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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

DALLAS BUYERS CLUB, LLC,

Plaintiff,

v.

JOHN HUSZAR,

Defendant.

Case No.: **3:15-cv-0907-AC**

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

FRCP 56

ORAL ARGUMENT REQUESTED

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NOTICE OF MOTION

Defendant John Huszar (“Huszar”) moves for summary judgment of non-infringement on the grounds that Huszar has absolute immunity under 17 U.S.C. §§ 512(a) and 512(b) as the transactions at issue were routed through a Tor Exit Node; Plaintiff Dallas Buyers Club (“DBC”) failed to produce a true and correct “depository copy” by the close of discovery, precluding DBC from proving its case under the best evidence rule; and DBC’s torrent monitoring company misled this Court and other Courts about the quality and integrity of MaverickMonitor. This motion will be heard before the Honorable John Acosta in the District of Oregon, Federal Courthouse, located at 1000 SW 3rd Ave #740, Portland, OR 97204 pursuant to the scheduling order at Docket 133.

MEMORANDUM

I. SUMMARY

Huszar moves for summary judgment of non-infringement on the following grounds:

- Huszar has statutory copyright infringement immunity under 17 U.S.C. §§ 512(a) and 512(b) for an ISP (internet service provider), as he operated as an ISP with a Tor server; and/or
- DBC cannot “prove up” its case as DBC has failed to produce a true and correct “depository copy” by the close of discovery. This precludes DBC from satisfying an essential element of infringement; and/or
- Any data generated from the “MaverickMonitor” torrent monitoring system cannot be relied upon for the purposes of proving any “infringement”. The software was built without any formal specifications, has no documentation, has never been tested, and has no reports on error rates.

II. INTRODUCTION

Huszar is the last defendant in an extensive litigation campaign, stretching from Sydney to Portland, the long way around, where DBC has sued thousands of defendants for allegedly downloading the movie *Dallas Buyers Club*, and has then asked for payments ranging from \$2,000.00 to \$10,000.00 for a \$2.99 movie. The allegations are the same in all countries – defendants went to torrent sites, like “PirateBay” and downloaded the movie and infringed. What

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these cases have in common, oddly enough, is a software company in Germany, known by various names, but here known as “Maverickeye” which makes the “detection” software “MaverickMonitor”. MaverickMonitor is allegedly the cat’s meow in torrent monitoring technology.

What distinguishes this case, from the other thousands, is that Huszar ran a Tor Server as an ISP, giving him statutory immunity. Also, Huszar did not agree with DBC, and rather than take their assertions at face value that the monitoring software was anything special, he hired an expert to look at and evaluate the code – Dr. Kal Toth. Dr. Toth’s evaluation is telling; the code is nothing but a stitched together patchwork of open source software based on “Monotorrent”. Despite the fact that MaverickMonitor could have chosen to verify the entire movie on the alleged infringer’s hard drive, MaverickMonitor chose instead to grab only 16KB of raw data to “prove” infringement. 16KB out of a 4GB movie is a miniscule drop in the bucket, and certainly wholly insufficient to ‘prove’ infringement.

What is equally strange is despite producing this blockbuster hit, DBC, who has sued thousands of people, has never had a copy of the depository copy of the movie. The depository copy was sitting on film reels, likely at Universal Studios. That raises a bigger question – what was MaverickMonitor looking at when they compared the thousands of infringed works?

III. UNDISPUTED FACTS

A. There are both a theatrical film version and a DVD version of *Dallas Buyers Club*

DBC applied for and received a copyright certificate on the theatrical version of *Dallas Buyers Club*. (RJN 1-1). The theatrical version was published on November 1, 2013. *Id.* Six reels of film was deposited with the Copyright Office by Carly Seabrook. (RJN 1-2). The theatrical version of the movie was released in the United States at the Mill Valley Film Festival on October 10, 2013. (RJN 1-3).

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The theatrical version was subsequently reedited into a “DVD”. The DVD version of the film was released on February 4, 2014. (RJN 1-4). The DVD version contains extra material not present in the theatrical version. (See *Vorrath* Decl.). Namely, the DVD version contains extra material not present in the theatrical version.

B. DBC hires MaverickMonitor to track infringements

Beginning in 2013, DBC began a campaign to sue individuals in the United States and other countries for alleged infringement. Over 300 lawsuits were filed in the United States against at least 1000 defendants.

The MaverickMonitor software has no formal specifications, no test plan, no user manual, or any documentation commonly associated with commercial software development. (See *Toth* Decl.). There is no documentation describing how the software works in real-time, what type of computer servers it operates on, how many computer servers it operates on, the failure rate of either the computer servers and/or the software. There was no documentation on how a particular torrent is located, how the torrent is processed, how the hash is processed, how data is collected from the swarm, and how a PCAP (packet capture) is generated. (See *Rockenstein* Decl., Exhibit 1, *Toth* Expert Report)

This software was developed by one or two programmers in German who have had no formal training in software development or validation processes.

C. Defendant Huszar operates an ISP with Tor installed

Huszar runs a small ISP in Oregon City where he configured a “Tor Exit Relay” using IP address 173.11.1.241. The Tor virtual machine (VM) was located on a server that also stored multiple business-related VMs. The Tor VM operated entirely independently and was the only VM with access to the IP address at issue in this case. (Docket 40 aka Second Huszar Decl. ¶ 17;

Docket 39 aka First Huszar Decl. ¶ 8; Huszar Dep. 47:24-48:2.)

D. This Lawsuit

On May 27, 2015, DBC sued Integrity Computer Systems for the infringement of Dallas Buyers Club (Docket 1) as a “Doe”. On October 29, 2015, Huszar made a “pro-se” appearance at Docket 15, stating that his system had no record of the infringing materials. Huszar offered to help then Plaintiff’s attorney Carl Crowell locate the infringer, but was rebuffed. On November 3, 2015, Crowell moved to strike Huszar’s appearance; oddly Crowell made no mention that Huszar tried to cooperate. Then Crowell filed an opposition to Huszar’s motion appearance at docket 15. (Docket 22). Huszar responded to Crowell’s opposition. (Docket 26). Huszar raised several defenses, including the DMCA Defense. (Docket 27-1).

The case progressed. An order was entered instructing an adverse jury instruction be entered. (Docket 95). Discovery was taken on DBC’s 30(b)(6) designee on topics regarding the “works” (Michael Wickstrom); and the operation of the BitTorrent monitoring system, (Robert Young).

IV. ARGUMENT

Summary judgment is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). “To establish a claim of copyright infringement by reproduction, the plaintiff must show ownership of the copyright and copying by the defendant.” *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003).

1. **SUMMARY JUDGMENT IS APPROPRIATE AS HUSZAR OPERATED A TOR EXIT NODE; DBC FAILED TO PRODUCE THE DEPOSITORY COPY; AND DBC REPEATEDLY MISLED THIS COURT ABOUT THE SOURCE**

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