

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

RICHARD CLEMONS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:17-cv-00963 (AJT/TCB)
	)	
GOOGLE, INC.,	)	
	)	
Defendant.	)	
_____	)	

**ORDER**

This matter is before the Court on Defendant’s Motion to Dismiss for Failure to State Claim [Doc. No. 10] (the “Motion”). On December 22, 2017, the Court held a hearing on the Motion, following which the Court took the Motion under advisement. Upon consideration of the Motion, the memorandum of law in support thereof, the arguments presented by counsel and *pro se* Plaintiff at the December 22, 2017 hearing, and for the reasons discussed below, Plaintiff fails to state a claim of relief pursuant to the Stored Communications Act (“SCA”), 18 U.S.C. § 2701, *et seq.* Accordingly, Defendant’s Motion to Dismiss for Failure to State a Claim is GRANTED.

On August 28, 2017, Plaintiff filed a “[c]ivil complaint pursuant to [T]itle 2 of SCA[the Stored Communications Act]” Compl. ¶ 1. While it is unclear precisely which provision of the Stored Communications Act (“SCA”), 18 U.S.C. § 2701 *et seq.*, Plaintiff contends was violated, he expressly seeks relief pursuant to 18 U.S.C. § 2707(a), (b)(1). Plaintiff also seeks damages of \$100,000 and an order requiring the Defendant to “surrender” the email account at issue and to produce his electronically stored writings. Compl. at 3. On November 16, 2017, Defendant filed a Motion to Dismiss. On December 20, 2017, Plaintiff filed a Motion to Amend the Original

Claim for Relief [Doc. No. 22] (“Motion to Amend Complaint”), in which he seeks leave to add an additional claim under the Digital Millennium Copyright Act, 17 U.S.C. § 1201(2)(a), (c).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although a *pro se* party’s complaint must be construed liberally, it must nevertheless comply with the proper pleading rules and allege some comprehensible basis for the Court’s jurisdiction. *See Giarratano v. Johnson*, 521 F.3d 298, 304 n.5 (4<sup>th</sup> Cir. 2008) (a *pro se* complaint must provide “more than labels and conclusions”) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotations omitted); *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387, 391 (4<sup>th</sup> Cir. 1990) (“The ‘special judicial solicitude’ with which a district court should view ... *pro se* complaints does not transform the court into an advocate. Only those questions which are squarely presented to a court may be properly addressed”); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4<sup>th</sup> Cir. 1985) (“Principles requiring generous construction of *pro se* complaints are not ... without limits” and district judges “cannot be expected to construct full blown claims from sentence fragments”). No matter how liberally construed, Plaintiff’s Complaint fails to state a cause of action that entitles him to relief.

In the Complaint, Plaintiff alleges that he entered a service agreement for an email account he maintained with the service provider, Defendant Google Inc.,<sup>1</sup> Compl. ¶ 1; that his email account was “maintained in good standing” and contained “valuable intellectual properties[,]” Compl. ¶ 2; that his email account was “compromised” and that he made repeated attempts to contact Defendant to inquire about “a procedure adequate to resolve what was

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<sup>1</sup> On November 16, 2017, Defendant filed a Motion [Doc. No. 14] to modify the case caption from Google, Inc. to Google, LLC, which was granted on November 20, 2017.

identity theft and fraud perpetrated upon the [email] account.” Compl. ¶ 3. He further alleges that Defendant responded by automatic reply that it was unable to verify whether the email account belonged to the Plaintiff since he no longer possessed the same cell phone associated with the account’s email address, *Id.*, following which he made numerous attempts to contact the Defendant regarding the loss of his “copy right material with commercial value” but his requests were “simply ignored.” Compl. ¶¶ 4, 5. Since he has been unable to access his email account, he has “suffered deadlines of contract dispute with his publisher Thom Byxbe, an independent internet publisher.” Compl. ¶ 5.

Although the Plaintiff fails to allege which provision of the SCA Defendant purportedly violated, Plaintiff seeks relief under 18 U.S.C. § 2707(a), which provides that “any provider of electronic communication service, subscriber, or customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a *knowing* or *intentional* state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.” *Tucker v. Waddell*, 83 F.3d 688, 690 (4th Cir. 1996) (citing 18 U.S.C. § 2707(a)) (emphasis added). Here, Plaintiff fails to allege any facts that make plausible any claim that Defendant acted with knowledge or intent. Moreover, as Defendant correctly contends, the only cause of action that could reasonably be read into the Complaint is 18 U.S.C. § 2701(a)<sup>2</sup> and plaintiff concedes that Defendant as a service provider

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<sup>2</sup> Section 2701(a) provides:

Except as provided in subsection (c) of this section whoever –

- (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
- (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorization access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2701(a).

statutory immunity for any liability under that provision.<sup>3</sup> See [Doc. No. 22] ¶ 1 (where plaintiff admits in his Motion to Amend Complaint that Defendant “correctly aver[s] that they are immune from suit under [T]itle 2 of the SCA....”). For these reasons, Plaintiff has failed to allege a cause of action that entitles him to relief under the SCA and Defendant’s Motion to Dismiss will accordingly be granted.

The Court also denies Plaintiff’s request for leave to amend the Complaint to file a claim under the Digital Millennium Copyright Act, 17 U.S.C. § 1201(2)(a), (c). First, Plaintiff is not entitled to amend as a matter of right since he did not file an amended complaint within the time limits specified under Fed. R. Civ. P. 15(a)(1). Second, Plaintiff relies on the same factual allegations as set forth in his Complaint, together with some additional allegations stated in his Motion to Amend Complaint. Upon review of those allegations for the purposes of his Motion to Amend Complaint, the Court concludes that the Plaintiff has failed to state facts that make plausible any cognizable claim and that any attempt to amend his Complaint would be futile. Accordingly, it is hereby

ORDERED that the Defendant’s Motion to Dismiss for Failure to State Claim [Doc. No. 10] be, and the same hereby is, GRANTED, and this action is DISMISSED; and it is further

ORDERED that Plaintiff’s MOTION to Amend the Original Claim for Relief [Doc. No. 22] be, and the same hereby is, DENIED.

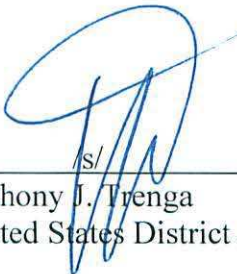
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<sup>3</sup> Section 2701 (c)(1) provides, in pertinent part, “Subsection (a) of [§ 2701] does not apply with respect to conduct authorized – (1) by the person or entity providing a wire or electronic communications service....” See *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1032 (N.D. Cal. 2014) (granting motion to dismiss on the basis that Section 2701(c)(1) “grants immunity for alleged violations of § 2701(a) to [electronic communication service providers] like Yahoo.”); *Hoofnagle v. Smyth-Wythe Airport Comm’n*, No. 1:15CV00008, 2016 WL 3014702, at \*10 (W.D. Va. May 24, 2016) (Section 2701(c)(1) of “[t]he SCA exempts a party from liability if the conduct at issue was authorized ... by the person or entity providing a wire or electronic communications service...”).

The Clerk is directed to forward copies of this Order to all counsel of record and to *pro se* Plaintiff at the address on record and to enter judgment in defendant's favor pursuant to Fed. R. Civ. P. 58.

**This is a final order for purposes of appeal.** To appeal, Plaintiff must file a written Notice of Appeal with the Clerk of the Court within thirty (30) days of the date of this Order. A Notice of Appeal is a short statement stating a desire to appeal an order and identifying the date of the order Plaintiff wishes to appeal. Failure to file a timely Notice of Appeal waives Plaintiff's right to appeal this decision.

Alexandria, Virginia  
December 29, 2017

  
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/s/  
Anthony J. Trenga  
United States District Judge