

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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UMG RECORDINGS, INC., et al,

05 CV 1095 (DGT)(RML)

Plaintiff,

-against-

MARIE LINDOR,

Defendant.

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**DEFENDANT'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS'
MOTION PURSUANT TO FED. R. CIV. P. 12(f)
TO DISMISS DEFENDANT'S FOURTH
AFFIRMATIVE DEFENSE,
OF COPYRIGHT MISUSE**

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Preliminary Statement

This is an action for copyright infringement brought by six (6) record companies:

1. UMG Recordings, Inc.,
2. Warner Bros. Records Inc.,
3. Arista Records LLC,
4. Interscope Records,
5. Motown Record Company, L.P., and
6. SONY BMG Music Entertainment,

who are (theoretically) competitors of each other.

On March 20, 2006, defendant interposed the following as her fourth affirmative defense:

8. The plaintiffs, who are competitors, are a cartel acting collusively in violation of the antitrust laws and of public policy, by tying their copyrights to each other, collusively litigating and settling all cases together, and by entering into an unlawful agreement among themselves to prosecute and to dispose of all cases in accordance with a uniform agreement, and through common lawyers, thus overreaching the bounds and scope of whatever copyrights they might have.

9. As such, they are guilty of misuse of their copyrights.

Defendant's second amended answer, filed November 9, 2006, contained the identical defense.

Plaintiffs now, some seventeen (17) months after the defense was interposed, and some nine (9) months after the last pleading including the defense was filed, move to strike the defense pursuant to Fed. R. Civ. P. 12(f) for legal insufficiency.¹

Defendant opposes said motion.

¹ In case the Court is wondering why plaintiffs have taken this sudden interest in the legal sufficiency of the defense, it is because the Magistrate has (a) in the past stayed discovery into the issues raised by this defense, and (b) now indicated that, in the absence of an order striking the defense, it is prejudicial to the defendant to prevent her from obtaining discovery into these matters. I.e., the plaintiffs are making this motion in an attempt to avoid discovery.

The plaintiffs, at page 2 of their brief, engage in fictionalization, creating words for Magistrate Judge Levy which he never uttered. Magistrate Judge Levy expressed no reservations about the legal sufficiency of the defense. Only *plaintiffs' counsel* expressed such an opinion, as their reason for opposing discovery. And it was the undersigned who suggested, in response to plaintiffs' counsel's argument that the fourth affirmative defense was legally insufficient, that a motion to strike the defense – and not the stonewalling of discovery into the facts of the defense – was the appropriate remedy for legal insufficiency.

The Magistrate agreed, stating that it would be prejudicial to defendant to prevent her from obtaining pretrial discovery while the defense remains as part of the pleadings, and indicated that he would await the outcome of a motion to strike before moving ahead with the discovery issue.

**I. STANDARDS FOR MOTION TO STRIKE
DEFENSE PURSUANT TO FED. R. CIV. P. 12(f)**

Motions pursuant to Fed. R. Civ. P. 12(f) are disfavored. William Z. Salcer, Panfeld, Edelman v. Envicon Equities Corp., 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1015, 106 S.Ct. 3324, 92 L.Ed.2d 731 (1986); Microsoft Corp. v. PTI (USA), 2003 WL 21406291 at 6; (EDNY 2003); Reliability Research Inc.v. Computer Associates Intern., Inc., 793 F. Supp. 68, 69 (EDNY 1992). The plaintiff bringing such a motion “has a weighty burden”. Reliability Research, *supra*, at 69.

To prevail on a motion to strike an affirmative defense, the moving party must satisfy each element of the following three-part test: First, there may be no question of fact which might allow the defense to succeed.... Second, there may be no substantial question of law, a resolution of which could allow the defense to succeed.... Third, plaintiff must show that it is prejudiced by the inclusion of the defense. Microsoft Corp. v. PTI (USA), *supra*, at 6-7; County Vanlines Inc. v. Experian Information Solutions, Inc., 205 F.R.D. 148, 153 (SDNY 2002); Sony Music Entertainment Inc. v. Robison, 2002 WL 272406 (SDNY 2002).

Plaintiffs have shown none of the above, let alone all three.

As stated by the Second Circuit in William Z. Salcer, *supra*,

A motion to strike an affirmative defense under Rule 12(f), Fed.R.Civ.P. for legal insufficiency is not favored and will not be granted "unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." (citations omitted). Moreover, even when the facts are not disputed, several courts have noted that a "motion to strike for insufficiency was never intended to furnish an opportunity for the determination of disputed and substantial questions of law." (citations omitted). This is particularly so when, as here, there has been no significant discovery.

"[E]ven when the defense presents a purely legal question, the courts are very reluctant to determine disputed or substantial issues of law on a motion to strike; these questions quite properly are viewed as determinable only after discovery and a hearing on the merits." (citation omitted) To do otherwise would be to run the risk of offering an advisory opinion on an abstract and hypothetical set of facts. (emphasis supplied)

744 F. 2d at 939.

In the instant case there has been no discovery at all relating to the fourth affirmative defense, and plaintiffs' very reason for bringing on the motion is to attempt *to prevent such discovery*, contrary to the teaching of Salcer.²

² Shockingly, after conceding the applicability of the foregoing standards at page 2 of their brief, plaintiffs then proceed, at pages 4-6, to ignore them, and to instead take the position – without benefit of any authority for their novel argument – that the standards for pleading an affirmative claim for violation of the antitrust laws, and the standards for determining a motion under Fed. R. Civ. P. 12(b)(6) to dismiss that claim, are controlling. They then proceed to argue why, if this were a 12(b)(6) motion addressed to an antitrust counterclaim, they would be entitled to a more definite statement (Moving Brief, p. 9). Needless to say, this is nonsense for a number of reasons, not the least of which is that the Federal Rules do not authorize a motion for a more definite statement of an affirmative defense, and another of which is that the defense is very clear in what facts it alleges: it alleges that the plaintiffs are competitors, and that they entered into an agreement among themselves to pool their copyrights and present a united front in terms of settling and litigating their copyright claims, so as to increase the scope of their copyrights.

II. PRELIMINARY QUESTION OF TIMELINESS OF MOTION

Although it was concededly we who mentioned in the proceedings before Magistrate Levy that a motion to strike, rather than continued stonewalling of discovery, was the appropriate way for plaintiffs to assert their argument as to the alleged legal insufficiency of the fourth affirmative defense, we must observe that Fed. R. Civ. P. 12(f) does not offer much leeway on the question of the timeliness of such a motion:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, *upon motion made by a party within 20 days after the service of the pleading upon the party* or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. (emphasis supplied)

It would appear that the motion, having been made by parties to the action, is untimely as a matter of law. This would be in keeping with the policy that such motions are "disfavored". William Z. Salcer, supra; Microsoft Corp. supra; Reliability Research, supra.

Plaintiffs' brief makes no reference to the untimeliness of its application.

III. PLAINTIFFS' STATEMENT OF THE LAW REGARDING COPYRIGHT MISUSE IS MISTAKEN

As stated in Goldstein on Copyright (2007):

A copyright infringer may invoke the defense of copyright misuse in cases where the copyright owner has violated a specific legal norm in enforcing its copyright..... [M]ost courts hold that a copyright tainted by misuse is completely unenforceable.....The copyright misuse defense is widely accepted today....The majority of copyright misuse decisions today explicitly or implicitly reject any requirement that a copyright misuse must also constitute an antitrust violation.

2 Goldstein on Copyright § 11.6 at 11:36-11:40.

Copyright misuse is the extension of a copyright monopoly beyond what the monopoly confers. See Microsoft Corp. v. PTI (USA), *supra* (denying motion to strike copyright misuse defense). See also Broadcast Music, Inc. v. Hearst/ABC Viacom, 746 F. Supp. 320, 328 (SDNY 1990)(Keenan, J.) (denying motion to strike copyright misuse defense). The defense of copyright misuse prevents a copyright owner from recovering for infringement where it has impermissibly extended the copyright monopoly in a manner which constitutes an unreasonable restraint of trade. Interscope Records v. Kimmel, 2007 WL 1756383 (NDNY June 18, 2007) (dictum); Coleman v. ESPN, Inc., 764 F. Supp. 290, 295 (SDNY 1991)(denying summary judgment motion to dismiss copyright misuse defense). In Bourne v. Walt Disney Co., 2003 WL 721405 (SDNY 2003), although granting a preliminary injunction motion in part because the defendant's copyright misuse defense was not likely to prevail, the Court accurately described the defense as follows: "The defense of copyright misuse is based upon the principle that copyright holders may not leverage their copyright monopoly to allow them to control [...] areas outside the monopoly." See also Reliability Research Inc. v. Computer Associates Intern., Inc., *supra*,

(denying motion to strike copyright misuse defense).

Plaintiffs erroneously state that copyright misuse has not been recognized by the United States Court of Appeals for the Second Circuit or by the United States Supreme Court. While there is some judicial dictum to that effect, which plaintiffs have eagerly culled and marshaled, we beg to differ on both counts, and could refer the Court to a single case – which bounced around in both courts – for authority on that point. Interestingly, plaintiffs do not refer to it at all, even though its sole subject was copyright-pooling, which is the subject of Ms. Lindor’s defense.

The case is BMI v. CBS, 441 U.S. 1 (1979), *on remand*, CBS v. ASCAP, 620 F.2d 930 (2d Cir. 1980), which involved general claims of “copyright misuse” as well as specific claims under the Sherman Act. There the defendants stood accused of “copyright misuse” based upon their *pooling of copyrights*. The district court, after an 8-week trial, had exonerated the defendant of copyright misuse; the Second Circuit reversed, holding that the pooling of copyrights was per se unlawful; the Supreme Court reversed, recognizing that the pooling of copyrights was indeed a restraint of trade, but holding that a “rule of reason” rather than “per se” test should be applied to the alleged “copyright misuse” and remanded to the Second Circuit, 441 U.S.1 (1979); the Second Circuit concluded that the test to be applied was whether the procompetitive effects of ASCAP’s blanket license outweighed its anticompetitive effects, and held that the district court’s trial verdict had adequately determined that question in the affirmative.

I.e. it has been the law at least since 1979, not only in the Second Circuit but throughout the United States, that copyright pooling by competitors raises a copyright misuse issue which is to be resolved by a rule of reason analysis. See, e.g., Broadcast Music, Inc. v.

Hearst/ABC Viacom, *supra*, at 326 (SDNY 1990)(Keenan, J.)

It is of more than passing interest that, while they devoted a third of their brief to the totally inapposite affirmative defense of the Noerr-Pennington doctrine (see Point IV *infra*), and most of the rest of the brief to the pleading requirements for antitrust claims which haven't been interposed in this case, plaintiffs have not devoted a single word of their brief to supporting *the reasonableness of their copyright-pooling behavior*, which ultimately would be their only possibly meritorious answer to Ms. Lindor's charges of copyright misuse. I.e., we are still left wondering, although they had another 15 pages or so left to them under the Court's page-limit requirements, what *lawful, "procompetitive"* explanation they might possibly have offered for their admitted copyright-pooling agreement that would enable it to survive a rule of reason analysis. We need to know why six (6) different multibillion dollar, multinational corporations did in fact need to pool all their resources to join forces against a home health aide living in Brooklyn, and found it impossible to negotiate settlements with her and others like her other than pursuant to an impermeable, seamless joint front, apart from the obvious explanation that they did it to increase their leverage in bludgeoning defendants into a defenseless posture, where accepting an extortionate settlement demand would be their only means of averting financial ruin.

Plaintiffs thus avoided the sole issue that is properly before the Court on this motion.

IV. PLAINTIFFS' AUTHORITIES ARE INAPPOSITE

As noted earlier, the authorities which plaintiffs cite are astonishingly off target.

For example, plaintiffs pointlessly cite numerous cases which deal with the pleading requirements for antitrust claims. Perhaps they did not read Ms. Lindor's answer; it did not assert *any* claims, much less any antitrust claims.

Similarly off target is plaintiffs' bizarre reliance – in Point II(B)(2) of its brief at pages 6-8 -- on the Noerr-Pennington doctrine, which is a possible *affirmative* defense to a tort *claim*, and thus might in some cases be a defense to a copyright misuse or Sherman Act *counterclaim*, but is wholly inapplicable where copyright misuse is a shield, rather than a sword, interposed solely *as a defense*. See, e.g. International Motor Contest Ass'n, Inc. v. Staley, 434 F. Supp. 2d 650, 662-663 (ND Iowa 2006); In re Independent Service Organizations Antitrust Litigation, 964 F. Supp. 1454, 1462-1463 (ND Kansas 1997). See also Practice Management Information Corp. v. American Medical Ass'n, 121 F.3d 516, 521 (9th Cir. 1997).³

³ We should note that even had Ms. Lindor asserted copyright misuse as a counterclaim there are countless reasons why Noerr-Pennington would not bar such a claim. E.g., (a) N-P does not apply to *agreements*; the heart of Ms. Lindor's defense is the allegation of an agreement; (b) N-P does not apply to the *strict joint settlement negotiation policy*; (c) N-P is an affirmative defense as to which plaintiffs have the burden of proof, rather than a basis for challenging the legal sufficiency of the claim to which it responds; (d) N-P does not apply to sham lawsuits; most or all of plaintiffs' lawsuits are sham lawsuits, and in Ms. Lindor's case plaintiffs have admitted they do not know who committed the alleged "infringement", they have *no evidence* that Ms. Lindor committed it (in fact she has never even used a computer), they have not detected any downloads or uploads by *any* person, and they have no competent witness to the fact of uploading or downloading, all further accentuating the sham nature of the proceeding. (The foregoing list is not intended to be all inclusive.) However, there is no point in briefing these issues, since – as the Court knows but plaintiffs pretend not to know – Ms. Lindor has not asserted a counterclaim.

Plaintiffs' reliance on Reliability Research Inc.v. Computer Associates Intern., Inc., *supra*, as authority for the proposition that the Second Circuit has not recognized the affirmative defense of copyright misuse is somewhat odd, given that Reliability Research was a *denial* of a motion to strike the affirmative defense of copyright misuse.

Equally unavailing are plaintiffs' citations to dictum about how the copyright misuse defense, although legally sufficient, has frequently fared poorly when it came down to an evidentiary showdown. This prattle better befits gossip around the water cooler, the barber shop, or the beauty parlor, than it does a legal brief, since the basis of plaintiffs' motion is the asserted legal insufficiency of the defense.⁴

⁴ In the instant case, we do not anticipate any problem at all with the evidence, as plaintiffs cannot challenge any of the factual assertions.

CONCLUSION

Plaintiffs have failed to sustain their burden of establishing that (a) there is no possible question of fact which might allow the defense to succeed, (b) there is no substantial question of law, a resolution of which could allow the defense to succeed, and (c) plaintiffs are prejudiced by the inclusion of the defense.

Indeed they have raised no issue at all as to either the defense's legal viability or its factual predicate. Nor have they made any showing of legally cognizable 'prejudice'.

Accordingly, their motion must be denied.

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