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28E-FILED on 4/6/2012

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOE HAND PROMOTIONS, INC.,

Plaintiff,

v.

AIMEE NGUYEN, individually and d/b/a XA  
LANG,

Defendant.

No. 11-CV-04745 RMW

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S MOTION  
TO STRIKE DEFENDANT'S ANSWER**[Re Docket No. 13]**

Plaintiff Joe Hand Promotions, Inc. moves to strike all sixteen affirmative defenses asserted by defendant Aimie Nguyen in her Answer to plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(f). Defendant opposes the motion. The court has read the moving and opposing briefs and considered the arguments of counsel. For the reasons set forth below, the court grants in part and denies in part plaintiff's motion to strike.

**I. BACKGROUND**

Plaintiff Joe Hand Promotions, Inc. owns exclusive commercial distribution rights to *Ultimate Fighting Championship 119: Frank Mir v. Mirko Cro Cop* (the "program"). Compl. ¶ 9. On September 23, 2011, plaintiff filed this action against defendant Aimie Nguyen individually and dba Xa Lang, alleging that defendant unlawfully intercepted or displayed the program at her commercial

1 establishment in San Jose, California. Compl. ¶ 12. The complaint alleges violations of the  
2 Communications Act of 1934, 47 U.S.C. § 605; the Cable & Television Protection and Competition  
3 Act of 1992, 47 U.S.C. § 553; and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.  
4 Code § 17200 *et seq.*, as well as a cause of action for conversion. *See* Compl. ¶¶ 8, 18, 23, 27.

5 On February 9, 2012, defendant filed an answer to the complaint asserting sixteen  
6 affirmative defenses. *See* Dkt. No. 11. On February 29, 2012, plaintiff filed a Motion to Strike the  
7 Affirmative Defenses pled in the answer. *See* Dkt. No. 13. Defendant filed a written opposition on  
8 March 14, 2012. *See* Dkt. No. 15. Plaintiff filed its reply on March 20, 2012. *See* Dkt. No. 16.

9 Defendant pleads the following affirmative defenses in her answer: (1) the Akien exception,  
10 (2) permissible secondary transmission, (3) lawful use, (4) fair use of copyrighted work, (5)  
11 untimely copyright registration, (6) improper claim for conversion, (7) failure to state a cause of  
12 action, (8) lack of subject matter jurisdiction, (9) waiver, (10) estoppel, (11) undue hardship, (12)  
13 undue penalty, (13) unjust enrichment, (14) cumulative and duplicative claims, (15) adequate  
14 remedy at law, (16) no violation of 17 U.S.C. § 106.

## 15 II. DISCUSSION

### 16 A. Legal Standard

17 Rule 12(f) states that "the court may order stricken from any pleading any insufficient  
18 defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

19 Rule 8(b) provides that "[a] party shall state in short and plain terms the party's defenses."  
20 Fed. R. Civ. P. 8(b). However, an affirmative defense must still give the plaintiffs "'fair notice' of the  
21 basis of the defense" and may be stricken if it fails to do so. *Qarbon.com Inc. v. eHelp Corp.*, 315 F.  
22 Supp. 2d 1046, 1048 (N.D. Cal. 2004). An affirmative defense is "a defendant's assertion of facts  
23 and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the  
24 complaint are true." *Black's Law Dictionary* (8th ed. 2004).

25 When ruling on a motion to strike, the court must view the pleading in question in the light  
26 most favorable to the non-moving party. *In re Facebook PPC Adver. Litig.*, 709 F. Supp. 2d 762,  
27 772 (N.D. Cal. 2010). When that non-moving party is proceeding pro se, the pleading in question  
28 should be construed even more liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

1 However, pro see litigants are still required to adhere to the rules of procedure. *Ghazali v. Moran*, 46  
2 F.3d 52, 54 (9th Cir. 1995). Accordingly, the court considers plaintiff's motion under generally  
3 applicable standards, while liberally construing defendant's affirmative defenses.

4 **B. Defenses That Are Not Affirmative Defenses**

5 The following defenses are stricken because they are not affirmative defenses to plaintiff's  
6 claims: (6) improper claim for conversion, (7) failure to state a cause of action, (8) lack of subject  
7 matter jurisdiction, and (16) no violation of 17 U.S.C. § 106. Rather than affirmative defenses, these  
8 defenses allege defects in plaintiff's claims and raise issues that are plaintiff's burden to prove.  
9 Moreover, the argument of affirmative defense (6) fails to stand as numerous federal courts in  
10 California have awarded conversion damages in cases filed by the very plaintiff to the instant action.  
11 *See Joe Hand Promotions v. Be*, No. 11-01333, 2011 WL 5105375 (N.D. Cal. Oct. 26, 2011); *see*  
12 *also Joe Hand Promotions v. Burlison*, No. 11-00499, 2011 WL 4905631 (E.D. Cal. Oct. 14, 2011).  
13 Accordingly, affirmative defenses (6), (7), (8), and (16) are stricken without leave to amend.

14 **C. Defenses Insufficiently Pled**

15 "The key to determining the sufficiency of pleading an affirmative defense is whether it  
16 gives plaintiff fair notice of the defense." *J & J Sports Productions, Inc. v. Montanez*, No. 10-cv-  
17 01693, 2010 WL 5279907, at \*2 (E.D. Cal. Dec. 13, 2010) (quoting *Wyshak v. City Nat'l Bank*, 607  
18 F.2d 824, 827 (9th Cir. 1979)). "The fair notice pleading requirement is met if the defendant  
19 sufficiently articulated the defense so that the plaintiff was not a victim of unfair surprise."  
20 *Montanez*, 2010 WL 5279907, at \*2 (quoting *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir.  
21 1999)).

22 Here, affirmative defenses (3), (4), (9), (10), (11), (12), (13) and (15) are stricken because  
23 they are wholly insufficient in providing plaintiff adequate notice of the facts supporting the defense.  
24 They are mere legal conclusions that fail to give plaintiff, or the court, any factual support to  
25 determine the applicability of such defenses. *See Montanez*, 2010 WL 5279907, at \*3 (striking  
26 affirmative defenses as insufficient when not plead with supporting facts). For example, defendant  
27 states that "some or all of the claims for damages in the Complaint are barred because Plaintiff  
28 waived those claims." *See* Dkt. No. 11. Defendant however offers no insight into what conduct by

1 plaintiff constituted waiver, when such waiver occurred, or even what claims plaintiff waived., the  
2 court strikes these defenses with leave to amend. Any amended answer should put forth sufficient  
3 legal defenses supported by specific factual allegations.

4 **D. Copyright Related Defenses**

5 The following affirmative defenses are also stricken: (1) the Akien exception, (2) permissible  
6 secondary transmission, and (5) untimely copyright registration. Although defendant states that  
7 "courts have construed sections 47 U.S.C. §§ 605 and 553 within the boundaries of the copyright  
8 statute," Dkt. No. 11, her copyright defenses are inapplicable to the instant action because plaintiff's  
9 claims are not brought under copyright law. Moreover, defendant's reliance on *J & J Sports*  
10 *Productions, Inc. v. Soto*, 10-CV-885, 2010 WL 3911467 (S.D. Cal. Sep. 28, 2010) is misguided as  
11 that case does not hold that 47 U.S.C. §§ 605 and 553 are within the copyright statute. Lastly,  
12 defendant has not sufficiently demonstrated that the aforementioned defenses could even apply to 47  
13 U.S.C. §§ 605 and 553. Accordingly, the court strikes these affirmative defenses without leave to  
14 amend.

15 **E. Cumulative and Duplicative Claim Defense**

16 The court denies plaintiff's motion to strike affirmative defense (14). Several courts have  
17 denied recovery for conversion damages as "cumulative" where statutory damages were already  
18 awarded. *DirecTV, Inc. v. Pahnke*, 405 F. Supp. 2d 1182, 1193, (E.D. Cal. 2005) (having already  
19 awarded statutory damages under § 605, the court denied plaintiff's additional request for conversion  
20 damages as "cumulative and excessive"); *see also Kingvision Pay-Per-View v. Guzman*, No. 09-  
21 00217, 2009 WL 1475722, at \*3 (N.D. Cal. May 27, 2009) (granting default judgment and statutory  
22 damages under § 605, while dismissing § 553 and conversion claims). Defendant's defense here  
23 could possibly reduce or negate her liability under certain of plaintiff's claims, and as such the court  
24 views this affirmative defense as sufficient.

25 **III. ORDER**

26 For the foregoing reasons, the court grants in part and denies in part plaintiff's motion to  
27 strike affirmative defenses. All defenses are stricken with the exception of (14) cumulative and  
28 duplicative claim. Defenses (1) the Akien exception, (2) permissible secondary transmission, (5)

1 untimely copyright registration, (6) improper claim for conversion, (7) failure to state a claim, (8)  
2 lack of subject matter jurisdiction, and (16) no violation of 17 U.S.C. § 106 are stricken without  
3 leave to amend. Defenses (3) lawful use, (4) fair use of copyrighted work, (9) waiver, (10) estoppel,  
4 (11) undue hardship, (12) undue penalty, (13) unjust enrichment, and (15) adequate remedy at law  
5 are stricken with leave to amend. Defendant has twenty days from the date of this order to file an  
6 amended answer properly asserting any applicable affirmative defenses and the factual or legal basis  
7 for each.

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DATED: April 6, 2012

  
RONALD M. WHYTE  
United States District Judge