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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID A. STEBBINS,  
Plaintiff,

v.

KARL POLANO,  
Defendant.

Case No. 21-cv-04184-JSC

**SCREENING ORDER PURSUANT TO  
28 U.S.C. § 1915 AND ORDER RE:  
MOTION TO APPOINT COUNSEL**

Re: Dkt. Nos. 1, 3

The Court previously granted Plaintiff’s Application to Proceed in Forma Pauperis. (Dkt. No. 6.) It must now review the complaint’s allegations under 28 U.S.C. § 1915. Because Plaintiff’s claims for misrepresentation under 17 U.S.C. § 512(f)(2) and intentional infliction of emotional distress (“IIED”) do not comply with Federal Rule of Civil Procedure 8, the Court gives Plaintiff the opportunity to amend the complaint.

Also pending before the Court is Plaintiff’s motion to appoint counsel. (Dkt. No. 3.) For the reasons explained below, the Court DENIES the motion.

**COMPLAINT ALLEGATIONS**

Plaintiff has dedicated channels on YouTube and Twitch where he posts original videos under the alias Acerthorn. He uses both channels as a part-time source of income and hopes to earn enough to become full-time. Defendant is a resident of Switzerland who also has channels on YouTube and Twitch, using the alias SofiannP.

On April 10, 2021, Plaintiff accidentally broadcast a live video for about two hours on his own Twitch channel. Unbeknownst to Plaintiff, people who followed his Twitch channel could watch him in his daily activities. At one point, the live video included strange sounds that Plaintiff does not recognize. The strange noises were the most memorable part of an otherwise banal

1 video. After he realized the video was broadcast, Plaintiff registered a copyright and posted the  
2 video on his YouTube channel, with viewing access limited to followers who pay him \$20 per  
3 month.

4 In mid-April 2021, Defendant began to harass Plaintiff online, including “doxxing” him by  
5 posting personal information on YouTube and Twitch. Defendant sent messages to new followers  
6 who came onto Plaintiff’s channels “in an attempt to get them to likewise despise Plaintiff,”  
7 thereby “heavily slowing down [] the growth of Plaintiff’s fanbase” and paying followers. (Dkt.  
8 No. 1 at 3.) Defendant also sent harassing messages directly to Plaintiff.

9 On May 20, 2021, Defendant posted a video to his own YouTube channel. Of the 50  
10 seconds in the video, 43 seconds were a direct clip from Plaintiff’s April 10, 2021 video. Plaintiff  
11 alleges that the only way Defendant could have acquired the clip is by illegally downloading it  
12 from Plaintiff’s Twitch channel with third-party software; there is no way to download directly  
13 from Twitch, and Plaintiff “knows for a fact” that Defendant does not have access to the video on  
14 YouTube because he does not pay Plaintiff \$20 a month for access. (*Id.* at 4.) Below the video,  
15 Defendant included the following description:

16 This is a parody. (obviously)  
17 Fair Use Disclaimer:  
18 - Copyright Disclaimer under Section 107 of the Copyright Act of 1976,  
19 allowance is made for ‘fair use’ for purposes such as criticism, comment, news  
20 reporting, teaching, scholarship, education and research.  
- Fair use is a use permitted by copyright statute that might otherwise be  
infringing.

21 (*Id.*) Plaintiff filed a “DMCA Takedown Notice” with YouTube, and Defendant’s video was  
22 removed about an hour later. On May 25, 2021, Defendant filed a “DMCA Counter-Notice” with  
23 YouTube, in which he stated, “I’ve created the video as a parody of it’s [sic] original content  
24 which was a 2 hour livestream, this parody is meant to be a meme and nothing like Acerthorns  
25 original content. This is Fair Use as his material has been altered to create new content and has  
26 also not been monetized.” (*Id.* at 4-5.) Plaintiff alleges that Defendant’s video “almost  
27 completely usurps the market” for his own video because “people are unlikely to pay [] the \$20

1 video will be automatically reinstated on June 8, 2021, unless Plaintiff files a lawsuit.

2 Plaintiff claims one count of copyright infringement for illegally downloading his video;  
3 another count for using the video; violations of 17 U.S.C. § 512(f)(2); and IIED.

#### 4 LEGAL STANDARD

5 A court must dismiss an *in forma pauperis* complaint before service of process if it is  
6 frivolous, fails to state a claim, or contains a complete defense to the action on its face. 28 U.S.C.  
7 § 1915(e)(2). Section 1915(e)(2) parallels the language of Federal Rules of Civil Procedure  
8 12(b)(6) regarding dismissals for failure to state a claim. *See* 28 U.S.C. § 1915(e)(2); *see also*  
9 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000). The complaint therefore must allege  
10 facts that plausibly establish each defendant's liability. *See Bell Atl. Corp. v. Twombly*, 550 U.S.  
11 544, 555-57 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that  
12 allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
13 alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

14 A complaint must also comply with Federal Rule of Civil Procedure 8, which requires the  
15 complaint to contain "a short and plain statement of the claim showing that the pleader is entitled  
16 to relief." Fed. R. Civ. P. 8(a)(2); *see also Moss v. Infinity Ins. Co.*, No. 15-CV-03456-JSC, 2015  
17 WL 5360294, at \*2 (N.D. Cal. Sept. 14, 2015). "While the federal rules require brevity in  
18 pleading, a complaint nevertheless must be sufficient to give the defendants 'fair notice' of the  
19 claim and the 'grounds upon which it rests.'" *Coleman v. Beard*, No. 14-CV-05508-YGR (PR),  
20 2015 WL 395662, at \*4 (N.D. Cal. Jan. 29, 2015) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93  
21 (2007)). A complaint that fails to state a defendant's specific acts "that violated the plaintiff's  
22 rights fails to meet the notice requirements of Rule 8(a)." *Medina Chiprez v. Becerra*, No. 20-CV-  
23 00307-YGR (PR), 2020 WL 4284825, at \*3 (N.D. Cal. July 27, 2020) (citing *Hutchinson v.*  
24 *United States*, 677 F.2d 1322, 1328 n.5 (9th Cir. 1982)).

25 Plaintiff is proceeding without representation by a lawyer. While the Court must construe  
26 the complaint liberally, *see Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984), it may not add to  
27 the factual allegations in the complaint, *see Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992).

1 District. *See* N.D. Cal. Civ. L.R. 3-9(a).

2 **DISCUSSION**

3 **I. Copyright Infringement**

4 To state a claim for copyright infringement, a plaintiff must allege facts plausibly showing  
 5 (1) that he owns a valid copyright in the work, and (2) “copying” and “unlawful appropriation.”  
 6 *Skidmore for Randy Craig Wolfe Trust v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en  
 7 banc). For “copying,” the alleged facts must plausibly show, directly, that the defendant copied  
 8 or, circumstantially, that the defendant had access to the plaintiff’s work and the works are  
 9 strikingly similar. *Id.* For “unlawful appropriation,” the alleged facts must plausibly show that  
 10 specific elements of the works are objectively similar and that an ordinary observer would view  
 11 the overall works as similar. *Id.*

12 Fair use is an affirmative defense establishing that the defendant’s use did not infringe the  
 13 copyright. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012); *see Lenz v.*  
 14 *Universal Music Corp.*, 815 F.3d 1145, 1151-53 (9th Cir. 2016). It is “a mixed question of law  
 15 and fact” that “requires a case-by-case determination whether a particular use is fair.” *Harper &*  
 16 *Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560, 549 (1985). Typically considered at  
 17 the summary judgment stage, fair use “may be considered on a motion to dismiss . . . where no  
 18 material facts are in dispute.” *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th  
 19 Cir. 2008). But, on the face of the complaint, “it is not necessary to plead facts that disprove fair  
 20 use [for the complaint] to survive.” *Peterman v. Republican Nat’l Comm.*, 320 F. Supp. 3d 1151,  
 21 1157 (D. Mont. 2018).

22 Plaintiff’s complaint adequately alleges that he owned a copyright as the original and sole  
 23 author of the April 10, 2021 video. The complaint also plausibly shows direct copying; Defendant  
 24 stated his video, the majority of which was a direct clip from Plaintiff’s, was a parody of  
 25 Plaintiff’s original video. The complaint alleges unlawful appropriation, in that both videos  
 26 contained unique strange noises and the 43-second clip from Plaintiff’s video would be  
 27 recognizable to an ordinary observer. Moreover, although the complaint suggests Defendant will

1 stage.

2 **II. Misrepresentation Under 17 U.S.C. § 512(f)(2)**

3 To state a claim for misrepresentation under 17 U.S.C. § 512(f)(2), a plaintiff must allege  
4 facts plausibly showing (1) that the defendant knowingly and materially misrepresented that its  
5 material was removed or disabled by mistake or misidentification; (2) the internet service provider  
6 relied on the misrepresentation in replacing the removed material or ceasing to disable access to it;  
7 and (3) the plaintiff was injured as a result. *See Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011,  
8 1026 (N.D. Cal. 2015). The first element is not met if the defendant had a subjective good faith  
9 belief that it was not making a misrepresentation—in this situation, if the defendant had a  
10 subjective good faith belief that its material was fair use and therefore removing it was a  
11 misidentification. *See Lenz*, 815 F.3d at 1153-54.

12 Plaintiff's complaint does not adequately allege the first element. Plaintiff alleges that  
13 Defendant's Counter-Notice claiming fair use was false and frivolous, and that Defendant's  
14 pattern of harassment suggests that Defendant's video was meant to harass, not parody. However,  
15 the facts as alleged do not plausibly suggest that any misrepresentation in Defendant's Counter-  
16 Notice was knowing. The allegations more plausibly suggest that Defendant believed his use of  
17 Plaintiff's video was fair use, and that such a belief might have been reasonable.

18 **III. Intentional Infliction of Emotional Distress**

19 To state a claim for IIED, the plaintiff must allege facts that plausibly show: (1) extreme  
20 and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the  
21 probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional  
22 distress; and (3) actual and proximate causation of the emotional distress by the defendant's  
23 outrageous conduct. *Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009).

24 Plaintiff's complaint does not make clear which conduct is the basis for his IIED claim.  
25 (Dkt. No. 1 at 5 ("Plaintiff also believes his entitlement to judgment on the merits in regards to the  
26 [IIED] is also self-explanatory at this point.")) Regarding both Defendant's use of Plaintiff's  
27 video and earlier online harassment, the complaint does not allege facts to show the conduct was

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