

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

JOE HAND PRODUCTIONS, INC.,

Plaintiff,

v.

**JEFFREY C. DUBOIS, individually, and
as officer, director, shareholder, member,
and/or principal of DD2, LLC, d/b/a
Lucky Horseshoe Saloon, and DD2, LLC,**

Defendants.

CIVIL ACT. NO. 1:18-cv-496-TFM-MU

MEMORANDUM OPINION AND ORDER

Now pending before the Court is *Plaintiff's Amended Motion for Summary Judgment* (Doc. 35, filed November 7, 2019). The Court has carefully reviewed the pleadings, motion, documents filed in the case, and relevant law, and it is ripe for review. For the reasons discussed below, the motion is **GRANTED in part and DENIED in part**.

I. JURISDICTION

The Plaintiff, Joe Hand Productions, Inc. ("JHP" or "Plaintiff"), asserts claims pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) against DD2, LLC, d/b/a/ Lucky Horseshoe Saloon ("DD2"), and Jeffrey C. Dubois, individually and as sole member of DD2 ("Dubois") (collectively, "Defendants"). Plaintiff alleges violations of the Copyright Act of the United States, 17 U.S.C. § 101, *et seq.*, and the Communications Act of 1934, as amended, 47 U.S.C. §§ 553, 605. No party contests either subject matter or personal jurisdiction and adequate support exists for both.

II. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff in this case is a Pennsylvania-based corporation that licenses and distributes

sporting and entertainment programming for commercial purposes to bars, restaurants, clubhouses, and other non-residential establishments. In the course of its business, Plaintiff purchased and retained the commercial exhibition rights to the planned August 26, 2017 Floyd Mayweather, Jr., vs. Conor McGregor prizefight, including all undercard bouts and the main event (collectively, “the Fight”). Under the contracted arrangement, JHP then sub-leased to bars, nightclubs, casinos, restaurants, and other commercial establishments the right to exhibit the Fight to patrons, customers, members, and/or guests in exchange for a commercial sublicensing fee based on the capacity of the establishment. In its Complaint, JHP contends that Defendants, owners of the Lucky Horseshoe Saloon in Fairhope, Alabama (“Lucky Horseshoe”), exhibited the Fight without permission or payment of the commercial licensing fee to JHP.

Plaintiff initiated this lawsuit on November 28, 2018, asserting two causes of action: (1) satellite and/or cable piracy, in violation of either 47 U.S.C. § 553 (Unauthorized Reception of Cable Service) or 47 U.S.C. § 605 (Unauthorized Publication of Communications); and (2) copyright infringement, in violation of 17 U.S.C. § 501. From the lawsuit, Plaintiff seeks statutory damages plus interest, costs, and attorney fees.

Plaintiff has filed an Amended Motion for Summary Judgment, asking the Court to grant summary judgment on the second count of copyright infringement. Doc. 35. Plaintiff does not seek summary judgment as to Count 1. Defendants failed to file a response to the Amended Motion for Summary Judgment by the Court-appointed deadline.¹ Moreover, Defendants have had ample

¹ Indeed, substantial time has passed since the response deadline, and Defendants have taken no action to remedy their failure to respond. The Court notes that, during the pendency of Plaintiff’s Amended Motion for Summary Judgment, counsel for Defendants otherwise continued to litigate this case, filing documents with the Court unrelated to the summary judgment motion and appearing for status conferences. The Magistrate Judge assigned to the case reminded Defendants during two (2) December 2019 status conferences of the pendency of the summary judgment motion and Defendants’ failure to respond to it. Thus, it is clear to the Court that counsel is aware

opportunity since that time to seek the Court's leave to file an out-of-time response or take other appropriate action. None having been taken, the Court finds Plaintiff's Amended Motion for Summary Judgment is ripe for review.

III. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(). A factual dispute alone is not enough to defeat a properly pleaded motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). "[T]he substantive law will identify which facts are material." *Id.* at 248, 106 S. Ct. at 2510. At the summary judgment stage, the court does not "weigh the evidence and determine the truth of the matter," but merely "determine[s] whether there is a genuine issue for trial." *Id.* at 249, 106 S. Ct. at 2511.

The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). "When a moving party has discharged its burden, the non-moving party must then 'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-94 (11th Cir. 1995) (citing *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553). The court must view facts and draw all reasonable inferences in favor of the nonmoving

of the summary judgment motion and the Court's Order (Doc. 38) setting a deadline for Defendants' response to the motion.

party. *Moore v. Reese*, 637 F.3d 1220, 1231 (11th Cir. 2011) (citing *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039, 1043 (11th Cir. 2007)). However, to avoid summary judgment, the nonmoving 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, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (citations omitted).

Fed. R. Civ. P. 56(e) provides that:

[i]f a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
- (4) issue any other appropriate order.

FED. R. CIV. P. 56(e).

Although Plaintiff’s Amended Motion for Summary Judgment motion is unopposed, the Court cannot grant summary judgment on this basis alone, but rather, must consider the merits of the motion and determine whether there is a genuine issue of material fact. *See United States v. One Piece of Property*, 5800 S.W. 74th Ave., Miami, Fla., 363 F.3d 1099, 1101 (11th Cir. 2004) (“[S]ummary judgment, even when unopposed, can only be entered when ‘appropriate’”). Although the Court “need not sua sponte review all of the evidentiary materials on file at the time the motion is granted,” the Court “must ensure that the motion itself is supported by evidentiary materials.” *Id.*

IV. DISCUSSION AND ANALYSIS

To demonstrate copyright infringement, Plaintiff must establish that (1) it owns a valid copyright and (2) that Defendants infringed on one or more of the exclusive rights to the copyright. *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011); *Suntrust Bank v. Houghton*

Mifflin Co., 268 F.3d 1257, 1265-66 (11th Cir. 2001); *Joe Hand Promotions, Inc. v. Phillips*, Civ. Act. No. 19-21723-Civ-Scola, 2020 WL 3404964, at *2, 2020 U.S. Dist. LEXIS 107981, at *5-6 (S.D. Fla. June 19, 2020); *see also* 17 U.S.C. § 106(3)-(5) (“[T]he owner of copyright under this title has the exclusive rights to ... distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending ... to perform the copyrighted work publicly; [and] ... to display the copyrighted work publicly”). A copyright owner need not prove a defendant knew or intended to commit the offense in order to establish copyright infringement. *Playboy Enters., Inc. v. Starware Pub. Corp.*, 900 F. Supp. 433, 436 (S.D. Fla. 1995); *Phillips*, 2020 WL 3404964, at *2, 2020 U.S. Dist. LEXIS 107981, at *6.

JHP has established that it contracted with Mayweather Promotions, LLC, the exclusive distributor of the Fight, and Showtime Networks, Inc. (“SNI”), the owner and operator of the copyright to the Fight, for the sole and exclusive rights to distribute the Fight on August 26, 2017, to commercial viewing locations in Alabama and elsewhere in the United States, including bars, taverns, public houses, restaurants, clubs, and other public viewing areas. *See* Docs. 35-1 to 35-4. SNI also assigned JHP the exclusive right to commence legal action to enforce its contractual rights under federal copyright laws. *See* Doc. 35-3. Thus, Plaintiff has established the first prong of its copyright infringement claim.

JHP also has established that the Lucky Horseshoe exhibited the Fight without permission on August 26, 2017. JHP filed with its Amended Motion for Summary Judgment an affidavit signed by Kimberly Jones, an auditor, stating that Jones personally observed that Lucky Horseshoe exhibited the Fight on August 26, 2017, on three (3) television screens—one on each side of the dance floor and another in an upstairs area. *See* Doc. 35-6. Jones stated that she paid a \$10 cover charge to enter the Lucky Horseshoe and observed the exhibition of the Fight. *Id.* In the affidavit,

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