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10
11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 TELUS Corporation, a foreign corporation,

14 Plaintiff,

15 vs.

16 DENNIS WATSON, an individual,

17 Defendant.

Case No.: C07 3434 VRW

Honorable Chief Judge Vaughn R. Walker

18 **OPPOSITION TO DEFENDANT’S MOTION
19 TO DISMISS AND MOTION TO STRIKE**

Date: March 20, 2008

Time: 2:30 p.m.

Location: Courtroom 6, 17th Floor

Before: Hon. Vaughn R. Walker

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiff TELUS Corporation (“TELUS”) hereby opposes Defendant Dennis Watson’s
3 (“Mr. Watson”) Motion to Dismiss and Motion to Strike (“the Motion”) on the grounds that the
4 assertions made in the Motion lack merit. Subject matter jurisdiction, personal jurisdiction, and
5 venue are all appropriate here. Additionally, Mr. Watson’s Motion to Strike is untimely, baseless,
6 and procedurally defective. Furthermore, his requests to impose criminal and civil penalties
7 against TELUS are procedurally defective, and lack proper explanation and merit.

8 **II. STATEMENT OF FACTS**

9 TELUS maintains its principal place of business in British Columbia, Canada. Complaint
10 for Copyright Infringement. Docket No. 1, Complaint for Copyright Infringement (“Complaint”),
11 ¶ 1. Dennis Watson is an individual that resides in British Columbia, Canada. Docket No. 21,
12 Defendant’s Answer to Complaint (“Answer”), ¶ 3.

13 In or around January 2004, TELUS hosted an internal promotional event in Montreal,
14 Quebec, Canada, regarding its voice over Internet protocol (“VoIP”) initiative. Complaint, ¶ 10.
15 Several videos were made during the event, including videos relating specifically to TELUS’
16 VoIP initiative. *Id.* TELUS thereafter learned that defendant Dennis Watson had obtained certain
17 of those videos and posted them on the California-based video broadcasting website,
18 YouTube.com (“YouTube”). Complaint, ¶ 9. Mr. Watson did not obtain consent from TELUS to
19 reproduce or distribute the videos or any portions thereof. Complaint, ¶ 14.

20 Accordingly, on or about June 1, 2007, TELUS provided notification to YouTube that Mr.
21 Watson had posted videos in which TELUS owned copyrights. Complaint, ¶ 4. TELUS provided
22 this notification in accordance with the express requirements of the Digital Millennium Copyright
23 Act (“DMCA”), 17 U.S.C. § 512(c)(3). *Id.* After TELUS submitted its notification, and after
24 YouTube removed the videos from its website, Mr. Watson provided a purported “counter
25 notification” to YouTube, citing DMCA § 512(g)(3) and stating that he “consent[s] to the
26 jurisdiction of the Federal District Court for the judicial district in which [he] reside[s].” *See*
27 Declaration of Ronald F. Lopez (“Lopez Decl.”), Exhibit B, ¶ 2 (June 2, 2007 Counter-notification
28 of Dennis Watson). Subsequently, TELUS informed YouTube that Mr. Watson’s purported

1 counter-notification was defective under the DMCA. *See* Lopez Decl., Exhibit C (June 29, 2007
2 correspondence re: Defective Counter-notification). TELUS, thereafter, filed the instant action
3 against Mr. Watson alleging copyright infringement on June 29, 2007, as required by the DMCA.
4 17 U.S.C. § 512(g)(2)(C). *See* Complaint. Mr. Watson answered TELUS' complaint on or about
5 July 24, 2007. Docket No. 21, Answer. Mr. Watson consented to jurisdiction in his Answer.
6 Answer, ¶ 5. He then filed the subject Motion on January 16, 2008, raising myriad arguments, all
7 of which are unfounded, as shown below.

8 **III. LEGAL ARGUMENT**

9 **A. This Court Has Subject Matter Jurisdiction over this Action Because** 10 **this Action Arises Under the Laws of the United States.**

11 Contrary to Mr. Watson's assertion, this Court has subject matter jurisdiction over this
12 matter pursuant to both 28 U.S.C. §§ 1331 and 1338(a). 28 U.S.C. § 1331 provides that the
13 "district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or
14 treaties of the United States." This is such a case. As noted above, this action arises under the
15 DMCA, which is directed at preventing copyright infringement due to rapidly changing
16 technologies, and provides the procedural mechanisms by which a copyright owner may notify a
17 service provider (such as YouTube) that its copyright is being infringed by materials found on the
18 service provider's system or network. *See, e.g., Blueport Co., LLP v. United States*, 71 Fed. Cl.
19 768, 769-770 (Fed. Cl. 2006). The instant action is a component and, indeed, a *requirement* of the
20 DMCA, 17 U.S.C. § 512(g)(2)(C); accordingly, this action directly arises under a law of the
21 United States. Further, the issue of infringement is governed by United States law, specifically,
22 the U.S. Copyright Act of 1976, 17 U.S.C.S. § 101 *et seq.*, *Allarcom Pay Television v. General*
23 *Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995).¹ Thus, because this case plainly arises under
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26 ¹ Canadian law will be used to determine whether the videos are copyright-protected in the first instance. *Lahiri v.*
27 *Universal Music & Video Distrib., Inc.*, 513 F. Supp. 2d 1172, 1175 (C.D. Cal. 2007) ("Initial ownership of a
28 copyrighted work is determined by the laws in the work's country of origin."). U.S. law will be used to determine
whether Mr. Watson *has infringed* TELUS' copyrights. *See Allarcom*, 69 F.3d at 387 (the law of the country where
the "potential infringement was [] completed" be used to determine the existence of infringement).

1 United States laws – the DMCA and the U.S. Copyright Act – this court has subject matter
2 jurisdiction pursuant to § 1331.

3 Additionally, this Court has express subject matter jurisdiction pursuant to 28 U.S.C. §
4 1338(a), which provides: “[T]he district courts shall have original jurisdiction of any civil action
5 arising under any Act of Congress relating to patents, plant variety protection, *copyrights* and
6 trade-marks.” (emphasis added). Because, as discussed above, this case arises under the DMCA
7 and the U.S. Copyright Act, Acts of Congress relating specifically to copyright (among other
8 things), this Court has *express original* jurisdiction over this action. Mr. Watson’s motion to
9 dismiss on the basis of alleged lack of subject matter jurisdiction is without merit and must be
10 denied.

11 **B. This Court has Personal Jurisdiction over Mr. Watson because**
12 **Mr. Watson has Consented to Jurisdiction.**

13 Mr. Watson has consented to jurisdiction in this case, specifically in his answer and his
14 counter-notification to YouTube; consent is a traditional basis for asserting personal jurisdiction
15 over a non-resident defendant. *See, e.g., Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022,
16 1071 (N.D. Cal. 2007) (only “[a]bsent one of the traditional bases for personal jurisdiction
17 (presence, domicile, or consent), [does] due process require[] that the defendant have certain
18 ‘minimum contacts’ with the forum state.”). Express consent, the kind at issue here, also serves to
19 waive any later challenge to personal jurisdiction. *See Chan v. Soc’y Expeditions, Inc.*, 39 F.3d
20 1398, 1406 (9th Cir. 1994) (“Challenges to personal jurisdiction may be waived by . . . express . . .
21 consent”).

22 Mr. Watson expressly consented to jurisdiction in this Court. First, in an effort to avail
23 himself of the privileges and protections of United States law, Mr. Watson attempted to consent to
24 jurisdiction in his counter-notification to YouTube, as required by the DMCA, 17 USC
25 § 512(g)(3)(D).² *See* Lopez Decl., Exhibit B (June 2, 2007 Counter-notification of Dennis

26 ² The DMCA provides that once a service provider has received notification of infringement from a copyright owner
27 and removed the infringing material, a person may contest the removal, if he or she, among other things, consents to
28 the jurisdiction of a Federal District Court. 17 USC § 512(g)(3)(D); *see also Doe v. Geller*, Case No. C 07-2478
VRW, 2008 WL 314498, at *12 (N.D. Cal. 2008) (“[T]he DMCA provides explicitly that internet users . . . who wish
to rebut a takedown notice must consent to the jurisdiction of a federal district court.”). Specifically, the DMCA

1 Watson). Mr. Watson stated that he “consent[s] to the jurisdiction of the Federal District Court for
2 the judicial district in which [he] reside[s].” However, since Mr. Watson’s counter-notification
3 was defective, (*See* Lopez Decl., Exhibit C (June 29, 2007 correspondence re: Defective Counter-
4 notification)), he expressly consented to jurisdiction in his answer: “I consent to jurisdiction of
5 Federal District Court for the judicial district of Northern California.” Answer, ¶ 5.

6 By virtue of his answer, Mr. Watson has consented to jurisdiction in this Court and thereby
7 waived any challenge based on personal jurisdiction.

8 **C. The Northern District of California is the Proper Venue for this Action**
9 **Because this Court has Personal Jurisdiction over Mr. Watson and a**
10 **Substantial Part of the Events Giving Rise to this Action Occurred in**
11 **the Northern District of California.**

12 As is relevant here, venue is proper under 28 U.S.C. §1400(a), which provides that “[c]ivil
13 actions, suits, or proceedings arising under any Act of Congress relating to copyrights ... may be
14 instituted in the district in which the defendant or his agent resides *or may be found*.” (emphasis
15 added). As discussed above, this action arises under United States law relating to copyright.
16 Further, for purposes of the copyright venue statute, Mr. Watson is, indeed, “found” in this
17 District. Specifically, because this Court has personal jurisdiction over Mr. Watson (as shown
18 above), venue is necessarily proper in this District. *See, e.g., Advideo, Inc. v. Kimel Broadcast*
19 *Group, Inc.*, 727 F.Supp. 1337, 1341 (holding that defendant was “found” within the meaning of
20 copyright venue statute wherever personal jurisdiction was proper).

21 Moreover, 28 U.S.C. §1391(b)(2) provides that in an action “wherein jurisdiction is not
22 founded solely on diversity of citizenship,” venue is proper in “a judicial district in which a
23 substantial part of the events or omissions giving rise to the claim occurred.” In this case, the
24 claim arises as a result of Mr. Watson having posted and uploaded copyright-protected videos to a
25 Northern California-based website, YouTube. It was this posting and the continuing existence of
26 the videos on the YouTube website that gave rise to this action. As such, a substantial part of the
27 events giving rise to this dispute took place in the Northern District of California.

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mandates that such an individual consent to the “jurisdiction of Federal District Court for the judicial district in which
[his or her] address is located, or *if the subscriber’s address is outside of the United States, for any judicial district in*
which the service provider may be found.” *Id.* (emphasis added).

1 It cannot be disputed that venue is proper in the Northern District of California, as
2 provided for in 28 U.S.C. §§ 1391 and 1400. Mr. Watson's motion to dismiss on this basis is
3 unfounded and must be denied.

4 **D. Mr. Watson's Suggestion that He Was Not Properly Served in this**
5 **Action is Demonstrably False.**

6 Mr. Watson was properly served in this action. As is clear from the record in this case, the
7 summons was issued to Mr. Watson on June 29, 2007 and an Affidavit of Service was filed with
8 the Court on August 31, 2007, verifying that Mr. Watson was served *in person* with the summons,
9 complaint, Office of the Clerk Guidelines, ECF Registration Information Handout, Notice of
10 Assignment of Case to a United States Magistrate Judge, Order Setting Initial Case Management
11 Conference, and ADR Guidelines. Docket No. 10, Affidavit. Mr. Watson's motion to dismiss on
12 this basis must be denied.

13 Similarly, Mr. Watson's allegation that he was not served with a copy of the Court's order
14 setting an October 11, 2007 Case Management Conference fails for multiple reasons. First, the
15 Case Management Conference scheduled for October 11, 2007 was vacated and rescheduled by
16 the Court on October 10, 2007. Docket Entry 10/10/2007, Notice Vacating Hearing. Thus, Mr.
17 Watson's argument, even if valid, is irrelevant and moot – no Case Management Conference took
18 place on October 11, 2007. Second, this action was designated for the Court's Electronic Case
19 Filing Program on June 29, 2007, and notice of the later-vacated October 11, 2007 Case
20 Management Conference was given to the parties via a Clerk's Notice. Docket No. 11, Clerk's
21 Notice. Although Mr. Watson did not begin submitting documents electronically until January
22 2008, his mailing address has appeared on the Court's certificate of service for electronically filed
23 and entered documents (such as the Clerk's Notice) since the beginning of the case. As such, at no
24 time did TELUS have reason to believe that Mr. Watson would not have received notice of the
25 October 10, 2007 Case Management Conference via mail from the Court.³ Finally, even if Mr.
26 Watson were correct in his assertion, which he is not, the Court's Order Setting Case Management

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28 ³ The Clerk's Notice provides that plaintiff shall serve a copy of the notice only on a party that does *not* appear on the Certificate of Service. (Docket No. 11, Clerk's Notice.)

1 Conference provides that a complaint is subject to dismissal under Rule 41(b) *only if* the plaintiff
2 fails to serve a defendant with each of the summons, complaint and order setting case management
3 conference. Docket No. 11, Order Setting Case Management Conference. Mr. Watson cites no
4 authority suggesting that a case may be dismissed for failure to properly serve *only* notice of a
5 case management conference. And, in all events, as discussed above, Mr. Watson was properly
6 served in this case and provided with all Case Management Conference notices by TELUS and/or
7 the Court.

8 **E. Mr. Watson’s “Motion to Strike” is Unfounded on its Face.**

9 Mr. Watson seeks to strike from the complaint “anything and everything that does not
10 apply to posting videos on YouTube.” Motion, ¶ 14. This Motion must be denied for three
11 independent reasons. First, Rule 12(f)(2) of the Federal Rules of Civil Procedure (“FRCP”)
12 requires that a Motion to Strike be made *before* a responsive pleading. (emphasis added). Here,
13 however, Mr. Watson filed his Motion *after* filing his answer on July 14, 2007. Accordingly, Mr.
14 Watson’s Motion is untimely. Second, TELUS’ complaint covers only videos posted on
15 YouTube. Therefore, Mr. Watson’s “Motion to Strike” non-YouTube videos is a non-starter.
16 Third, Mr. Watson fails to meet the standard under FRCP 12(f), which requires that the moving
17 party identify which of the four grounds specified in FRCP 12(f) allegedly support the Motion.
18 Specifically, per FRCP 12(f), Mr. Watson must state which part of the pleading is “redundant,
19 immaterial, impertinent, or scandalous,” and Mr. Watson has failed to do so. Thus, this Motion is
20 procedurally defective.

21 For the above three independent grounds, this motion must be denied.

22 **F. Mr. Watson’s Demands that TELUS be Criminally Charged Under the**
23 **United States Copyright Act and Sanctioned Under Federal Rule of**
24 **Civil Procedure 11 are Unsupported, Procedurally Inadequate, and, in**
All Respects Improper and Frivolous.

25 Mr. Watson’s assertion that TELUS should be criminally charged under 17 U.S.C. §
26 506(c) has no place in this Motion. In addition to the fact that Mr. Watson’s conclusory and
27 unsubstantiated allegations of “fraudulent intent” are without merit, it is not the function of this
28 Court to file criminal charges.

1 Mr. Watson’s apparent request for Rule 11 sanctions is, likewise, unfounded and improper.
2 As a primary matter, any motion for Rule 11 sanctions “must be made *separately* from any other
3 motion and must *describe* the *specific conduct* that allegedly violates Rule 11(b).” Fed. R. Civ. P
4 11(c)(2) (emphasis added). Clearly, Mr. Watson’s two sentence demand that TELUS be
5 sanctioned does not constitute a separate motion as is required by the Federal Rules of Civil
6 Procedure.

7 Moreover, the claims put forward in TELUS’ complaint were properly asserted. Mr.
8 Watson has not presented any evidence to the contrary, either to support his assertion that TELUS
9 does not have a good faith belief as to the veracity of its claims or that, in fact, TELUS is not the
10 rightful owner of copyrights in the materials at issue. Rather, he presents nothing more than
11 conclusory statements and allegations, which cannot support a Rule 11 motion for sanctions.

12 **IV. CONCLUSION**

13 As shown above, Mr. Watson’s “Motion to Dismiss and Motion to Strike” is wholly
14 unsupported. The Motion is procedurally improper in many respects, unsupported by law, and
15 directly contrary to the undisputable factual record in this case. For each of these reasons and all
16 of the reasons discussed herein, TELUS respectfully requests that Mr. Watson’s Motion to
17 Dismiss and Motion to Strike be denied in its entirety.

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Dated: February 28, 2008

/s/Ronald F. Lopez
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