

Attorney ID No.

Defendant Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK VICINAGE

Malibu Media LLC,

Plaintiff,

vs.

Defendant.

) Case No.

**Memorandum In Support
Of Motion To Dismiss**

FACTS

Plaintiff, Malibu Media LLC, through their attorney, Mr Esq, alleges that Defendant, over a period of 16 months, downloaded 13 movies.

Argument

I. Plaintiff's attorney has acted unethically.

Plaintiff's claim must be dismissed because Plaintiff's attorney's actions, by his own admission, are unethical. During the Court mandated telephone conference on October 23 of this year, Plaintiff's attorney admitted that Defendant was more of a computer expert than he was by saying words similar to "well, you're obviously more of an expert than I am" and also stating that "he would be flying in his expert in a couple of weeks" and asking if Defendant would be willing to have a telephone conversation with Plaintiff's attorney and Plaintiff's expert, to which Defendant agreed.

Plaintiff's attorney also admitted "it would be unethical for him to pursue a lawsuit against the wrong party and if Defendant could convince Plaintiff's attorney's expert then Plaintiff's attorney would be ethically bound to dismiss the suit.

Plaintiff's attorney did not fly in his expert nor did he set up the telephone conversation he promised to both Defendant and Court (Court told

Plaintiff's attorney that she wanted "this matter settled sooner rather than later" and Plaintiff's attorney responded "Yes, Your Honor".

Instead Plaintiff's Attorney sent documents to Defendant with veiled threats, for instance asking for Defendant's work history, clearly a veiled threat of contacting Defendant's co-workers and employer; additionally in Plaintiff's Initial Disclosures he threatens to contact Defendant's neighbors.

The above is clearly done as a means of intimidating Defendant into not fighting back against a lawsuit built on knowingly and intentionally faulty evidence.

Plaintiff's attorney has also attempted to deceive Defendant about when Responses were due. According to Pacer Monitor, Defendant's Exhibit "Pacer Monitor", The Court ordered that Rogs/Docs were due by Nov 30 2018, which Plaintiff's attorney met when he had one of his staff members email the documents to Defendant on 11/30/18.

However, he explicitly and deliberately misrepresented this Court's order by claiming that The Court ordered Responses due by January 1

2019, which is a legal holiday, instead of stating what The Court actually ordered, which is that Responses were due by January 15 2019.

Plaintiff may try to counter that this is the result of a simple clerical error, however Defendant maintains that this misstatement was deliberate, with the goal of trying to gain an advantage ahead of the January X 2019 Court mandated telephone conference.

Plaintiff's attorney has claimed that Plaintiff's have filed over 1000 law suits and near as Defendant can tell this attorney has about 70 such similar cases filed with this District Court, if he can't tell the difference between a "1" and a "15" then how can anything he has offered as proof be trusted by this Court or a Jury at trial?

II. Plaintiff and Plaintiff's Attorney, direct, employ, entice and instruct investigators they hire to use investigative techniques they know, or should know, are illegal and or unethical.

Defendant contends that Plaintiff's investigators violated one or more of the following laws:

The NJ Electronic Surveillance Control Act

This act states:

4. It shall not be unlawful under this act for:

b. Any investigative or law enforcement officer to intercept a wire, electronic or oral communication, where such officer is a party to the communication or where another officer who is a party to the communication requests or requires him to make such interception;

d. A person not acting under color of law to intercept: (1) a wire [,] communication except as described in paragraph (2) of this subsection, or an electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted or used for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act [.]

Defendant asserts Plaintiff, their Attorney and investigators violated the above provisions, and any

other provisions of the NJ Electronic Surveillance Control Act The Court, in it's wisdom, deems applicable and must have been aware that they were violating this and related state and federal statutes as evidenced by the fact that by their own admission their investigators are based in Germany and conduct their activities from German soil, in what appears to be an attempt to circumvent this and related state and federal laws.

Defendant asserts that they violated the law because Plaintiff's investigators are not parties to the communications they record.

In other words, the act makes it legal for a law enforcement officer or investigative officer to record an electronic communication when said officer is a party to the communication but since Plaintiff's investigators are not acting under color of law (i.e. under the direction of a court order), are not law enforcement officers and are not parties to the communication, i.e. no one knowingly tries to communicate with Plaintiff's investigators, this act does not protect their actions.

The Private Detective Act of 1939

This act states:

(a) The term "private detective business" shall mean the business of conducting a private detective agency or for the purpose of making for hire or reward any investigation or investigations for the purpose of obtaining information with reference to any of the following matters, notwithstanding the fact that other functions and services may also be performed by the same person, firm, association or corporation for fee, hire or reward, to wit:

(2) the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, association, organization, society or groups of persons, firms or corporations;

(9) the securing of evidence to be used before any investigating committee, board of award, board of arbitration, or in the trial of any civil or criminal cause;

No person, firm, association or corporation shall engage in the private detective business or as a private detective or investigator or advertise his or

its business to be a private detective business or that of a detective agency or investigator without having first obtained from the superintendent a license to conduct such business, as hereinafter provided. Any person, firm, association or corporation who shall violate any of the provisions of this Section shall be guilty of a misdemeanor.

In a nutshell, any person or business that wishes to conduct investigations of any kind for hire has to be first licensed as a private investigator and the business has to be licensed as a private investigation business.

According to Plaintiff's attorney, IPP International UG, Tobias Fieser and Ben Perino; the 2 "investigators" that conducted this "investigation" and the company that employs them are based in Germany, with German addresses and German telephone numbers, meaning that there is no way they have satisfied licensing requirements of this act.

Defendant, upon information and belief, asserts that Plaintiff's "investigators" are not legally licensed in the State of NJ to conduct investigations for hire; consequently, since Defendant is a resident of NJ, Plaintiff's attorney is admitted in the NJ Bar Association and the NJ Federal District Court and this

action was filed in the NJ District Court, that The NJ Private Detective Act mandates that Plaintiff must use NJ Licensed Private Investigators if they wanted to collect evidence for a civil trial.

Because Plaintiff's attorney's conducted their "investigations" from Germany, outside the jurisdiction of U.S. Federal and NJ state courts, any "evidence", no matter how flimsy, faulty or factually and technically inaccurate, must be barred from this trial, which means that Plaintiff can't prove a cause of action and thus this case must be dismissed.

18 U.S. Code § 2511 - Interception and disclosure of wire, oral, or electronic communications prohibited

This act states:

Section 2511 of Title 18 prohibits the unauthorized interception, disclosure, and use of wire, oral, or electronic communications. The prohibitions are absolute, subject only to the specific exemptions in Title III. Consequently, unless an interception is specifically authorized, it is impermissible and, assuming existence of the requisite criminal intent, in violation of 18 U.S.C. § 2511.

Section 2511(1)(a) is a blanket prohibition against the intentional interception, endeavor to intercept, or procurement of another person to intercept or endeavor to intercept any wire, oral, or electronic communication.

Plaintiff's, through the Complaint and Disclosure provided to Defendant, has admitted their investigators violated this act repeatedly, at least 16 times in attempting to build a case against Defendant, though in practice, if one assumes each fragment of the files is a violation, which it is, then they violated this act countless times in the 16 month period they claim Defendant infringed Plaintiff's rights and when coupled with the claim that Plaintiff has filed at least 1000+ lawsuits such as this one, it becomes clear that Plaintiff, their attorneys and investigators have a wanton disregard for state and federal statutes governing illegal searches and seizures.

III. The Court Erred when it granted Plaintiff's early discovery motion that resulted in Defendant's identity being revealed to Plaintiff.

With respect to this Court and it's wisdom, Defendant submits that The Communications Act explicitly protects a subscribers identity, specifically, 47 U.S.C. § 551 and in fact in April 4th 2018, Judge Franklin Noel, in

Strike 3 Holdings v John Doe (MND 18-cv-00768), in a similar case where the Plaintiff was seeking to discover the identity of a John Doe Defendant said:

"Plaintiff's ex parte motion illustrates an ongoing conflict between the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, the Communications Act, 47 U.S.C. § 551, and Federal Rule of Civil Procedure 45. At the heart of this conflict is whether a copyright owner can use the federal judiciary to discover evidence about a potential, alleged infringer when the infringer's actual identity is unknown."

"This Court concludes that the conflict between the statutes, DMCA and the Communications Act, compels it to deny Plaintiff's instant ex parte motion. As the Eighth Circuit reasoned in *In Re Charter Communications*, when it held that DMCA did not authorize the subpoena the district court had issued, "it is the province of Congress, not the courts, to decide whether to rewrite DMCA 'in order to make it fit a new and unforeseen internet architecture.'" 393 F.3d at 777 (quoting *Verizon*, 351 F.3d at 1238)."

IV. Plaintiff strategically employs investigators that operate outside the oversight of the United States federal and state government restrictions, which is a continuation of Plaintiff's wanton disregard for adherence to laws that govern doing business in the State of NJ.

The Defense asserts that the reason Plaintiff and Plaintiff's attorneys did not hire NJ based investigators was due to their desire to circumvent NJ state and Federal laws governing conducting investigations, acquiring evidence, applicable licensing statutes and as such any evidence collected by Plaintiff's investigators is inadmissible.

Defendant, upon information and belief, further adds, that in addition to the already referenced failure to hire investigators properly licensed to conduct investigations, Plaintiff's themselves are not licensed to conduct business of any kind in the state of NJ.

According to the NJ Division of Taxation:

<https://www.state.nj.us/treasury/taxation/br1.shtml>

If you are planning to start a business in New Jersey, you must register the business with the State of New Jersey at least 15 business days prior to opening.

If you plan to incorporate your business, you must obtain a charter from the New Jersey Division of Revenue, Business Services Bureau. If your business is incorporated in another state, you must also request authorization to do business in New Jersey.

V. Defendant's IP address does not match the IP address on Plaintiff's complaint.

As Defendant has pointed out in the Response filed with this court, the IP address that Plaintiff's investigators illegally obtained does not match the IP address of the Defendant. Plaintiff counters that it matched at the time of the alleged infringement, however this leads to a number of fatal problems to Plaintiff's case, among them:

Plaintiff's attorneys conducted illegal search and seizures as outlined and thus should never have had any IP addresses to compare to one another. Further, Defendant can demonstrate conclusively that residential IP address are dynamic in nature, as evidenced by the fact that residential IP addresses are assigned via DHCP.

DHCP, literally stands for Dynamic Host Configuration Protocol and is a client/server protocol that

automatically provides an Internet Protocol (IP) host with its IP address and other related configuration information such as the subnet mask and default gateway. One of the features of DHCP is that it provides an IP address that expires.

Optimum Online assigns IP addresses via DHCP with an IP lease of only 6 hours, every 6 hours the IP address must be renewed, which is done automatically. If the modem is without power or otherwise unconnected to Optimum's network for a period of 6 hours or later, then a new IP address is assigned. The Court, as well as Plaintiff's and Plaintiff's attorney can easily verify this by checking their IP address before they go to sleep, shut off their modem and computer for at least 6 hours overnight and then rebooting modem, router and computer and checking the IP address again; they will find that the IP address has changed.

Furthermore, if Plaintiff takes the position that at some point the IP address changed, as I already demonstrated it does, there is no way of showing what Defendant's IP address was at any given time during the time span from September 2016 to today, December 3 2018 and in fact it is very likely that it changed numerous times in that time frame.

Plaintiff is likely to counter that Optimum would have records of who the IP addresses were assigned to during that time frame however Plaintiff can not legally get their hands on those records because The Communications Act explicitly protects a subscribers identity and records; because according to YAANA has informed Defendant that records are only kept for 1 year, meaning that the records from 2016 and 2017 are long gone and the records from 2018 are soon to follow, a fact that this Court, in the Letter Order this Court issued acknowledged when it said:

“Plaintiff also argues that ISPs may only maintain the necessary information for a short period of time, which may result in the loss of the information without prompt action (Brief, at 2.)”

Furthermore, the IP address associated with each alleged instance of infringement was XX.XXX.XX.XXX; due to the dynamic nature of IP address allocation, it's likely that each alleged act of infringement was committed by a different computer.

As Defendant pointed out in his Answer to Amended Complaint, Defendant's IP address at the time Answer to Complaint was prepared was XX.XXX.XX.XXX; Defendant just checked his IP address again, it has changed to XX.XXX.XX.XXX.

Defendant can demonstrate the following, for the Court, Plaintiff's attorney and a Jury: residential IP address are dynamic by their nature, "static" IP address only exist for server use, and cost significantly more because they add a significant burden to an ISP's infrastructure.

Defendant, by virtue of his education and extensive experience with computers, owing to having majored in XXXX and XXXX as well as have earned accreditation from XXXX University as a Certified Unix System Administrator, has been aware for at least 20 years, of the dynamic nature of IP addresses, as well as how to have a new IP address assigned.

As a way of educating the Court and Plaintiff's attorney as to how trivial it is to change the Global IP address a subscriber is assigned, Defendant offers the following instructions for changing the IP address assigned to their home computers, that is an additional, more technical method, to that outlined above.

First go to Google.com, and search for "What's My IP", follow the link and establish a base line IP address.

Next, if your home computer runs Windows, simply plug your home computer directly into the modem, not the router, open a command prompt and type:

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ipconfig /release
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Hit the "enter" button, then type:

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ipconfig /renew
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Repeat the above steps related to checking your IP address and compare the 2 numbers, you will find that you IP address has changed.

If you use Linux, as Defendant does, the above steps are similar except the commands are:

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sudo dhclient -r
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```
sudo dhclient
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Since it can be demonstrated that it is trivially easy for even the average user to change the Global IP address assigned to a subscriber, due to the dynamic nature of IP address allocation, a Jury is highly unlikely to believe that Defendant's account is responsible for any of the alleged infringements.

VI. Content of the type Plaintiff produces is not eligible for copyright protections under The Copyright Act.

First, The Copyright Act only protects "original works of authorship", Defendant maintains that there is nothing "original" about people having sex, whether by themselves or with one or more partners. Nearly every species in existence does it, not just humans, So Defendant fails to see how Plaintiff's content can be an "original work or authorship."

Second, the law requires 2 copies of the best edition of a work to be sent to the Copyright Office within 3 months of publication and these works are for the use of the Library of Congress.

Third, federal obscenity laws prohibit the sending of obscene materials via any common carrier or possessing it on federal property with intent to distribute.

Taken together, Defendant does not see how most, if not all, content produced by Plaintiff and others like them, can be copyrighted since the third point above makes it illegal to comply with the second point above.

VII. Content of the type Plaintiff produces is not eligible for copyright protections because it violates Federal. California and New Jersey prostitution laws.

**Title 2C - THE NEW JERSEY CODE OF CRIMINAL JUSTICE
Section 2C:34-1 - Prostitution and related offenses.**

(1)"Prostitution" is sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value.

(2)"Sexual activity" includes, but is not limited to, sexual intercourse, including genital-genital, oral-genital, anal-genital, and oral-anal contact, whether between persons of the same or opposite sex; masturbation; touching of the genitals, buttocks, or female breasts; sadistic or masochistic abuse and other deviate sexual relations.

This same law states:

“(6)The actor promotes prostitution of the actor's spouse;”

The title of one of the movies Plaintiff claims were infringed is “Want to F**k My Wife?”, Defendant has censored the actual title out of respect for this Court

but points out that one of the titles of the allegedly downloaded movies actively appears to promote the exact activity 2C:34-1 prohibits.

Plaintiff's have their principal place of business in California and presumably film, produce, finish, archive and distribute the content they produce in the state of California.

Part 1, Title 15, Chapter 2, 647, Penal Code of California

Except as provided in paragraph (5) of subdivision (b) and subdivision (1), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(b) (1) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with the intent to receive compensation, money, or anything of value from another person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation by another person to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.

18 USC 2422(a) states:

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

As shown above, there are Federal laws against the inducement and or enticement of one or more people to engage in sexual activity in exchange for anything of value as well as laws in the State of California and State of New Jersey that similarly make the engaging in the acts recorded and distributed by Plaintiffs illegal if it is done for money.

How then can Plaintiffs have valid copyrights to content that is effectively illegal to produce or even attempt to produce unless the participants are doing it for free?

The 3 laws quoted above effectively mean that it is illegal to produce a pornographic movie or even attempt to hire the actors to do so, if any participant is

promised anything of value, including the person filming, producing and distributing the movie.

Consequently, since the movies Plaintiff's produce are done for a profit, as evidenced by the fact that they run a web site where they sell yearly subscriptions for \$100 per year, they are not eligible for copyright registration under the The Copyright Act because they depict illegal activity.

Relief Sought

For all the reasons outlined above jointly and separately, Defendant asks this court for Dismissal with Prejudice of the entire Complaint, as well as removal of Defendant's name and address from all documents filed in this case.

Respectfully,

Dated this December 16, 2018
