

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

MALIBU MEDIA, LLC,)	
)	
Plaintiff,)	
)	Civil Action No.
v.)	8:14-cv-1580-VMC-TBM
)	
GREGORY WEAVER,)	
)	
Defendant.)	
_____)	

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW Defendant, GREGORY WEAVER, by and through his undersigned counsel, pursuant to Rule 56, Federal Rules of Civil Procedure, and hereby moves for summary judgment as a matter of law on Plaintiff's claims in the Amended Complaint (Doc. 10).

I. Introduction

Plaintiff, Malibu Media, has made more than 700 pornographic videos under the Trademark "X-Art" and publishes them on its website www.xart.com, from which it offers its subscribers "unlimited downloads" of these videos. Here, Plaintiff sued Defendant for Direct Copyright Infringement of 31 specific pornographic videos it listed in Exhibit "A" to its Amended Complaint.

Plaintiff employs an agent, IPP International UG, which alleges to have made, from Germany, "a direct connection" with IP Address 173.78.19.241 (Doc. 10 ¶ 17) using a modified BitTorrent client. BitTorrent software allows users to transmit large files by breaking them up into many small pieces.¹ Plaintiff's agent allegedly "downloaded one or more" pieces² of the following 31 specific X-Art videos (Doc. 10 at 4 ¶ 21), which are the subject of this lawsuit:

1. A Hot Number
2. Blindfold Me Baby
3. Catching Up
4. Come To Me Now
5. Deep Blue Passion
6. Double Tease
7. Epic Love
8. Floating Emotions
9. From Three to Four Part 2
10. Get Wild at Home
11. Group Sex
12. I Am In the Mood
13. I Can Not Wait
14. I Want You To Watch Me
15. Insanely Gorgeous

¹ See, e.g., Doc. 10 at 3 ¶ 12 ("BitTorrent protocol breaks a file into many small pieces called bits.")

² Plaintiff has consistently used the wrong word, "bit," when it should be using the word "piece" to refer to the smaller units that comprise a file transferred using the BitTorrent protocol. **Bit** is short for a "binary digit," a single basic unit of information that consists of either a 1 (one) or 0 (zero). A **piece** on the other hand is the unit by which a file is divided; "[t]he pieces are distributed in a random fashion among peers ... to optimize trading efficiency." Wikipedia, Glossary of BitTorrent Terms, https://en.wikipedia.org/wiki/Glossary_of_BitTorrent_terms#Piece

16. Just Watch Part 2
17. Meet My Lover From Austria
18. Mile High Club
19. Morning Glory
20. Morning Meditation
21. Not Alone
22. Perfect Timing
23. Pink Perfection
24. Remembering Strawberry Wine
25. Season of Love
26. Sex and Submission
27. Sweet Dreamers
28. Sweet Surrender
29. They Only Look Innocent
30. Trophy Wife
31. Wake Me Up

Doc. 10-1 and 10-2 (listing video titles).

Plaintiff accused Defendant of downloading these 31 videos onto his computer hard drive. During discovery, Plaintiff was given carte blanche access to that hard drive. Doc. 57. As such, Plaintiff had ample opportunity to find evidence of actual copies of the 31 videos, if they had been downloaded by Defendant. Despite the conducting of a deep, comprehensive, forensic search on that hard drive by Plaintiff's own expert, former law enforcement officer Patrick Paige, Plaintiff was unable to find a single copy, or even a piece of, of **any** of the 31 videos. Discovery is now closed.

Without providing a single copy – or even a piece – of any of the 31 videos, or proving that Defendant downloaded any

one of the 31 video, Plaintiff has not, nor cannot, meet its burden of proving a copyright infringement cause of action in this case. Plaintiff cannot prove that Defendant copied any one of the 31 movies or that any file uncovered on Defendant's computer is substantially similar to an original movie. As such, the expense and delay of trial should be avoided, and summary judgment should be granted in favor of Defendant.

II. Uncontested Facts

"Torrent files" relating to 19 of the 31 movies were found on Defendant's hard drive. **Exhibit "1"** at 2 (Dorn's Report); Doc. 74-3, ¶ 25 (Paige's report).³

No copy of (or piece of) any one of the 31 movies was found on Defendant's hard drive or in Defendant's possession. Exh. "1," at 2 (Dorn's Report); Doc. 92 at at 2, ¶ A; see Doc. 74-3.

³ Patrick Paige's reported finding "torrent files" for 25 of the 31 movies on Defendant's hard drive. Defendant's expert Greg Dorn reported finding "torrent files" for 19 of the 31 movies. Therefore, it is uncontested that at least 19 *torrent files* were found on Defendant's hard drive. However, this does not create a genuine issue of material fact. For purposes of this motion for summary judgment, it would not matter if "torrent files" for all 31 movies were found on Defendant's hard drive. As will be explained in detail below, the copying of "torrent files" does not prove the copying of movie files, as "torrent files" do not contain the media file but only instructions on how to download same.

There is no evidence that any of the 31 movies ever existed on Defendant's hard drive. Exh. "1," at 2 (Dorn's Report); see Doc. 92 at at 2, ¶ A; Doc. 74-3, ¶ 27, n. 1

III. Legal Standard

Summary Judgment is warranted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

The summary judgment analysis requires a two-part framework: First, the movant carries the initial burden of "informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. Proc. R. 56).

Where, as here, the non-movant bears the burden of proof at trial:

the moving party is not required to support its motion with affidavits or other similar material negating the opponent's claim in order to discharge this initial responsibility. Instead, **the moving party simply may show — that is, point out to the district court — that there is an absence of evidence to support the non-moving party's case.**

Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115-16 (11th Cir. 1993) (quoting *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991)) (emphasis added, internal brackets omitted).

Next, once the movant meets its burden, the burden shifts to the non-movant to demonstrate the existence of a genuine issue of material fact. The non-moving party must do more than simply show some doubt as to the facts of the case. *Fitzpatrick*, 2 F.3d at 1116. The nonmovant must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories, and admissions on file, and designate specific facts showing a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324. The evidence must be significantly probative to support the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). "When ruling on a defendant's motion for summary judgment or a directed verdict in favor of plaintiff, mere existence of a scintilla of evidence in support of the plaintiff's position will not be sufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*; Fed. R. Civ. Proc. R.

50(a), 56(c). "Some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material fact*." *Anderson*, 477 U.S. at 247-48.

IV. Copyright Infringement

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." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). A court may determine non-infringement as a matter of law on a motion for summary judgment when no reasonable jury, properly instructed, could find that the two works are substantially similar. *See Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 918 (2d Cir. 1980).

A. No jury could find that Defendant copied the movies

In another recent and virtually identical Malibu Media case, Malibu Media, just like it did here, received a copy of the defendant's hard drive and Patrick Paige forensically analyzed it. *Malibu Media v. Doe*, 82 F.Supp.3d 650, 2015 WL 412855 (E.D. Pa. Feb. 2, 2015). There, the forensic analysis of the hard drive produced evidence of "a data fragment referencing 'X-Art Angelica Good Night Kiss Preview' -- one of Malibu Media's copyrighted works listed within the Complaint

for [that] lawsuit.” *Id.* at 656. There, Plaintiff moved for summary judgment arguing it had found evidence that the defendant had downloaded the movies at issue. Notwithstanding the evidence of the data fragment, the district court denied Plaintiff’s motion and granted summary judgment in favor of defendant because the file fragment was not a copy of any movie at issue, and Plaintiff had no further evidence to show that copying of the at-issue movies had taken place.

The court found that the substantial similarity test obliged it to determine whether copying had occurred and if that copying constituted improper appropriation. *Id.* Even though Malibu Media had found what it purported to be an actual fragment of a video file on defendant’s computer – which is much more than it has obtained in the instant case – it had “a complete failure of proof concerning an essential element of its claim”: “whether Doe copied from the plaintiff’s work and whether the copying, if proven, constitutes an improper appropriation.” *Id.* at 660. As Malibu Media failed to prove that actual copies were made of its videos, the court could not conclude that the defendant had copied even the one movie for which a related fragment was found.

Similarly, here, Malibu Media received a copy of Defendant's hard drive, on which it performed a forensic analysis. Its forensic expert, Patrick Paige, stated:

Using EnCase, I searched for the exact unique filenames of all the infringed works and found exact matches. Indeed, as the chart below illustrates, I located the **torrent files** for twenty-five (25) of the thirty-one (31) infringed works. Nearly every one of Plaintiff's infringed works once existed on Defendant's MacBook and had subsequently been deleted.

Doc. 74-2 at 5 ¶ 25 (emphasis added). Defendant's copying of "torrent files," however, does not evidence copying the corresponding movies because a "torrent file" does not contain a copy of, or any part of, the actual movie.

Paige's blanket statement that Plaintiff's movies "once existed on Defendant's MacBook" is pure unsupported speculation, as a "torrent file" does not contain the media file and does not evidence downloading. Just a few months ago in another similar Malibu Media case, Plaintiff made it abundantly clear that a "torrent file" does not contain an actual media file at all, and that "downloading a .torrent file correlated to a media file is not the same thing as downloading the media file itself." Doc. 82-2 at 5, Plaintiff's Response in Opposition to Defendant's Motion for

Sanctions in *Malibu Media, LLC v. Sharp*, 8:14-cv-02138-VMC-MAP [81] (M.D. Fla. Oct. 19, 2015).

Essentially, a "torrent file" is no more similar to a video file than a 3x5 index card pulled from an old-style library card catalog would be to the book to which that card relates. In *Sharp*, the defendant had moved for sanctions after Plaintiff's agent had admitted under oath to downloading "torrent files" to certain movies, while separately, in discovery, Plaintiff denied having ever downloaded actual copies of those particular movies – the media files. In an effort to describe the difference between a "torrent file" and an actual movie file, Plaintiff explained how someone (including its own agent) can download a "torrent file" but never download the corresponding movie:

In the BitTorrent file distribution system, a torrent file is a computer file that contains metadata about files and folders to be distributed, and usually also a list of the network locations of trackers, which are computers that help participants in the system find each other and form efficient distribution groups called swarms. *A torrent file does not contain the content to be distributed; it only contains information about those files, such as their names, sizes, folder structure, and cryptographic hash values for verifying file integrity. A file with*

the TORRENT file extension is a BitTorrent Data file. TORRENT files contain information for how files should be accessed through the BitTorrent P2P network, much like a URL. Things like file names, locations, and sizes are included in a TORRENT file. **The digital files that are downloaded using TORRENT files are not contained in the file itself,** but instead are simply referred to through it.

Doc. 82-2 at 3-4 (internal quotations and citations omitted) (bolded emphasis in original, italics added). There, Plaintiff explained that its agent downloaded "torrent files" only but never the actual movies, and therefore sanctions were improper because Plaintiff did not lie under oath about having never downloaded the movie files. Notably, here, Paige allegedly uncovered only "torrent files" but failed to uncover on Defendant's hard drive even a piece of any of the 31 videos. A "torrent file" is not a media file. **Exh. "1,"** at 4 (Dorn's Report) (explaining that on the hard drive "are only torrent files containing the names of the alleged downloaded files, not the files themselves.")

Plaintiff has freely admits, "it is true that Plaintiff was only able to locate the .torrent files for its movies and not the actual movies themselves." Doc. 92 at 2. Plaintiff, however, attempts to diminish the fact that it cannot prove

copying by stating that "Defendant admitted that he deleted all the X-art movies he downloaded prior to producing his computer for examination."⁴ *Id.* However, Defendant clearly stated that he did not recognize any of the 31 movies at issue. Doc. 74-4 at 30, 117:6-118:1.⁵ If Defendant had downloaded any of those 31 movies onto his computer, there would be evidence on that computer. "Portions of the downloaded files would have been recoverable during this search had they existed on [Defendant's computer] in the live and organized folders and files that are part of the operating system or in unallocated space." Exh. "1," at 4 (Dorn's Report). This is further evidenced by Paige's admission that when a file is deleted the data remains in the unallocated space. Doc. 74-3 at 27. Paige said he able to recover what he

⁴ Defendant's admission to downloading X-Art movies in the past does not mean that he downloaded the 31 movies expressly listed in the complaint. In fact, he doesn't recognize any of the 31 movies listed in the Amended Complaint. Doc. 74-4, 117:6-23.

⁵ Q: Mr. Weaver, I would like you to please review Exhibit-E. Exhibit-E is a copy of what was attached to our amended complaint actually as Exhibit A. You've seen this list before; is that correct?

A. Yes.

Q. I would like you to take a minute to review each and every title that is on this list and let me know when you're done?

A. Yes. Okay.

Q. Mr. Weaver, did you download any of these movies?

A. I don't know.

Q. Using BitTorrent?

A. I don't know.

Q. How do you not know?

A. I don't recognize any of these titles.

Q. None of these titles are familiar to you?

A. No.

alleged to be evidence of *other* deleted X-Art movies and other files in Defendant's unallocated space, but he found no evidence of the 31 movies in the complaint. *Id.*

In a declaration in support of Plaintiff's reply to its own motion for summary judgment, Paige included several screenshots that indicated that he found evidence that some other X-Art titles had been "downloaded to completion and therefore existed on Defendant's computer." Doc. 92-1 at 2-3 ¶6. Those titles – the only Xart movies Paige found to have actually been downloaded – are shown in the screenshots in Paige's declaration, and highlighted with red boxes drawn around the file names. *Id.* Although those screenshots appear to show titles of X-Art movies, they do not include any file names for the 31 videos at issue.^{6,7}

⁶ Plaintiff has misled the Court by stating that Paige "was able to access logs on Defendant's hard drive showing that such files at one time existed," Doc. 92 at 8, implying that the files **for the 31 movies** at one time existed. Such statement is grossly misleading because nowhere in Paige's report does he indicate that he found any evidence of any of the media files for the 31 movies; rather, Paige's report only showed that other, entirely different X-art movies may have at one time existed. Such falsity is demonstrated by the fact that Plaintiff can only cite *generally* to Paige's report, and cannot cite to a specific portion for such proposition.

⁷ After Paige completed its analysis, Plaintiff moved to amend the complaint to sue Defendant for those other Xart movies that Paige allegedly detected being downloaded. (Doc. 71). The Court, however, denied this motion to amend, and those additional works never became a part of the instant lawsuit. (Doc. 72.)

This lawsuit was filed about 31 very specifically listed movie titles, all of which are listed in the amended complaint: (1) Mile High Club, (2) Season of Love, (3) Get Wild at Home, (4) They Only Look Innocent, (5) I Can Not Wait, (6) A Hot Number, (7) I Am In the Mood, (8) Morning Meditation, (9) Sex and Submission, (10) Trophy Wife, (11) Sweet Dreamers, (12) Remembering Strawberry Wine, (13) Insanely Gorgeous, (14) Deep Blue Passion, (15) Sweet Surrender, (16) Wake Me Up, (17) Floating Emotions, (18) Pink Perfection, (19) Not Alone, (20) Catching Up, (21) Double Tease, (22) Group Sex, (23) Come To Me Now, (24) I Want You To Watch Me, (25) Perfect Timing, (26) Meet My Lover From Austria, (27) Epic Love, (28) Just Watch Part 2, (29) Morning Glory, (30) Blindfold Me Baby, and (31) From Three to Four Part 2.

Paige found no evidence of any of those 31 videos on Defendant's hard drive. *Id.* In short, Plaintiff has no direct evidence that any of its 31 movies was ever present on Defendant's computers.

Because Plaintiff cannot demonstrate that Defendant ever had any of the 31 movies downloaded on his computer, Plaintiff cannot demonstrate that Defendant ever actually copied Plaintiff's works, an essential element to a copyright

infringement. As Plaintiff cannot demonstrate this element, summary judgment in favor of Defendant is appropriate.

B. Plaintiff provides no evidence of when the alleged computer devices attached to the MacBook

In its motion for summary judgment, Plaintiff refers to evidence of other devices Paige alleges had at one point connected to Defendant's MacBook and concludes that evidence of infringement must exist on those devices. Notably, however, Paige was unable to indicate when those devices actually connected to the MacBook. Plaintiff's Interrogatory No. 3 specifically limited itself to computer devices used within the past two years.⁸ On November 13, 2015, Plaintiff deposed Defendant and asked Defendant if he had any external storage devices. Doc. 74-4, 59:2-24. Defendant made clear in his deposition that he was unaware of any thumb drives he had anymore. Doc. 74-4, 59:2-24. Furthermore, Defendant stated that the external hard drive had been stored in his closet during the past two years. Doc. 74-4, 59:2-24. Therefore, this external hard drive was not used during the past two years. More importantly, on September 28, 2015, Defendant provided Plaintiff with his hard drive. Plaintiff could have served a

⁸ Plaintiff's Interrogatory No. 3 asks Defendant to identify every Computer Device used in his home during the preceding two years. Doc. 74, ¶ 36.

discovery request for the various devices that had allegedly connected to Defendant's MacBook, yet failed to do so.

C. No jury could find that "torrent files" bear a substantial similarity to Malibu Media's movies

"Even if the Plaintiff were able to offer evidence sufficient to raise an inference of copying, [Plaintiff] would also have to show that [the copies were] substantially similar in protected expression to [the works.]" *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1257 (11th Cir. 1999). Not all copying amounts to copyright infringement. *Dream Custom Homes, Inc. v. Modern Day Const., Inc.*, 773 F. Supp. 2d 1288, 1301 (M.D. Fla. 2011) *aff'd*, 476 Fed. Appx. 190 (11th Cir. 2012). "Once copying is established, a plaintiff must show that the copying amounts to an improper appropriation by demonstrating that substantial similarities relate to protectable material." *Id.* "Substantial similarity is determined from an 'average lay observer's' point of view, i.e., 'where an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'" *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 (11th Cir. 1982)); *quoted by Dream Custom Homes*, 773 F. Supp. 2d at 1301.

No properly instructed jury could find that the detected "torrent files" are substantially similar to the 31 movies.

Just like a card from a card catalog would bear similarity to nothing more than the Dewey decimal number taped to a book's spine, a "torrent file" contains only instructions on how to download a movie. Therefore, torrent files have no more similarity to movies than a 3x5 card would have to, for example, a copy of Richard Adams's *Watership Down*.

At most, the existence of "torrent files" on Defendant's computer suggests that Defendant had an opportunity to copy the works. However, the Eleventh Circuit would then require Plaintiff to show that any copy made is substantially similar to the original copyrighted work. *Herzog*, 193 F.3d at 1248 (citing *Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 (11th Cir. 1986), *reh'g denied*, 801 F.2d 404 (11th Cir. 1986) (*en banc*)). Here, Plaintiff has not uncovered, nor can it uncover, any evidence that any one of Plaintiff's 31 videos was downloaded on Defendant's computer or in Defendant's possession. Plaintiff has made it crystal clear that one can download a "torrent file" without subsequently downloading the movie. Without evidence of any video files on Defendant's hard drive or in Defendant's possession, Plaintiff cannot provide a copy for the trier of fact to review. Therefore, there is nothing for the trier of fact to compare to Plaintiff's movies to

determine substantial similarity. Plaintiff cannot meet its burden on this element of the copyright infringement cause.

Plaintiff has only provided evidence that Defendant downloaded *instructions* on how to download Plaintiff's works. Possession of "torrent files" is not copyright infringement. Therefore, Plaintiff *cannot* prove the essential elements of a copyright infringement cause of action and summary judgment should be had in favor of Defendant.

D. Downloading a piece of a film is not necessarily copyright infringement

Plaintiff has claimed that its investigator, IPP International UG, established a direct connection with Defendant's IP address and downloaded one or more pieces from the digital movie files to "confirm[] through independent calculation that the file hash matched what is listed on Exhibit A," thereby verifying that the collected data correlating to each file hash contained a copy of the movie Defendant allegedly downloaded. Doc. 10 at ¶¶ 17-21.

Plaintiff provided "PCAP" files ("packet captures") as evidence of the connection between IPP and IP address 173.78.19.241 and the piece of the film allegedly downloaded by Defendant. However, each PCAP is not representative of an entire video. **Exhibit "2"** at 4, Expert Report of Tom Parker, §

III(B). To begin, Plaintiff's PCAP evidence, which Plaintiff alleges are the pieces of the video files allegedly intercepted by its German agent as being transmitted through IP address 173.78.19.241, are miniscule in size compared to actual video files. For example, the size of the PCAP that allegedly corresponds to file hash No. CC2228DBFA53DB83C886724F18487A3B5B9DCC46 recorded in that PCAP amounted to only 127KB. *Id.* However, the size of the video file for the corresponding movie, "Morning Glory," is 244,600KB – about 2000 times larger than the PCAP. *Id.* Therefore, Plaintiff has no evidence that anyone utilizing IP address 173.78.19.241, much less Defendant, downloaded the entire movie "Morning Glory."⁹ Furthermore, each allegedly downloaded piece is so small in size that it could not be substantially similar to the movie itself. The purpose of the substantial similarity test is to determine whether a copy contains protectable expression. *See Intervest Const., Inc. v.*

⁹ Any accusation that the downloading of one small piece of a file constitutes the downloading of an entire video is pure speculation. As Plaintiff has aptly stated, "speculation is improper and disallowed by Federal Rule of Evidence 602." Doc. 92 at 4. Plaintiff's statement, "Defendant's own computer logs reveal that the X-Art .torrent files were used to download X-Art movie files to completion" [Doc. 92 at 7], is misleading. Although there is evidence that X-art videos were downloaded to completion, these are only from completely unrelated videos that are not part of this lawsuit. Therefore, as it relates to the videos alleged in the complaint, Plaintiff's statement is not supported by any evidence. The expert report of Patrick Paige nowhere indicates proof that Defendant downloaded a copy of any one of the 31 works to completion.

Canterbury Estate Homes, Inc., 554 F.3d 914, 920 (11th Cir. 2008). In truth, "a single piece, alone, is basically worthless; with only a single piece, you may not be able to see a frame." Exh. 3 at 5, § III(C). If the pieces Plaintiff's German agent allegedly intercepted from IP address 173.78.19.241 are unviewable, the substantial similarity test cannot even be performed to determine whether those pieces – which, again, were not even found on Defendant's hard drive – bear any similarity. Therefore, Plaintiff cannot prove its copyright infringement cause of action. As such, summary judgment should be granted in favor of Defendant.

E. If Defendant had downloaded any of the 31 video files, Plaintiff's expert witness would have uncovered at least pieces of those files or evidence of the downloading.

Again, in searching Defendant's hard drive, Plaintiff's forensic expert did not find a single piece or even a fragment of any of the works.¹⁰ Plaintiff's expert, Patrick Paige, and Defendant's expert, Greg Dorn, both confirmed that *not a single piece* of any one of the 31 works existed or could be recovered from the unallocated files of Defendant's hard drive. If such evidence ever did exist, some trail of evidence

¹⁰ The only .torrent files that were used to download X-art videos to completion are for X-art videos that are not even alleged in the Complaint. That Defendant downloaded one bittorrent file to completion is not proof that he downloaded a different bittorrent file to completion.

would have indicated such. **Exh. "1,"** at 4 (Dorn's report). Patrick Paige showed that he was fully capable of uncovering files that had been deleted, since he did uncover two other X-art movies that were **not** among the 31 videos. Doc 74-3 at 6 ¶ 27 ("I searched the MacBook's unallocated space for movies. I located two X-Art movies on Defendant's hard drive, 'A Thought of You' and 'Rope Priority.' Both movies were in the unallocated space which confirms that the files were deleted."). Additionally, Paige boasted about finding evidence that "several X-Art titles were downloaded to completion and therefore existed on Defendant's computer" Doc. 92-1 at 2 ¶ 6. However, Paige's screenshots show that none of those X-Art titles – "Getting Ready for Bed," "At Home with Tiffany," "Go Fish," "Pretty Little Belle," "Threesomes are the Bestsomes," "Just the Three of Us," "Tie Her Up for Me," and "Fantasy Come True" – correspond to the 31 movies at issue in this lawsuit.¹¹ However, even though Paige thoroughly searched the "unallocated space," which he explained "is not viewable to

¹¹ Again, the 31 videos at issue, in alphabetical order, are: A Hot Number, Blindfold Me Baby, Catching Up, Come To Me Now, Deep Blue Passion, Double Tease, Epic Love, Floating Emotions, From Three to Four Part 2, Get Wild at Home, Group Sex, I Am In the Mood, I Can Not Wait, I Want You To Watch Me, Insanely Gorgeous, Just Watch Part 2, Meet My Lover From Austria, Mile High Club, Morning Glory, Morning Meditation, Not Alone, Perfect Timing, Pink Perfection, Remembering Strawberry Wine, Season of Love, Sex and Submission, Sweet Dreamers, Sweet Surrender, They Only Look Innocent, Trophy Wife, Wake Me Up

the typical computer user and requires specialized computer forensic software to view and analyze,"¹² he could not locate any one – or even a piece of one – of the 31 separate movie files at issue in this lawsuit, nor could he locate any record that a download had ever been made of any piece of the 31 movies files.

a. No reasonable doubt can be found from the torrent files

Plaintiff may argue that evidence of the torrent files for 25 of 31 of the works on Defendant's hard drive raises enough doubt that Defendant downloaded the works and therefore summary judgment for Defendant should be denied. On a motion for summary judgment, however, the Court must "draw inferences from the evidence in the light most favorable to the nonmovant and resolve all **reasonable** doubts in that party's favor." *U.S. v. Pizano*, No. 8:15-CV-284-T-EAK-TB, 2015 WL 2449591, at *1 (M.D. Fla. May 21, 2015) (emphasis added) (citing *Speciality Malls of Tampa v. The City of Tampa*, 916 F.Supp. 1222 (Fla.M.D.1996)). Considering that Plaintiff's thorough forensic search failed to uncover even a piece of any of the 31 movies, even though Plaintiff's expert searched in the

¹² Doc 74-3 at 6-7 ¶ 27, n. 1 (adding that "When a file is deleted, the pointers to the file are removed, but the data remains in unallocated space until the operating system stores another file in the same space, thereby over-writing the data.")

unallocated space and found other deleted movies, any such doubt would not be reasonable. It is abundantly clear that a torrent file is not a media file, and that a person can download a "torrent files" without ever having downloaded the corresponding media files, as Plaintiff's agent did, for example, as aptly explained by Plaintiff. Therefore, there is no doubt that Plaintiff has no evidence to prove, and cannot prove, claim for direct copyright infringement against Defendant, and summary judgment should be entered in Defendant's favor.

F. Attorney Fees

Lastly, section 505 of the United States Code provides for an award of attorney fees as costs to the prevailing party in a copyright infringement action. *Arthur Rutenberg Corp. v. Dawney*, 647 F. Supp. 1214, 1216 (M.D. Fla. 1986) (citing 17 U.S.C. § 505). An award of attorney fees to the prevailing party in a copyright action is the rule rather than the exception. *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573 (5th Cir. 2002).

G. Conclusion

As Plaintiff can only prove that torrent files correlating to the works were downloaded, Plaintiff cannot demonstrate copying or substantial similarity. Without this

evidence, no jury properly instructed could find for Plaintiff on its copyright infringement cause of action. Therefore, the expense and delay of trial should be avoided and summary judgment should be had in favor of Defendant.

WHEREFORE, Defendant, GREGORY WEAVER, pleads that this Honorable Court enter final summary judgment in favor of Defendant and award Defendant his costs, including attorney's fees, pursuant to 17 U.S.C. § 505, as prevailing party.

ATTORNEY'S CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on **January 28, 2016**, a true and correct copy of the foregoing has been served to Plaintiff's attorney via the electronic filing system.

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