UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MALIBU MEDIA,

Plaintiff,

No. 13-11432

v.

Hon. Gershwin A. Drain

JOHN DOE

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO STRIKE [#41] AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM FOR DECLARATORY RELIEF [#42]

I. Introduction

On March 29, 2013, Plaintiff Malibu Media LLC, filed a Complaint under §106 of the Copyright Act of 1976 ("the Copyright Act"), as amended 17 U.S.C. §§101 *et seq*., against Defendant John Doe for copyright infringement. Plaintiff produces pornographic videos and markets them over the internet. Those who wish to view Plaintiff's videos can purchase access to them on Plaintiff's website. Plaintiff alleges Defendant used a file sharing method called a BitTorrent to infringe upon its copyrighted films. BitTorrents allow multiple internet users to download small amounts of large media files from one another until a user has obtained the whole file. Initially, Plaintiff did not know Defendant by name, but knew Defendant's internet protocol address ("IP address"). The Court granted Plaintiff's Motion for Leave to Serve a Third party Subpoena on Defendants internet service provider, and was able to determine Defendant's name. Thereafter, the Court granted Defendant's Motion to Proceed Anonymously Through Discovery and Dispositive Motions on September 26, 2013.

Presently before the Court are Plaintiff's Motion to Strike Defendant's Affirmative Defenses [#41] and Motion to Dismiss Defendant's Counterclaim for Declaratory Relief [#42]. The Court finds that oral argument will not aide in the resolution of this matter. Accordingly, these motions will be decided on the briefs submitted. *See* E.D. Mich. L.R. 7.1(f)(2). For the reasons that follow, the Court will GRANT IN PART AND DENY IN PART Plaintiff's Motions.

II. Factual Background

On February 20, 2014, Defendant filed an Answer containing thirteen Affirmative Defenses. *See* Dkt. #37. Defendant raised the defenses of unclean hands, copyright misuse, estoppel, implied license, innocent intent, no volitional conduct, unconstitutionality of statutory damages, misuse by others, intervening acts, knowledge, consent and acquiescence, fair use, *de minimis* infringement and laches. *Id*. Defendant also filed a counterclaim for declaratory relief. *Id*. Defendant seeks a declaration that the doctrines of unclean hands, copyright misuse, estoppel, and implied license preclude Plaintiff from enforcing its copyrights, therefore, Defendant is not liable for copyright infringement. *Id*.

III. Law and Analysis

A. Standard of Review

i. Motion to Strike Affirmative Defenses

The court can strike an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter from a pleading. Fed R. Civ. P. 12(f). A defense is insufficient "if as a matter of law, the defense cannot succeed under any circumstances." *Hahn v. Best Recovery Servs., LLC*, No. 10–12370, 2010 WL 4483375, *2 (E.D.Mich. Nov.1, 2010). The decision to strike is within the court's discretion. 2 Moore's Federal Practice § 12.37 (3d ed. 2002). Courts should

only grant a motion to strike when the "purposes of justice require" it. *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953).

Generally, motions to strike "are disfavored and should only be granted when 'insufficiency of the defense is clearly apparent.'" *Malibu Media, LLC v. Doe*, No. 12-2078, 2013 U.S. Dist. Lexis 55985 *6 (E.D Pa. Mar. 6, 2013). The Sixth Circuit Court of Appeals has recognized "the action of striking a pleading should be sparingly used by the courts" and resorted to only when required for the purpose of justice" and when the pleading to be stricken has no possible relation to the controversy. *Brown & Williamson Tobacco Corp.*, 201 F.2d at 822. Moreover, "a court should restrain from evaluating the merits of a defense where, as here, the factual background for the case is largely undeveloped." *Id*. (quoting *Cipollone v. Liggett Grp., Inc*., 789 F.2d 131, 188 (3d. Cir. 1986)).

Lastly, the Sixth Circuit Court of Appeals has never expressly held that the heightened pleading standards in *Iqbal* and *Twombly* apply to affirmative defenses. *See Peters v. Credit Portection Ass'n, LP*, No. 2:13-cv-767, 201 U.S. Dist. LEXIS 34825, *6-7 (S.D. Ohio Mar. 14, 2014). However, some courts have so held, including courts in this circuit. Other courts in this circuit have reached the opposite conclusion. *Peters*, 2014 U.S. Dist. LEXIS 34825, at *7-8; *Joe Hand Promotions, Inc. v Havens*, No.2:13-cv-0093 2013 U.S. Dist. LEXIS 104962, *2 (S.D. Ohio Jul. 26, 2013); *Paducah River Painting, Inc. v. Mcnational, Inc*., No. 5:11-cv-00135 U.S. Dist. LEXIS 131291, *4-10 (N.D. K.Y. Nov. 12, 2011). This Court finds the latter group of courts' reasoning persuasive, thus affirmative defenses "need only be pleaded such that they give fair notice of the nature of the defense." *Paducah River Painting, Inc.*, 2011 U.S. Dist. LEXIS 131291, at *4 (quoting *Lawrence v. Chabot*, 182 F. App'x 442, 456 (6th Cir. 2006)).

ii. Motion to Dismiss

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this standard does not require "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rule 12(b)(6) of the Federal Rules of Civil Procedure allows the court to make an assessment as to whether the plaintiff has stated a claim upon which relief may be granted. Under the Supreme Court's articulation of the Rule 12(b)(6) standard in *Bell Atl. Corp. v. Twombly*, the court must construe the complaint in favor of the plaintiff, accept the allegations of the complaint as true, and determine whether plaintiff's factual allegations present plausible claims. To survive a Rule 12(b)(6) motion to dismiss, plaintiff's pleading for relief must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007). Even though the complaint need not contain "detailed" factual allegations, its "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Id.* To survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient "to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009).

When deciding a motion under Rule 12(b)(6), the court can take into account matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint. *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001). The court can properly treat documents the defendant attaches to its motion as pleadings if those documents are central

to the plaintiff's complaint and its claims. *Werner v. Klais & Co., Inc.*, 108 F.3d 86, 88 (6th Cir. 1997).

B. Motion to Strike

Plaintiff seeks to strike Defendant's affirmative defenses of unclean hands, copyright misuse, estoppel, implied license, knowledge, consent, acquiescence, and laches.

Plaintiff's first argument is that the Court should strike the affirmative defense of unclean hands. The doctrine of unclean hands allows the court to deny injunctive relief where the party applying for the relief is "guilty of fraud, deceit, unconscionability, or bad faith related to the matter at issue[.]" *Performance Unlimited, Inc. v. Questar Publisher's, Inc.*, 52 F.3d 1373, 1383 (6th Cir. 1995). The plaintiff's misconduct "must relate directly to the transaction about which the plaintiff has made a complaint." *Id*.

Defendant first argues that Plaintiff failed to comply with 18 U.S.C. § 2257, a statute aimed at protecting underage children from exploitation in the sex industry. *See American Library Ass'n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994). The statute requires pornographic movie producers to create and maintain a record of their performers' ages. *Id*. (stating Congress' intent in creating the act). This is a criminal statute with no private right of action. *Bullard v. MRA Holding, LLC*, 890 F. Supp.2d 1323, 1029 (N.D. Ga. 2012). Congress created civil remedies for the statutes under this chapter, but did not include one for section 2257. *Id*. at 1330.

According to Defendant, the doctrine of unclean hands is appropriate because Plaintiff's films feature "young-looking girls[.]" *See* Countercl. at ¶¶ 8,16. Regulations under the act require pornographic film producers to display section 2257 notice either at the beginning or at

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