IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LIVE FACE ON WEB, LLC,   )
)
        Plaintiff,   )
)
)
     v.   )   1:17cv937
)
)
ABSONUTRIX, LLC, et al.,   )
)
        Defendants.   )
)

MEMORANDUM OPINION AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This case comes before the undersigned United States Magistrate Judge for a recommendation on Defendants' "Motion to Dismiss for Failure to State a Claim" (Docket Entry 11) (the "Motion"). For the reasons that follow, the Court should deny the Motion.

BACKGROUND

Live Face on Web, LLC ("LFOW"), commenced this action against Absonutrix, LLC, and Himanshu Nautiyal (collectively, "Defendants"), alleging copyright infringement. (See Docket Entry 1 (the "Complaint"), ¶¶ 1-3, 42.) According to the Complaint:

"LFOW is a developer and owner of 'live person' software, which is an original work of authorship independently created by LFOW ('LFOW Software')." (Id., ¶ 11.) "The LFOW Software allows a company to display a video of a 'walking' and 'talking' personal host who introduces a website to an online visitor. The personal

host is, in effect, a website spokesperson for the specific company for whom the video has been created. Typically, the website spokesperson explains a company's products and/or services and directs a visitor's attention to a particular product or aspect of the website." (Id., ¶ 12.) "The LFOW Software seeks to enhance a website by using a real spokesperson to capture, hold and prolong the attention of the average online visitor, enhancing the ability of the website to advertise specific goods and services." (Id., ¶ 14.)

"Generally speaking, the LFOW Software can be implemented by LFOW's customers by modifying the HTML code of the LFOW customer's website. An HTML script tag is embedded in the HTML code of the LFOW customer's website, which links the LFOW customer's website to a copy of the LFOW Software." (Id., ¶ 15.) "Regardless of the particular webserver(s) where the LFOW Software is stored, the functionality and result is the same. When a web browser is directed to a website linked to the LFOW Software, the embedded HTML script tag is read by the web browser and causes the automatic distribution of a copy of the LFOW Software. The LFOW Software is automatically saved by the web browser into cache, and/or a hard drive(s), and loaded into computer memory and/or RAM (random access memory). As a result of the distribution of the LFOW software, the specific website spokesperson video is automatically launched and displayed to advertise on the associated website." (Id., ¶ 16.)

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LFOW owns a registered copyright in the LFOW Software. (Id., ¶ 19.)

"Defendants own, operate and/or control the website http://www.absonutrix.com/ ('Defendants' Website')." (Id., ¶ 20.) "Upon information and belief, Defendants have used a website spokesperson video to promote their products and/or services. . . . [I]n order to display the website spokesperson video on Defendants' Website, Defendants used, copied and distributed, without permission, [an] infringing version of the LFOW Software, thereby infringing upon LFOW's rights in its copyrighted work." (Id., ¶¶ 22-23.)

"[T]o implement and distribute the infringing version of the LFOW Software, the Defendants' Website was modified by or on behalf of Defendants . . . ." (Id., ¶ 25.) Specifically, source code on Defendants' Website "links the Defendants' Website to the file 'ip_player.js', which is an infringing version of the LFOW Software, which was stored for Defendants on the webserver(s) for www.tweople.com." (Id., ¶ 26.) "As a result of the modifications to the Defendants' Website . . . when a web browser retrieves a page from the Defendants' Website, a copy of the infringing version of the LFOW Software is distributed by Defendants to the website visitor and stored on the visitor's computer in cache, memory, and/or its hard drive. Accordingly, each visit to the Defendants' Website is a new act of copyright infringement." (Id., ¶ 28.) In

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sum, LFOW contends that, in modifying their website to link to the "ip_player.js" file stored on a third-party server, Defendants engaged in "direct, indirect and/or vicarious infringement of registered copyright(s)." (Id., ¶ 42.)

In response to the Complaint, Defendants moved to dismiss, contending, first, that the allegations in the Complaint do not state a plausible claim for copyright infringement under Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Rules"), and second, that any alleged copyright infringement occurred outside the three-year statute of limitations. (See Docket Entry 12 at 6, 8.) LFOW filed a response to the Motion (Docket Entry 14), to which Defendants replied (Docket Entry 15).

DISCUSSION

I. Failure to State a Claim

In support of the Motion, Defendants contend that LFOW's allegations of "'use[], cop[ying] and distribut[ion]' of the code in question" constitute factually "unsupported conclusions" that fail to satisfy Rule 8's pleading standards. (Docket Entry 15 at 2 (brackets in original); see also Docket Entry 12 at 6 ("[The Complaint] does not provide facts supporting the conclusory and formulaic labels of copying and use by Absonutrix.").)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual allegations "to 'state a claim to relief that is plausible on its face.'" Ashcroft v.

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Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). To qualify as plausible, a claim needs sufficient factual content to support a reasonable inference of the defendant's liability for the alleged misconduct. Id. Facts that remain "'merely consistent with'" liability fail to establish a plausible claim for relief. Id. (quoting Twombly, 550 U.S. at 557). However, a complaint need not contain detailed factual recitations, as long as it provides the defendant "fair notice of what the claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555 (internal quotation marks and alteration omitted).

In reviewing a motion to dismiss, the Court must "accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff." Coleman v. Maryland Court of Appeals, 626 F.3d 187, 189 (4th Cir. 2010), aff'd sub nom., Coleman v. Court of App. of Md., 566 U.S. 30 (2012). The Court must also "draw all reasonable inferences in favor of the plaintiff." E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 440 (4th Cir. 2011) (internal quotation marks omitted). However, the Court "will not accept 'legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments.'" United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 455 (4th Cir. 2013) (quoting Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 (4th Cir.

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