

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WARNER BROS. RECORDS INC., et al*
*
Plaintiffs, *
*
v. * CIV. NO. SA-06-CA-615-OG
*
JOSE DUARTE, *
*
Defendant. *

MEMORANDUM AND RECOMMENDATION

Before the Court is the defendant's motion to dismiss and motion for summary judgment. (Docket no. 22). Plaintiffs have responded. (Docket nos. 24,25). Upon consideration, the Court concludes defendant's motion to dismiss should be **DENIED** and defendant's motion for summary judgment should be **DENIED**.

Discussion

Plaintiffs are recording companies who filed suit against Jose Duarte alleging he committed copyright infringement by wrongfully downloading copyrighted material using the internet. Duarte then filed this motion to dismiss arguing plaintiffs' complaint fails to state a claim upon which relief may be granted. Duarte also filed this motion for summary judgment arguing plaintiffs cannot prove that any infringement occurred or that any infringement occurred within the three-year statute of limitations for copyright actions. This Court will address each in turn.

I. Motion to Dismiss

With just a simple conclusory argument with no factual support, Duarte moves the Court “[t]o dismiss all parts of the complaint herein on the ground that same fails to state a claim against this defendant upon which relief can be granted....” Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the filing of a motion to dismiss a case for failure to state a claim upon which relief can be granted. The complaint must be liberally construed in favor of the plaintiff, all reasonable inferences are to be drawn in favor of plaintiff’s claims, and all factual allegations plead in the complaint must be taken as true. **Campbell v. Wells Fargo Bank**, 781 F.2d 440, 442 (5th Cir. 1986). Following this guidance, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. **Conley v. Gibson**, 355 U.S. 41, 45-46 (1957); **Bauer v. Texas**, 341 F.3d 352, 356 (5th Cir. 2003).

In their complaint, plaintiffs state they are the copyright owners of certain sound recordings, and Duarte used an online media distribution system to download and/or distribute their copyrighted material without their permission. Plaintiffs’ complaint clearly states a claim for relief for copyright infringement under the Copyright Act. Plaintiffs provide sufficient factual basis for the asserted cause of action. Therefore, Duarte’s argument is without

merit, and his motion to dismiss for failure to state a claim should be **DENIED**.

II. Motion for Summary Judgment

Federal Rule of Civil Procedure 56(b) provides that a defending party may move, with or without supporting evidence, for a summary judgment in the party's favor. **FED. R. CIV. P. 56(b)**. Summary judgment shall be rendered if the pleadings and evidence show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. **FED. R. CIV. P. 56(c)**. An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing there is a genuine issue for trial. **FED. R. CIV. P. 56(e)**.

Duarte seeks summary judgment by simply arguing plaintiffs "cannot prove that the alleged violations in the complaint herein occurred or, ... when they occurred in compliance with the three-year statute of limitations for civil copyright infringement...." Duarte also submits an affidavit in which he attests he bought a home computer for his children's use, and he does not know how to turn on or otherwise use a computer. Plaintiffs respond with competent summary judgment evidence showing that on three separate occasions in June 2004, their investigators detected their copyrighted sound recordings were being distributed over the Internet from IP addresses registered to Duarte. **See plaintiff's**

response, Appendix, Sec. H, Carpenter Decl. pars. 3,5-7. This evidence confirms plaintiffs are the owners of the copyrighted material, the infringement originated from Duarte's Internet account with Southwestern Bell, and the infringement occurred within three years of the filing of this lawsuit. **See id.** This evidence is sufficient to raise a genuine issue of material fact whether Duarte committed the alleged copyright infringement. For this reason, Duarte's motion for summary judgment should be **DENIED.**

RECOMMENDATION

It is the recommendation of the Magistrate Judge that defendant's motion to dismiss be **DENIED** and motion for summary judgment be **DENIED.**

**Instructions for Service and
Notice of Right to Appeal/Object**

The United States District Clerk shall serve a copy of this United States Magistrate Judge's Memorandum and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "Filing User" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified

by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. **Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the district court. **See *Thomas v. Arn***, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Servs. Auto. Ass'n***, 79 F.3d 1413, 1428 (5th Cir. 1996).

It is so **ORDERED**.

SIGNED May 2, 2007.



JOHN W. PRIMOMO
UNITED STATES MAGISTRATE JUDGE