UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LHF Productions, Inc.,

Plaintiff

v.

Matthew Wilson,

Defendant

Case No.: 2:16-cv-02368-JAD-NJK

Order Granting Motion for Default Judgment

[ECF No. 46]

This is one of several essentially identical cases filed by plaintiff LHF Productions, Inc., in which LHF sues many unidentified Doe defendants—under a single filing fee—for separately infringing its copyright in the film "London Has Fallen" by using BitTorrent software. LHF's practice in these cases is to move for expedited discovery to identify the defendants, and then systematically dismiss the claims against defendants after failing to serve them or settling with them.[1] Now, only one defendants remains: Matthew Wilson. It has been over six months since the Clerk of Court entered default against Wilson, and he continues to avoid this action against him. So, LHF moves for default judgment against him,[2] and I grant the request in part.

Discussion

A. Default-judgment standard

Federal Rule of Civil Procedure 55(b)(2) permits a plaintiff to obtain default judgment if the clerk previously entered default based on a defendant's failure to defend. After entry of default, the complaint's factual allegations are taken as true, except those relating to damages.[3] "[N]ecessary facts not contained in the pleadings, and claims [that] are legally insufficient, are

[1] *See, e.g.*, *LHF Productions, Inc. v. Kabala*, 2:16-cv-02028-JAD-NJK; *LHF Productions, Inc. v. Buenafe*, 2:16-cv-01804-JAD-NJK; *LHF Productions, Inc. v. Smith*, 2:16-cv-01803-JAD-NJK; *LHF Productions, Inc. v. Boughton*, 2:16-cv-01918-JAD-NJK.

[2] ECF No. 46.

[3] *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (per curiam); FED. R. CIV. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.").

not established by default."[4] The court has the power to require a plaintiff to provide additional proof of facts or damages in order to ensure that the requested relief is appropriate.[5] Whether to grant a motion for default judgment lies within my discretion,[6] which is guided by the seven factors outlined by the Ninth Circuit in *Eitel v. McCool*:

> (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.[7]

A default judgment is generally disfavored because "[c]ases should be decided upon their merits whenever reasonably possible."[8]

B. The BitTorrent protocol

A brief description of the BitTorrent protocol is helpful to contextualize my *Eitel* analysis. *Safety Point Products, LLC v. Does* describes it well:

> BitTorrent is a program that enables users to share files via the internet. Unlike other "peer-to-peer" (P2P) file sharing networks that transfer files between users or between a user and a central computer server, BitTorrent allows for decentralized file sharing between individual users who exchange small segments of a file between one another until the entire file has been downloaded by each user. Each user that either uploads or downloads a file segment is known as a "peer." Peers that have the entire file are known as "seeds." Other peers, known as "leeches" can simultaneously download and upload the pieces of the shared file until they have downloaded the entire file to become seeds.
>
> Groups of peers that download and upload the same file during a given period are known as a "swarm," with each peer being

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[4] *Cripps v. Life Ins. Co.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

[5] *See* FED. R. CIV. P. 55(b)(2).

[6] *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

[7] *Id.* at 1471–72.

[8] *Id.* at 1472.

> identified by a unique series of alphanumeric characters known as "hashtag" that is attached to each piece of the file. The swarm's members are relatively anonymous, as each participant is identifiable only by her Internet Provider (IP) address. Overseeing and coordinating the entire process is a computer or server known as a "tracker" that maintains a record of which peers in a swarm have which files at a given time. In order to increase the likelihood of a successful download, any portion of the file downloaded by a peer is available to subsequent peers in the swarm so long as the peer remains online.
>
> But BitTorrent is not one large monolith. BitTorrent is a computer protocol, used by various software programs known as "clients" to engage in electronic file-sharing. Clients are software programs that connect peers to one another and distributes data among the peers. But a peer's involvement in a swarm does not end with a successful download. Instead, the BitTorrent client distributes data until the peer manually disconnects from the swarm. It is only then that a given peer no longer participates in a given BitTorrent swarm.[9]

C. Evaluating the *Eitel* factors

1. Possibility of prejudice to LHF

The first *Eitel* factor weighs in favor of granting default judgment against Wilson. LHF sent Wilson numerous demand letters and a summons along with the first-amended complaint, but Wilson never responded.[10] LHF claims that Wilson infringed its copyright by downloading its film using BitTorrent software. Given the nature of BitTorrent software, Wilson may be exacerbating LHF's injury by continuing to seed the file to the BitTorrent swarm.

2. Substantive merits and sufficiency of the claims

The second and third *Eitel* factors require LHF to demonstrate that it has stated a claim on which it may recover.[11] The first-amended complaint sufficiently pleads LHF's direct-copyright-infringement, contributory-copyright-infringement, and vicarious-liability claims.

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[9] *Safety Point Products, LLC v. Does*, 2013 WL 1367078, at *1 (N.D. Ohio Apr. 4, 2013) (internal citations omitted).

[10] ECF No. 46 at 4.

[11] *See Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

To present a prima facie case of direct infringement, LHF must show that: (1) it owns the allegedly infringed material, and (2) the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.[12] LHF alleges that it is the owner of the copyright registration for the film "London Has Fallen."[13] LHF also alleges that Wilson willfully violated several exclusive rights granted by 17 U.S.C. § 106, and that those violations caused it to suffer damages.[14]

The contributory-copyright-infringement claim requires LHF to allege that Wilson "had knowledge of the infringing activity" and "induce[d], cause[d,] or materially contribute[d] to the infringing conduct of another."[15] "Put differently, liability exists if the defendant engages in personal conduct that encourages or assists the infringement."[16] Given the nature of BitTorrent technology, BitTorrent swarm participants who download files compulsorily upload those same files so that other participants may download them at a faster rate. Accordingly, LHF's allegations that each defendant is a contributory copyright infringer *because* they participated in a BitTorrent swarm[17] is sufficient to satisfy the induced-caused-or-contributed requirement. LHF satisfies the remaining requirements by alleging that Wilson knew or should have known that other BitTorrent-swarm participants were directly infringing on LHF's copyright by downloading the files that they each uploaded.[18]

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[12] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

[13] ECF No. 8 at 10, ¶ 46; *see also* ECF No. 8-2.

[14] ECF No. 8 at 10–11.

[15] *A&M Records*, 239 F.3d at 1019 (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971) and citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).

[16] *Id.* (quoting *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998)).

[17] ECF No. 8 at 11, ¶ 56.

[18] *Id.* at 12, ¶¶ 58–61.

LHF also claims that Wilson, as the account holder for the Internet service, is vicariously liable for any infringing activity conducted by other users on his internet connection.[19] "Vicarious infringement is a concept related to, but distinct from, contributory infringement."[20] "To state a claim for vicarious copyright infringement, [LHF] must allege that [Wilson] had (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity."[21]

LHF's allegations satisfy the first prong. As the court discussed in *Dallas Buyers Club, LLC v. Doughty*, "the Internet service account holder, appea[rs] to have had exclusive control over use of the Internet service" and the account holder "could have simply secured access to the Internet by creating a password or by changing an already existing password."[22] "Thus, . . . [the account holder] had the capacity to terminate use of his Internet service by any infringing third party if he believed it was being used to violate applicable law."[23]

LHF also satisfies the direct-financial-interest prong. "The essential aspect of the direct financial benefit inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of how substantial the benefit is in proportion to a defendant's overall profits."[24] "Financial benefit exists where the availability of infringing material acts as a 'draw' for customers."[25] "The size of the 'draw' relative to a defendant's overall business is immaterial. A defendant receives a 'direct financial benefit' from a third-party infringement so long as the infringement of third parties acts as a 'draw' for customers 'regardless of *how substantial* the benefit is in proportion to a defendant's overall

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[19] *Id.* at 14.

[20] *Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788, 802 (9th Cir. 2007).

[21] *Id.*

[22] *Dallas Buyers Club, LLC v. Doughty*, 2016 WL 1690090 (D. Or. Apr. 27, 2016).

[23] *Id.* (citing *A&M Records*, 239 F.3d 1004).

[24] *Perfect 10, Inc. v. Giganews, Inc.*, 2014 WL 8628031, at *3 (C.D. Cal. Nov. 14, 2014) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)).

[25] *A&M Records*, 239 F.3d at 1023.

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