. We have consistently held that statutory damages are recoverable" and not unconstitutionally excessive. *New Form, Inc. v. Tekila Films, Inc.*, 357 Fed.Appx. 10, 11 (9th Cir. 2009); *see also Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 (8th Cir. 2012) ("Congress, exercising its 'wide latitude of discretion,' set a [constitutionally permissible] statutory damages range for willful copyright infringement of $750 to $150,000 per infringed work. … Congress no doubt was aware of the serious problem posed by online copyright infringement [when it did so]."); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 578, 587–88 (6th Cir. 2007) (rejecting argument that statutory damages within the constitutional range of $750 and $150,000 per copyright infringed could violate due process).

G. Sixth Affirmative Defense: Failure to Mitigate Damages

Defendant's sixth affirmative defense, entitled "Failure to Mitigate Damages," states that "[u]pon information and belief, rather than discouraging the purportedly unlawful sharing of its works via BitTorrent, Plaintiff has actively engaged in activity designed to encourage the sharing of its works via BitTorrent." CM/ECF 29 at p. 8. Setting aside the clear Rule 11 violations contained within Defendant's spurious "upon information and belief" representation, Defendant's sixth affirmative defense fails as a matter of law because a failure to mitigate defense is not applicable where, as here, a copyright holder elects to recover statutory damages instead of actual damages. *See* 17 U.S.C. § 504(c)(1) (noting that a copyright owner may elect to recover statutory damages "instead of" actual damages); *Malibu Media, LLC v. Doe*, No. RWT 13-cv-0512, 2015 WL 1402286, at *2 (D. Md. Mar. 25, 2015) ("[D]efenses of failure to mitigate or prove damages are not properly pled where, as here, Malibu has elected to recover *only* statutory damages instead of an award of actual damages and profits. [C]ourts all agree that a copyright plaintiff's exclusive pursuit of statutory damages invalidates a failure to

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mitigate defense."); *Purzel Video GmbH v. St Pierre*, 10 F. Supp. 3d 1158, 1169 (D. Colo. 2014) ("A copyright plaintiff's exclusive pursuit of statutory damages invalidates a failure-to-mitigate defense"); *Malibu Media, LLC v. Doe*, No. 13-3648, 2014 WL 2581168, at *5 (N.D. Ill. June 9, 2014) (same); *Malibu Media, LLC v. Fitzpatrick*, No. 1:12-cv-22767, 2013 WL 5674711, *3 n.17 (S.D. Fla. Oct. 17, 2013) (same); *Malibu Media, LLC v. Doe*, No. 1:13-cv-30, 2013 WL 4048513, at *2 (N.D. Ind. Aug. 9, 2013) (same); *Clements v. HSBC Auto Fin., Inc.*, 2010 WL 4281697, *11 (S.D. W.Va. 2010) (same).

H. Seventh Affirmative Defense: Waiver

Defendant's seventh affirmative defense vaguely alleges that "Plaintiff's claim is barred by the doctrine of waiver." CM/ECF 29 at p. 9. In the copyright context, waiver, which "is the intentional relinquishment of a known right with knowledge of its existence," "occurs only if there is an intent by the copyright proprietor to surrender rights in his work." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001). Here, although Defendant's Answer and Affirmative Defenses contain other allegations that blatantly violate Rule 11 (for which a Rule 11 motion will be served upon Defense Counsel if necessary to the extent the subject Motion is not granted), many of Defendant's allegations completely undermine and disprove a waiver defense. While Defendant repeatedly disclaims any "knowledge or information" regarding Plaintiff and its intentions, Defendant asserts that Plaintiff is a staunch protector of its intellectual property, who has "filed upwards of 4000 lawsuits alleging infringement of its works." CM/ECF 29 at p. 4. And Defendant concedes that Plaintiff has timely instituted this action to enforce its copyright interests. *See* CM/ECF 29 at p. 6 (noting that Plaintiff commenced this action within the three-year statute of limitations to seek redress for "alleged infringements from July 23, 2013 to July 15, 2015"). Defendant's Answer defeats her seventh affirmative defense, as it is simply a legal impossibility for a copyright holder to strictly enforce

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and simultaneously waive its copyrights. Plainly, Defendant's Answer does not contain any well-pled allegations that could conceivably indicate that Plaintiff relinquished its copyright interests or intended to so relinquish.

I. Eighth Affirmative Defense: Estoppel

Defendant's final defense is the doctrine of estoppel, a defense that has since time immemorial been "disfavored and … only applied as needed to avoid injustice." *Bangkok Broadcasting & T.V. Co., Ltd. v. IPTV Corp.*, 742 F. Supp.2d 1101, 1115 (C.D. Cal. 2010) (quoting *Richardson v. U.S.*, 60 U.S. 236, 267 (1856) ("Estoppels, which preclude the party from showing the truth, are not favored.")). "[T]o prevail on an estoppel defense, the following four elements must be established: (1) the plaintiff knew of the defendant's allegedly infringing conduct; (2) the plaintiff intended that the defendant rely upon his conduct or act so that the defendant has a right to believe it so intended; (3) the defendant is ignorant of the true facts; and (4) the defendant detrimentally relied upon the plaintiff's conduct." *Id.* (citing *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960)). "The gravamen of estoppel … is misleading and consequent loss. Delay may be involved, but is not an element of the defense." *Petrella*, 134 S.Ct. at 1977.

Here, overlooking the Rule 11 issues (which, again, will be addressed in a subsequent Rule 11 motion if necessary) and overlooking that all of Defendant's factual allegations are couched with the terms "upon information and belief" (which is permitted only "where the belief is based on factual information that makes the inference of culpability plausible," *Clifton*, 2015 WL 9319402 at *3), Defendant's Answer emphasizes that Plaintiff is a known "prodigious litigant" who consistently files suit to prosecute the "infringement of its works via BitTorrent protocol." CM/ECF 29 at p. 4. Any suggestion that Defendant could or would have been misled into thinking that Plaintiff would not enforce Defendant's infringement via BitTorrent is

therefore unintelligible. Nothing in Defendant's Answer articulates a basis for Defendant being misled. Further, while affirmative defenses may be inconsistent with one another, Defendant's eighth affirmative defense is actually inconsistent with and wholly antithetical to Defendant's Answer. Defendant's Answer unambiguously denies using BitTorrent to infringe Plaintiff's works. Therefore, it is incoherent to maintain that Plaintiff is estopped from bringing its claim on the basis that Defendant only used BitTorrent to infringe Plaintiff's works because Defendant was misled by Plaintiff into doing so.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order striking with prejudice Defendant's affirmative defenses and granting to Plaintiff any additional and further relief that the Court deems just and equitable under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ *Brenna Erlbaum*