

1 John A. Stottlemire
 2 33103 Lake Garrison Street
 3 Fremont, CA 94555
 4 Telephone: (614) 358-4185
 5 Email: jstottl@comcast.net
 6 Defendant, *pro se*

7 UNITED STATES DISTRICT COURT
 8 NORTHERN DISTRICT OF CALIFORNIA
 9 SAN JOSE DIVISION

10 COUPONS, INC., a California corporation,)	Case No. 5:07-cv-03457 HRL
11 Plaintiff,)	DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SANCTIONS PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE
12 v.)	
13 JOHN STOTTMIRE, and DOES 1-10,)	
14 Defendant)	
)	Date: November 4, 2008
)	Time: 10:00 a.m.
)	Courtroom: 2, 5 th Floor
)	Judge: Hon. Howard R. Lloyd

15
 16 **NOTICE**

17 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

18 PLEASE TAKE NOTICE that on November 4, 2008, at 10:00 a.m., before the Honorable
 19 Howard R. Lloyd, United States Magistrate Judge, in Courtroom 2, 5th Floor, 280 South 1st Street,
 20 San Jose, California the following Motion for Sanctions Pursuant to Rule 11 of the Federal Rules
 21 of Civil Procedure will be heard.

22 **MOTION**

23 Pursuant to Federal Rules of Civil Procedure 11(c)(2), Defendant John Stottlemire hereby
 24 moves the Court to determine if Federal Rules of Civil Procedure 11(b) has been violated on the
 25 grounds that Coupons, Inc, by and through counsel, has filed with the Court, in violation of Rule
 26 11(b) of the Federal Rules of Civil Procedure, a Third Amended Complaint that contains claims,
 27 factual contentions and allegations which have no evidentiary support and have not been
 28 specifically identified to have evidentiary support after a reasonable opportunity for further

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND SUMMARY**

3 Duty of candor, these three words are essential to preserving public confidence in our
4 system of justice. Rule 11 of the Federal Rules of Civil Procedure (“Rule 11”) mandates the duty
5 of candor an attorney or unrepresented party has to the Court and exists to deter attorneys or
6 unrepresented parties from presenting claims based on factual allegations which have no
7 evidentiary support. Coupons, Inc. (“Plaintiff”), by and through its counsel, Dennis Cusack
8 (“Cusack”), has filed with the Court a Third Amended Complaint (“TAC”) that violates Rule 11 in
9 this respect and warrants an award of sanctions. Moreover, despite notice under the “safe harbor”
10 provision of Rule 11, Plaintiff and Cusack have refused to withdraw the TAC. Because the TAC
11 contains false allegations which are factually and legally groundless, the Court should impose
12 appropriate sanctions against Plaintiff and/or Cusack to deter Plaintiff and Cusack from engaging
13 in such egregious misconduct in the future.

14 As the attorney who signed the TAC, Cusack submitted and file with the Court a TAC for
15 violations of 17 U.S.C. § 1201(a), 17 U.S.C. § 1201(b) and other related State Law Claims on
16 behalf of Plaintiff in this action. By doing so, Cusack certified that “to the best of [his] knowledge,
17 information, and belief, formed after an inquiry reasonable under the circumstances...the
18 allegations and other factual contentions [in the TAC] have evidentiary support.” Federal Rules of
19 Civil Procedure 11(b)(3).

20 Unfortunately, Plaintiff’s TAC attempts to satisfy pleading requirements which would
21 survive a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) by making a
22 false claim. Specifically, Plaintiff claims its security “features block an individual computer’s
23 access to a particular coupon offer altogether if that computer does not have proper registry keys in
24 place (has not previously been identified as a unique computer)” (TAC ¶ 15). This false claim is
25 antithetical to the gravaman of Plaintiff’s claim, by erasing the registry keys deposited on a
26 computer by the Plaintiff, “Stottlemire and Defendants have intentionally manufactured, offered to
27 the public, and provided a service, method and technology...to gain unauthorized access to
28 Plaintiff’s copyrighted works” (TAC ¶ 48) and is clearly a violation of Rule 11.

1 **PROCEDURAL HISTORY**

2 Plaintiff filed its Complaint with this Court on July 2, 2007 alleging violations of the
3 Digital Millennium Copyright Act (“DMCA”) 17 U.S.C. § 1201 and related state law claims
4 against defendants John Stottlemire and Does 1-10 (collectively “Defendant”).

5 Defendant filed an Administrative Motion to Extend Time to Answer the Complaint on
6 July 24, 2007 which was granted in part by this Court, granting Defendant until September 24,
7 2007 in which to answer Plaintiff’s complaint.

8 Plaintiff filed its First Amended Complaint (“FAC”) on August 29, 2007 and again alleged
9 violations of the DMCA and related state law claims against Defendant.

10 Defendant filed responsive pleadings to the FAC on September 24, 2007. The responsive
11 pleadings included Defendant’s Motion to Dismiss for Failure to State a Claim upon which Relief
12 May Be Granted, or in the alternative, for Summary Judgment and its supporting Memorandum of
13 Points and Authorities. Plaintiff filed its Opposition to Defendant’s responsive pleadings on
14 November 13, 2007. Defendant filed his Reply to Opposition to Defendant’s responsive pleadings
15 on November 20, 2007. The Court, being fully briefed and hearing the responsive pleadings on
16 December 4, 2007, granted in part Defendant’s Motion to Dismiss and dismissed the First
17 Amended Complaint with leave to amend on December 12, 2007. The Court gave Plaintiff until
18 January 2, 2008 to file a Second Amended Complaint.

19 Plaintiff filed its Second Amended Complaint (“SAC”) on December 27, 2007 and alleged
20 violations of the DMCA, specifically 17 U.S.C. § 1201(a) and 17 U.S.C. § 1201(b); and related
21 state law claims against Defendant.

22 Defendant filed an Administrative Motion to Extend Time to Answer the Second Amended
23 Complaint on January 14, 2008 which was granted in part by this Court, granting Defendant until
24 February 26, 2008 in which to answer Plaintiff’s SAC.

25 Defendant filed responsive pleadings to the SAC on February 26, 2008. The responsive
26 pleadings included Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint for
27 Failure to State a Claim upon which Relief May Be Granted and it’s supporting Memorandum of
28 Points and Authorities. On March 25, 2008 *Amicus Curiae* EFF (“*Amicus Curiae*”) filed Leave to

1 File Amicus Curiae Brief in Support of Defendant’s Motion to Dismiss concurrently with Brief
2 Amicus Curiae of Electronic Frontier Foundation in Support of Defendant’s Motion to Dismiss.
3 This Court granted *Amicus Curiae* Motion for Leave to File Amicus Curiae Brief in Support of
4 Defendant’s Motion to Dismiss on March 31, 2008. Plaintiff and Defendant filed a Stipulation to
5 Extend Time to File Opposition and Reply to Motion to Dismiss on March 28, 2008 which was
6 granted by this Court on March 31, 2008 granting Plaintiff until April 4, 2008 to file its opposition
7 to Defendant’s Motion to Dismiss including any response to the proposed amicus brief filed by
8 *Amicus Curiae* and granting Defendant until April 11, 2008 to reply to Plaintiff’s opposition. The
9 Court also, on the Court’s own Motion, continued the hearing on Defendant’s Motion to Dismiss
10 until May 6, 2008. On April 3, 2008, *Amicus Curiae*, Defendant and Plaintiff filed a Stipulation,
11 which was granted by the Court, to continue the hearing on Defendant’s Motion to Dismiss until
12 May 13, 2008.

13 The Court, being fully briefed and hearing the responsive pleadings on May 13, 2008
14 granted in part Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint for Failure
15 to State a Claim on which Relief May Be Granted on July 2, 2008 and dismissed Plaintiff’s SAC
16 First Cause of Action with leave to amend; dismissed Plaintiff’s SAC Third Cause of Action with
17 leave to amend; dismissed Plaintiff’s SAC Fourth Cause of Action with leave to amend; and
18 dismissed Plaintiff’s SAC Fifth Cause of Action, Conversion, without leave to amend. The Court
19 further ordered Plaintiff file an Amended Complaint by July 22, 2008.

20 Plaintiff filed its Third Amended Complaint (“TAC”) on July 22, 2008 and alleged
21 violations of the DMCA, specifically 17 U.S.C. § 1201(a) and 17 U.S.C. § 1201(b); and related
22 state law claims against Defendant.

23 Defendant filed an Administrative Motion to Extend Time to Answer the Third Amended
24 Complaint on July 28, 2008 which was granted in part by this Court, granting Defendant until
25 October 6, 2008 in which to respond to Plaintiff’s TAC. The Court, as a part of granting
26 Defendant’s Administrative Motion to Extend Time to Answer the Third Amended Complaint,
27 shortened the safe harbor period provided under Federal Rules of Civil Procedure Rule 11 to five
28 days.

1 **STATEMENT OF RELEVANT FACTS**

2 Plaintiff offers coupons for many of the country’s most prominent consumer product
3 manufacturers, advertising agencies, retailers, promotional marketing companies and Internet
4 portals, to consumers over the Internet. These coupons are offered by Plaintiff’s clients from
5 Plaintiff’s clients’ websites, online banner ads and targeted e-mails. Plaintiff also offers a
6 sampling of coupons on its own website (TAC ¶¶ 10, 11).

7 To print a coupon from a website, online banner ad or targeted e-mail belonging to one of
8 Plaintiff’s clients or to print a coupon directly from Plaintiff’s website, consumers are required to
9 download and install Plaintiff’s coupon printer software using standard techniques for installing
10 plug-ins from Plaintiff’s website (TAC ¶¶ 16, 21). After installing Plaintiff’s coupon printer
11 software from Plaintiff’s website, Plaintiff assigns the particular computer in which the software
12 was installed a unique identifier and identifies the computer as unique (TAC ¶ 16). This unique
13 identifier is stored within the Microsoft Windows registry as registry keys and in hidden files on
14 the computer.¹

15 During the month of May 2007, Defendant posted instructions on two different online
16 forums which would erase all Microsoft Windows registry keys and hidden files deposited on a
17 computer by Plaintiff. The Microsoft Windows registry keys and hidden files which would have
18 been deleted by instructions provided by Defendant included the unique identifier Plaintiff stored
19 within the Microsoft Windows registry and hidden files which Plaintiff uses to identify a computer
20 as unique. Instructions posted by the Defendant would not have made any other changes to a
21 consumer’s computer other than erasing the Microsoft Windows registry keys and hidden files
22 deposited on the consumer’s computer by Plaintiff. Over the course of the next several months,
23
24

25 ¹ Plaintiff’s TAC ¶ 15 states “features block an individual computer’s access to a particular coupon
26 offer altogether if that computer does not have the proper registry keys in place (has not previously
27 been identified as a unique computer)” and although Plaintiff’s security features do not block
28 access as stated; when Plaintiff identifies a computer as unique, Plaintiff causes the unique
identifier to be stored in the Microsoft Windows registry.

1 Defendant continued to update the posted instructions each time Plaintiff changed the names of the
2 Microsoft Windows registry keys or the hidden files Plaintiff stored on the consumer's computer.

3 Each time a consumer would follow the instructions provided by Defendant, the Microsoft
4 Windows registry keys and the hidden files deposited by Plaintiff would be completely removed,
5 they simply would no longer exist. As a result of this, the next time a consumer who would follow
6 Defendant's instructions attempted to print a coupon from Plaintiff's website, or a website, online
7 banner ad or targeted email belonging to one of Plaintiff's clients, Plaintiff would assign the
8 consumer's computer a unique identifier and store that unique identifier in Microsoft Windows
9 registry keys and hidden files, again identifying that computer as unique.

10 THE FALSE ALLEGATIONS IN THE TAC

11 Plaintiff falsely claims its security features "block an individual computer's access to a
12 particular coupon offer *altogether* if that computer does not have the proper registry keys in place
13 (has not previously been identified as a unique computer)" (emphasis added) (TAC ¶ 15). While
14 Plaintiff stores information in the Microsoft Windows Registry which identifies a computer
15 uniquely as they have claimed, Plaintiff obviously does not block access if that computer has not
16 been previously identified as unique. A computer that has not been identified as unique would not
17 have the proper registry keys in place.

18 Under Plaintiff's claim it would be impossible for consumers who had never printed a
19 coupon from Plaintiff's website to gain access to Plaintiff's coupons and print the coupons.
20 Fundamentally, these consumers would not have the "proper registry keys in place" as there has
21 never been an opportunity for Plaintiff to identify them as a unique computer and create the proper
22 registry keys. The answer to this question can be found elsewhere in Plaintiff's TAC: "When a
23 consumer first request a coupon from a website, Plaintiff delivers to the consumer's computer a
24 security feature in the form of a unique identifier" (TAC ¶ 16). This, without doubt, is exactly how
25 Plaintiff's security feature works: The security features inspects the Microsoft Windows Registry
26 to determine if the "proper registry keys [are] in place"; if "that computer does not have the proper
27 registry keys in place" Plaintiff "delivers to the consumer's computer a security feature in the form
28 of a unique identifier" and stores the unique identifier in the Microsoft Windows Registry and then

1 provides access to Plaintiff's coupons. At no point does the security feature "block an individual
2 computer's access" in the absence of the "proper registry keys", the security features simply create
3 the proper registry keys without any opportunity for the consumer to intervene.

4 Plaintiff's flagrant disregard of the truth is most obvious in Plaintiff's claims against
5 Defendant. The gravamen of Plaintiff's claim here is that Defendant created, utilized, offered and
6 distributed software which erased the "proper registry keys" that identified a computer as unique
7 thereby, Defendant "allowed an individual uniquely identified computer to gain repeated
8 unauthorized access to the same coupon offers" (TAC ¶ 27) and as a result of that access, "also
9 allowed such a computer to obtain additional, unauthorized numbers of uniquely identified coupon
10 prints" (Id.) Plaintiff claims in its TAC that the security features block access altogether to the
11 particular coupon offer if that computer does not have the proper registry keys in place, however
12 the Court is also to believe that by erasing the proper registry keys Defendant allowed the
13 computer to gain access to the coupon offer. These two claims are exact opposite to one another
14 and it is obviously impossible for both of them to be true.

15 Plaintiff claims its security measures block access altogether when a computer, operated by
16 a consumer has not been identified as unique. The notion that any part of this statement holds truth
17 is simply absurd. If the statement were true, how would it be possible for anyone who has never
18 printed a coupon from Plaintiff's website to gain access to Plaintiff's coupons? It would be equally
19 impossible, if Plaintiff blocked access altogether when a computer was not identified as unique, for
20 a consumer to gain access to Plaintiff's coupons after using the method Defendant created,
21 described and distributed; the very reason Plaintiff has filed this claim against the Defendant.

22 **ARGUMENT**

23 Plaintiff makes a false claim to satisfy the pleading requirements of the Federal Rules of
24 Civil Procedure to bring its First Cause of Action against Defendant, an alleged violation of 17
25 U.S.C. § 1201(a) and sanctions are warranted pursuant to Federal Rules of Civil Procedure Rule
26 11.

27 Rule 11 provides, in relevant part:
28

1 By presenting to the court (whether by signing, filing, submitting, or later
2 advocating) a pleading, written motion, or other paper, an attorney...is *certifying*
3 *that to the best of the person's knowledge, information, and belief, formed after an*
4 *inquiry reasonable under the circumstances,... the allegations and other factual*
5 *contentions have evidentiary support.* Fed.R.Civ.P.11 (b)(3) (emphasis added).

6 Sanctions must be imposed on any party, attorney, or law firm that has violated Rule 11(b)
7 or is responsible for the violation. Fed.R.Civ.P.11(c)(1)(A) ("Absent exceptional circumstances, a
8 law firm shall be held jointly responsible for violations committed by its partners, associates, and
9 employees."); see also Rule 11 Advisory Committee Notes (1993) ("Since ... a [sanctions] motion
10 may be filed only if the offending paper is not withdrawn or corrected within 21 days after service
11 of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under
12 established principles of agency."); *Religious Technology Center v. Gerbode*, No. CV 93-2226
13 AWT, 1994 WL 228607, at **4-5 (C.D. Cal. May 2, 1994) (discussing imposition of sanctions
14 against parties, law firms, and co-counsel).

15 As described by the Supreme Court, the

16 "central purpose of Rule 11 is to deter baseless filings in District Court and thus ...
17 streamline the administration and procedure of the federal courts ... Although the
18 Rule must be read in light of concerns that it will spawn satellite litigation and chill
19 vigorous advocacy ... any interpretation must give effect to the Rule's central goal
20 of deterrence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 at 393 (1990).

21 Designed for deterrence, the Rule is governed by an objective standard of reasonableness;
22 no showing of subjective intent or bad faith is required. *Truesdell v. S. Cal. Permanente Medical*
23 *Group*, 209 F.R.D. 169 at 173-174 (C.D. Cal. 2002).

24 By requiring certification that a pleading's allegations and factual contentions have
25 evidentiary support, Rule 11 imposes three related obligations on counsel. First, counsel must
26 conduct a reasonable investigation into the factual allegations. *See generally Estate of Blue v.*
27 *County of Los Angeles*, 120 F.3d 982 at 985 (9th Cir. 1997). Second, counsel must act reasonably
28 in the face of the results of the investigation. *See Schrag v. Dinges*, 73 F.3d 374 (Table), 1995 WL
675475, at *12 (10th Cir. Nov. 14, 1995); *see also id.* at *15 ("Rule 11 requires that an attorney act
reasonably based on the information he learns from a pre-filing investigation into the facts ... If,
after inquiry, the facts do not support the claims, counsel should not sign the complaint.")
(citations omitted); *Navarro-Ayala v. Nunez*, 968 F.2d 1421 at 1426 (1st Cir. 1992) ("The duty of

1 reasonable inquiry performance requires that the signer of a pleading act upon knowledge he
2 acquires.”).

3 Third – and axiomatically – counsel must not misrepresent the results of his investigation
4 to the Court. Indeed, the law on this point is unmistakable: filing a pleading containing false
5 allegations is grounds for sanctions under Rule 11. *See, e.g., Truesdell v. S. Cal. Permanente*
6 *Medical Group*, 293 F.3d 1146 at 1153-54 (9th Cir. 2002) (upholding sanctions against counsel
7 under Rule 11 where complaint stated allegations that counsel “must have known were false”
8 based on his representation of another client); *Schrag*, 1995 WL 675475 at *13 (counsel’s filing of
9 amended complaint containing allegations “that even a cursory reading of the management
10 agreement [on which the complaint was based] would show to be false” violated Rule 11);
11 *Navarro-Ayala v. Nunez*, 968 F.2d at 1421 at 1426 (defendant’s signature on pleading “that he had
12 reason to believe was both incorrect and misleading” warranted imposition of sanctions under Rule
13 11); *Peerless Industries Paint Coatings, Co. v. Canam Steel Corporation*, 979 F.2d 685 at 686-87
14 (8th Cir. 1992) (upholding Rule 11 sanctions against counsel where pleadings misstated known,
15 relevant facts); *Avirgan v. Hull*, 932 F.2d 1572 at 1581-82 (11th Cir. 1991) (upholding sanctions
16 against counsel who filed affidavit outlining purported testimony of 79 witnesses, where witnesses
17 “later stated under oath that they did not know [plaintiffs’ counsel], had never spoken to him, or
18 flatly denied the statements he had attributed to them in his affidavit”); *Method Electronics v.*
19 *Adam Technologies, Inc.*, No. 03-C-2971, 2003 WL 21799934 at *11 (N.D. Ill. July 25, 2003),
20 *aff’d*, 371 F.3d 923 (7th Cir. 2004) (Rule 11 sanctions against counsel warranted where complaint
21 contained false venue allegation in effort to deceive court and litigate in convenient forum);
22 *Truesdell*, 209 F.R.D. at 177 (imposition of Rule 11 sanctions against counsel “independently
23 justified” by fact that counsel filed complaint containing claim that he must have known was false,
24 by virtue of his representation of another client); *Zatko v. Rowland*, 835 F. Supp. 1174 at 1181-82
25 (N.D. Cal. 1993) (sanctioning *pro se* plaintiff under Rule 11 for filing a complaint containing
26 untrue factual allegations and material misrepresentations); *Balfour Guthrie, Inc. v. Hunter Marine*
27 *Transport, Inc.*, 118 F.R.D. 66 at 76 (M.D. Tenn. 1987) (sanctioning plaintiff and its counsel under
28 Rule 11 for filing complaint after pre-filing investigation “disclosed facts that only exculpated

1 defendant”). As the United States Court of Appeals for the Second Circuit has aptly noted, “the
2 creativity of an attorney may not transcend the facts of a given case; counsel in his attempts at
3 creativity concocted “facts” that were not well grounded, and therefore exceeded the bounds of
4 conduct acceptable of members of the bar of this court as well as those incorporated in Fed. R. Civ.
5 P. 11.” *Levine v. FDIC*, 2F.3d 476 at 479 (2nd Cir. 1993).

6 Here, Defendant has successfully challenged Plaintiff’s claim for relief pursuant to 17
7 U.S.C. § 1201(a) twice in the past year. Most recently, the Electronic Freedom Foundation,
8 *amicus curiae* (“EFF”) argued “because [Plaintiff’s] consumers have access to coupons (typically
9 two per computer) ... the allegations pertain only to § 1201(b) (the provision dealing with use of
10 protected works, i.e., “rights controls”) and not to § 1201(a) (the provision addressing “access
11 controls”) (*Coupons, Inc. v. Stottlemire*, Order on Defendant’s Motion to Dismiss Second
12 Amended Complaint, CV 07-03457 HRL, July 2, 2008, Pgs 3,4). The Court accepted this
13 argument and dismissed with leave to amend, Plaintiff’s First Cause of Action in the Second
14 Amended Complaint. The Court noted “as the SAC currently stands, the only viable asserted
15 claim is under § 1201(b) “rights controls” i.e. allowing people to print more than the authorized
16 number of copies. If [Plaintiff] wishes to assert a claim under the newly argued § 1201(a) “unique
17 coupons” / “access controls” theory, it may do so in the amended complaint” (Id at Pg 5).

18 In the light of the Court’s decision, Plaintiff indeed amended its SAC. Plaintiff filed a
19 TAC on July 22, 2008. The TAC filed by Plaintiff again alleges Defendant violated 17 U.S.C. §
20 1201(a) and that Plaintiff is entitled to relief as a result of that violation. In an attempt to escape
21 arguments that Plaintiff is not entitled to protection under 17 U.S.C. § 1201(a) made previously
22 before the Court, Plaintiff falsely claims that its security features “block an individual computer’s
23 access to a particular coupon offer altogether if that computer does not have the proper registry
24 keys in place (has not previously been identified as a unique computer)” (TAC ¶ 15). With this
25 false claim it becomes difficult for the Defendant to move the Court for dismissal pursuant to
26 Federal Rules of Civil Procedure 12(b)(6). The Court’s posture that “all material factual
27 allegations should be accepted as true and construed in the light most favorable to the nonmoving
28 party” *Cahill v. Liberty Mutual Insurance Company*, 80 F.3d 336 at 337-38 (9th Cir. 1996)

