

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PATRICK COLLINS, INC.)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 1:12-cv-00971-BAH
)	
BARBARA SUTER)	
)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(6) OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56(c)**

Defendant Dr. Barbara Suter files this MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6) OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56(C) and states:

I. THE COMPLAINT FAILS TO ALLEGE ANY ACT BY DEFENDANT THAT CONSTITUTES INFRINGEMENT OF COPYRIGHT

The material allegations of the Complaint are contained in Paragraphs 22, 23 and 28:

"22. As the subscriber of the Internet service being used to distribute Plaintiffs copyrighted movies, *Defendant is the most likely infringer*. Consequently, Plaintiff hereby alleges Defendant is the infringer.

23. *Defendant is the only person who can be identified as the infringer at this time.*

28. *By using the BitTorrent protocol, Defendant copied and distributed the constituent elements of each of the original works covered by the Copyrights-in-Suit.*" (emphasis supplied)

The remainder of the Complaint alleges that Plaintiff allegedly is the owner of 7 movies that were downloaded to some computer through the IP address¹ of the cable router rented by Dr.

¹ "Internet Protocol Address" – is the location that a packet of information on the internet either is sent, or ultimately resides. A more complete explanation of how the IP address, a router and how users of a router that obtain private

Suter. There is no dispute, for the purposes of this motion, that copyrighted content passed through Dr. Suter's internet router.

As a matter of law, it is not sufficient to allege that the Defendant is merely the holder or designated cable customer of an IP address through which copyrighted content passed. As a matter of law it is not sufficient to merely allege that “*Defendant is the most likely infringer.*”

II. PLAINTIFF HAS BEEN PROVIDED ALL INFORMATION IN DR. SUTER'S KNOWLEDGE AND CONTINUES TO REFUSE TO DISMISS THIS CASE

After Plaintiff obtained Dr. Suter's name and address, they contacted her, and she explained to them that she never downloaded, viewed, stored or distributed any of their content. Notwithstanding informing Plaintiff that she did not engage in the acts alleged to constitute infringement, the Plaintiff amended this complaint and added Dr. Suter as the defendant, making the above set forth allegations. Undersigned counsel was then retained, and undersigned then notified Plaintiff, through Plaintiff's counsel, that Dr. Suter had not engaged in any infringing act, and provided Plaintiff a declaration under oath as to the facts. See Letter Dated October 30, 2012, including the Declaration under Oath of Dr. Suter, attached and incorporated herein as **Exhibit A**. Plaintiff refused to dismiss this case, and Plaintiff's office, apparently receiving many of these calls, directed undersigned counsel to call the Plaintiff directly, which undersigned did.

In the call undersigned made to Plaintiff's representative at the request of Plaintiff's office, Plaintiff refused to back off the demand for \$7,000 to settle this case, which they calculated at \$1,000 per work (even though Plaintiff's representative admitted only 5 of the works in the case had been timely registered with the U.S. Copyright Office). See Email to Plaintiff's Counsel dated November 5, 2012, attached hereto as **Exhibit B** and incorporated

IP addresses to share that router, are contained in the Hard Drive Productions case cited and discussed at length, *supra*.

herein by reference. Instead, Plaintiff requested a declaration from the actual infringer, who was a houseguest in Dr. Suter's home. Dr. Suter complied with that request in an effort to both provide discovery Plaintiff would obtain anyway, and to resolve this matter without litigation. The Declaration of Amon Hotep, the person who engaged in the acts alleged to constitute copyright infringement, is attached hereto as **Exhibit C**. Undersigned provided Plaintiff's counsel the declaration of Mr. Hotep and made another request that Plaintiff dismiss the case against Dr. Suter, which Plaintiff's counsel refused on the grounds that "The information provided therein is insufficient even to begin negotiation of settlement with Mr. Hotep, let alone to substitute Mr. Hotep for your client as a defendant in a second amended complaint." See Email from Plaintiff's counsel dated November 16, 2012, attached hereto as **Exhibit D** and incorporated herein by reference.² In response to this statement, undersigned made one final request to Plaintiff to dismiss this case, noting that Dr. Suter had no additional relevant evidence, was not the guarantor of Plaintiff's ability to either sue or collect copyright infringement damages, and was not liable for copyright infringement. See Letter to Plaintiff's counsel dated November 19, 2012, attached hereto as **Exhibit E** and incorporated herein by reference. In all of the communications by Dr. Suter, Dr. Suter has invited Plaintiff to either explain the basis of their claims, add additional facts that might justify such case, and/or to make additional requests for information that Dr. Suter might have if she were subpoenaed in discovery; however, Dr. Suter has no additional information, and in any event, Plaintiff has not requested any – they have essentially requested Dr. Suter to guaranty they will be able to sue and collect damages from the actual infringer.

² Plaintiff marked that email as a Fed. R. Civ. P 408 communication, and Defendant notes here that (a) such communication is not a communication making any offer or settlement in compromise, and hence, does not constitute a Fed. R. Civ. P. 408 communication; and (b) even if said communication is a qualified Fed. R. Civ. P. 408 communication, it is not offered for the purpose of establishing a claim or defense in this matter, but only to show the unreasonable position Plaintiff has taken with respect to the requests made by Dr. Suter.

III. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

In Sturdza v. The Government Of The United Arab Emirates, No. 98-2051 (CKK), 2000 U.S. Dist. LEXIS 22090 (D. D.C. 2000) the court explained:

"Summary Judgment Standard

Rule 56(c) of the Federal Rule of Civil Procedure requires a court to grant judgment "if the pleadings, depositions, answers to interrogatories, [*8] and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Tao v. Freeh, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994). Although the court should draw all inferences from the supporting records submitted by the nonmoving party, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The adverse party's pleadings must evince the existence of a genuine issue of material fact. See 477 U.S. at 247-48.

To be material, the factual assertion must be capable of affecting the substantive outcome of the litigation: to be genuine, the issue must be supported by sufficient admissible evidence such that a reasonable trier-of-fact could find for the nonmoving party. See *id.*; Laningham v. United States Navy, 259 U.S. App. D.C. 115, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987). Mere allegations or denials in the adverse party's pleadings are insufficient to defeat an otherwise proper motion [*9] for summary judgment. Rather, the nonmoving party bears the affirmative duty to present, by affidavits or other means, specific facts showing that there is a genuine issue for trial. See 813 F.2d at 1241. The adverse party must do more than simply "show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Sturdza, 2000 U.S. Dist. LEXIS 22090 at *7-8. In Spychalski v. The Univ. Club, 2004 U.S. Dist. LEXIS 29541, *4-5 (D. D.C. 2004) the court further explained that "Plaintiff's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. See FED. R. CIV. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Plaintiff is "required to provide evidence that would permit a reasonable jury to find" in his favor. Laningham v. United States Navy, 259 U.S.

App. D.C. 115, 813 F.2d 1236, 1242 (D.C. Cir. 1987). [*5] If plaintiff's evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249-50. To defeat summary judgment, plaintiff must have more than "a scintilla of evidence to support his claims." Freedman v. MCI Telecommunications Corp., 347 U.S. App. D.C. 112, 255 F.3d 840, 845 (D.C. Cir. 2001)."

17 U.S.C. § 512(a) provides as follows:

"(a) Transitory Digital Network Communications.— A service provider³ *shall not be liable for monetary relief*, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright *by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider*, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content." (emphasis supplied).

As set forth in her declaration, Dr. Suter meets each of the five requirements of Section 512(a). See Exhibit A, Declaration of Dr. Barbara Suter, ¶ 5. Therefore, Dr. Suter is immune from any claim that copyrighted content passed through her router.⁴

³ 17 U.S.C. § 512(k) defines "service provider" as follows: "(1) Service provider.— (A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."

⁴ One open fact question here is whether the router is owned or rented. Defendant's position is that this fact is not material – that is, if the router were rented, then clearly Section 512(a) would apply, but Section 512(a) is broad enough to cover any "service provider" – there is no requirement that the service provider charge for the service, or

Even if Section 512(a) is held not to apply, Dr. Suter is not liable for any copyright infringement.

"In order to establish that a defendant has infringed on a copyright, a plaintiff must demonstrate that (1) it owns a valid copyright and (2) the defendant copied original elements of the copyrighted work. See Feist Publications, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991); White-head v. Paramount Pictures Corp., 53 F. Supp.2d 38, 45 (D.D.C. 1999)." Sturdza, 2000 U.S. Dist. LEXIS 22090 at *9.

Dr. Suter did not copy (nor distribute) any copyrighted work of Plaintiff. All Dr. Suter did was rent (or purchase) a router from her cable company, and allow a third party houseguest to access the internet through that device.

These issues are not new to the Federal Court system. In Hard Drive Productions, Inc., v. Does 1-90, No. C11-03825 HRL, 2012 U.S. Dist. LEXIS 45509, *8-9 (U.S.D.C. N.D. Cal, San Jose Div, March 30, 2012) the said "This subscriber may be the infringer who participated in the swarm, or he may just be the person who pays for internet access in a given household. Multiple people may, and often do, use a single ISP subscription—family members, roommates, guests, or other individuals (unknown to the subscriber) who access the internet using any unprotected wireless signals they can find. The named ISP subscriber may or may not be the infringer, as plaintiff acknowledges by saying that it may need to take further discovery even after it locates the subscribers whose IP addresses appeared in the swarm. Dkt. No. 16, p. 4." (emphasis supplied)

The Plaintiff is asking this court to assist it in civil extortion. Other courts that have been asked to help plaintiffs in the same context have refused to do so:

have more than one customer, or in any other manner dictate the method the service provider provides the service (other than the 5 requirements in the statute).

"[T]he court will not assist a plaintiff who seems to have no desire to actually litigate but instead seems to be using the courts to pursue an extrajudicial business plan against possible infringers (*and innocent others caught up in the ISP net*). Plaintiff seeks to enlist the aid of the court to obtain information through the litigation discovery process so that it can pursue a non-judicial remedy that focuses on extracting "settlement" payments from persons who may or may not be infringers. This the court is not willing to do."

Hard Drive Productions, 2012 U.S. Dist. LEXIS 45509, *23 (emphasis supplied).

Indeed, this same plaintiff has been admonished in other litigation that, while discovery was being permitted, the courts are growing weary:

"The federal courts are not cogs in a plaintiff's copyright-enforcement business model. *The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial.* By requiring Malibu to file [*10] separate lawsuits for each of the Doe Defendants, Malibu will have to expend additional resources to obtain a nuisance-value settlement—making this type of litigation less profitable. If Malibu desires to vindicate its copyright rights, it must do it the old-fashioned way and earn it." (emphasis added)

Patrick Collins, Inc. v. John Does 1 through 37, No. 2:12-cv-1259-JAM-EFB, 2012 U.S. Dist. LEXIS 96350, *9 (U.S.D.C. E.D. Cal, July 11, 2012), quoting *Malibu Media, LLC v. John Does 1 through 10*, 2012 U.S. Dist. LEXIS 89286, at *8-9 (C.D. Cal. June 27, 2012); see also *Malibu Media, LLC v. Does 1-5*, 2012 U.S. Dist. LEXIS 77469, 2012 WL 2001968, at *1 (S.D.N.Y. June 1, 2012) (permitting limited discovery but stating that the court "*shares the growing concern about unscrupulous tactics used by certain plaintiffs, particularly in the adult films industry, to shake down the owners of specific IP addresses from which copyrighted adult films were allegedly downloaded.*")

That "shakedown" that concerned these courts has materialized here. Dr. Suter's sole "crime" here was that she owns (or rents) a cable router through which a houseguest, without her knowledge,⁵ downloaded copyrighted content. The Plaintiff, having been told this, did not

⁵ See **Exhibit A**, Declaration of Dr. Barbara Suter, at ¶ 6, 7; **Exhibit C**, Declaration of Amon Hotep, ¶ 5.

believe her, and continued to prosecute this case in bad faith, having been given all of the discovery Dr. Suter could give them in respect of the facts related to the downloaded movies.

There is no evidence that Dr. Suter herself copied, downloaded, re-distributed, or viewed any of the allegedly copyrighted content held by Plaintiff. For the above set forth reasons, the Court should enter judgment in favor of Dr. Suter.

IV. PLAINTIFF HAS FAILED TO ATTACH AND THEREFORE PLEAD ACTUAL CERTIFICATES OF REGISTRATION, WHICH ARE PRE-REQUISITE TO THIS ACTION

17 U.S.C. § 411(a) provides that "[e]xcept for an action brought for a violation of the rights of the author under section 106A (a), and subject to the provisions of subsection (b), [1] no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." In Strategy Source, Inc. v. Lee, 233 F. Supp. 2d 1 (D.D.C. 2002) this court dismissed an action where the plaintiff had failed to plead and attach registration certificates to its complaint. This same Plaintiff in another court has been denied discovery for the same reason (in a case citing approvingly the Strategy Source case), see Patrick Collins, Inc. v. Does 1-26, 843 F. Supp. 2d 565 (E.D. Pa. 2011) (plaintiff denied discovery because it did not present certificates of copyright registration to the court). Plaintiff's complaint therefore should be dismissed for failure to plead and attach the copyright registration certificates.

V. DEFENDANT IS ENTITLED TO COSTS AND ATTORNEYS' FEES

17 U.S.C. § 505 provides as follows: "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 a reasonable attorney's fee to the prevailing party as part of the costs." As established in Exhibits A-E, Defendant cooperated with Plaintiff, going well beyond her duties, and obtained a signed declaration of the actual infringer, and provided all relevant evidence to Plaintiff that she has, without even a discovery request or subpoena. Dr. Suter, through undersigned, respectfully asked the Plaintiff to dismiss this case as it has no evidence the person it sued engaged in any act that gives it a right to recovery – this offer was even made to dismiss the case without prejudice so that, if after Plaintiff engaged in additional discovery, it determined it did have a basis to file a claim, they could re-commence the suit. In addition, Dr. Suter offered through counsel to toll limitations. Despite all of these efforts, Plaintiff has refused to dismiss Dr. Suter, and instead has taken the unsupported position that Dr. Suter somehow should be the guarantor of Plaintiff's ability to sue and collect damages, apparently on the grounds that the alleged infringement traversed her router. No law, nor any reasonable extension of law, imposes strict liability or any other type of liability on Dr. Suter as claimed by Plaintiff. As a result, Dr. Suter has incurred attorneys' fees to file this motion, and hereby requests that the Court enter judgment in her favor and award her reasonable attorneys' fees actually incurred to file and prosecute this motion.

WHEREFORE, Defendant moves this court to dismiss this case, or in the alternative, enter a judgment in favor of Defendant, and award Defendant all of its costs and expenses, as well as its attorneys' fees as authorized by 17 U.S.C. § 505.

Dated: January 8, 2013

Respectfully submitted,

_____/s/_____
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