

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

FRASERSIDE IP L.L.C., an Iowa
Limited Liability Company,

Plaintiff,

vs.

HAMMY MEDIA, LTD. d/b/a
xHamster.com and www.xHamster.com
and JOHN DOES 1-100 AND JOHN
DOE COMPANIES 1-100,

Defendants.

No. C11-3025-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING DEFENDANT
HAMMY MEDIA, LTD.'S MOTION
TO DISMISS**

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Justice Marshall recognized that the issue of determining personal jurisdiction “is one in which few answers will be written ‘in black and white. The greys are dominant and even among them the shades are innumerable.’” *Kulko v. Superior Ct.*, 436 U.S. 84, 92, (1978) (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)). Nonetheless, I must venture into this field of innumerable shades of grey to determine whether the plaintiff has made a *prima facie* showing that the defendant, a Cyprus corporation alleged to have infringed plaintiff’s copyrights and trademark through its offering of adult motion pictures on its website, has sufficient minimum contacts with Iowa to satisfy due process and permit the exercise of personal jurisdiction over it.

I. INTRODUCTION AND BACKGROUND

A. Procedural Background

On February 17, 2011, plaintiff Fraserside IP L.L.C. (“Fraserside”) filed a complaint against Hammy Media, Ltd., doing business as xHamster.com, www.xHamster.com (“xHamster”), John Does, and John Doe Companies, alleging the following causes of action: copyright infringement, in violation of 17 U.S.C. §§ 106 and 501 *et seq.*; contributory copyright infringement, in violation of 17 U.S.C. §§ 106 and 501 *et seq.*; vicarious copyright infringement, in violation of 17 U.S.C. §§ 106 and 501 *et seq.*; inducing copyright infringement, in violation of 17 U.S.C. §§ 106 and 501 *et seq.*; trademark infringement, in violation of 15 U.S.C. § 1114; contributory trademark infringement, in violation of 15 U.S.C. § 1114; vicarious trademark infringement, in violation of 15 U.S.C. § 1114; false designation of origin, in violation of 15 U.S.C. § 1125(a); and, dilution of trademark, in violation of 15 U.S.C. § 1125(c).

On September 19, 2011, xHamster filed a Motion to Dismiss (docket no. 34). In its motion, xHamster contends that it is not subject to personal jurisdiction in Iowa and the

Complaint must be dismissed pursuant to Federal Rule of Civil procedure 12(b)(2). Alternatively, xHamster asserts Fraserside is not the registrant or owner of any of the copyrights or trademarks at issue and therefore has no standing to bring this case. xHamster argues that since Fraserside does not have standing to bring the copyright and trademark claims, there are no claims over which subject matter jurisdiction exists and the Complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), or Fraserside's lack of standing means that it has failed to state a claim upon which relief may be granted and the Complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Alternatively, xHamster argues that it is entitled to dismissal based on the "safe harbor" provision of 17 U.S.C. § 512(c). This is because xHamster has maintained a Digital Millennium Copyright Act ("DMCA") agent for service of takedown notices, and Fraserside has failed to allege that it notified xHamster of any of the alleged instances of infringement, a prerequisite to defeating xHamster's safe harbor defense.

On October 3, 2011, Fraserside filed a resistance to xHamster's motion. Fraserside argues that xHamster's internet activities establish a sufficient basis for specific personal jurisdiction. Alternatively, Fraserside contends that the facts support a finding of general jurisdiction over xHamster. Fraserside further asserts that it has standing to sue because it is the proper assignee of the copyrighted and trademarked products at issue. Finally, Fraserside argues that xHamster is not entitled to dismissal based on the DMCA's safe harbor provision because the safe harbor provision is an affirmative defense and not grounds for a Rule 12(b)(6) dismissal.

On November 7, 2011, xHamster filed its reply brief. In turn, Fraserside filed a sur-reply brief on November 11, 2011. On December 21, 2011, xHamster withdrew its Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) challenges to the Complaint.

B. Factual Background

1. Facts Drawn From First Amended Complaint

On a motion to dismiss, I must assume all facts alleged in the Complaint are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The following factual background is drawn from the Complaint, documents attached to the Complaint, and public records.¹

Plaintiff Fraserside is a wholly owned subsidiary of Fraserside Holdings, Ltd. (“Fraserside Holdings”). Fraserside was created in October 2010. Fraserside Holdings is a Cyprus-based company known commercially as “Private.” Fraserside Holdings is a producer of adult motion pictures. Its adult films are distributed on a wide range of platforms, including mobile handsets in 45 countries, digital television in 24 countries,

¹ I note that I may consider public records, those materials that are embraced by the complaint, and documents attached to the complaint. *See Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011) (“In addressing a motion to dismiss, [t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.”) (quoting *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010); *Noble Sys. Corp. v. Alorica Cent., L.L.C.*, 543 F.3d 978, 983 (8th Cir. 2008) (“the district court is limited to the materials properly before it on a motion to dismiss, which may include public records and materials embraced by the complaint.”); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (noting that a court “generally must ignore materials outside the pleadings, but it may consider ‘some materials that are part of the public record or do not contradict the complaint,’ as well as materials that are “‘necessarily embraced by the pleadings.’”)(citations omitted). Materials necessarily embraced by the complaint include “documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.” *Kushner v. Beverly Enters.*, 317 F.3d 820, 831 (8th Cir. 2003)); *see Jenisio v. Ozark Airlines, Inc., Ret. Plan*, 187 F.3d 970, 972 n.3 (8th Cir. 1999) (“A district court may consider documents on a motion to dismiss where . . . the plaintiffs’ claims are based solely on the interpretation of the documents and the parties do not dispute the actual contents of the documents.”).

broadband internet, a South American cable channel, DVDs, and on demand and subscription based services on the internet. Fraserside Holdings, in turn, is a wholly owned subsidiary of Private Media Group, Inc. (“Private Media”), a Nevada Corporation.

Defendant xHamster is also a Cyprus-based company. xHamster competes with Fraserside Holdings in the distribution and sale of adult audio-visual works through the internet. xHamster operates the website www.xHamster.com. The xHamster.com website is visited daily by internet users worldwide. Roughly 20 percent of the site’s visitors are from United States. The website allows users the option of viewing adult films, or downloading the films by becoming a member of the website.

2. Facts Related Solely To Personal Jurisdiction

xHamster has supplied an affidavit in support of its request to dismiss the Complaint on the ground of lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). I have extracted the following facts, all uncontroverted, from that affidavit which relates to xHamster’s contacts with the State of Iowa.

xHamster has no offices in Iowa, no employees in Iowa, no telephone number in Iowa, and no agent for service of process in Iowa. xHamster does not advertise in Iowa. No xHamster officer or director has ever visited Iowa. xHamster does not maintain any of its servers within Iowa. All of xHamster’s servers are located outside of the United States.

II. LEGAL ANALYSIS

A. Rule 12(b)(2) Standards and Personal Jurisdiction

In considering xHamster’s motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), Fraserside’s Complaint “must state sufficient facts . . . to support a reasonable inference that [each defendant] may be

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