

ENTERED

July 13, 2017

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MALIBU MEDIA, LLC.,

Plaintiff,

v.

JONATHAN GONZALES,

Defendant.

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CIVIL ACTION H-16-2406

MEMORANDUM OPINION & ORDER

Pending before the court is plaintiff Malibu Media, LLC’s (d/b/a “X-Art.com”) (“Malibu Media”) amended motion for default judgment. Dkt. 21. Having considered the amended complaint, motion, record evidence, and applicable law, the court is of the opinion that the motion should be GRANTED IN PART AND DENIED IN PART.

I. BACKGROUND

This case arises under the United States Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 et. seq. (the “Copyright Act”). Dkt. 10 at 1. Malibu Media brings this copyright infringement action against defendant Jonathan Gonzales. Malibu Media alleges that it owns copyrights to eighteen adult films (the “Copyrighted Works”) and that Gonzales used computer software known as BitTorrent to illegally download, copy, and distribute the films. Dkt. 10 at 4.

Malibu Media is a California corporation engaged in the production and distribution of adult erotic films through its website “X-Art.com.” See Dkt. 6-2 (Pelissier Dec.). Customers pay monthly or annual subscription fees to access an online library of copyrighted video content. *Id.* at 3. Internet subscription sales are Malibu Media’s primary source of revenue. *Id.* However, Malibu Media

claims its content is well-known and ranks as the most downloaded adult content on several popular BitTorrent websites. *Id.* According to Malibu Media, it must “protect its copyrights in order to survive and . . . hope for future revenue growth.” *Id.* at 4.

A. BitTorrent

Malibu Media alleges that the copyright infringement occurred through the use of BitTorrent. Malibu Media alleges that BitTorrent is one of the most common computer programs that allows people to share files over the Internet. Dkt. 10 at 2–3. BitTorrent, a peer-to-peer file sharing system, is primarily used for distributing large amounts of data, including digital movie files. *Id.* at 3. Malibu Media claims that BitTorrent’s defining feature is that it allows files to be transferred among multiple computers simultaneously without creating a heavy load on any individual source computer. *Id.*

Malibu Media explains that in order to distribute a large file, the BitTorrent protocol breaks a file into smaller pieces and assigns each piece a “hash,” a unique alphanumeric identifier, similar to an electronic fingerprint. *Id.* Every digital file has one hash value correlating to it. *Id.* The BitTorrent protocol uses the hash values to ensure each piece is properly routed among BitTorrent users as they engage in file sharing. *Id.* The entire digital media file also has a hash value that acts as a digital fingerprint to identify the media file or movie. *Id.* When a software user completes downloading all the pieces of a digital media file, the BitTorrent software uses the file hash to determine that the file is complete and accurate. *Id.* Once a BitTorrent file has been created, other BitTorrent users may access and download the file. *Id.*

B. Alleged Copyright Infringement

Malibu Media hired investigators, IPP International UG and Excipio GmbH (“IPP”), to

identify individuals who use BitTorrent to illegally download and distribute content. *Id.* IPP uses software to detect the Internet Protocol (“IP”) addresses of BitTorrent users that distribute Malibu Media’s Copyrighted Works within the BitTorrent File Distribution Network. *See* Dkt. 6-4 at 2 (Fieser Dec.). Infringement of Malibu Media’s copyrights can occur through the distribution of a single movie file correlating to a copyrighted Malibu Media movie, or a large scale distribution of “Unauthorized Packs.” *Id.* IPP claims it established a direct Transmission Control Protocol/Internet Protocol (“TCP/IP”) connection with the assigned IP address of 98.195.133.204, belonging to Gonzales. Dkt. 10 at 3; Dkt. 1-1. IPP claims it downloaded a full copy of each file hash from the BitTorrent File Distribution Network and confirmed that the file hash matched files containing Malibu Media’s Copyrighted Works. Dkt. 10 at 4. IPP claims its investigation revealed that Gonzales had used BitTorrent to download, copy, and distribute the Copyrighted Works without authorization. Dkt. 10 at 4.

C. Procedural History

On August 9, 2016, Malibu Media filed a complaint against an unnamed individual who allegedly used BitTorrent to copy and distribute the Copyrighted Works without Malibu Media’s consent, thereby infringing its copyright. Dkt. 1. The original complaint alleged that the defendant John Doe, a subscriber with an IP address of 98.195.133.204, infringed on Malibu Media’s registered copyrights using BitTorrent. Dkt. 1. After filing the complaint, Malibu Media moved for leave to serve a third-party subpoena on John Doe’s Internet Service Provider, commanding it to provide the subscriber’s name and contact information. Dkt. 8. The court granted the motion, after which Malibu Media filed an amended complaint naming Gonzales as the infringer. Dkt. 10. Malibu Media then moved for entry of default judgment (Dkt. 17), but the court granted an order striking

the motion for failing to comply with filing requirements. Dkt. 20. The original motion for default judgment failed to serve Gonzales by certified mail with a return receipt. *Id.* On January 24, 2017, Malibu Media properly served Gonzales with certified mail and a return receipt. Dkt. 21-1. On January 26, 2017, Malibu Media filed an amended motion for default judgment against Gonzales. Dkt. 21. Malibu Media’s attorney provides a sworn declaration stating that Gonzales is not a minor, incompetent, or in active military service. Dkt. 19.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 55(a), “[w]hen a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Fed. R. Civ. P. 55(a). Under Rule 55(b)(2), a party may apply for the court to enter a default judgment, and the “court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter.” Fed. R. Civ. P. 55(b)(2). Rule 4 of the Federal Rules of Civil Procedure requires the plaintiff to serve a copy of the summons and complaint on the defendant. Fed. R. Civ. P. 4(c)(1). Under Local Rule 5.5, a motion for default judgment must be served upon the defendant via certified mail, return receipt requested. S.D. Tex. L.R. 5.5.

A default judgment is a “drastic remedy, not favored by the Federal Rules[,] and resorted to by courts only in extreme situations.” *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass’n*, 874 F.2d 274, 276 (5th Cir. 1989). “The Federal Rules of Civil Procedure[s] are designed for the

just, speedy, and inexpensive disposition of cases on their merits, not for the termination of litigation by procedural maneuver.” *Id.*

Gonzales has failed to plead or otherwise defend against this lawsuit. Malibu Media properly served Gonzales with this lawsuit under the Federal Rules and with the amended motion for default judgment under the Local Rules. Dkt. 11; Dkt. 21; *see* Tex. L.R. 5.5. Given Gonzales’ failure to answer the complaint in a timely manner, the court: (1) has the authority to enter default against Gonzales, (2) accept all well-pleaded facts in Malibu Media’s complaint as true, and (3) award the relief sought by Malibu Media in this action. *See Nishimatsu Constr. Co. v. Hous. Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

III. ANALYSIS

To receive a default judgment, a plaintiff must state a plausible claim for relief. *Id.* Malibu Media argues that Gonzales committed direct copyright infringement. Copyright infringement requires two elements to be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282(1991).

A. Ownership of a Valid Copyright

First, Malibu Media alleges that it is the registered owner of the eighteen Copyrighted Works listed in Exhibit B. Dkt. 10-2. Exhibit B provides an overview of the Copyrighted Works, including a hit date, date of first publication, registration date, and registration number issued by the United States Copyright Office. Dkt. 10 at 4; Dkt. 10-2. However, the court observes that Malibu Media lists three of the registration numbers as “pending” Dkt. 10-2.

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