

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

MALIBU MEDIA, LLC,)	
)	
Plaintiff,)	Civil Case No. 8:14-cv-01580-VMC-TBM
)	
v.)	
)	
GREGORY WEAVER,)	
)	
Defendant.)	
_____)	

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Malibu Media, LLC (“Plaintiff”), by and through undersigned counsel and pursuant to Fed. R. Civ. P. 56, hereby moves for entry of an order granting summary judgment in Plaintiff’s favor, and files this memorandum in support.

I. INTRODUCTION

Defendant admits using BitTorrent to download and distribute Plaintiff’s movies. After downloading the movies, he watched and erased them. Defendant’s MacBook Pro laptop contains torrent files for twenty five (25) of the thirty one (31) titles listed in Plaintiff’s Amended Complaint. Torrent files for an additional nine (9) of Plaintiff’s titles and two of Plaintiff’s movies are also on Defendant’s laptop. Further, other computer devices were withheld during discovery. For the twenty five (25) titles found on Defendant’s laptop, his liability is clear. As for the six titles that could not be found, they were either erased or are stored on one of Defendant’s withheld computer devices. No rational trier of fact could find that anyone besides Defendant infringed those six works and no genuine issue of material fact remains. Thus, summary judgment should be granted in Plaintiff’s favor.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Malibu Media Owns the Copyrights-in-Suit

1. Malibu Media is the registered owner of the thirty one (31) copyrights set forth on Exhibit B to the Amended Complaint [CM/ECF 10-2] (the “Copyrights-in-Suit”). *See* Printouts from Copyright Office official online records, Exhibit A hereto, and Declaration of Colette Field, CM/ECF 5-2.

2. “No other person or entity has or can claim an ownership interest in the copyrights.” CM/ECF 5-2, ¶ 10.

B. Plaintiff’s Investigator Recorded Someone Using IP Address 173.78.19.241 Infringe Thirty One (31) of Plaintiff’s Movies

3. Plaintiff’s investigator recorded someone using IP address 173.78.19.241 infringe thirty one (31) of Plaintiff’s copyrighted movies between January 2014 and June 2014. *See* Declaration of Michael Patzer, Exhibit B, ¶ 21.

4. Plaintiff’s investigator logged eighty two (82) infringing transactions taking place between IP address 173.78.19.241 and its servers on fourteen (14) different days. *Id.*

C. IP Address 173.78.19.241 Was Assigned to Defendant During the Period of Recorded Infringement

5. Verizon, correlated IP address 173.78.19.241 to Defendant and Patrick Paige (Plaintiff’s computer forensic expert), confirmed Defendant’s computer records show he used that IP address during the entire period of recorded infringement. Declaration of Patrick Paige (“Paige Decl.”), Exhibit C, at ¶¶ 11-14.

D. Defendant’s Internet Signal Was Password Protected and Only Defendant and His Wife Had Access

6. Defendant secured his wireless internet signal when he set up his Apple Airport Extreme wireless router. Defendant’s Deposition (“Weaver Depo.”), Exhibit D, at p. 29:5-12.

7. At all times between January 2014 and June 2014, when the infringement occurred, Defendant's wireless internet signal was password protected. Weaver Depo., p. 30:10-13.

8. Defendant lived alone between January 2014 and June 2014. Weaver Depo., p. 9:19-25, 10:1-11.

9. Only Defendant and his visiting fiancé (now wife) had access to Defendant's wireless internet. Weaver Depo., p. 31:11-15.

10. No one else was in Defendant's home on each of the fourteen days the infringement occurred. Weaver Depo. p. 16:17-25, 17:1-18,

11. None of Defendant's neighbors had Defendant's wireless internet password. Weaver Depo., p. 32:4-7.

E. Defendant Only Had Two (2) Computers During the Period of Recorded Infringement and Only He and His Wife Had Access to Them

12. From January 2014 to June 2014, Defendant only had two (2) computers, a MacBook Pro and a Dell laptop given to him by his employer.¹ See Defendant's Amended

¹ Although the Dell laptop computer was in Defendant's home between February 2012 and October 2014, Defendant failed to disclose it in his original interrogatory responses. See Defendant's Original Interrogatory responses, Exhibit F, at No. 4. He claims that it was merely accidentally overlooked. Weaver Depo., p. 49:13-25. The first time it was disclosed was in his amended responses, *months* after the originals were served. As with the original responses, Defendant's amended responses were *still* materially inaccurate; the length of time Defendant possessed the Dell laptop is misstated. Weaver Depo., 48:7-25. To date, the amended responses have not been corrected. Defendant's deposition testimony makes clear that Rules 26(e) and 26(g) were violated when he submitted his initial responses *and* amended responses. Numerous other examples of incomplete and inaccurate responses are contained in both Defendant's original *and* amended discovery. Indeed, Defendant admits that he conducted no investigation prior to responding to Plaintiff's discovery either time. See Weaver Depo., pp. 64:14-22 ("Q: Mr. Weaver, prior to answering the fourth interrogatory, what sort of action did you take to investigate your responses were true and correct? A: I read them. Q: Did you search around your house for the relevant computer devices? A: I did not. I simply was going off of memory . . ."), p.93:1-7, ("Q: What did you do to ensure that the answers were true and accurate? A: I guess I read through them and – I read through them and didn't see – I didn't see anything that was incorrect. However, I don't know if I did a good enough job of reviewing to see if they were complete."), p.94:13-17 ("Q: I got that much.

Responses to Plaintiff's Interrogatories, Exhibit E, No. 4.

13. Defendant's Dell laptop was never used for personal purposes. Weaver Depo., 89:8-15.

14. Only Defendant and his wife had access to Defendant's MacBook laptop although Defendant's wife rarely used it. Weaver Depo., p.121:12-15.

15. Defendant has no reason to believe that his wife has ever used BitTorrent. Weaver Depo., p. 97:13-22.

F. Defendant Used BitTorrent on His MacBook Pro Laptop to Download Software, Television Shows, Movies, Music, and Adult Content

16. Defendant is an admitted BitTorrent user. Weaver Depo., 85:18-20.

17. He claims that he last used BitTorrent in June 2014. Weaver Depo., 87:19-25, 88:1-4.

18. Defendant used and subsequently erased the MicroTorrent BitTorrent client from his MacBook Pro laptop. Weaver Depo., p.89:5-7, 89:23-25, 94:18-20, 95:3-5.

19. Defendant used BitTorrent to download: (a) Linux distributions (software); (b) television shows; (c) music; (d) movies; and (e) adult content.² Weaver Depo., p. 88:5-25.

20. Defendant invoked the Fifth Amendment when asked if he downloaded episodes of the television shows The Goldbergs, Leftovers, Two Broke Girls, Californication, The Daily Show, The Colbert Report, The Middle, Bob's Burgers, Saturday Night Live, and Shameless. Weaver Depo., p. 25:19-25

You read them and you went over them with counsel. Outside of that, did you do anything else? A: No.")

² Significantly, neither Defendant's original interrogatory responses nor his amended responses identify *all* of the foregoing. This information came to light at his deposition and is *another* example of how Defendant's original and amended interrogatory responses are materially incomplete and inaccurate in violation of Rules 26(e) and (g). See Weaver Depo., p. 90:7-25, 91:1-9 ("Q: You agree with me that your response to interrogatory -- your amended response to Interrogatory No. 11 is incomplete? A: Yes.")

21. Plaintiff's investigator detected Defendant's IP address downloading and distributing some of those shows via BitTorrent. *See* Paige Decl., ¶ 37.

22. Defendant admits visiting the torrent websites The Pirate Bay, Isohunt.com, and Kick Ass Torrents.³ Weaver Depo., p. 96:25, 97:1-8.

23. Computer records prove that as far back as 2013, before this lawsuit was filed, Defendant searched for the term "X-Art" *several* times on both Kickass Torrents and IsoHunt. Paige Decl., at ¶ 32.

24. Notwithstanding Defendant's computer records, Defendant falsely claimed under oath that he never searched for "X-Art" on the internet or torrent websites. *See* Weaver Depo., p. 128:1-12 and Exhibits E and F at No. 15.

G. Defendant Admits Using BitTorrent To Download X-Art.com Torrent Files and Movie Files, Watching the Movies, and Erasing Them

25. Prior to this lawsuit, Defendant knew about Plaintiff's website, X-Art.com. Weaver Depo., p. 114:20-22.

26. Defendant admits downloading X-Art torrent files and movies using BitTorrent. *Id.* at p.116:12-16, 118:24-25, 119:1.

27. Defendant also admits watching Plaintiff's movies and erasing them. *Id.* at p. 115:19-21, 121:16-21.

28. Defendant does not know which movies he downloaded or how many he downloaded. *Id.* at p. 116:17-22.

29. Defendant claims he does not know if he downloaded or attempted to download

³ Again, Defendant's original and amended interrogatory responses violate Rules 26(e) and (g). Defendant failed to identify any of these websites in response to Plaintiff's 12th interrogatory seeking identification of "each BitTorrent website that you have visited." Weaver Depo., p.97:9-12 ("Q: Mr. Weaver, again, none of those websites were identified in response to any of plaintiff's interrogatories, right? A: No.")

any of the movies listed in Plaintiff's Amended Complaint (CM/ECF 10-1) because "it was well over almost two years to a year and a half ago . . ." *Id.* at p.117:16-20, 118:2-4, 119:8-15.

H. Torrent Files for 25 of the 31 Titles in the Amended Complaint, 2 X-Art Movie Files, and 9 Other X-Art Torrent Files Were on Defendant's Computer

30. Patrick Paige examined Defendant's MacBook computer. Paige Decl., ¶¶ 15-16.

31. He found two X-Art movies on Defendant's hard drive, "A Thought of You" and "Rope Priority." Both movies had been deleted. *Id.* at ¶ 27.

32. Neither movie was included in the Amended Complaint. *See* CM/ECF 10-1.

33. Mr. Paige also searched Defendant's MacBook Pro for the exact filenames of the works included in Plaintiff's Amended Complaint. *Id.* at ¶ 25.

34. He found the torrent files for twenty-five (25) of the thirty-one (31) titles contained therein. *Id.*

35. Nine (9) other X-Art torrent files were additionally found. *Id.* at ¶ 26.

I. Defendant Failed to Produce All Relevant Computer Devices in His Home

36. Plaintiff's Interrogatory No. 3 asks Defendant to identify every Computer Device used in his home during the preceding two years. Defendant only listed his MacBook laptop but subsequently amended to include a Dell laptop. *See* Exhibits E, F.

37. Computer records on Defendant's MacBook prove Defendant has several computer devices he failed to produce. Paige Decl., at ¶ 42.

38. Defendant accessed a computer device titled "winxpro" from his MacBook laptop. Defendant failed to produce this device to Mr. Paige for examination. *Id.* at ¶ 43.

39. Defendant used his MacBook to access a computer device titled "bossman." He failed to disclose or produce this device to Mr. Paige for examination. *Id.* at ¶ 44.

40. Defendant used his MacBook to access a computer device titled “greg-98a26ba35e.” He failed to disclose or produce this device to Mr. Paige for examination. *Id.* at ¶ 45.

41. Defendant used his MacBook to access a computer device titled “station 3.” He failed to disclose or produce this device to Mr. Paige for examination. *Id.* at ¶ 47.

42. Defendant used his MacBook to access a computer device titled “station 4.” He failed to disclose or produce this device to Mr. Paige for examination. *Id.* at ¶ 46.

43. Defendant testified that he possessed an external hard drive which he did not produce to Plaintiff.⁴ Weaver Depo., p.59:2-10.

44. Defendant failed to disclose or produce this device to Mr. Paige for examination. Paige Decl., ¶ 49.

45. Defendant’s failure to list the foregoing devices in response to Plaintiff’s Interrogatory No. 3 causes his response to be materially incomplete.⁵ *Id.* at ¶ 50.

46. Additional evidence of Plaintiff’s works may be on any of Defendant’s undisclosed computer devices listed above. *Id.* at ¶ 51.

III. LEGAL STANDARD

Summary judgment is proper where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A genuine factual dispute exists only if a reasonable fact-finder ‘could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict.’” *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300 (11th Cir. 2012), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986);

⁴ Without production of this external hard drive, Mr. Paige is unable to determine if this external hard drive is one of the foregoing devices listed in paragraphs 43-48 of his report.

⁵ This is further proof of Defendant’s Rule 26(e) and (g) violations.

see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”) (citation omitted). “A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment.” *United States v. Hayes*, No. 8:13-CV-2507-T-33AEP, 2013 WL 6598019, at *2 (M.D. Fla. Dec. 16, 2013) (citing Fed.R.Civ.P. 56(a) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). “An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* (Citation omitted).

“When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. Evidence that is “merely colorable, or is not significantly probative” of a disputed fact cannot satisfy the non-moving party’s burden, *Anderson*, 477 U.S. at 249-50 (citation omitted), and a “mere scintilla” of evidence is likewise insufficient, *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004). If a non-movant’s response consists of nothing “more than a repetition of his conclusional allegations,” summary judgment is not only proper, but required. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982). “[M]ere denials or allegations by the respondent . . . [do not] suffice to create issues of material fact to preclude summary judgment.” *Sanders v. Nunley*, 634 F. Supp. 474, 476 (N.D. Ga. 1985). *See also United States v. Mallard*, 2003 WL 1908424 at *4 (S.D. Ala. Mar. 10, 2003) (granting plaintiff’s motion for summary judgment where defendant failed to rebut the plaintiff’s evidence by “resting upon mere denials[.]”)

IV. SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR SHOULD BE GRANTED ON PLAINTIFF'S DIRECT COPYRIGHT INFRINGEMENT CLAIM

A. Plaintiff Owns Valid Copyrights for Each of the Thirty One (31) Movies at Issue in this Lawsuit

In copyright infringement cases summary judgment is proper where the evidence is so overwhelming that a district court can rule as a matter of law that infringement occurred. *See Fame Pub. Co., Inc. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 672 (11th Cir. 1975) (holding summary judgment proper in case of unauthorized duplication of “bootleg” cassette tapes where ample facts existed to find infringement and defendant “admitted the material facts necessary to permit the district court to rule whether, as a matter of law, their activity was protected[.]”). To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *See Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 1296, 113 L. Ed. 2d 358 (1991). Each of Plaintiff's films at issue is registered with the United States Copyright Office. True and correct copies of printouts from the United States Copyright Office's online records are filed in support hereof. *See* Exhibit A. The screen shots and Field Declaration (CM/ECF 5-2) prove that Malibu Media is the owner of the subject works. To date, Defendant has not contested the validity of the registrations or Plaintiff's ownership thereof. Indeed, he testified that has no evidence tending to suggest that they are invalid. Weaver Depo., p. 100:2-6. There is no genuine issue of material fact with regard to the first element of Plaintiff's claim.

B. Defendant Copied Constituent Elements of the Works That Are Original

“[Malibu Media] has never authorized anyone to put [its] works on a torrent website.” Field Decl., CM/ECF 5-2, at ¶ 29. Malibu Media has also never distributed its works through the

BitTorrent protocol, nor has it authorized anyone else to distribute its works through the BitTorrent protocol. Defendant admits using BitTorrent to download Plaintiff's movies. He also admits watching and erasing them. Facts, ¶ 26-27. Defendant's admissions prove he unlawfully copied constituent elements of the works that are original.⁶ *See Feist*, 499 U.S. at 361. As such, no genuine issue of material fact exists regarding the second element of Plaintiff's claim and summary judgment should be granted.

C. Courts Unanimously Hold That Using BitTorrent to Download Copyrighted Content Constitutes Infringement

This Court has previously held that “[u]nauthorized copying of a copyrighted sound recording by downloading the recording onto a computer is a ‘reproduction’ prohibited by the copyright act[,]” and “[d]istributing copyrighted sound recordings without authorization through a peer-to-peer network is a ‘distribution’ prohibited by the copyright act.” *Warner Bros. Records Inc. v. Tait*, No. 3:07-CV-134-J16-HTS, 2008 WL 2415036, at *3 (M.D. Fla. June 12, 2008) (granting motion for summary judgment). That holding applies with equal force here. Using BitTorrent to download and distribute Plaintiff's copyrighted movies constitutes infringement.

Defendant participated in getting [unauthorized copies of Plaintiff's copyrighted works] on his computer by installing and using BitTorrent technology. BitTorrent allowed Defendant to create the unauthorized copy by combining with a swarm of other BitTorrent users to fragment an original unauthorized copy into small digital packages; to transmit those digital packages through the swarm of users; and then to re-assemble the small packages into the complete, unauthorized copies found on his computer. In so doing, Defendant participated directly in creating an unauthorized copy for himself in a functionally indistinguishable way from the

⁶ Defendant intends to argue that only *torrent* files for twenty five of the thirty one movies at issue were found on his MacBook Pro laptop, but not the movies themselves. Defendant's argument is insufficient to create a genuine issue of material fact. Defendant testified that he repeatedly downloaded not *just* X-Art torrent files, but the actual X-Art movie files. Statement of Undisputed Material Facts (“Facts”), ¶ 26. Defendant could not have watched Plaintiff's movies if he had *only* downloaded torrent files. And, Patrick Paige found two deleted X-Art movie files on his computer. Facts, ¶ 31. The missing files were either erased per Defendant's admission or stored on one of the undisclosed and unexamined computer devices.

infringers in peer-to-peer infringement cases. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

. . . Defendant himself engaged the technology to create new and unauthorized copies with a swarm of other users. True enough, the process is not identical to the peer-to-peer file sharing program in *Grokster*. It is, however, functionally indistinguishable from the perspective of both the copyright holder and the ultimate consumer of the infringed work. In both situations, the end user participates in creating a new and unauthorized digital copy of a protected work. It makes no difference from a copyright perspective whether the infringing copy is created in a single wholesale file transfer using a peer-to-peer protocol; or in a swarm of fragmented transfers that are eventually reassembled into the new infringing copy . . . Here, as in *Grokster*, the Defendant's use of software creates for himself a new and unauthorized copy of a protected work.

Malibu Media, LLC v. Don Bui, No. 1:13-cv-00162-RJJ, CM/ECF 40, pp. 2–3, (W.D. Mich. July 21, 2014) (granting Plaintiff's motion for summary judgment). See also, e.g., *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp.2d 779, 788 (E.D. Pa. 2013) ("Malibu has satisfied its burden of proof with substantial evidence and deserves a large award."); *Malibu Media, LLC v. Tashiro*, No. 1:13-CV-00205-WTL, 2013 WL 5366356, at *1 (S.D. Ind. Sept. 25, 2013) (the defendant was not able to "direct the Court to any case where motions to dismiss or motions for summary judgment have been granted against the Plaintiff in these actions. On the contrary, a simple search has shown that Plaintiff has been able to [repeatedly] survive motions to dismiss[.]"). See also *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (downloading copyrighted music via peer-to-peer system is not fair use and constitutes infringement); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) ("Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright. The swappers, who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement, are the direct infringers.").

V. SUMMARY JUDGMENT ON DEFENDANT’S AFFIRMATIVE DEFENSES SHOULD BE GRANTED

“[T]he burden of proving an affirmative defense is on the defendant.” *Schweikhard v. Sch. Bd. of Collier Cnty.*, No. 2:14-cv-466, 2015 WL 1470676, *2 (M.D. Fla. Mar. 31, 2015) (citing *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1292 (11th Cir. 2005)). Here, Defendant cannot discharge this burden. Defendant conceded at his deposition that he lacked a good faith basis to plead his affirmative defenses and admitted that he has no good faith basis to maintain them now. *See* Weaver Depo., p.98:21–109:21. When asked if he “has evidence which would support each [affirmative defense]”, Defendant answered “I suppose not.” *Id.* at p.102:3–6. Further, many of Defendant’s affirmative defenses are foreclosed by law. Accordingly, summary judgment should be entered.

1. Defendant’s First Affirmative Defense: Rule 12(b)(6)

Defendant’s first affirmative defense claims “Plaintiff has failed to state a sufficient factual basis to constitute a cause of action on either count.”⁷ CM/ECF 27, p. 7. But “[a] defense which points out a defect in the plaintiff’s *prima facie* case is not an affirmative defense.” *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988). Since failure to state a claim is merely a basis upon which to seek dismissal, Defendant’s first affirmative defense is “legally insufficient” and “is not properly asserted as an affirmative defense.” *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp.2d 1283, 1292 (S.D. Fla. 2007). Regardless, Defendant’s defense fails on its face because the pleadings plainly confirm that Plaintiff has sufficiently alleged *prima facie* direct copyright infringement.

⁷ Defendant’s reference to “either count” is erroneous, as there has always been only one count, direct copyright infringement. *See* CM/ECF 1, 10.

Defendant further argues that “Plaintiff is wrongfully suing Defendant” because, “based on the evidence provided,” “Plaintiff is unable to demonstrate that Defendant committed a volitional act” or that “Defendant made a complete copy of the work alleged by Plaintiff[.]” CM/ECF 27, p. 7. Defendant’s argument is outside the scope of a 12(b)(6) claim. “Copyright infringement may occur by reason of a substantial similarity that involves only a small portion of each work,” *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 624 n.14 (2d Cir. 1982), and “[t]he Copyright Act is a strict liability regime under which any infringer, whether innocent or intentional, is liable.” *Dellacasa, LLC v. John Moriarty & Assocs.*, No. 07-21659-CIV, 2007 WL 4117261, *3 n.2 (S.D. Fla. Nov. 16, 2007). Moreover, Defendant concedes that the purpose of using BitTorrent is to obtain complete files. And, Defendant admits downloading complete copies of Plaintiff’s movies. *See* Weaver Depo., p.86:17–87:18, 115:19–23, 116:12–117:1, 117:16–118:4, 118:17–119:1. Defendant also testified that he is unaware of any basis to support this so-called affirmative defense. *See id.* at 99:1–13.

2. Defendant’s Second Affirmative Defense: *De Minimis Non Curat Lex*

Defendant’s second affirmative defense claims “[a]ny infringing activity using Defendant’s Internet connection was momentary at best.” CM/ECF 27, p. 8. When asked if he was aware of any evidence to support the defense, Defendant said “I am not.” *Id.* at 104:3-6. Defendant did not even understand his own defense when he asserted it. *Id.* at 100:23-25, 101:1-4. Regardless, as stated above, copying even a small portion of a work may constitute infringement. *Metro-Goldwyn-Mayer, Inc.*, 683 F.2d at 624. And, downloading full copies of Plaintiff’s movies to watch is not “*de minimis*.”

3. Defendant’s Third Affirmative Defense: Failure to Mitigate

Defendant’s third affirmative defense argues “Plaintiff has made no attempt to mitigate

any actual or perceived damages.” CM/ECF 27, p. 8. However, “the defense of failure to mitigate damages is generally inappropriate when [as here] a party seeks only statutory, as opposed to actual, damages.” *Malibu Media, LLC v. Jason Sterling*, No. 8:13-cv-00472, CM/ECF 19 (M.D. Fla. July 17, 2013); *see also* 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. Fitzpatrick*, No. 1:12-cv-22767, 2013 WL 5674711, *3 n.17 (S.D. Fla. Oct. 17, 2013) (holding that an election of statutory damages precludes the defense of failure to mitigate damages); *Clements v. HSBC Auto Fin., Inc.*, 2010 WL 4281697, *11 (S.D. W.Va. 2010) (“[T]he Court finds that there is no genuine issue of material fact as to whether Plaintiffs failed to mitigate their damages as this affirmative defense is not applicable to the imposition of statutory damages.”). Regardless, the defense is baseless. Defendant admits having no evidence to support it. Weaver Depo., p.102:3–19; 106:1–15. And, the defense ignores that Plaintiff “invest[s] significant resources into pursuing all types of anti-piracy enforcement, such as Digital Millennium Copyright Act (“DMCA”) takedown notices and direct efforts aimed at infringing websites.” Field Declaration, CM/ECF 5-2, ¶¶ 27, 28.

4. Defendant’s Fourth Affirmative Defense: Barring of Statutory Damages and Attorney’s Fees

Defendant’s fourth affirmative defense asserts that “Plaintiff’s claim for statutory damages is barred by the U.S. Constitution.” CM/ECF 27, p. 8. However, Courts repeatedly and consistently reject due process challenges to the imposition of statutory damages under the Copyright Act. *See, e.g., Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013) (upholding statutory damages of \$675,000 over a due process challenge where the

defendant was liable for illegally downloading 30 songs for his own non-commercial use)⁸; *Malibu Media, LLC v. Fitzpatrick*, No. 1:12-cv-22767, 2013 WL 5674711, *5 (S.D. Fla. 2013) (holding that “statutory damages need not necessarily be proportionate to actual damages because statutory damages also serve a deterrent function”). And, yet again, Defendant admits being unaware of any basis for the defense. *See Weaver Depo.*, p.102:3–19; 106:16–107:17.

5. Defendant’s Fifth Affirmative Defense: Failure to Join an Indispensable Party

Defendant’s fifth affirmative defense erroneously asserts “Plaintiff failed to conduct any significant investigation to truly identify the individual(s) who allegedly engaged in the downloading/sharing in question and who is/are indispensable parties Plaintiff has simply collected public IP addresses ... and sued them” CM/ECF 27, p. 9. This is nonsense. This lawsuit only concerns one IP address—Defendant’s. All record evidence establishes Defendant used his computer and his Internet to infringe Plaintiff’s copyrights. No other person is required to be joined in this action and no one else can claim an interest in Defendant’s use of BitTorrent to infringe Plaintiff’s works. “[D]efendant’s representation that other alleged infringers have not, and must, be joined in this lawsuit is debunked by well-settled interpretations of Rule 19(a).” *Malibu Media, LLC v. Batz*, No. 12-cv-01953, 2013 WL 2120412, *4 (D. Colo. 2013) (striking affirmative defense of failure to join indispensable party); *Malibu Media, LLC v. Doe*, No. 12-2078, 2013 WL 30648, *9 (E.D. Pa. Jan. 3, 2013) (“[E]ven if the other members of the swarms

⁸ The *Tenenbaum* court specifically rejected the argument that the statutory award “violate[d] due process because it [was] not tied to the actual injury . . . caused. . . [.]” The court opined that such argument asked the court “to disregard the deterrent effect of statutory damages, the inherent difficulty in proving damages in a copyright suit, and [plaintiff’s] evidence of the harm that it suffered from conduct such as *Tenenbaum*’s.” It further noted that the Supreme Court previously held that statutory damages are not to be measured this way. *See Tenenbaum*, 719 F.3d at 71 (“Nor does giving the penalty to the aggrieved [party] require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.” (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919))).

involved in the Does' downloading activities were considered to be joint tortfeasors, the law is clear that joint tortfeasors are permissive parties under Fed. R. Civ. P. 20 but not necessary or indispensable parties under Fed. R. Civ. P. 19(a) and (b). This is a well-settled doctrine that has been acknowledged by the Supreme Court") (citing *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990)). And, as with his other affirmative defenses, Defendant admits being unaware of any basis for asserting or maintaining this affirmative defense. *See* Weaver Depo., p.102:3–19; 107:21–25.

6. Defendant's Sixth Affirmative Defense: Communication Decency Act

Defendant's sixth affirmative defense argues he is immunized from liability pursuant to the Communication Decency Act, 47 U.S.C. § 230. *See* CM/ECF 27, p. 9. Defendant's argument is directly contrary to the language of the statute. The CDA does not apply to intellectual property disputes—"nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). Courts uniformly reject the Communication Decency Act as a viable defense to copyright infringement actions. *See, e.g., Malibu Media, LLC v. Laura Xiong*, No. 1:13-cv-01525-WYD-MEH, CM/ECF 26, at p. 7 (D. Colo. December 16, 2013) (striking identical affirmative defense, noting that "[t]he immunity provided by the CDA does not extend to any law pertaining to intellectual property"); *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1125 (D. Nev. 2013) (holding that the grant of immunity under the CDA does not extend to intellectual property claims); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp.2d 690, 702–04 (S.D. N.Y. 2009) (same). Again, Defendant admits he is unaware of any basis for asserting or maintaining this affirmative defense. *See* Weaver Depo., p.102:3–19; 108:3–6.

7. Defendant's Seventh Affirmative Defense: License, Consent, and Acquiescence

Defendant's seventh affirmative defense reads, in its entirety: "Plaintiff's claims are barred by Plaintiff's implied license, consent, and acquiescence to Defendant because Plaintiff authorized use via Bit Torrent." CM/ECF 27, p. 10. Plaintiff did not authorize Defendant to download and distribute its copyrighted works via BitTorrent or acquiesce in Defendant's doing so. *See* Field Declaration, CM/ECF 5-2, ¶ 29. Defendant admits Plaintiff never granted him a license, express or implied, and concedes he is unaware of any basis for asserting or maintaining this affirmative defense. *See* Weaver Depo., p.102:3–19; 108:15–109:4.

8. Defendant's Eighth Affirmative Defense: Unclean Hands

Defendant's eighth affirmative defense reads: "Plaintiff's claims are barred by the doctrine of unclean hands. CM/ECF 27, p. 10. "For a defendant to successfully avail itself of the doctrine of unclean hands, it must satisfy two requirements. First, the defendant must demonstrate that the plaintiff's wrongdoing is directly related to the claim against which it is asserted. Second, even if directly related, the plaintiff's wrongdoing does not bar relief unless the defendant can show that it was personally injured by her conduct." *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 450–51 (11th Cir. 1993). The defense "must be pled with the specific elements required to establish the defense." *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-cv-01644, 2010 WL 3522409, *3 (D. Colo. Aug. 10, 2010).

Plaintiff has not committed any transgression against Defendant relating to this lawsuit and therefore Defendant cannot show that he was personally injured by such conduct. Tellingly, Defendant has not and cannot proffer any evidence to the contrary:

Q: Mr. Weaver, what evidence supports your eighth affirmative defense of Unclean Hands?

A: I don't know.

Weaver Depo., p.109:5–8. *See also* p. 84:10-12 (“Q: Can you name one “shady” practice that you are referring to? A: At the moment, no.”)

9. Defendant’s Ninth Affirmative Defense: Injunctive Relief

Defendant’s ninth and final affirmative defense asserts “Plaintiff is not entitled to injunctive relief because any alleged injury to Plaintiff is not immediate nor is it irreparable.” CM/ECF 27, p. 10. This so-called affirmative defense fails as a matter of law. It is not an affirmative defense, but merely a denial of Plaintiff’s entitlement to certain requested relief. Regardless, Defendant again admits that he is unaware of any basis for asserting or maintaining this purported affirmative defense. *See* Weaver Depo., p.102:3–19; 109:9–21.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court grant the subject Motion and enter summary judgment in Plaintiff’s favor on all claims.

Dated: December 11, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2015, 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/ Jason H. Cooper