

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SONY BMG MUSIC
ENTERTAINMENT, ETAL,

Plaintiffs,

LEAD CASE NUMBE

03CV11661NG

vs.

JOEL TENENBAUM,

Defendant

ORIGINAL CASE NUMBER

03CV11446NG

**DEFENDANT'S OPPOSITION TO PLAINTIFFS' OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS**

Defendant respectfully submits this Opposition to Plaintiffs' Opposition to Defendant Joel Tenenbaum's "Defendant") Motion to Dismiss the Complaint ("Motion"). Because Plaintiffs' arguments are a distortion of the case law, the relevant Federal Rules of Civil Procedure, the Copyright Infringement Law, and are, in essence, an expansion of the allegations not originally found in the original Complaint, and, therefore, amount to an "Amended Complaint in the Plaintiffs', and because Plaintiffs' Opposition to Defendant's Motion to Dismiss was not filed in a timely manner, Plaintiffs' Opposition to Defendant's Motion to Dismiss should be denied.

SUMMARY OF THE ARGUMENT

Motion is identical to some of the motions filed around the country by some possibly similarly situated defendants. There is no possible way that either Plaintiffs nor Defendant can make a correct and blanket statement that these Motions to Dismiss are filed "by similarly situated defendants who are trying to escape liability for infringing the copyrights held by Plaintiffs." Each and every case has a different set of facts, is set in a different jurisdiction, and is subject to different interpretations by different jurisdictions. Defendant's Motion to Dismiss filed on November 23, 2007, states cases to support that not all Motions to Dismiss have been denied. Further, cases that are from different jurisdictions and are not published opinions do not hold "weight" in other jurisdictions.

Plaintiffs' Opposition to Defendant's Motion to Dismiss stating that Defendant failed to state a claim for which relief may be granted is based on her statement that "A sufficient claim for copyright infringement need only contain two allegations: (1) that the plaintiff owns a valid copyright, and (2) that the defendant violated one or more of the exclusive rights in 17 U.S. C. Section 106, such as reproduction or distribution of the plaintiff's copyrights works." Defendant in his Motion to Dismiss stated that Plaintiffs' failed to plead with specificity and was sufficiently vague as to meet the requirements of a Federal Rules of Civil Procedure Rule 12 (b)(6) Motion to Dismiss. Although Plaintiffs' attorney states that Plaintiffs' Complaint is more than sufficient to meet these requirements, Plaintiffs' attorney then proceeds to, in essence, draft an entire, detailed "Amended Complaint" with an extraordinary amount of details none of which were present in the original complaint in response to Defendant's Motion to Dismiss. It is Defendant's understanding that the Federal Rules of Civil Procedure do not allow for an Amended Complaint to be filed. Further, it is Defendant's understanding that any Amendments require the advance approval of the Court. Finally, Defendant respectfully requests that his Motion to Dismiss be allowed, and such other and further relief be given to Defendant as this Plaintiffs' Opposition to Defendant's Motion to Dismiss was not filed in a timely manner.

STATEMENT OF ALLEGATIONS

Defendant acknowledges that Plaintiffs are the copyright owners or licensees of exclusive rights under the United States copyright law. Defendant presumes, therefore, that Plaintiffs would likely have exclusive rights to the seven (7) copyrighted sound recordings identified in Exhibit A and certain of the sound recordings identified in Exhibit B of the Complaint. However, Plaintiffs do not and cannot prove that Defendant used and/or continues to use an online media distribution system to download, distribute and make available the Copyrighted Recordings. Plaintiffs cannot prove that Defendant ever used his computer, whether or not he purchased these copyrighted materials, or whether or not he purchased these sound recordings through a legitimate on-line downloading service.

Further, Plaintiffs' state that "Defendant has used and continues to use an online media distribution system...". Plaintiffs' mention a "comprehensive list of all 816 audio files." as of August 14, 2004. There is no mention in any of the papers filed or attached as Exhibits by Plaintiffs that any

additional audio files have been "added" to this comprehensive list. Therefore to state that "defendant ..continues to use an online media distribution system, is clearly not true by their own accounts. No disseminating of any of the files found on Defendant's computer has ever taken place. Since this has been the case for 3 ½ years if not longer, Defendant has clearly not violated one or more of the exclusive rights in 17 U.S.C. Section 106 copyright infringement since no "...reproduction or distribution of the plaintiffs' copyrighted works" have taken place. Therefore, one of the two, key allegations sufficient to state a claim for copyright infringement is missing from Plaintiffs' Complaint. Therefore, the Defendant's Motion to Dismiss meets the criteria of Federal Rules of Civil Procedure Rule 12 (b)6), because Plaintiffs' Complaint is missing one of the key allegations sufficient to state a claim for copyrights infringement.

ARGUMENT

I. LEGAL STANDARD FOR MOTIONS TO DISMISS

Defendant would respectfully ask the Court to consider his Memorandum in Support of his Motion to Dismiss that was filed with this Court on November 23, 2007. He clearly laid out that he had sufficient grounds to justify the court dismissing the complaint for failure to state a claim, i.e. one of the two critical allegations for copyright infringements i.e. that the defendant violated one or more of the exclusive rights in 17 U.S.C. Section 106, such as reproduction or distribution of the plaintiff's copyrighted works.

A large portion of Plaintiffs' Opposition to Defendant's Motion to Dismiss argues Copyright Law, states that the WIPO Digital Treaties Support Plaintiffs' Position Here (They do not), and she encloses numerous Exhibits to her Opposition to Defendant's Motion to Dismiss without any explanation as to why they are included with her Opposition to Defendant's Motion to Dismiss. Many of the exhibits are Orders, Recommendations, Etc., from other jurisdictions, and even a jury instruction; they are not published opinions, and are, therefore, not binding on this Court. Further, each and every case must be decided on its own merits, and no decision by any court can be automatically decided in this Court without a careful review of the facts and matters of this particular case. Therefore, Defendant believes that the Exhibits are irrelevant, immaterial and have no bearing in Defendant's case.


Additionally, Defendant can and will reiterate that all of Plaintiffs' Opposition to Defendant's Motion to Dismiss was filed on January 3, 2008, nearly one month after the Plaintiffs' Opposition to

Defendant's Motion to Dismiss was due on December 7, 2007. Defendant would, therefore, respectfully request that the Court not permit any of Plaintiffs' Opposition to Defendant's Motion to Dismiss to be allowed, as its filing was not done in a timely manner, and because Defendant has made enough showing in his Motion to Dismiss for the Court to allow his Motion. In addition, Defendant believes that Plaintiff's main purpose in filing these papers is to harass Defendant, to cause delay, and to drive up the cost of litigation, all of which issues Defendant has raised in his Motion for Sanctions under Federal Rules of Civil Procedure, Rule 11(b). The replies of Plaintiffs' counsel are beyond the scope of an appropriate response.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion to Dismiss should be allowed, and Plaintiffs' Opposition to Defendant's Motion to Dismiss be stricken

Respectfully submitted,



JOEL TENENBAUM
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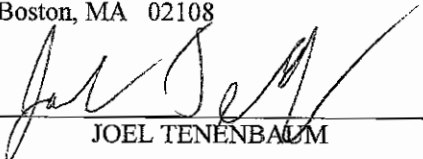
January 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been mailed to

All attorneys of record on the ___ day of January, 2008, addressed as follows:

JOHN R. BAUER
Robinson and Cole LLP
One Boston Place
Boston, MA 02108



JOEL TENENBAUM