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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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NINTENDO OF AMERICA INC,
a Washington corporation
Plaintiff

vs.

MATTHEW STORMAN,
an individual,
Defendant

Case No.: 2:19-CV-07818 CBM(RA0x)
**MEMORANDUM IN SUPPORT OF
PRETRIAL MOTION TO DISMISS**

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I. SUMMARY

Plaintiff has filed suit against Matthew Storman, Service Provider (SP) of websites ndsuniverse.com and romuniverse.com for Copyright Infringement, Trademark Infringement and Unfair Competition. Plaintiff’s claims are solely based on digital material on these websites. 17 U.S. Code § 512 provides SP with liability protection and limits relief for the Plaintiff to only injunctive relief. The plaintiff has previously recognized Defendant's right to infringement liability protections under DMCA (codified 17 U.S. Code § 512). Furthermore, the copies and trademarks on the websites were previously sold by the Plaintiff and under the First Sale Doctrine, the plaintiff has no rights to these copies or trademarks. Competition cannot be unfair since the copies have already been sold by the Plaintiff to owners and under the First Sale Doctrine the owners may dispose of the copies as they see fit. The Defendant is not selling the copies or trademarks.

The defendant prays the court to Dismiss the suit based on legal, procedural, and common law considerations or Sua Sponte.

II. FACTS/DEFENSES IN SUPPORT OF MOTION TO DISMISS.

Plaintiff has been in communication with Service Provider (SP¹) admin@romuniverse.com¹¹ of the websites ndsuniverse.com, and romuniverse.com for years.

III. DEFENDANT LIABILITY PROTECTION

The Digital Millennium Copyright Act (DMCA²) codified as 17 U.S. Code § 512 protects SPs from liability when potentially infringing material is on websites. DMCA is also known as Ocilla, Safe Harbor, etc. Essential to protection are²:

- 1 a. Providing copyright owners inspection access to websites, and
- 2 b. Requires owners to properly request the removal of material if the owner
- 3 has a good faith belief it is infringing
- 4 c. The request for removal must be proper⁹.
- 5 d. The material is removed.

6
7 Plaintiff has recognized Defendants rights under DMCA by sending requests¹¹ to
8 remove potentially infringing material from Website. These requests were honored
9 by Defendant

10 11 **IV. COPY OWNERSHIP**

12 Copies on a website of potentially infringing materials may be owned by
13 “persons” who legally acquired a copy, multiple copies, or collections of the
14 Copyrighted material ⁵ (known as First Sale Doctrine). The copies do not belong
15 to the plaintiff.

16 These (First sale doctrine⁵) copies may be sold, destroyed, lost, or given away for
17 free by the owner. The number of copies not owned by the plaintiff is equal at
18 least to the number of copies sold or given away by the Plaintiff, his distributors,
19 or suppliers. The first sale or exhaustion doctrines also apply to trade marks⁸.

20 There are other copies that may not be infringing^{2,3} including fair use, expired,
21 uses for education, research, storage, lost, damaged, exemptions from anti-
22 circumvention, and those beyond a statute of limitations, etc.

23
24 The Plaintiff has not properly requested any of the copies referred to in the
25 complaints be properly removed as is required under DMCA⁹. Especially
26 regarding specificity, timeliness and penalty of perjury.

27 Basis of Plaintiff’s complaints is only the digital content of websites.
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V. PLAINTIFF FAILURES

Plaintiff's complaint obfuscates and makes no mention of the DMCA, Plaintiff's complaints offer no claim or proof of ownership of the copies on the websites.

Plaintiff offers no complete and full description of Copyright Registrations content necessary for bringing complaint⁷

Plaintiff offers no accurate and complete description of copy contents for defense.

Plaintiff may have violated Copyright Law by not fully and completely describing the contents of Copyright and copies.

Copy right law is inadequate as a means of protecting digital matter, as it does not depict the contents of the digital material to the human senses.

Plaintiff fails to disclose where the original copyrights are registered. It is unclear where the copyrights originated or are based in Japan, or Germany or USA.

VI. BASIS OF MOTION TO DISMISS

F.R.C.P 12

(1) lack of subject-matter jurisdiction; The court does not have jurisdiction over this matter because of liability immunity and proof ownership of copies has not been claimed. Plaintiff is a Japanese or German Company.

(2) lack of personal jurisdiction; Defendant is not an individual (Matthew Storman) but rather an SP (admin@romuniverse.com) who is not part of the required forum. The court does not have personal jurisdiction because SP is protected under DMCA, and potential involvement of international actors. The Plaintiff is a German company. Plaintiff may have violated Defendant's privacy rights or by using unlawful means.

1 (3) improper venue; Owners of copies may be international; the Plaintiff is a
2 German or Japanese company.

3 (4) insufficient process; Process is insufficient because it not based on DMCA
4 violations.

5 (5) insufficient service of process; service is insufficient because it does not timely
6 serve, essential actors, such as owners of copies, suppliers, distributors, and
7 copyright owners.

8 (6) failure to state a claim upon which relief can be granted. Complaints do not
9 include any required DMCA violation, or ownership of copies. Fails to identify
10 essential owners of copies.; and

11 (7) failure to join a party under Rule 19. The plaintiff has failed to join the true
12 and essential owners of the copies known only to Plaintiff, or unknown
13

14 **VII. EXHAUSTION NON-JUDICIAL REMEDIES.⁹**

15 DMCA provides the Plaintiff with administrative(non-judicial) processes⁹ to have
16 SP remove potentially infringing copies and obtain injunctive relief for the
17 Plaintiff. The Plaintiff is in effect asking the court to do what the Plaintiff can do
18 non-judicially and thereby causing unnecessary expenditure of time and resource
19 of the court, the defendant, and the Plaintiff. Troubling is the fact the Plaintiff has
20 previously and successfully requested⁹ the SP remove website copies and SP
21 complied.

22 The arrangement in these previous communications are an implied contract that
23 any copies challenged by Plaintiff will not result in further legal action. Quote
24 from Plaintiff¹¹

25 *“Therefore I request you to take immediate action to remove or disable access to*
26 *unauthorised copies of the Nintendo Game listed at the URLs below and in order*
27 *to prevent further legal actions against your company.”* This also implies copies
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1 not challenged by the Plaintiff are permitted on the website until challenged by the
2 Plaintiff.

3
4 The Plaintiff receives unpaid advertising on the websites in return.

5
6 Due Process – basic fairness. It is unfair for Plaintiff to not adhere to DMCA
7 protections for defendant.

8 **VIII. ARGUMENT**

9 1. DMCA is an integral part of Copyright Law and covers digital material
10 on websites and therefore must be adhered to in any copyright complaint - the
11 Plaintiff has not. The First Sale Doctrine permits non-copyright or trademark
12 owner to dispose of their copies as they see fit. The Plaintiff does not own copies
13 on websites.

14
15 2. Since DMCA protects SP from any liability, and only limits Plaintiff
16 to only injunctive relief, the Plaintiff complaints are without basis and potentially
17 an abuse of process.

18
19 3. Plaintiff’s Complaints are a direct violation of DMCA, in that each of
20 the complaints are based on liability protected material in the ndsuniverse.com and
21 romuniverse.com websites.

22
23 4. Furthermore, the Plaintiff has not offered any proof, that the copies in
24 the websites are the property of the Plaintiff. There are no serial numbers, dates,
25 origin, etc. and who owns the copy. The plaintiff sells, donates, gives away, copies
26 of the copy righted material to copy owners. A non-Plaintiff copy owner has the
27 right to sell, destroy, or give away copies. The owner may own several copies, or
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1 collections. Furthermore, use of a copy is permissible for education, research,
2 reverse engineering, and other purposes.

3
4 5. Plaintiff has not properly requested, as required under DMCA, that
5 copies in complaint be removed from websites. The Plaintiff has not met the
6 requirements of DMCA; therefore, complaints are baseless or premature at best.

7
8 6. Cease and Desist. The plaintiff did not send Cease and Desist notices
9 to Defendant; therefore, the defendant did not know of infringement prior to
10 complaints.

11
12 7. Since, the Plaintiff is not the owner of the copies, the plaintiff is a third
13 party to the action and has no standing to bring the action¹⁰.

14
15 8. Since, Plaintiff previous contacts were from Germany, and the copies
16 do not belong to Plaintiff, there are issues of ownership, insufficient process,
17 insufficient service, subject matter jurisdiction, personal jurisdiction, not joining
18 essential copy owners, and plaintiff's unfounded complaints makes it impossible
19 for defendant to defend.

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CONCLUSION

For the reasons stated above, the Defendants Motion should be granted

DATED: 10/21/2019



Matthew Storman
160 E. Ruddock St
Covina, CA 91724
In Pro Se

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REFERENCES

1. The term “Service Provider” (SP) includes Online Service Provider (OSP) and Internet Service Provider (ISP).

2. The **Digital Millennium Copyright Act (DMCA)** Title II, the Online Copyright Infringement Liability Limitation Act ("OCILLA"), creates a safe harbor for online service providers (OSPs, including ISPs) against copyright infringement liability, provided they meet specific requirements.^[4] OSPs must adhere to and qualify for certain prescribed safe harbor guidelines and promptly block access to alleged infringing material (or remove such material from their systems) when they receive notification of an infringement claim from a copyright holder or the copyright holder's agent. OCILLA also includes a counternotification provision that offers OSPs a safe harbor from liability to their users when users claim that the material in question is not, in fact, infringing. OCILLA also facilitates issuing of subpoenas against OSPs to provide their users' identity. Codified in 17 U.S. Code § 512. Limitations on liability relating to material online

(a) Transitory Digital Network Communications.—**A service provider shall not be liable for monetary relief,** or, except as provided in subsection (j), for injunctive or other equitable relief, **for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider,** or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

1 (3) the service provider does not select the recipients of the material except as an
2 automatic response to the request of another person;

3 (4) no copy of the material made by the service provider in the course of such
4 intermediate or transient storage is maintained on the system or network in a
5 manner ordinarily accessible to anyone other than anticipated recipients, and no
6 such copy is maintained on the system or network in a manner ordinarily
7 accessible to such anticipated recipients for a longer period than is reasonably
8 necessary for the transmission, routing, or provision of connections; and

9 (5) the material is transmitted through the system or network without modification
10 of its content.

11 3. 17 U.S. Code §101 - §122, Limitations on exclusive rights
12 including § 1201 Permissible uses

13
14 4. Cullins, Ashley Music Industry A-Listers Call on Congress to Reform
15 Copyright Act *Hollywood Reporter*. April 5, 2016

16
17 5. 17 U.S. Code § 109. Limitations on exclusive rights: Effect of transfer
18 of particular copy or phonorecord

19 (a) Notwithstanding the provisions of section 106(3), the owner of a particular
20 copy or phonorecord lawfully made under this title, or any person authorized by
21 such owner, is entitled, without the authority of the copyright owner, to sell or
22 otherwise dispose of the possession of that copy or phonorecord.

23
24 6. US S.C *Reed Elsevier v. Muchnick*, Slip. Op., 559 U.S. ____ (March 2,
25 2010)

1 7. Section 411(a) of the Copyright Act (at 17 U.S.C. 411(a)) provides,
2 among other things, that “no civil action for infringement of the copyright in any
3 United States work shall be instituted until . . . registration of the copyright claim
4 has been made in accordance with this title.”⁶

5 8. Polymer Technology Corporation, Plaintiff-appellant, v. Emile
6 Mimran, **-975 F.2d 58 (2d Cir. 1992)**

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8 As a general rule, trademark law⁸ does not reach the sale of genuine goods
9 bearing a true mark even though the sale is not authorized by the mark owner.
10 NEC Electronics v. Cal Circuit Abco, 810 F.2d 1506, 1509 (9th Cir.), cert. denied,
11 484 U.S. 851, 108 S. Ct. 152, 98 L. Ed. 2d 108 (1987). Thus, a distributor who
12 resells trademarked goods without change is not liable for trademark infringement.
13 See 2 J. Thomas McCarthy, Trademarks and Unfair Competition, § 25:11 (2d ed.
14 1984) (citing *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 44 S. Ct. 350, 68 L. Ed. 731
15 (1924) and *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 67 S. Ct. 1136, 91
16 L. Ed. 1386 (1947)). In addition, even repackaging of goods is not trademark
17 infringement if it does not deceive the public or damage the mark owner's
18 goodwill. See *Prestonettes*, 264 U.S. at 368, 44 S. Ct. at 351 (sale of repackaged
19 cosmetics permitted provided statement disclosing origin is enclosed); *Champion*,
20 331 U.S. at 130, 67 S. Ct. at 1139 (sale of reconditioned spark plugs under original
21 name permitted provided full disclosure made).

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1 **9.** 17 U.S. Code § 512.(c)(3)Elements of notification.—

2 (A) To be effective under this subsection, a notification of claimed infringement
3 must be a written communication provided to the designated agent of a service
4 provider that includes substantially the following:

5 (i) A physical or electronic signature of a person authorized to act on behalf of the
6 owner of an exclusive right that is allegedly infringed.

7 (ii) Identification of the copyrighted work claimed to have been infringed, or, if
8 multiple copyrighted works at a single online site are covered by a single
9 notification, a representative list of such works at that site.

10 (iii) Identification of the material that is claimed to be infringing or to be the
11 subject of infringing activity and that is to be removed or access to which is to be
12 disabled, and information reasonably sufficient to permit the service provider to
13 locate the material.

14 (iv) Information reasonably sufficient to permit the service provider to contact the
15 complaining party, such as an address, telephone number, and, if available, an
16 electronic mail address at which the complaining party may be contacted.

17 (v) A statement that the complaining party has a good faith belief that use of the
18 material in the manner complained of is not authorized by the copyright owner, its
19 agent, or the law.

20 (vi) A statement that the information in the notification is accurate, and under
21 penalty of perjury, that the complaining party is authorized to act on behalf of the
22 owner of an exclusive right that is allegedly infringed.

23 (B)

24 (i) Subject to clause (ii), a notification from a copyright owner or from a person
25 authorized to act on behalf of the copyright owner that fails to comply
26 substantially with the provisions of subparagraph (A) shall not be considered
27 under paragraph (1)(A) in determining whether a service provider has actual
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1 knowledge or is aware of facts or circumstances from which infringing activity is
2 apparent.

3 (ii) In a case in which the notification that is provided to the service provider's
4 designated agent fails to comply substantially with all the provisions of
5 subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of
6 subparagraph (A), clause (i) of this subparagraph applies only if the service
7 provider promptly attempts to contact the person making the notification or takes
8 other reasonable steps to assist in the receipt of notification that substantially
9 complies with all the provisions of subparagraph (A).

10
11 **10.** *Warth v. Seldin*, 422 U.S. 490 (1975), was a United States Supreme
12 Court case in which the Court reviewed the concept of judicial standing and
13 affirmed that if the plaintiffs lacked standing, they could not maintain a case
14 against the defendants. The Court found that as none of the plaintiffs could
15 demonstrate any injury actually done to them by the defendants, the plaintiffs
16 were third parties to the issue and had no standing to sue

17
18 **11. Example email from German Plaintiff - take down notice.**

19 Take-down notice due to copyright infringement: Super Mario Odyssey (Switch)
20 Friday, November 09, 2018 06:35 PST

21 DMCA-notice@bertelsmann.de

22 To admin@romuniverse.com abuse@enom.com support@gumroad.com

23 Dear Sir or Madam,

24 we have detected unauthorised copies of the video game "Super Mario Odyssey
25 (Switch)" (the "Nintendo Game") hosted on your servers. The urls
26 concerned are listed below.

1 The copyright and other intellectual property rights in the Nintendo Game are
2 owned and/or controlled by Nintendo Co., Ltd. ("Nintendo") for the
3 world and any unauthorised use, including but not limited to any unauthorised
4 copying or communication to the public of the Nintendo Game is
5 therefore an infringement of copyright and/or other intellectual property rights.
6 I declare under penalty of perjury that this notice is true and correct, that I am
7 authorized to act on behalf of the intellectual property rights owner
8 Nintendo and that I have good faith and reasonable belief that neither Nintendo
9 nor any licensee of Nintendo has authorised you or any other third
10 party to copy or communicate the Nintendo Game to the public in the manner
11 described in this notice. I therefore have good faith belief that use of
12 the material in the manner complained of is not authorized by the copyright
13 owner, its agent, or the law.

14 Therefore I request you to take immediate action to remove or disable access to
15 unauthorised copies of the Nintendo Game listed at the URLs below
16 and in order to prevent further legal actions against your company.

17 linked from romuniverse.com:

18 linked from [https://www.romuniverse.com/download/84925/super-mario-odyssey-](https://www.romuniverse.com/download/84925/super-mario-odyssey-all-en-fr-de-es-it-nl-ru-ja-bigbluebox)
19 [all-en-fr-de-es-it-nl-ru-ja-bigbluebox](https://www.romuniverse.com/download/84925/super-mario-odyssey-all-en-fr-de-es-it-nl-ru-ja-bigbluebox)

20 1.

21 [https://regular.romuniverse.com/roms/nintendoswitch/Super%20Mario%20Odysse](https://regular.romuniverse.com/roms/nintendoswitch/Super%20Mario%20Odyssey%20(All)%20(En,%20Fr,%20De,%20Es,%20It,%20Nl,%20Ru,%20J)
22 [y%20\(All\)%20\(En,%20Fr,%20De,%20Es,%20It,%20Nl,%20Ru,%20J](https://regular.romuniverse.com/roms/nintendoswitch/Super%20Mario%20Odyssey%20(All)%20(En,%20Fr,%20De,%20Es,%20It,%20Nl,%20Ru,%20J)

23 linked from [https://www.romuniverse.com/download/85235/super-mario-odyssey-](https://www.romuniverse.com/download/85235/super-mario-odyssey-v001-jpn-en-ja-fr-ge-es-it-nl-ru-jrp)
24 [v001-jpn-en-ja-fr-ge-es-it-nl-ru-jrp](https://www.romuniverse.com/download/85235/super-mario-odyssey-v001-jpn-en-ja-fr-ge-es-it-nl-ru-jrp)

25 1.

26 [https://regular.romuniverse.com/roms/nintendoswitch/Super%20Mario%20Odysse](https://regular.romuniverse.com/roms/nintendoswitch/Super%20Mario%20Odyssey%20v001%20(JPN)%20(En,%20Ja,%20Fr,%20Ge,%20Es,%20It,%2)
27 [y%20v001%20\(JPN\)%20\(En,%20Ja,%20Fr,%20Ge,%20Es,%20It,%2](https://regular.romuniverse.com/roms/nintendoswitch/Super%20Mario%20Odyssey%20v001%20(JPN)%20(En,%20Ja,%20Fr,%20Ge,%20Es,%20It,%2)

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1 linked from <https://www.romuniverse.com/download/85291/0277-super-mario-odyssey-world-en-ja-fr-de-es-it-nl-ru-rev-1-trimmed>

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3 1. [https://regular.romuniverse.com/roms/nintendoswitchtrimmed/0277%20-%20Super%20Mario%20Odyssey%20\(World\)%20\(En,Ja,Fr,De,Es,It,Nl,Ru\)%20\(Rev%201\)%20\[Trimmed\].xci](https://regular.romuniverse.com/roms/nintendoswitchtrimmed/0277%20-%20Super%20Mario%20Odyssey%20(World)%20(En,Ja,Fr,De,Es,It,Nl,Ru)%20(Rev%201)%20[Trimmed].xci)

6 linked from <https://www.romuniverse.com/download/85530/0038-super-mario-odyssey-world-en-ja-fr-de-es-it-nl-ru-trimmed>

7
8 1. [https://regular.romuniverse.com/roms/nintendoswitchtrimmed/0038%20-%20Super%20Mario%20Odyssey%20\(World\)%20\(En,Ja,Fr,De,Es,It,Nl,Ru\)%20\[Trimmed\].xci](https://regular.romuniverse.com/roms/nintendoswitchtrimmed/0038%20-%20Super%20Mario%20Odyssey%20(World)%20(En,Ja,Fr,De,Es,It,Nl,Ru)%20[Trimmed].xci)

11 Best regards,

12 Thorsten Johanntoberens

13 Director IT & Development | mbargo servies

14 -----

15 Sonopress GmbH

16 Carl-Bertelsmann-Str. 161 F

17 33332 Gütersloh

18 Germany

19 Phone: +49 (0) 5241 80-42457

20 E-Mail: thorsten.johanntoberens@bertelsmann.de

21 www.sonopress.de

22 -----

23 -----

24 Sitz Gütersloh | Amtsgericht Gütersloh HRB 2034 | Geschäftsführer Sven

25 Deutschmann, Jörg Dickenhorst

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1 Diese E-Mail und eventuelle Anlagen können vertrauliche und/oder rechtlich
2 geschützte Informationen enthalten. Wenn Sie nicht der richtige
3 Adressat sind oder diese E-Mail irrtümlich erhalten haben, informieren Sie bitte
4 sofort den Absender und vernichten Sie diese E-Mail. Das
5 unerlaubte Kopieren sowie die unbefugte Weitergabe dieser E-Mail sind nicht
6 gestattet.

7 -----
8 -----

9 Registered Office Gütersloh | District Court Gütersloh Commercial Registry 2034
10 | Managing Director Sven Deutschmann, Jörg Dickenhorst

11 -----
12 -----

13 This e-mail and any attachments may contain confidential and/or privileged
14 information. If you are not the intended recipient (or have received this
15 e-mail in error) please notify the sender immediately and destroy this e-mail. Any
16 unauthorized copying, disclosure or distribution of the material in
17 this e-mail is forbidden.

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20 Bitte denken Sie über Ihre Verantwortung gegenüber der Umwelt nach, bevor Sie
21 diese E-Mail ausdrucken.

22 Please consider the environment before printing this mail.

23 thorsten.johantoberens@bertelsmann.de

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