

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

MALIBU MEDIA, LLC,)	
)	
Plaintiff,)	Civil Action Case No.: 1:13-cv-00360-RJJ
v.)	HON. ROBERT J. JONKER
)	MAG. JUDGE: RAY KENT
JESSE RALEIGH,)	
)	
Defendant.)	
_____)	

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STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD THE COURT ENTER AN ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANT?

Defendant Says “Yes.”

Plaintiff Says “No.”

- II. SHOULD THE COURT SCHEDULE A HEARING WITH REGARD TO DEFENDANT’S MOTION FOR ATTORNEY’S FEES?

Defendant Says “Yes.”

Plaintiff Says “No.”

- III. SHOULD THE SETTLEMENT CONFERENCE SCHEDULED FOR MAY 31, 2016, BE ADJOURNED AND/OR CANCELED?

Defendant Says “Yes.”

Plaintiff Says “No.”

DEFENDANT’S BRIEF IN SUPPORT OF HIS MOTION FOR ENTRY OF JUDGMENT, TO SCHEDULE ORAL ARGUMENT FOR DEFENDANT’S ATTORNEY’S FEES AND ADJOURN SETTLEMENT CONFERENCE

FACTUAL BACKGROUND

This case was brought by Plaintiff, Malibu Media (hereinafter, “Malibu” or “Malibu Media”) alleging that Defendant infringed upon Malibu Media’s copyrighted materials, in violation of The Copyright Act, 17 U.S.C. § 101, *et seq.* (Doc. No. 1). Specifically, Malibu claims that Defendant Raleigh illegally uploaded to Malibu’s investigator, IPP, through a process called “BitTorrenting,” pornographic movies for which Malibu claims copyright protection.

Discovery in this case is closed. Both parties have filed motions for summary judgment. (Doc No. 131 and Doc. No. 137). Oral argument was scheduled for May 2, 2016. (Doc. No. 133 and Doc. No. 139). On April 18, 2016, a mere two-weeks before the hearing on the cross-motions for summary judgment, two of Plaintiff’s former attorneys, Keith Lipscomb and Jessica Fernandez, moved to withdraw as attorneys for Malibu Media. (Doc. No. 143 and Doc. No. 144). On April 28, 2016, one day before the hearing on the motions to withdraw, Malibu Media’s “local counsel,” who had not moved to withdraw and who had also represented to Defendants’ co-counsel just days prior that he was *currently representing* Malibu Media, moved to withdraw, claiming that he had been “unofficially replaced” as the attorney for Malibu Media. (Doc. No. 151).

On April 29, 2016, this court granted the attorneys’ motions to withdraw as counsel and this court gave Malibu Media until May 20, 2016, to obtain new counsel or show cause why this case should not be dismissed for want of prosecution. As of the

date of this Motion, Malibu Media has not had new counsel file an appearance in this matter.¹

This matter is scheduled for a settlement conference on May 31, 2016. Trial is currently scheduled for July 12, 2016.

LEGAL ARGUMENT

I. THE COURT SHOULD ENTER AN ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANT.

As indicated above, the parties filed cross-motions for summary judgment, which were initially scheduled to be heard on May 2, 2016. Defendant spent a significant amount of time preparing for the May 2, 2016 hearing. As this court is aware, from the telephone hearing the parties conducted with regard to Malibu Media's former attorneys' Motion to Withdraw, the attorneys moved to withdraw literally 14 days prior to the oral argument for the motions for summary judgment and well after those very same attorneys filed their motion for summary judgment.

Malibu Media has shown no inclination to continue to litigate this matter because they are terrified that this Court will enter a Judgment in favor of Defendant Raleigh on

¹ Although Mr. Nicoletti's explanation to the Court of why he should have been allowed to be removed as counsel in this case was *ex parte* in order to protect attorney-client privileged communications (and, thus, defense counsel are not privy to that explanation), Defendant would draw this Court's attention to the following. On May 20, 2016, under the continued representation of Mr. Nicoletti, Malibu Media took a default judgment of \$97,000.00 against one Jason Ressler in a case in the Eastern District of Michigan (USDC ED Mich, Case No. 15-cv-11500, Doc. # 20). Hence, in the above-entitled action where dispositive rulings or a trial were imminent, Mr. Nicoletti has some sort of conflict which does not allow him to continue representing Malibu Media. At the same time, in a case one district over, where the Defendant failed to Answer the Complaint, Mr. Nicoletti apparently has no conflict and can continue to represent Malibu Media. Furthermore, it is decidedly ironic that Mr. Ressler must now pay Malibu Media \$97,000 with no actual proof on the merits, but instead, as a sanction for doing no more than Malibu Media has done in this case (i.e., Ressler's failure to answer within the allotted time is analogous to Malibu's failure to arrange for the appearance of substitute counsel within the allotted time).

the grounds that there is no evidence that he violated the Copyright Act, 17 U.S.C. § 501, *et seq.* Malibu knows that Defendant's counsel has spent a significant amount of time defending this case, and that discovery has established that Defendant-Raleigh does not, and has never, been in possession of **any** of Malibu Media's allegedly copyright protected pornography. In fact, as stated by Plaintiff in its Motion for Summary Judgment, it is banking on establishing liability in this solely based on the speculative theory that Mr. Raleigh **must have been** an infringer because **he fits the profile** of someone who theoretically may have BitTorrented Malibu's material. Malibu's theory is based purely on speculation. Moreover, Malibu's expert cannot testify in this case and is the subject of Defendant's Daubert-motion, which was also scheduled to be hear on May 2. (Doc. No. 129).

It is clear that Malibu is trying to entice this Court to enter an Order dismissing this case for Plaintiff's failure to prosecute as opposed to an Order dismissing it on the merits in an attempt to avoid paying Defendant's attorney's fees. Regardless of Malibu's attempts to circumvent three years of litigation and attempt to claim that a dismissal of the case for failure to prosecute (which Defendant assumes Malibu will claim), the U.S. Supreme Court, in Title VII cases, has done away with the "prevailing party" requirement for awarding attorney's fees. The same rationale applies to Copyright Act cases.

In its May 19, 2016, decision in *CRST, Inc. v. EEOC*, Docket No. 14-1375 (May 19, 2016), an 8-0 Supreme Court reconciled a circuit split that resulted from the Eighth Circuit's decision regarding the definition of "prevailing party." The Supreme Court stated that "a defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party' under Title VII." The Court noted that Congress had not intended

that defendants should be eligible to recover for costs and fees only when courts disposed of cases on their merits and reasoned:

Common sense undermines the notion that a defendant cannot “prevail” unless the relevant disposition is on the merits. Plaintiffs and defendants come to court with different objectives. A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff’s favor. The defendant, of course, might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff’s allegations. The defendant has, however, fulfilled its primary objective whenever the plaintiff’s challenge is rebuffed, irrespective of the precise reason for the court’s decision. The defendant may prevail even if the court’s final judgment rejects the plaintiff’s claim for a nonmerits reason.

CRST, Inc., *supra* at p. 12, attached as **Exhibit 1**.

Malibu has had three attorneys represent it at different points in time in this case, and all have made significant errors with regard to their respective conduct. For example, Malibu’s former attorney, Paul Nicoletti, never formally withdrew from this case, represented to defense counsel that, as of April 26, 2016, he was still representing Malibu Media, and two days later, on April 28, 2016, filed a motion with this court stating that he had ceased representing Malibu Media as of June, 2015. (Doc. No. 151).

Additionally, Malibu Media’s former attorneys filed numerous pleadings in this case, which were filled with both stylistic and “substantive” errors, the most glaring of which was that they failed to realize that they had left Defendant’s technology devices in the backseat of a car belonging to one of their couriers, delaying production of the first expert report in this case for 45 days. Additionally, Malibu’s experts failed to make a digital copy of a device owned by the defendant, even though they had that device for approximately two months, necessitating Defendant to spend time and money shipping that device back to Malibu’s experts for further copying.

Quite simply, Malibu has litigated this case for three years and now wants to try and avoid attorney's fees on procedural grounds. The parties are at the stage in this lawsuit where summary judgment can, and should be, granted on the motions themselves. Oral argument is not necessary.

Malibu has shown no inclination whatsoever that it actually wants to litigate this case. Rather, it has abused the discovery process in this case, has accused Defendant of spoliation of evidence (in reliance on no evidence of spoliation other than the lack of evidence of infringement), and has requested sanctions on two occasions, both of which were denied by this court. Despite all of this, Defendant's technology devices (including two laptops, two desktops, two external hard drives, an iPad, an iCloud, and a PlayStation 4) have revealed that Defendant does not, and did not, possess any of Malibu Media's copyrighted pornography.

Accordingly, no oral argument is necessary on Defendant's Motion for Summary Judgment. This court can rule on the motion based on the pleadings alone. Therefore, Defendant respectfully requests that this court enter an order, pursuant to Fed. R. Civ. Pro. 56(c), dismissing these cases as a matter of law, followed by a Judgment reflecting the same.

II. DEFENDANT REQUESTS THAT THIS COURT SCHEDULE A HEARING WITH REGARD TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES.

As part of Defendant's Motion for Summary Judgment, he requested attorney's fees, pursuant to 17 U.S.C. § 505. As this court can imagine, after three years of litigation, Defendant strongly believes that he should be awarded attorney's fees, particularly in light of Malibu Media's abuse of the legal system.

Accordingly, Defendant respectfully requests that this court schedule a hearing to determine Defendant's attorney's fees. 17 U.S.C. § 505 provides:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

As part of its business model, which is clearly designed to shakedown potential "John Does," defendants who do not wish for their identity to be associated with pornography, Malibu Media routinely requests, and is awarded, attorney's fees by district courts. In fact, it is clear from reviewing the approximately 3,800 cases Malibu Media has filed, that Malibu's business model is based, in part, on pressuring attorney's fees from defendants, even at the beginning of lawsuits which are dismissed based on motions for default.

Defendant, Jesse Raleigh, has spent three years of his life defending a lawsuit for which there is absolutely no evidence which supports Malibu Media's allegation that Raleigh illegally BitTorrented Malibu Media's copyrighted pornography. Malibu Media has tried every way possible to establish its case, only to discover, at every instance, that Mr. Raleigh does not, and never has, possessed any of Malibu Media's copyrighted works. Malibu Media did this despite Raleigh telling Malibu Media from the very beginning of this case that he was not living at the address which Malibu Media claims was associated with the internet router at issue.

As detailed in Defendant's Motion for Summary Judgment, as well as Defendant's Response to Malibu Media's Motion for Sanctions, Malibu Media has

proceeded under the wrong theory, with the wrong set of facts, and a defendant who did not possess Malibu Media's copyrighted works.

Instead of giving up on this case in the beginning, when it should have, Malibu Media insisted on dragging Mr. Raleigh's name through the mud. This was a risk Malibu Media took. Malibu Media should be responsible for paying Mr. Raleigh's attorney's fees. Therefore, pursuant to 17 U.S.C. § 505, Defendant, Jesse Raleigh, respectfully requests that this court schedule a hearing on Defendant's request for attorney's fees.

III. THE SETTLEMENT CONFERENCE SCHEDULED FOR MAY 31, 2016, SHOULD BE ADJOURNED AND/OR CANCELED.

The settlement conference scheduled for May 31, 2016 should be adjourned and/or canceled. In the event this court does not grant summary judgment and enter a Judgment for Defendant, the settlement conference should not occur prior to oral argument regarding the cross-motions for summary judgment. This court's ruling with regard to summary judgment should occur prior to any settlement conference because, in the event the court grants summary judgment for either party, the settlement conference would be deemed irrelevant. Accordingly, in the event the court does not dismiss this case, Defendant respectfully requests that the court adjourn and/or cancel the settlement conference.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court enter an Judgment dismissing this case as a matter of law on the merits, scheduling this matter for a hearing to determine costs and attorney's fees to be awarded to Defendant,

and adjourning the settlement conference currently scheduled for May 31, 2016 to a future date to be determined by the Court.

With respect to L.R. 7.1(d), concurrence is not required because Defendant is seeking entry of a Judgment and, therefore, this motion is dispositive.

Respectfully submitted,

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Dated: May 23, 2016