

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT MICHIGAN**

MALIBU MEDIA, LLC,	)	
	)	
Plaintiff,	)	Civil Action Case No. 1:13-CV-360-RJJ
	)	
v.	)	
	)	
JESSE RALEIGH,	)	
	)	
Defendant.	)	
<hr style="border: 0.5px solid black;"/>	)	

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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## **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Malibu Media, LLC ("Plaintiff"), pursuant to Fed. R. Civ. P. 56, hereby moves for entry of an order granting summary judgment in its favor, and files this memorandum in support.

### **I. INTRODUCTION**

Defendant is an admitted BitTorrent user. Defendant's IP address was repeatedly recorded using BitTorrent to infringe Plaintiff's works. Defendant's internet service provider ("ISP") confirmed Defendant was the subscriber. Defendant's IP address was also logged as a peer in BitTorrent swarms for third party works that correlate directly to Defendant and his family's hobbies and interests. Indeed, the correlations are so numerous and exact that the BitTorrent use Excipio logged *must* have occurred by Defendant or his wife. No rational juror *could* conclude otherwise. Not surprisingly, Defendant did not voluntarily turn over the computer containing Plaintiff's infringing works. But, the existence of that computer is nevertheless proved by, *inter alia*, the correlating evidence. Plaintiff's computer forensic expert found evidence of BitTorrent clients, movies, music, software and other content on his computers. Since Defendant had denied using BitTorrent for these purposes, the computer evidence proves Defendant provided false testimony. Defendant's mere denial is insufficient to overcome the record evidence proving his liability. For the foregoing reasons, as explained more fully below, Plaintiff respectfully requests this Court grant the subject Motion.

### **II. MATERIAL FACTUAL QUESTIONS**

At trial, Plaintiff would, if permitted, submit the following interrogatory to a jury pursuant to Fed. R. Civ. P. 49.

Did Plaintiff prove by a preponderance of the evidence that:

- a) Plaintiff owns the copyrights to the Works set forth on Exhibit A to the Amended Complaint. Yes or No?
- b) Plaintiff did not authorize Defendant to use BitTorrent to download and distribute its Works. Yes or No?
- c) IP address 24.247.226.165 was used to distribute copies of its Works via the BitTorrent protocol. Yes or No?
- d) Charter assigned IP address 24.247.226.165 to Defendant. Yes or No?
- e) No one heard, saw, smelled, tasted or touched a neighbor or lurker use BitTorrent via Defendant's Internet. Yes or No?
- f) It is more probable that Defendant, as opposed to a neighbor or lurker, used BitTorrent to infringe Plaintiff's copyrights? Yes or No?
- g) No one visited Defendant with sufficient frequency during the applicable time period to be the infringer. Yes or No?
- h) Defendant is more likely than his wife to be the infringer. Yes or No?

Based on the undisputed material facts, all rational triers of fact must answer "Yes" to each and every one these questions. Any contrary conclusion is fatally illogical and could not survive a JNOV motion or appellate scrutiny. *See* Fed. R. Civ. P. 49(b)(3) (when the verdict is inconsistent with special interrogatories, a court may "approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict; direct the jury to further consider its answers and verdict; or order a new trial."). In other words, a verdict that is inconsistent with the answers to special interrogatories cannot stand.

As it relates to the instant Motion for Summary Judgment, this Court should expressly decide whether a rational juror could find, by a preponderance of the evidence, that Plaintiff did not prove any of the foregoing eight facts. *See Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 159 (6th Cir. 1995) ("[T]he Supreme Court has indicated that the existence of subjective issues does not necessarily foreclose summary judgment disposition. Thus, a nonmoving party may not

avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations or subjective evidence. Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment.”). Here, Plaintiff respectfully submits that no rational juror could find that Plaintiff failed to prove any of the foregoing questions. Therefore, summary judgment is warranted.

### **III. STATEMENT OF UNDISPUTED FACTS**

#### **A. Malibu Media Owns the Copyrights-in-Suit**

Malibu Media is the registered owner of the six (6) copyrights set forth on Exhibits A and B to the Amended Complaint [CM/ECF 10-1,10-2] (the “Copyrights-in-Suit”). *See* Printouts from Copyright Office official online records, attached hereto as Exhibit A. “No other person or entity has or can claim an ownership interest in the copyrights.” Declaration of Colette Field (“Field Decl.”), CM/ECF 85-1, ¶ 10.

#### **B. The BitTorrent Files Are Copies of the Infringed Works**

The files containing the cryptographic hash values set forth in Plaintiff’s Amended Complaint at CM/ECF 10-1 are identical to, strikingly similar to or substantially similar to the Infringed Works. *See* Declaration of Tobias Feiser (“Feiser Decl.”), CM/ECF 3-1, at ¶ 20.

#### **C. The Infringing IP Address Was Assigned to Defendant**

Defendant’s Internet Service Provider, Charter, is “certain” Defendant was the subscriber whose equipment was assigned the unique IP address 24.247.226.165 (“Defendant’s IP Address”) when the infringement was occurring. *See* Declaration of Charter Communications (“Charter Decl.”), attached hereto as Exhibit B, at ¶¶ 8-13.

#### **D. Charter’s Correlation and Excipio’s Business and Computer Records Prove The Infringer Used Defendant’s Internet**

With Plaintiff’s permission, Excipio established a TCP/IP internet connection with a

person (the “Infringer”) using Defendant’s IP Address 24.247.226.165. Excipio’s system recorded the Infringer sending its servers pieces of six (6) of Plaintiff’s copyrighted movies between February 11 and February 17, 2013. *See* Declaration of Michael Patzer (“Patzer Decl.”), attached hereto as Exhibit C, ¶ 15; *See also* MySQL log attached as Exhibit A to Patzer Decl. Excipio’s system recorded and logged forty nine (49) computer transactions between Defendant’s IP Address and Excipio’s system (each an “Infringing Transaction,” collectively the “Infringing Transactions.”). *See* MySQL log attached as Exhibit A to Patzer Decl. As used herein the “Infringing Transaction” is the computer transaction between Excipio and the Infringer illegally distributing Plaintiff’s work in violation of Plaintiff’s exclusive distribution right as set forth in 17 U.C.S. §106.

The Infringing Transactions took place on February 11, February 13, February 15, February 16, and February 17. *Id.* During each Infringing Transaction, the Infringer sent a “bit” (also known as a “piece”) of a media file, via the Internet, to Excipio. *See* Patzer Decl. ¶ 15. Each one of the 49 bits correlates via a unique cryptographic hash value to a piece of a copy of one of the Infringed Works. *See* Feiser Decl., CM/ECF 3-1, at ¶ 19; *See also* Patzer Decl. ¶ 14. Each entry on the MySQL log file correlates to a packet capture computer file known as a “PCAP.” *See* Patzer Decl. ¶ 21. Each PCAP is a recording of an Infringing Transaction between Excipio and the Infringer related to a bit or piece of one of Plaintiff’s works. *See* Patzer Decl. ¶ 16-17. The PCAPs and MySQL log files are computer records and Excipio’s business records. Michael Patzer can lay the foundation for their introduction at trial. Patrick Paige, Plaintiff’s computer forensic expert, tested Excipio’s system and concluded the system works by “accurately record[ing] the IP address of a person using BitTorrent to transmit data to Excipio’s computer servers.” *See* Patrick Paige’s Amended Expert Report, (“Paige’s Amended Report.”),

attached hereto as Exhibit D, at ¶ 7.

**E. Defendant Provided False Testimony About His BitTorrent Use**

The BitTorrent client “uTorrent” is installed on a Windows XP virtual machine on Defendant’s Macbook Laptop No. 1. *Id.* at ¶ 30. Within the Windows XP virtual machine Paige also located the uTorrent protocol LNK file for the computer user “Jesse.” *Id.* at ¶ 31. The BitTorrent client “uTorrent” was also installed on Defendant’s MacBook Laptop No. 2. *Id.* at ¶ 35. Defendant does not dispute that he uses BitTorrent. *See* Mr. Raleigh Dep., CM/ECF 122-2, 52:16-18.

In response to Plaintiff’s Interrogatory No. 20, Defendant denied using BitTorrent to illegally download copyrighted content by declaring he “does not download torrents that are not opensource software and legally distributed.” Def. Resp. to Pl. Interrog., CM/ECF 81-1, at No. 20. Computer records on Defendant’s hard drives prove this to be a false statement. *See* Paige’s Amended Expert Report at ¶¶ 28-41. Specifically, computer records show that Defendant used BitTorrent to obtain copyrighted works and highly sensitive personal documentation of third parties released by hackers. *Id.*

First, a search for the term “torrent” on Defendant’s MacBook Laptop No. 1 yields torrent files for the copyrighted works listed below.

- “Zenith.Part.1.2011.720p.x264-VODO.torrent” – a torrent file located on the MacBook Laptop No. 2 for the copyrighted movie “Zenith”.
- “THE METEORS - [ WWW.PunksAndSkins.COM ] - 13 ALBUMS.torrent” – a torrent file located on the MacBook Laptop No. 2.
- “Demented Are Go.torrent” – a torrent file located on the MacBook Laptop No. 2 of music by a British band;
- “American Survival Guide Magazine.torrent”

*Id.* at ¶ 37.

Defendant's MacBook Laptop No. 1, also contains "NFO"<sup>1</sup> files in connection with the movie file "Lost Highway 1997 720p BRRip x264 RmD (HDSScene Release).mkv." *Id.* at ¶ 33. The NFO files establish that these movie files were unauthorized pirated movies. *Id.* at ¶ 34.

Defendant's DropBox also contains numerous copyrighted music files with torrent metadata, demonstrating that the copyrighted content originated from the torrent website "torrentazos.com." The music files are listed below:

- "05 The Rape Over.mp3"
- "06 - I Got Bass.mp3"
- "06 - Walk this way.mp3" By Aerosmith
- "06 Drive Slow (ft. Paul Wall & Glc).mp3"
- "06 Hate that I love You (Feat. Ne-Yo).mp3"
- "06 Metal Hear.mp3"
- "06 Nothing's The Same.mp3"
- "06 Silver.mp3"
- "07 – Dude (Looks Like A Lady).mp3" By Aerosmith
- "07 – Girls Love Me feat. Rick Ross.mp3"
- "07 Bedstudy Parade & Funeral March.mp3"
- "07 Civilize The Universe.mp3"
- "07 Hell is High.mp3"
- "07 My Way Home (ft. Common).mp3" By Kanye West
- "07 Say it.mp3"
- "07 Sex Is Not The Enemy.mp3" By Garbage
- "07 What else is there.mp3"
- "08 – Blown feat T-Pain.mp3"
- "08 – Rag Doll.mp3" By Aerosmith
- "05 – Arab Money (Street Runnaz Remix) feat. Rick Ross, T-Pain, Akon & Lil Wayne 19884011e4a90.mp3"
- "06 – I Got Bass19883011e4a90.mp3"

*Id.* at ¶ 39. Other files in Defendant's DropBox contain metadata proving they originated from the "Kickass Torrent" database. The files are listed below.

- "Interactive Data Visualization for the Web14b0052a561.pdf"
- "JavaScript Programmers Reference13b0052a561.pdf"
- "Killer UX Design631e0052a561.pdf"

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<sup>1</sup> "An NFO file is basically pirated information which pertains to software or program that is released and distributed by any organized group without the knowledge or permission of the creator or owner of the software." *Id.* at ¶ 33.



- “Learning iOS Programmingcc0052a561.pdf”
- “Professional Nodea30052a561.pdf”
- “Python for Kids63080052a561.pdf”
- “The Principles of Object – Oriented JavaScript63050052a561.pdf”

*Id.* at ¶ 40.

Further, a search for the term “torrent” on Defendant’s MacBook Laptop No. 1 yields text files within a folder titled “Chinga\_La\_Migra\_Dos.” *Id.* at ¶ 32. This folder and its contents are related to a hacking event that took place in 2011. *Id.* at ¶ 32. The folder contains sensitive files released by hacker(s) which contain military and law enforcement officers’ personal information including social security, driver’s license numbers, account passwords, etc. *Id.* at ¶ 32. Similar files were also discovered on Defendant’s MacBook Laptop No. 2 as listed below.

- “cablegate-201011290900.7z.torrent”; – a torrent file related to the United States diplomatic cables leak, widely known as “Cablegate”;
- “Chinga La Migra.torrent” – a torrent file related the publication of hundreds of Arizona law enforcement classified documents;
- “Chinga\_La\_Migra\_Dos.torrent” – a torrent file located related to the publication of hundreds of Arizona law enforcement classified documents;
- “MMM\_Booz\_Allen.torrent” – a torrent file related to the publication of ninety thousand military email addresses and passwords;
- “cablegate-201108300212.7z.torrent” – a torrent file related to the United States diplomatic cables leak, widely known as “Cablegate”

*Id.* at ¶ 36.

Paige also located several BitTorrent website URLs pertaining to the website “The Pirate Bay.” *Id.* at ¶ 41. The Pirate Bay is an online website which enables piracy of copyrighted works through its extensive index of torrent files. *Id.* at ¶ 41.

Accordingly, Defendant’s sworn statement regarding his BitTorrent use is false.

#### **F. No Rational Juror Could Find Defendant Is Not The Infringer**

Since the infringement definitely occurred using Defendant’s Internet, the universe of people who may be the Infringer are limited to Defendant, a resident in his home, an invited

guest using Defendant's Internet, or a neighbor using Defendant's Internet.

1) No Rational Juror Could Conclude Anyone Who Lived In Defendant's Home Other Than Defendant Is the Infringer

Defendant identified only his wife and two young sons residing in the relevant residence during the period of recorded Infringement. *See generally* Defendant's Dep. CM/ECF 122-2; Mrs. Raleigh's Dep., EM/ECF 122. Defendant's sons were approximately four and one years old during the period of recorded infringement, and therefore could not have known how to use BitTorrent. *See* Mrs. Raleigh's Dep., EM/ECF 122, 12:5-8. Defendant's wife does not know what BitTorrent is and therefore does not have the know-how to be the Infringer. *Id.* at 18:9-13. Defendant does not dispute this fact, and agrees that he is more likely to use BitTorrent than his wife. *See* Mr. Raleigh Dep., CM/ECF 122-2, 52:11-25.

2) No Rational Juror Could Conclude A Guest Is The Infringer

Neither Defendant nor his wife could identify any specific person who repeatedly visited their home during the period of recorded infringement nor any individual who brought their computer device in the Defendant's home. *See* Defendant's Dep. CM/ECF 122-2, 48:12-20; Mrs. Raleigh's Dep., EM/ECF 122, 38: 5-12. And, Defendant did not produce any evidence or an affidavit from any individual who purportedly brought a computer device into their home during the period of recorded infringement. Accordingly, no evidence of a guest being the Infringer exists.

3) No Rational Juror Could Conclude A Neighbor Is The Infringer

*i. Plaintiff's Additional Evidence Proves Defendant Downloaded and Distributed Media Files Obtained Through BitTorrent that Were Not Turned Over*

Excipio's computer database records show Defendant's IP address was a registered peer within swarms for certain third party torrent files (the "Additional Evidence"). Patzer Decl., ¶¶

30-31. As such, the Additional Evidence contains a list of third-party swarms distributing movies, television shows, music titles, games and e-books for which Defendant's IP address was a registered peer. *See* Patzer Decl., attached hereto as Exhibit C, ¶ 15; *See also* Additional Evidence attached as Exhibit B to Patzer Decl. There are significant correlations between the Additional Evidence and Defendant's hard drives, deposition testimony, and public information about Defendant. *See* Paige's Amended Expert Report at ¶ 52. The correlations are too substantial to be coincidental. *Id.* at ¶ 53.

On Defendant's YouTube page [<https://www.youtube.com/user/dravine>], Defendant subscribed to the channels "The Modern Survivalist," "six pack shortcuts," and "sigma 3 survival school." *Id.* Defendant also has a phone application called "SAS Survival Guide." *See* Def. Supp. Resp. to Pl. Req. for Prod., attached here to as Exhibit E, p. 24. He further testified he possesses the book, "The Ultimate Guide to U.S. Army Survival Skills, Tactics and Techniques," and that he may be in possession of the e-books "The Survival Handbook, Essential Skills for Outdoor Adventure" and "Kettlebell training for athletes develop explosive power and strength for martial arts." *See* Paige's Amended Expert Report, ¶ 54, *citing* Defendant's Dep. 90:13-25. Plaintiff's Additional Evidence includes "The Ultimate Guide to U.S. Army Survival Skills, Tactics, and Techniques," "The Survival Handbook - Essential Skills for Outdoor Adventure," "Kettlebell Training for Athletes Develop Explosive Power and Strength for Martial Arts, F," and "The Pocket Outdoor Survival Guide - The Ultimate Guide for Short-Term Survival." *See* Paige's Amended Expert Report, at ¶ 55. The torrent file "American Survival Guide Magazine.torrent" was also located on Defendant's MacBook Laptop No. 2. *Id.* at ¶ 56.

Plaintiff's Additional Evidence includes a PlayStation 3 game titled "Dead Space 3".

Defendant owns a PlayStation 3. And, Defendant testified that he has played Dead Space 3. *Id.* at ¶ 57, citing Defendant's Dep. 91: 9-11. Examination of Defendant's PlayStation 3 revealed that Defendant played "Resident Evil 6" and "Resident Evil 5" which Defendant also confirmed at his deposition. Defendant's Dep. 92:15-18. Plaintiff's Additional Evidence includes "Resident Evil 6 Full For PC + Crack," downloaded on February 1, 2013. *See* Paige's Amended Expert Report, at ¶ 58.

Plaintiff's Additional Evidence lists "The Karate Kid (2010)" as downloaded on February 6, 2013. *See* Paige's Amended Expert Report, at ¶ 59. Defendant's PlayStation3 contained the movie "The Karate Kid" in Blue Ray. *Id.*

Defendant admitted using BitTorrent for linux purposes and to download ISO images. *See* Def. Resp. to Pl. Interrog., CM/ECF 81-1, No. 14. Plaintiff's Additional Evidence lists "linuxmint-13-kde-dvd-64bit.iso," a linux related download. *Id.* at ¶ 60.

Defendant's Deviant Art website [<http://dravine.deviantart.com/>] states that his favorite cartoon character is "Shake" from the television show "Aqua Teen Hunger Force." *Id.* at ¶ 61. Defendant testified he watches "Aqua Teen Hunger Force." *Id.* at ¶ 61, *citing* Defendant's Dep. 91:12-14. The television show "Aqua Teen Hunger Force" is on Plaintiff's Additional Evidence numerous times as indicated in the chart below. *Id.* at ¶ 61.

Date	Torrent File Name
09/07/2012	[ www.TorrentDay.com ] - Aqua.Teen.Hunger.Force.S09E09.HDTV.x264-2HD
08/28/2012	Aqua.Teen.Hunger.Force.S09E10.Totem.Pole.480p.WEB-DL.AAC2.0.H264
08/07/2012	[ www.TorrentDay.com ] - Aqua.Teen.Hunger.Force.S09E07.Fightan.Titan.HDTV.x264-FQM
07/30/2012	{www.scenetime.com} Aqua.Teen.Hunger.Force.S09E06.HDTV.XviD-AFG
07/24/2012	[ www.TorrentDay.com ] - Aqua.Teen.Hunger.Force.S09E05.The.Granite.Family.HDTV.x264-FQM
07/23/2012	Aqua.Teen.Hunger.Force.S09E04.Rocket.Horse.Jet.Chicken.HDTV.x264-FQM.mp4
07/23/2012	[ www.TorrentDay.com ] - Aqua.Teen.Hunger.Force.S09E03.HDTV.XviD-AFG
07/23/2012	[ www.TorrentDay.com ] - Aqua.Teen.Hunger.Force.S09E01.HDTV.XviD-AFG
07/23/2012	[ www.TorrentDay.com ] - Aqua.Teen.Hunger.Force.S09E02.HDTV.XviD-AFG

Defendant's personal website [<http://www.jraleigh.com>] states that Mrs. Raleigh has an interest in "up cycling clothing." *Id.* at ¶ 62. Mrs. Raleigh defined "up cycling clothing" as "taking one piece of clothing or article and turning it into something else." *Id.* at ¶ 62, *citing* Mrs. Raleigh's Dep. 48:1-6. She also confirmed that she upcycles clothing. *Id.* Plaintiff's Additional Evidence lists "1000 Ideas for Creative Reuse - Remake, Restyle, Recycle, Renew – Mantesh" which is "a cutting edge collection of the most inventive work being made with re-used, upcycled, and already existing materials."<sup>2</sup> *Id.* at ¶ 62.

Mr. and Mrs. Raleigh have two young boys. Mrs. Raleigh's Dep. 48:12-13. Mrs. Raleigh testified that no other children resided within their quadruplex during the period of recorded infringement and that if there were other children living in the quadruplex, she would have been aware. Mrs. Raleigh's Dep. 13:2-11; 13:14-25; 14:1-5. Plaintiff's Additional Evidence lists numerous media content specifically targeted at children. Below is a list of such content. *See* Paige's Amended Expert Report, at ¶ 63.

- "Finding Nemo (2003)";
- "Toy Story 3 (2010) [1080p]";
- "The Amazing Spiderman (2012) [1080p]";
- "The Avengers (2012) [1080p]";
- The Movie "Arthur Christmas";
- "Captain.America.2.Jaybob.DVDRip";
- "Dragon.Hunters.2008.720p.BluRay.DTS.x264-PIS [PublicHD]";
- "Sammy s Adventures 2 2012.French DVDRip XviD READNFO-ICE"; and
- "How to Train your Dragon (2010) [1080p] {5.1}"

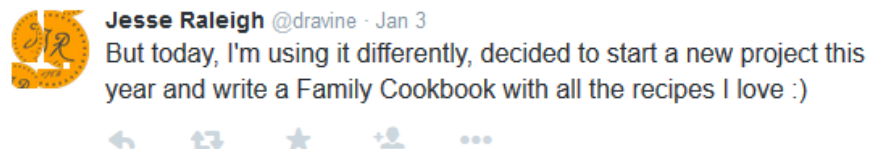
Mrs. Raleigh testified that her sons have seen all of the "Toy Story" movies. Mrs. Raleigh's Dep. 49:1-11. The movie Toy Story 3 ("Toy Story 3 (2010) [1080p]") is listed on Plaintiff's Additional Evidence. *See* Paige's Amended Expert Report, at ¶ 64.

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<sup>2</sup> <http://www.amazon.com/1000-Ideas-Creative-Reuse-Restyle/dp/1592535402> (Last Accessed on October 2, 2015)

Defendant had the software application “Medical Encyclopedia” installed on his phone. *See* Def. Supp. Resp. to Pl. Req. for Prod., attached here to as Exhibit E, p. 10. Plaintiff’s Additional Evidence lists “Current Medical Diagnosis and Treatment 2013 (gnv64).pdf”. *See* Paige’s Amended Expert Report, at ¶ 65.

Defendant possesses phone applications titled “How to Cook Everything” and “Betty Crocker”. *See* Def. Supp. Resp. to Pl. Req. for Prod., attached here to as Exhibit E, p. 42 and 28. Defendant also tweeted that he intended on writing a “Family Cookbook with all the recipes [he] [loves]”. *See* Paige’s Amended Expert Report, at ¶ 66.



This matches Plaintiff’s Additional Evidence which includes “Mastering the Art of French Cooking.pdf” and “631\_Mackenzies\_Ten\_Thousand\_Receipts.” *Id.* at ¶ 67. Indeed, Defendant testified he likes “see food,” meaning all food he sees. *See* Defendant’s Dep. 92:8-22

*ii. The Probability of Two Serial BitTorrent Users With the Same Interests Living Next To Each Other is Virtually Non-Existent*

When ruling on a motion for summary judgment, inferences based on common sense are permitted. *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 743 (1st Cir. 1995); *see also HCP of Illinois, Inc. v. Farbman Grp. I, Inc.*, 978 F. Supp. 2d 943, 946 (N.D. Ill.) reconsideration denied, 991 F. Supp. 2d 999 (N.D. Ill. 2013), *citing Hobgood v. Illinois Gaming Bd.*, 731 F.3d 635, 646 (7th Cir.2013). Here, common sense tells us that the probability that two serial BitTorrent users with the same interests in survival tactics, kettle-bell training, Dead Space 3, Resident Evil 5 and 6, The Karate Kid, linux software, Aqua Teen Hunger Force, upcycling clothing, children’s movies, medical encyclopedias, and cookbooks live next to each other is

virtually non-existent. Mathematically, if A and B are independent events, and an individual seeks to calculate the overall probability that both A and B will occur, this is calculated by multiplying the probability of A occurring by the probability of B occurring. The formula is often expressed as:  $P(A \cap B) = P(A) \cdot P(B)$ .<sup>3</sup> The probability of another person living close to Defendant who also uses BitTorrent and likes: (A) survival tactics; (B) kettle-bell training; (C) Dead Space 3; (D) Resident Evil 5 and 6; (E) The Karate Kid; (F) linux software; (G) Aqua Teen Hunger Force; (H) upcycling clothing; (I) children's movies; (J) medical encyclopedias; and (K) cookbooks is miniscule. This Court can use its common sense to fill in the probabilities for purposes of engaging thought experiment.

No matter what remotely realistic value the Court sets for each of the independent events, it is simply impossible to arrive with an answer that is remotely possible. Accordingly, no rationale juror could believe one of Defendant's neighbors shared all of these unique interests with Defendant and his family. There is no set of realistic probabilities anyone, including any rationale juror, can put into the above formula that would make it remotely probable that a neighbor with the exact same interest, stole Defendant's internet, used BitTorrent, and downloaded the exact same things Defendant and his family are interested in.

**G. Defendant Failed to Produce all of His Computer Devices**

Since we know Defendant downloaded the third party works listed on Excipio's Additional Evidence, and Plaintiff did not find them, Plaintiff knows Defendant has either not turned over a computer which stored the BitTorrent works or deleted computer evidence in such a way that it cannot be recovered. And, there is specific computer evidence of both events occurring in this case. Indeed, Paige's examination of Defendant's hard drives unearthed a picture taken in Defendant's home revealing the presence of a third MacBook and Tablet, neither

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<sup>3</sup> [http://www.vitutor.com/statistics/probability/probability\\_formula.html](http://www.vitutor.com/statistics/probability/probability_formula.html)

of which had ever been identified. *See* Paige’s Amended Expert Report, at ¶ 16. Defendant explains this evidence by stating that the devices belonged to a “friend,” whom he now, after the close of discovery, reveals to be “Nick Peariso.” CM/ECF 130 at p. 9. Yet, during discovery, neither Defendant nor his wife were ever able to identify any individuals who brought their computer devices into Defendant’s home, and Defendant never produced an affidavit from his friend. *See* Defendant’s Dep. CM/ECF 122-2, 48:12-20; Mrs. Raleigh’s Dep., EM/ECF 122, 38:5-12.

On December 27, 2014, Defendant tweeted, “looking at the timestamps of some files on an *old server of mine*.” *See* Paige’s Amended Expert Report, at ¶ 13 (emphasis added). But no server was ever produced. *Id.* at ¶ 14. Defendant’s tweet is evidence of suppressed computer evidence. Further, Defendant’s explanation is incredible; he now says he was referring to files on his MacBook laptop. But a MacBook laptop is not a server.

Paige also uncovered evidence on Defendant’s MacBook demonstrating unidentified storage locations on other computer devices within Defendant’s home network. *Id.* at ¶ 26. Specifically, Paige located a directory titled “PSF” which computer records show Defendant consistently accessed. *Id.* The contents of this computer directory were never produced. *Id.* And, none of the computer evidence Defendant produced reflects the folders contained within the “PSF” directory. *Id.*

#### **H. Defendant’s Western Digital Drive Was Spoiled**

During examination, Paige discovered that a Western Digital hard drive had not initially been produced for examination. *Id.* at ¶ 43. Once Defendant produced the Western Digital, Paige learned that the Western Digital had been used numerous times between October 2012 and December 2014. *Id.* at ¶ 44. Examination revealed that, since December 17, 2013, the drive was



used as a “backup drive” through use of the software “Time Machine.” *Id.* at ¶ 46. However, the FileVault2 encrypted volume on the Western Digital was created on December 17, 2013. *Id.* at ¶ 49. Notably, near that time, Defendant’s responses to Plaintiff discovery were due and Defendant would therefore be required to produce his hard drives to Plaintiff. *Id.* Creation of FileVault2 encrypted volume erased all data that existed on the hard drive prior to December 17, 2013. *Id.* at ¶ 50. And, its subsequent use caused all data to be unrecoverable. *Id.* Accordingly, Defendant failed to produce the contents which existed on the Western Digital prior to December 17, 2013.

**I. Plaintiff’s Works Could Have Been On The Server He Did Not Produce, The Western Digital Hard Drive, or Another Computer**

Since the evidence establishes that Defendant did not turn over all of his devices and spoiled the Western Digital, Plaintiff’s works could have been on any of those devices.

**J. Defendant Has Not Produced Any Evidence To Corroborate Any Defense**

Defendant’s only defense to Plaintiff’s infringement claim is that his internet was unsecured and that he was not living at his Petoskey, Michigan residence during the period of recorded infringement because he obtained a job in Grand Rapids, Michigan. *See* Defendant’s Dep. CM/ECF 122-2, 47:4-13; *see also* *See* Def. Resp. to Pl. Interrog., CM/ECF 81-1, Nos. 9 - 10. Throughout this litigation, Plaintiff sought travel documentation, lease agreements, and any other documents evidencing that Defendant was not at his residence during the period of recorded infringement. *See* Def. Supp. Resp. to Pl. Req. for Prod., CM/ECF 81-4, Nos. 15-16. Tellingly, despite Defendant’s assertion that he was away from his residence during this time due to a change in employment, Defendant failed to produce any receipts proving travel, an employment offer letter, an affidavit from any friends who he purportedly temporarily resided with during his move to Grand Rapids, banking statements demonstrating purchases made in

Grand Rapids, paystubs showing his employment start date, or any documents showing the execution or termination of a lease agreement in light of his move. In short, he has told a story that can be corroborated, but failed to provide any corroboration. Consequently, the date of Defendant's move to Grand Rapids during the period of recorded infringement cannot be verified through any documentation or any witness besides Defendant's wife. Finally, peers in a BitTorrent swarm continue to distribute pieces so long as the peer's computer is on. The peer has to affirmatively command the computer to stop distribution. So, it really does not matter if Defendant was home or merely joined the swarms prior to leaving.

Further, there is no evidence that anyone other than Defendant and his family used Defendant's internet during the period of recorded infringement. And there is no evidence that any one living near Defendant or who ever came to Defendant's house used BitTorrent.

#### **IV. LEGAL STANDARD**

"Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (citing Fed. R. Civ. P. 56). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). If "the record, taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment should be granted. *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6<sup>th</sup> Cir. 1992) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Indeed, summary judgment is appropriate "where a trial would serve no useful purpose." *Wahl v. Vibranetics, Inc.*, 474 F.2d 971, 976 (6th Cir. 1973).

## V. ARGUMENT

### A. Plaintiff Is Entitled To Summary Judgment For Direct 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. *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).

#### 1) Malibu Media Owns the Copyrights-in-Suit

Each of Plaintiff's films is registered with the United States Copyright Office. Registration constitutes prima facie evidence of the validity of the copyright and ownership. 17 U.S.C.A. § 410 (c). True and correct copies of printouts from the United States Copyright Office's online records are attached hereto as Exhibit A. The screen shots and Field Declaration (CM/ECF 85-1) 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. *See e.g.* Answer to Amended Complaint, CM/ECF 16, ¶ 3 ("Defendant neither admits nor denies [Plaintiff is the registered owner of the copyrights set forth on Exhibit B (the 'Copyrights-in-Suit')], but leaves Plaintiff to its proofs."). *See also id.* at ¶ 28 (same). There is no genuine issue of material fact regarding the first element of Plaintiff's claim.

#### 2) Defendant Copied and Distributed Constituent Elements of the Works That are Original

Defendant infringed Plaintiff's copyrights by downloading and distributing its movies without authorization. Plaintiff's MySQL Log contains records of each infringing transaction. *See* MySQL log attached as Exhibit A to Patzer Decl. Each transaction involved Excipio's system receiving a bit or piece of Plaintiff's copyrighted works. Patzer Decl., ¶¶ 14-15. The records demonstrate that in at least 49 instances, spanning a total of seven days, Defendant

distributed Plaintiff's movies to Excipio. *Id.* In doing so, Defendant violated Plaintiff's exclusive right to distribute its works. *See* 17 U.S.C. 106 ("the owner of copyright under this title has the exclusive rights to do and to authorize any of the following.... distribute copies or phonorecords of the copyrighted work to the public"); *see also Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) ("[d]istributing unlawful copies of a copyrighted work violates the copyright owner's distribution right and, as a result, constitutes copyright infringement.")

"In order to establish 'distribution' of a copyrighted work, a party must show that an unlawful copy was disseminated 'to the public.'" *Id.* citing *National Car Rental v. Computer Associates*, 991 F.2d 426, 434 (8th Cir.1993). Here, Defendant distributed unlawful copies to the public, via the BitTorrent protocol. Indeed, any person could download a BitTorrent program and participate in the same swarm as Defendant. And, because of the nature of how BitTorrent works, at the same time that Defendant distributed Plaintiff's movies to Excipio without authorization, he distributed Plaintiff's movies to other infringers within the swarm. The length of time evidences that Defendant not only downloaded a complete copy of the work, but sent Plaintiff's works to the public, over and over again.

3) No Rational Trier of Fact Could Find by a Preponderance of the Evidence Defendant is Not Liable

The infringement occurred; the PCAP computer records prove it. Charter's business records prove that the infringing IP address was assigned to Defendant. "[P]reponderance of the evidence' exists when such evidence has, upon consideration and comparison with that opposing it, more convincing force and produces in the mind of the trier of fact a belief that such evidence is more likely true than not true." *In re Myers*, 124 B.R. 735, 740 (Bankr. S.D. Ohio 1991). Under the low preponderance of the evidence standard, no rational trier of fact could find

Defendant is not liable. *See Ellis v. Diffie*, 177 F.3d 503, 507 (6th Cir. 1999) (acknowledging preponderance of the evidence standard was appropriate standard in copyright infringement case).

Based on the foregoing facts, no rational jury could conclude anyone other than Defendant is the Infringer. Defendant's failure to produce computer evidence that no rational person could believe does not exist, and his failure to produce corroborating evidence for his defenses justifies an adverse inference. "When parties ... intentionally withhold properly requested information, courts have the authority to presume that the party's refusal to produce the information is an admission of the want of merit in the asserted defense[.]" *Tech. Recycling Corp. v. City of Taylor*, 186 F. App'x 624, 639 (6th Cir. 2006). Indeed, if Defendant "had the meat, [he] would have put it on the grill[.]" *Id.*; *see also Peoria Life Ins. Co. v. Smith*, 47 F.2d 279, 280 (E.D. Mich. 1931) ("There can be no doubt that the failure to produce witnesses who have knowledge of material facts authorized the inference that the testimony of such witnesses would be adverse."); *See also Kowalchuk v. United States*, 176 F.2d 873, 877 (6th Cir. 1949) ("The general rule is that failure to produce available evidence which would help decide the issue raises the inference that such evidence would be unfavorable to that party if produced."). To date, Defendant has not presented any evidence to support his defense that he was in Grand Rapids during the period of recorded infringement.

No triable issue of fact remains; Plaintiff proved Defendant is more likely than not the infringer. "When [as here] 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 . . . the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106

S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (citations omitted) (emphasis in original). “[T]he nonmoving party cannot rest upon mere allegations or denials in its pleadings[.]” *Stewart v. Nathan & Nathan*, No. 2:12-CV-361, 2014 WL 977979, at \*1 (E.D. Tenn. Mar. 12, 2014) (citing *Matsushita*, 475 U.S. at 586-87.); *See also Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 159 (6th Cir. 1995) (“[T]he Supreme Court has indicated that the existence of subjective issues does not necessarily foreclose summary judgment disposition. Thus, a nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations or subjective evidence. Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment.”). No record evidence aside from self-serving testimony supports Defendant’s denial. Defendant has not come forward with specific facts or showing there is a genuine issue for trial. As such, the Court should grant the subject Motion.

## VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court grant the subject Motion.

Dated: February 26, 2016

Respectfully submitted,

LIPSCOMB EISENBERG & BAKER, PL

By: /s/ Jessica Fernandez

**Jessica Fernandez**

*Pro Hac Vice*

[jfernandez@lebfirm.com](mailto:jfernandez@lebfirm.com)

2 South Biscayne Blvd.

Penthouse 3800

Miami, FL 33131

Telephone: (786) 431-2228

Facsimile: (786) 431-2229

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that On February 26, 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/ Jessica Fernandez