

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UMG RECORDINGS, INC., et al.,

05 CV 1095 (DGT)(RML)

Plaintiffs,

- against

MARIE LINDOR,

Defendant
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**PLAINTIFFS' MEMORANDUM BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO PRECLUDE**

Plaintiffs respectfully submit this brief in opposition to defendant's motion to preclude plaintiffs from asserting or introducing evidence that defendant infringed any sound recordings of plaintiffs other than those identified and produced by plaintiffs on April 21, 2006. Defendant contends that a copyright plaintiff cannot proceed on a claim of infringement of a sound recording unless the plaintiff produces a copy of the infringing recording. Not only can defendant not cite a single case to support such a proposition, but also such a rule would be absurd. A copyright plaintiff is, in many respects, a victim of theft. In much the same way that someone who is a victim of theft need not introduce the stolen property into evidence to proceed on his or her claim, a copyright plaintiff is not required to produce the infringing recording. It is hornbook law that a copyright plaintiff need only identify the infringing recording, establish the plaintiff's copyright ownership and registration, and prove that the defendant is the infringer. Because plaintiffs have provided such evidence to defendant, and for the reasons more fully set forth below, defendant's motion should be denied.

FACTUAL BACKGROUND

Plaintiffs filed their Complaint in this action on February 28, 2005. See Affidavit of Richard L. Gabriel, Esq. in Support of Plaintiffs' Memorandum Brief in Opposition to Defendant's Motion to Preclude ("Gabriel Aff.") ¶ 2. In their Complaint, plaintiffs assert that defendant infringed on their "Copyrighted Recordings," which are defined to include all of the recordings on Exhibit A and certain of the recordings on Exhibit B to the Complaint. See Compl. ¶ 12.

On October 19, 2005, plaintiffs produced to defendant, in connection with their first set of requests for admissions, a Schedule 1, which listed the certain sound recordings from Exhibit B on which plaintiffs are proceeding. See Gabriel Aff. ¶ 3 & Exh. A thereto. Indeed, various of plaintiffs' requests for admissions were directed to Schedule 1, and, on March 7, 2006, defendant, through her current counsel, responded to each of those requests for admissions, never taking issue with the fact that those Schedule 1 recordings are properly in this case. See id. at ¶ 3.

On March 9, 2006, defendant served upon plaintiffs a request for production of documents. This request sought, among other things, all documents concerning the Copyrighted Recordings and all sound recordings downloaded by plaintiffs or their investigators from defendant. See id. at ¶ 4.

On April 21, 2006, plaintiffs responded to defendant's requests for production and produced hundreds of pages of documents, as well as copies of 11 of the hundreds of digital music files that defendant was distributing from the "share" folder on her computer. Plaintiffs' investigators downloaded these 11 files from defendant, and these files represent a sample of the

numerous recordings that defendant was distributing at the time that plaintiffs' investigators detected defendant's infringement. In addition to these files, plaintiffs produced voluminous evidence indicating that (1) they own or control and validly registered the copyrights in the sound recordings at issue, (2) those sound recordings were in the "share" folder on defendant's computer at the time plaintiffs first identified defendant as an infringer, and (3) defendant was distributing those recordings, without authorization, at that time. See id. at ¶ 5. This evidence includes: (1) a screenshot of defendant's "share" folder, see Compl., at Exh. B; (2) metadata that plaintiffs' investigators downloaded from defendant and that demonstrates that the files at issue were unauthorized copies, see Gabriel Aff., at ¶ 5 & Exh. B thereto; (3) electronic data indicating, among other things, the size of the files at issue, which correspond to the size of plaintiffs' copyrighted recordings, see id. at ¶ 5 & Exh. C thereto; (4) copyright registration forms showing that each of the Schedule 1 sound recordings was properly registered, see id. at ¶ 5 & Exh. D thereto; and (5) extensive documents showing copyright chain of title for each of the Schedule 1 recordings, see id. at ¶ 5. Notably, defendant has inquired in discovery about many of these documents, thereby undermining any suggestion of prejudice. See id. at ¶ 6.

For the reasons more fully set forth below, plaintiffs have provided all information required by Fed. R. Civ. P. 26(a) and 26(e)(1), and defendant's motion to preclude should be denied.

ARGUMENT

I. Neither Fed. R. Civ. P. 26(a) Or 26(e)(1) Nor Applicable Law Supports The Preclusion Of Evidence Of Infringement Of A Sound Recording Merely Because The Injured Copyright Holders Do Not Have Copies Of The Infringing Recordings

Defendant's motion is premised on her assertions that (1) plaintiffs have failed to disclose the information required by Fed. R. Civ. P 26(a) and 26(e)(1) and, therefore, cannot attempt to prove infringement of the Schedule 1 sound recordings at trial, and (2) a copyright owner is required to produce copies of the infringing sound recordings at issue before it is permitted to proceed on claims of infringement. Both of these premises are baseless.

First, with respect to Rules 26(a) and 26(e)(2), nothing in either of these rules requires a party to produce documents or information that the party does not have. This is particularly true in cases like this, where the information that allegedly was not produced is exclusively in defendant's control. Nor do either of these rules limit the ability of a plaintiff to assert claims that are supported by the facts and the evidence. Here, as more fully set forth above, plaintiffs have produced all documents in their possession, custody, or control regarding the Schedule 1 recordings, and these documents demonstrate that those recordings are plaintiffs' recordings and that they were, indeed, being distributed from the "share" folder on defendant's computer. Moreover, in response to defendant's discovery requests, plaintiffs have produced all of the copyright registration forms for the Schedule 1 sound recordings and voluminous documents proving the chain of copyright title as to those recordings, all of which prove plaintiffs' copyright ownership and valid copyright registration of each of the Schedule 1 recordings. Finally, defendant has questioned one of plaintiffs' representatives regarding the Schedule 1 sound recordings and has yet to depose the representatives of the other plaintiffs, thereby establishing

the absence of any prejudice to defendant here. As such, defendant's suggestion that plaintiffs have failed to provide responsive documents and that plaintiffs are litigating by stealth are unfounded.

Second, defendant's assertion that a copyright owner is required to produce a copy of the infringing sound recording at issue before it is permitted to proceed on a claim of infringement is without merit. Notably, defendant cites no case to support such a proposition, because it simply is not the law. Thus, there are innumerable cases against jukebox operators and bar and nightclub owners who infringe on copyright holders' copyrights by playing copyrighted music in their establishments without permission and without paying appropriate fees. See, e.g., Broadcast Music, Inc. v. Star Amusements, Inc., 44 F.3d 485 (7th Cir. 1995) (affirming award of statutory damages against jukebox operator); E Beats Music v. Andrews, 433 F. Supp. 2d 1322 (M.D. Ga. 2006) (holding that corporate owner and operator of nightclub and its sole shareholder were jointly and severally liable for copyright infringement by disc jockey in nightclub). There are likewise numerous cases against vendors in flea markets who distribute unauthorized copies of record companies' copyrighted sound recordings. See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996) (finding that complaint stated a claim against operators of a swap meet for infringement based on the sales of counterfeit recordings by independent vendors at the meet); Arista Records, Inc. v. Flea World, Inc., No. 03-2670 (JBS), 2006 WL 842883 (D. N.J. Mar. 31, 2006) (granting summary judgment for plaintiff record companies and against corporate defendants who owned and operated a flea market for vicarious and contributory copyright infringement based upon the sale by flea market vendors of counterfeit sound recordings); UMG Recordings, Inc. v. Sinnott, 300 F. Supp. 2d 993 (E.D. Cal. 2004) (granting

summary judgment in favor of plaintiff record companies and against owner and operator of a flea market for contributory and vicarious copyright infringement based on the sales by flea market vendors of counterfeit CDs). In neither case is the copyright owner required to produce a copy of the sound recording at issue, because it may well be unavailable due to the conduct of the defendant. The same principle applies here.

Moreover, a rule requiring a copyright owner to have a copy of the infringing recording before it is permitted to assert claims for infringement would make no sense. First, sound policy and the interests of efficiency and economy for the Court and the parties support the notion of allowing a copyright owner in a case such as this, where literally hundreds of works have been infringed, to download and produce only a sampling of such works, provided, of course, that the copyright owner can demonstrate copyright ownership and infringement of all of the works at issue. Second, a rule requiring copyright holders to produce copies of infringing recordings before they can pursue claims of infringement would prevent copyright owners from asserting their rights against the vast majority of infringers who never announce their infringing conduct to the copyright owners, let alone provide the copyright owners with copies of the infringing works. See, e.g., Warner Bros. Records, Inc. v. Payne, No. 6:06-cv-00051-WSSM, at 7 (W.D. Tex. July 17, 2006) (“As Plaintiffs note, ‘[p]iracy takes place behind closed doors and beyond the watchful eyes of a copyright holder.’”) (unpublished) (attached to Gabriel Aff., at Exh. E thereto).

The rule that defendant appears to espouse would be akin to saying that the government could never pursue a thief without having all of the contraband that the thief stole, surely an absurd proposition and one that the courts have consistently rejected. See, e.g., United States v.

Harper, 505 F.2d 924, 926 (5th Cir. 1974) (“Indeed there is no requirement that the prosecution introduce the contraband itself when other reliable evidence is proffered which establishes the nature of the contraband.”) (citation omitted); United States v. Graham, 464 F.2d 1073, 1076 (5th Cir.), cert. denied, 409 U.S. 987 (1972) (same). Moreover, such a rule would create a scenario in which defendants who have the ability to hide infringing works or other contraband could always avoid responsibility for their illegal conduct, again, an absurd result.

For these reasons as well, defendant’s arguments are baseless.

CONCLUSION

WHEREFORE, defendant’s motion to preclude plaintiffs from asserting or introducing evidence that defendant infringed any sound recordings of plaintiffs other than those identified and produced by plaintiffs on April 21, 2006 should be denied, and this Court should enter such other and further relief as this Court deems just and proper.

Respectfully submitted this 15th day of September, 2006.

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