



Holme Roberts & Owen LLP
Attorneys at Law

DENVER

June 29, 2007

ECF AND U.S. MAIL

BOULDER

Hon. Robert M. Levy
U.S. District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

COLORADO SPRINGS

Re: UMG Recordings, Inc. v. Lindor, No. 05 Civ. 1095 (DGT)(RML)

Dear Magistrate Judge Levy:

LONDON

Plaintiffs respectfully submit this opposition to what defendant characterizes as a renewed motion to compel responses to Document Request No. 2 and Interrogatory No. 2, dated March 9, 2006. In actuality, defendant's motion is an untimely motion for reconsideration. This matter was fully briefed, argued, and decided almost one year ago. See Doc. Nos. 29, 33, 35, and 8/3/06 Docket Entry. Moreover, the same discovery requests formed the basis for the protective order regarding the MediaSentry Agreement, which was litigated over many months. If defendant wanted to seek reconsideration, she should have filed that motion within 10 days, or by August 13, 2006. See Local Civil Rule 6.3. Alternatively, if defendant was dissatisfied with this Court's ruling, then she could have filed objections with Judge Trager within 10 days, pursuant to 28 U.S.C. § 636(b)(1). Defendant did neither, and her current motion comes 10 months too late.

LOS ANGELES

MUNICH

SALT LAKE CITY

The sole basis for defendant's effort to renew her unsuccessful motion to compel is that one federal district court in another district issued a ruling on a motion to dismiss (not a discovery issue) regarding a counterclaim containing the same inflammatory but factually void allegations that defendant has asserted as a defense here. Defendant's motion is baseless and should be denied for at least six reasons.

SAN FRANCISCO

First, the ruling in Lava Records v. Amurao introduced no new law or facts to justify defendant's untimely motion. Defense counsel himself stated to this Court that he has been litigating this very misuse defense for years. Thus, by defense counsel's own admission, Amurao changed nothing.

Hon. Robert M. Levy
June 29, 2007
Page 2

Second, the ruling in Lava Records v. Amurao did not involve a discovery issue at all. Thus, the fact that the defendant there has been permitted to plead a counterclaim for copyright misuse has nothing to do with whether the discovery at issue here was proper or not. This Court previously denied defendant's motion to compel on the grounds that the request at issue was overbroad. Nothing about the decision in Amurao has changed that fact.

Third, during the hearing at which Judge Brieant indicated that he would allow the misuse counterclaim to proceed for the time being, Judge Brieant himself recognized that his decision was in conflict with decisions of various other federal courts, but he specifically indicated that he did not care what a district judge in New Jersey or even in Foley Square thinks. See, e.g., Shady Records, Inc. v. Source Enterprises, Inc., No. 03 Civ. 9944 (GEL), 2005 WL 14920 at *15 (S.D.N.Y. Jan. 3, 2005) (noting that copyright misuse is not firmly established as a defense in the Second Circuit and collecting cases); Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services, 746 F. Supp. 320, 328 (S.D.N.Y. 1990) (dismissing copyright misuse counterclaim because "[s]uch a claim is unprecedented and the Court declines to create the claim"); see also Reliability Research Inc. v. Computer Associates International, Inc., 793 F. Supp. 68, 69 (E.D.N.Y. 1992) ("Within the Second Circuit, misuse or abuse of copyright is not firmly established as either a counterclaim or an affirmative defense, and there is some disagreement in the other Circuits as to whether it can give rise to a defense outside the context of antitrust violations, let alone an independent counterclaim."). As such, plaintiffs respectfully submit that Amurao was incorrectly decided. Indeed, although defendant makes much of Judge Brieant's recent decision, several other courts have recently dismissed the identical misuse counterclaim, which contained the identical inflammatory allegations that were made in Amurao and in this case. See Order, Elektra Entertainment Group v. Garrett, No. W-07-CA-037 (W.D. Tex. Jun. 22, 2007) (attached as Exhibit A); Interscope Records v. Kimmel, No. 3:07-cv-0108, 2007 WL 1756383, at *5 (N.D.N.Y. Jun. 18, 2007) (attached as Exhibit B); Order Granting Plaintiffs' Motion to Dismiss Counterclaims and Defendant's Answer, Affirmative Defenses and Counterclaims, at ¶¶ 59-66, Atlantic Recording Corp. v. DeMassi, Case No. 4:07-CV-00006 (S.D. Tex.) (attached as Exhibit C). These rulings, which represent the majority view, are, of course, entitled to at least as much weight as the ruling in Amurao. None justify this Court's revisiting a long closed discovery matter in this case.

Fourth, at the motions hearing in Amurao, Judge Brieant himself noted the limited nature of his ruling. Specifically, he expressly warned the parties that they were to concentrate on the dispute between them and that he would not have them

Hon. Robert M. Levy
June 29, 2007
Page 3

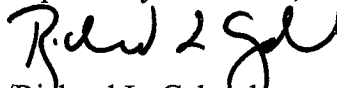
litigate issues among third parties and strangers. As such, plaintiffs firmly believe that the issue there will be resolved against the defendant on summary judgment, because there will be no evidence to support the inflammatory allegations that were made, all of which center on plaintiffs' national anti-piracy campaign, and not on the facts in Amurao.

Fifth, to the extent that defendant appears to believe that the language of her pleading is somehow relevant here, plaintiffs note that, just last month, the United States Supreme Court held that proper pleadings require "more than labels and conclusions, and the formulaic recitation of the elements of a cause of action will not do." See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007). As this Court will recall, in briefing defendant's motion to compel almost one year ago, plaintiffs specifically noted, with respect to defendant's assertions of copyright misuse, "[B]ald allegations of copyright misuse, without any supporting factual allegations, clearly do not open plaintiffs to a limitless fishing expedition." See Doc. No. 33 (attached as Exhibit D). In denying defendant's motion to compel, this Court apparently agreed with plaintiffs' assessment, and the United States Supreme Court's recent ruling further supports this Court's decision.

Finally, plaintiffs note that, in the very last sentence of her renewed motion to compel, defendant suggests that her renewed motion is proper in light of her "likely counterclaims" for copyright misuse. Defendant has not asserted counterclaims to date in this case, and it is surely too late for her to attempt to do so now.

For all of these reasons, defendant's renewed motion is nothing more than a regurgitation of the same arguments that defendant attempted and lost approximately one year ago, and the renewed motion should be denied.

Respectfully submitted,


s/Richard L. Gabriel
Counsel for Plaintiffs

RLG:ah

cc: Ray Beckerman, Esq. (by ECF and e-mail)
Richard Guida, Esq. (by ECF and e-mail)
Timothy M. Reynolds, Esq. (by e-mail)
Patrick Train-Gutierrez, Esq. (by e-mail)