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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13
14
15 NINTENDO OF AMERICA INC., a
Washington corporation

16 Plaintiff,

17 v.

18 MATTHEW STORMAN, an
individual, JOHN DOES 1-10,
19 individuals and/or corporations,

20 Defendant.
21

Case No. 2:19-CV-07818-CBM-RAO

**NINTENDO'S REPLY IN SUPPORT
OF ITS MOTION FOR SUMMARY
JUDGMENT**

Date: March 23, 2021
Time: 10:00 a.m.
Ctrm: #8B

The Honorable Consuelo B. Marshall

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I. INTRODUCTION

1
2 Mr. Storman's opposition to Nintendo's summary judgment motion falls far
3 short of carrying his burden. At bottom, he offers nothing more than a short list of
4 twelve "disputed facts," most of which appear intended to assign some
5 responsibility to unidentified third-parties for the massive infringement to which he
6 himself has expressly admitted. He does not offer any evidence in support of these
7 "facts;" does not attempt to explain how they are material; and, in any event, cannot
8 avoid the conclusion that these "facts" can and should be disregarded because they
9 contradict his sworn deposition testimony and the only evidence in the record.

10 Mr. Storman's opposition is also notable because it does not dispute
11 Nintendo's legal arguments, and largely fails to even address those arguments. He
12 does not dispute his infringement of Nintendo's trademarks and does not resist
13 Nintendo's request for statutory damages, attorney's fees, a permanent injunction,
14 or spoliation sanctions. Where he fails to dispute or address Nintendo's arguments,
15 those should be accepted as true and Nintendo's requested relief granted.

16 Mr. Storman needed to provide more than bald assertions to avoid summary
17 judgment. Despite multiple opportunities and additional time, he has not done so.
18 Nintendo's motion should be granted.

II. ARGUMENT

19
20 Summary judgment is appropriate when the evidence "show[s] that there is
21 no genuine issue as to any material fact and that the moving party is entitled to
22 judgment as a matter of law." Fed. R. Civ. P. 56(c). Although courts view the
23 evidence in the light most favorable to the party opposing summary judgment,
24 "bald assertions or a mere scintilla of evidence . . . are both insufficient to withstand
25 summary judgment." *FTC v. Stefanichik*, 559 F.3d 924, 929 (9th Cir. 2009). The
26 non-moving party "must produce at least some significant, probative evidence . . .
27 to create a genuine issue of material fact." *Hexcel Corp. v. Ineos Polymers, Inc.*,
28 681 F.3d 1055, 1063 (9th Cir. 2012) (internal quotation marks and citation

1 omitted). “[C]onclusory, self-serving affidavit[s], lacking detailed facts and any
2 supporting evidence, are insufficient to create a genuine issue of material fact.” *Id.*;
3 *see also FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010).

4 The Ninth Circuit also applies the “sham affidavit” rule holding that “a party
5 cannot create an issue of fact by an affidavit contradicting his prior deposition
6 testimony.” *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012). “This sham
7 affidavit rule prevents a party who has been examined at length on deposition from
8 raising an issue of fact simply by submitting an affidavit contradicting his own
9 prior testimony which would greatly diminish the utility of summary judgment as a
10 procedure for screening out sham issues of fact.” *Id.* (internal quotation marks and
11 citations omitted).

12 Here, Mr. Storman asserts that there are material facts in dispute but fails to
13 provide *any* evidence in support. Even construing Mr. Storman’s “Statement of
14 Undisputed Facts” as a sworn declaration, his representations do not create a
15 dispute of material facts, are largely contradicted by his sworn deposition testimony
16 and should be disregarded. Mr. Storman does not deny, however, that the files
17 hosted on his website are infringing copies of Nintendo’s videogames, that those
18 files were downloaded by users of his website, and that he profited from such
19 infringement. Nor does he address his infringement of Nintendo’s trademarks or
20 his spoliation, tacitly conceding those claims. As Mr. Storman has not raised any
21 issues of fact, Nintendo is entitled to summary judgment on each of its claims.

22 **A. Mr. Storman Does Not Dispute That He Distributed Infringing Copies of**
23 **Nintendo’s Videogames, Incorporating Nintendo’s Trademarks**

24 As explained in detail in Nintendo’s motion, Mr. Storman used RomUniverse
25 to distribute unauthorized copies of thousands of Nintendo’s videogames by
26 copying and distributing the “read-only memory files” (referred to as “ROMs”) of
27 Nintendo’s videogames. During its investigation, Nintendo downloaded 37 of these
28 ROMs (the “Infringing ROMs”) and confirmed that all but three were functional

1 copies of Nintendo’s copyrighted videogames. Dkt. No. 52-3 (“Bell Decl.”), Ex. 2,
2 pp.8.¹ Nintendo also uncovered extensive use of its trademarks both throughout the
3 RomUniverse website and incorporated in the gameplay of the Infringing ROMs.
4 *Id.*, Ex. 3; Dkt. No. 52-2 (“Marcelo Decl.”), Ex. 2 pp.104-111. Similarly,
5 Mr. Storman displayed copies of Nintendo’s copyrighted videogame box art to
6 identify and promote the Infringing ROMs. Bell Decl., Ex. 3. Mr. Storman offers
7 no evidence to refute any of these facts.²

8 Mr. Storman also did not dispute that Nintendo owns valid copyrights in the
9 relevant works (the “Nintendo Copyrights”)³ and valid trademark registrations for
10 the relevant marks (the “Nintendo Trademarks”)⁴. Storman Dep. at 63:25-64:20.

11 Having uploaded and distributed infringing copies of the Nintendo Games,
12 and displayed the Nintendo Box Art to promote these pirated game copies, Mr.
13 Storman infringed Nintendo’s exclusive rights under the Copyright Act and is liable
14 as a matter of law for copyright infringement. *Columbia Pictures Indus., Inc. v.*
15 *Fung*, 710 F.3d 1020, 1034 (9th Cir. 2013) (“Both uploading and downloading
16 copyrighted material are infringing acts. The former violates the copyright holder’s
17 right to distribution, the latter the right to reproduction.”).

18 Likewise, Mr. Storman’s undisputed use of the Nintendo Trademarks, both
19 throughout RomUniverse and as incorporated in the Infringing ROMs, infringed
20 Nintendo’s trademark rights as a matter of law. *Sega Enters Ltd. v. MAPHIA*, 948
21 F. Supp. 923, 938 (N.D. Cal. 1996). For these same reasons, summary judgement
22 should be granted regarding Nintendo’s unfair competition claim under California
23

24 ¹ While Mr. Storman alleges that he never “verif[ied] the content” of the ROMs on
25 RomUniverse, he does not deny the findings of Nintendo’s investigation including that the ROMs
26 were functional copies of Nintendo’s videogames. Marcelo Decl., Ex. 1 (“Storman Dep.”) at
27 89:5-8.

28 ² Mr. Stroman includes a single, unadorned sentence in his brief denying “[a]ny and all
other allegations not expressly admitted herein[.]” Such conclusory language, offered to rebut
numerous unspecified facts and provided without any supporting evidence is insufficient to create
a dispute of fact. *See Hexcel Corp.*, 681 F.3d at 1063.

³ Dkt. No. 52-5 (Knudson Decl.), Exs. 1-2 (copyright registrations) pp. 5-142.

⁴ *Id.*, Ex. 3 (trademark registrations) pp. 143-221.

1 law. *See Moroccanoil, Inc. v. Groupon, Inc.*, 278 F. Supp. 3d 1157, 1161 (C.D.
2 Cal. 2017).

3 Mr. Storman's sole assertion relevant to his liability for copyright
4 infringement is his denial that he "uploaded any files to [RomUniverse.]" Opp. at
5 4. That contention, however, is directly contradicted by his sworn deposition
6 testimony. Under oath, Mr. Storman conceded that he uploaded numerous ROMs
7 to RomUniverse. Storman Dep. at 36:20-39:18 ("I would say that I have uploaded
8 files, yes."). In fact, Mr. Storman admits that in response to user requests to add
9 specific, pirated ROMs to RomUniverse, he has found *and uploaded* those ROMs
10 to RomUniverse, including ROMs of Nintendo's videogames. *Id.* at 87:25-88:24.

11 Mr. Storman's recent change in story to contradict his previous sworn
12 testimony cannot create a dispute of material fact. *Yeager*, 693 F.3d at 1080.
13 Moreover, the uncontroverted evidence confirms that Mr. Storman uploaded pirated
14 ROMs of Nintendo's games to RomUniverse. Knudson Decl., Ex. 7 p. 225 ("I'm
15 getting ready to upload a huge number of NSW files").^{5,6} Mr. Storman has not and
16 cannot provide any evidence to refute Nintendo's copyright infringement claims,
17 and summary judgment should be granted in Nintendo's favor.

18 **B. Mr. Storman Is Liable for Secondary Copyright Infringement**

19 Having induced, caused or materially contributed to the infringing activity of
20 users of RomUniverse, Mr. Storman is liable for contributory copyright
21 infringement. *Sega v. MAPHIA*, 948 F. Supp. at 932. And as he had the right and
22 ability to supervise the infringing activity and profited from such activity, he is also
23 liable for vicarious copyright infringement. *Fonovisa, Inc. v. Cherry Auction, Inc.*,
24 76 F.3d 259, 264 (9th Cir. 1996). Mr. Storman has conceded each of the elements
25
26

27 ⁵ "NSW" is used as shorthand for "Nintendo Switch."

28 ⁶ Mr. Storman concedes that he cannot recall if he personally uploaded the Infringing ROMs or directed one of his administrators to do so. Storman Dep. at 38:5-15; 87:20-89:4.

1 of secondary copyright infringement. Indeed, he admitted, among other relevant
2 facts, that he:

- 3 • is the sole owner of RomUniverse (Storman Dep. at 15:21-25);
- 4 • had the ability and authority to control the content made available on
5 RomUniverse by his website administrators (Storman Dep. at 95:9-
6 97:14);
- 7 • had “control of every aspect of the website and its accessibility” (Opp.
8 at 4; *see also* Storman Dep. at 40:19-41:7; 95:9-97:14);
- 9 • uploaded pirated ROMs of Nintendo videogames to RomUniverse at
10 the request of RomUniverse users (Storman Dep. at 87:25-88:24);
- 11 • promoted RomUniverse by advertising the availability of the
12 Infringing ROMs and other pirated ROMs of Nintendo videogames
13 (Storman Dep. at 53:18-54:17; Marcelo Decl., Ex. 16, pp. 222-23); and
- 14 • directly profited from his infringement through the sale of Premium
15 Memberships, which allowed members to download multiple files at
16 the same time, and at faster speeds than non-paying users (Storman
17 Dep. at 41:8-42:13).

18 Additionally, the evidence shows that Mr. Storman helped organize the
19 ROMs offered by RomUniverse in order to make it “easier for the public to find
20 specific ROMs[.]” Knudson Decl., Ex. 5 p. 223. Thus, Mr. Storman is
21 contributorily and vicariously liable for infringing Nintendo’s copyrighted works.
22 *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021-24 (9th Cir. 2001)
23 (finding contributory infringement where defendant knew of availability of
24 infringing files, assisted in accessing the files, and failed to block access to the
25 files); *Sega v. MAPHIA*, 948 F. Supp. at 932-33; *Sega Enters Ltd. v. Sabella*, No. C
26 93-04260 CW, 1996 WL 780560, at *8 (N.D. Cal. Dec. 18, 1996).

27 While conceding facts sufficient to establish the necessary elements of
28 secondary infringement, Mr. Storman attempts to shift the blame to unnamed

1 administrators of the website claiming that he “is not *solely* responsible for the
2 content that exists on RomUniverse.” Opp. at 4 (emphasis added). He explains
3 that *both* “[Mr. Storman] and other admins had control of every aspect of the
4 website and accessibility.” *Id.* Mr. Storman once again provides no evidence to
5 support these claims. Yet, even if his assertions are assumed to be true, they do
6 nothing to absolve him of liability. Indeed, his concession that he had “control of
7 every aspect of the website” supports Nintendo’s claims for secondary
8 infringement. At most, Mr. Storman presents an argument that his administrators
9 are—along with himself—jointly liable for infringing Nintendo’s copyrights. That
10 does not create a material issue of fact as to Mr. Storman’s liability.

11 Moreover, in addition to having control over the content on RomUniverse,
12 Mr. Storman also had control over the relevant actions of the RomUniverse
13 administrators. For instance, he had the ability to prevent administrators from
14 adding ROMs to RomUniverse, control whether the administrator could edit the
15 website, and track and review any changes made by his administrators. Storman
16 Dep. at 95:9-97:14. Thus, the overwhelming evidence demonstrates that Mr.
17 Storman had the right and ability to supervise the infringing activity.

18 As Mr. Storman raises no dispute of material facts regarding his liability for
19 secondary infringement, summary judgment on these claims should be granted.

20 **C. The DMCA Safe Harbor Provisions Are Inapplicable**

21 In his brief, Mr. Storman provides a passing reference to RomUniverse
22 acting as a “service provider.” Opp. at 4. He does not support this reference with
23 any evidence, case law, or other authority. Nor does he provide any explanation for
24 how this assertion affects any of Nintendo’s claims or his defenses. Given the lack
25 of specificity or evidence presented by Mr. Storman in connection with this
26 reference, it should be given no weight. However, if considered, and to the extent
27 this reference can be read as Mr. Storman asserting that his actions fall under the
28 protections available under 17 U.S.C. § 512(c), his argument should be rejected.

1 Indeed, Mr. Storman does not meet any of the numerous requirements under §
2 512(c), including without limitation that: (1) the infringing material was stored by
3 Mr. Storman “at the direction of a user,” (2) Mr. Storman did not “receive a
4 financial benefit directly attributable to the infringing activity,” (3) Mr. Storman
5 had a designated DMCA agent during the infringement, and (4) the required
6 information for DMCA notices was displayed on the RomUniverse website.

7 *First*, the Infringing ROMs were not stored on RomUniverse by users of the
8 website, but rather were uploaded by Mr. Storman and his administrators. Storman
9 Dep. at 36:17-39:18. *Second*, Mr. Storman directly profited from his infringement,
10 selling Premium Memberships for RomUniverse which provided the members with
11 benefits such as downloading more pirated ROMs at faster speeds. *Id.* at 41:8-
12 42:13. *Third*, Mr. Storman did not have a designated DMCA agent during the
13 course of the infringement nor did the RomUniverse website contain any
14 information for DMCA notices at the relevant time. *Id.* at 65:1-5.

15 Thus, any affirmative defense based on § 512 that Mr. Storman may be
16 attempting to assert should be procedurally and substantively denied.

17 **D. Mr. Storman Does Not Dispute Nintendo’s Entitlement to Statutory**
18 **Damages, Attorney’s Fees and a Permanent Injunction**

19 Mr. Storman does not dispute that Nintendo is entitled to statutory damages
20 or attorney’s fees and costs under the Copyright Act and Lanham Act. Nor does he
21 dispute that Nintendo is entitled to a permanent injunction. And while he “denies
22 and disputes that he knowingly and willingly [sic] distributed pirated ROMs of
23 Nintendo video games[,]” he once again provides no evidence to support his claim.
24 Opp. at 4. Such conclusory, unsupported claims are insufficient to rebut the
25 undisputed and overwhelming evidence presented by Nintendo which demonstrates
26 that Mr. Storman’s infringement was willful.

27 “[T]o prove willfulness under the Copyright Act, the plaintiff must show (1)
28 that the defendant was actually aware of the infringing activity, or (2) that the

1 defendant's actions were the result of reckless disregard for, or willful blindness to,
2 the copyright holder's rights." *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d
3 980, 991 (9th Cir. 2017). Similarly, in order to establish the level of willfulness
4 necessary to warrant enhanced damages under the Lanham Act, a plaintiff need
5 only show that the defendant acted with "willful blindness" to the trademark
6 holder's rights. 15 U.S.C. §1117(b); *Philip Morris USA Inc. v. Liu*, 489 F. Supp. 2d
7 1119, 1123 (C.D. Cal. 2007).

8 As discussed in detail in Nintendo's motion, Mr. Storman's infringement was
9 undoubtedly willful. Mot. at 18-20. He concedes, for instance, that he uploaded
10 pirated ROMs—which were identified as ROMs of Nintendo's videogames—to
11 RomUniverse, and that he obtained those ROMs from other pirating websites.
12 Storman Dep. at 36:17-39:18; Knudson Decl., Ex. 7, p. 228. Then, despite
13 receiving multiple notices that the content on RomUniverse infringed Nintendo's
14 copyrights, Mr. Storman continued to upload and distribute the Infringing ROMs.
15 Storman Dep. at 67:15-68:25; Knudson Decl. ¶ 7. That is willful infringement.

16 Mr. Storman appears to be asserting that his infringement cannot be willful
17 as he never "verified the content" of the ROMs on his website. Knowledge,
18 however, is not a requirement of willfulness; reckless disregard or willful blindness
19 is sufficient to establish willful infringement. *Unicolors*, 853 F.3d at 991. Thus,
20 even if true, Mr. Storman's decision to not investigate the ROMs, despite knowing
21 they were identified as ROMs of Nintendo's games, is both reckless and willful
22 blindness. *See id.* ("Regardless of how difficult it may be to determine whether
23 particular designs have been registered with the Copyright Office, a party may act
24 recklessly by refusing, as a matter of policy, to even investigate or attempt to
25 determine whether particular designs are subject to copyright protections.").

26 Likewise, Mr. Storman's infringement of the Nintendo Trademarks was
27 willful. He knew that the Nintendo Trademarks were used throughout
28 RomUniverse to categorize the pirated ROMs and even helped organize the ROMs

1 to make it “easier for the public to find specific ROMs[.]” Storman Dep. at 89:19-
2 22; Knudson Decl., Ex. 5 p. 223. Such actions constitute willful infringement. *See*
3 *Sega v. MAPHIA*, 948 F. Supp. at 936 (finding willful infringement where
4 defendant allowed others to use Sega’s mark and upload and download Sega’s
5 games, solicited others to upload games, and profited from operating the website).

6 Because Mr. Storman’s infringement was willful, Nintendo is entitled to
7 enhanced statutory damages for his copyright and trademark infringement, as well
8 as its attorney’s fees. And because Mr. Storman does not address the amount of
9 damages requested by Nintendo nor Nintendo’s entitlement to a permanent
10 injunction, Nintendo’s requested relief should be granted.

11 **E. Mr. Storman Does Not Dispute His Spoliation Or Address His**
12 **Counterclaims**

13 On September 25, 2020, the Court ordered Mr. Storman to preserve and
14 produce (1) download data regarding the Infringing ROMs, and (2) relevant
15 communications. Dkt. No. 45 (“September 25 Order”). The Court reminded Mr.
16 Storman that he could be sanctioned for failing to comply with its order. *Id.*
17 Despite this warning, Mr. Storman failed to timely produce the evidence, and
18 subsequently admitted the evidence had been lost or destroyed. Storman Dep. at
19 75:18-79:8. He has no explanation for how this evidence was lost, nor does he
20 address his spoliation in his brief. As such, Nintendo’s requested relief—an
21 adverse inference and monetary sanctions—should be granted.

22 Likewise, while Nintendo moved for summary judgment on any
23 counterclaims asserted, Mr. Storman does not address these arguments. Any such
24 claims should thus be dismissed.

25 **III. CONCLUSION**

26 For the above reasons, Nintendo requests that Court grant summary judgment
27 as to Nintendo’s affirmative claims, dismiss any counterclaims articulated by Mr.
28 Storman, and enter an adverse inference regarding Mr. Storman’s spoliation.

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DATED: March 4, 2021

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