

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**ELEKTRA ENTERTAINMENT)
GROUP INC. et al**

Plaintiffs)

Case No. 1:07 CV 569 HJW

V.)

Judge Weber

DAVID LICATA

Magistrate Judge Black

Defendant)

**DEFENDANT DAVID LICATA’S OBJECTIONS TO THE MEMORANDUM
AND OPINION OF THE MAGISTRATE JUDGE (DOC. 28)**

ORAL ARGUMENT REQUESTED

The defendant files his objections to the Memorandum and Opinion of the Magistrate Judge (Doc. 28) to the extent that it recommends the overruling of Defendant’s Motion to Dismiss (Doc. 14); and the granting of Plaintiffs’ Motion to Voluntarily Dismiss (Doc. 19) as permitted by Doc. 30.

The Magistrate Judge’s initial conclusion, that the defendant David Licata “is responsible for” an IP address at which infringing conduct allegedly occurred report is unsupported by admissible evidence and contrary to law. The mere maintenance of Internet account and its associated Internet Protocol (IP) address does not carry with it direct or vicarious liability for activities performed by other users of that IP address.

Defendant respectfully requests that the court set this matter for oral argument because of the public importance of the issues presented in these cases.

In a similar case; cited to the Magistrate judge

“the concern of this court is that in these lawsuits, potentially meritorious and legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants’ (Order 3/2/2007 *Elektra Ent. Group et al. v. O’Brien* –CV 06 5289 Central Dist. California- Doc. 16-5)

I. STANDARD OF REVIEW

Section 28 U.S. Code 636(c) provides for a *de novo review* of the report and recommendations of a magistrate judge upon the filing of objections thereto.

II. STATEMENT OF FACTS

Defendant, a parent and high school teacher, first became aware of the existence of a claim of copyright infringement in February 2007. (Doc. 14-1, ¶17) At that time, he was advised that on June 29, 2005, or twenty months previously, some one had used his AOL account to download and/or share sound recordings.

This lawsuit was filed on July 24, 2007 or over two years after the alleged infringement alleging that

“Defendant, without the permission or consent of Plaintiffs. has used and continues to use, an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to Make the Copyrighted Recordings available for distribution to others.”. (Doc. 1, ¶12)

Through counsel, defendant informally advised plaintiffs; that he had not downloaded or shared any sound recordings, and that he did not know who had used his address over two years ago to download or share recordings. Rather than accepting Mr. Licata’s declaration that he was not responsible and dismissing the lawsuit at that point. Plaintiffs required him to identify “the direct infringer” or pay money to settle the case. (Doc. 19-6) Defendant was unable to identify the direct infringer.

When that informal declaration of non-liability and lack of knowledge regarding the identity of the alleged infringer was rejected Defendant filed an answer to this lawsuit. (Doc. 7)

Defendant responded to plaintiffs' demand for settlement on September 20, 2007

“...he in fact has no knowledge as to who the actual infringer may be and is unable to testify as to the identity of any person who downloaded or uploaded files.

He is therefore unable to identify the individuals he might believe to be responsible for the conduct you allege. He is not unwilling to do so, he is unable to do so. He is not required to speculate as to who may have done so.”

(Letter to Brian J. O'Connell, September 20, 2007 Doc. 19-7).

Plaintiffs' Rule 26(f) disclosures and discovery requests disclosed that the alleged infringement was accomplished through the use of “LimeWire” peer-to-peer or P2P software which resulted in the creation of a “shared folder” on Defendant's computer. That computer had malfunctioned and had been discarded before defendant learned of the existence of plaintiffs' claim.

After Rule 26(f) disclosures, defendant submitted a Rule 68 Settlement Offer which expired. Six days after the Preliminary Pretrial conference, Defendant filed his motion to dismiss (Doc-14) on January 14, 2008, appending his declaration (Doc. 14-1) that

He had “no personal involvement in the distribution, or reproduction of the recordings at issue. (¶6)

“I am unable to state with any degree of certainty the identity of any persons who had access to or used my America OnLine Account” on the date of the alleged infringement”(¶8)

“I have never had an account with LimeWire. (¶9)

None of those statements have been controverted by declarations or evidentiary material meeting the standards of Rule 56

On February 20, 2008 defendant timely served responses to plaintiffs' discovery which reiterated that Mr. Licata did not install the LimeWire peer to peer file sharing software which was allegedly used to download or share the music. And, that he did not use the use of that LimeWire software to download or share music.

He identified the members of his household as his spouse; and five children who in 2005 ranged from 17 to 6.

Mr. Licata stated that they and all of their friends and acquaintances had complete and unrestricted access to the computer which he then owned. (Document 19-8, Defendant's response to Interrogatory No. 7) And, that he did not exercise any direction or control over the use of the computer by other persons. (Document 19-8, Response to Interrogatory 13; Doc. 14-2 ¶ 9)

Plaintiffs' have raised no objection to the adequacy of the served discovery responses.

None of those statements have been disputed by any material cognizable under Rule 56.

Plaintiffs' 88 page response to the motion to dismiss (Doc. 15) was served and filed on March 3, 2008, after expiration of time for the amendment of the pleadings and thirteen days after service of defendant's responses to discovery.

It does not contradict Mr. Licata's declarations.

When plaintiffs' counsel informally raised the subject of the depositions of the members of the Licata household as non- party witnesses in March 2008; counsel for defendant consulted with independent counsel. That independent counsel advised trial counsel that those members of the defendant's family other than the defendant could and

should assert a Fifth Amendment privilege. The concept of elementary and high school students being examined by a skilled litigator in an arena where criminal penalties are possible admits of no other resolution than the mandatory appointment of guardians ad litem under Civil Rule 17 for the minors and independent counsel for the adults.

Plaintiffs' counsel had previously been advised of the likelihood of the need for the appointment of Guardians ad litem for the Licata children in the event that discovery was sought from them as early as September 2007 (Doc 19-7). Thus, the availability of Fifth Amendment protection to the targets of plaintiffs' interrogations should not have come as a surprise to Plaintiffs' counsel.

III. THE ORDER OF THE MAGISTRATE JUDGE GRANTING PLAINTIFFS' MOTION TO DISMISS UNDER RULE 41(A) 2 WAS INCORRECT

A. The Magistrate's Factual Foundation Is Incorrect

1. The conclusion of the Magistrate Judge that defendant was armed with more information than the plaintiff and withheld information from the plaintiff was wholly unwarranted and unsupported

The Magistrate Judge unwarrantedly imputed dishonesty to the defendant (Doc. 28, p. 8) by assuming without foundation that defendant was "armed with more information than Plaintiffs, [and] is not willing to disclose relevant information".

The record before the magistrate does not support that conclusion. Mr. Licata had no information regarding the existence of a claim before February 2007. Plaintiffs' on the other hand, claim that they became aware of the infringement in June 2005.

It is respectfully submitted that it is not disingenuous to be unable to ascertain, with certainty, the identity of individuals who had used a computer located at a residence over two years prior to the notice of claimed infringement under these circumstances.

Defendant had no information regarding “the real infringer” to disclose in September 2007. Defendant has no more relevant information to disclose in September 2008. And, Defendant will not likely obtain additional information within the next year, regarding the alleged infringement which now occurred over three years ago.

2. The Conclusion of The Magistrate Judge’s That Defendant “Was Responsible For” The Use of His Internet Address Is Factually and Legally Incorrect.

The Magistrate Judge finds, “before filing this action, Plaintiffs identified defendant as the responsible individual based upon AOL’s IP address identification,” (Document 15 exhibit C.) In point of fact, the tendered document is not admissible in this litigation and not cognizable under Rule 56. It is not authenticated and as to Mr. Licata in this litigation it is hearsay.

The Haltermon affidavit (Doc. 16-3) negates the inference of “responsibility” (Doc.15- Exh. C) - drawn for counsel other than trial counsel; in litigation to which Mr. Licata was not a served party; that mere connection with an America On Line AOL address permits the inference that the defendant in this lawsuit engaged in the conduct that infringed the plaintiffs’ copyright. Ownership of a street address or a telephone number does not establish responsibility for the conduct of others who are upon the real estate or using the telephone.

3. The Magistrate Judge’s Suggestion That Defendant Unduly Prolonged This Litigation Is Incorrect.

Despite the Magistrate Judge’s characterization of Doc. 19-6 as “reaching out” to resolve the issue (Doc. 28, p.9) it is more than clear from that letter that final termination of the litigation as to Mr. Licata depended upon the payment of some sum of money by

him to plaintiffs regardless of his personal responsibility and that this litigation was going to be maintained until a settlement was forced out of him whether he was liable or not.

The defendant's effort and expense of trial preparation are substantial simply because the practice and procedure of this court require it.

It does appear that Plaintiffs' filings have been unduly proliferative, (eg. filing of both responses to plaintiffs' discovery and the blank discovery documents served; Objection to the delayed tender of draft Findings of Fact and conclusions of Law with respect to Document 14).

By the time briefing on the motion to dismiss with prejudice had been completed defendant had been compelled to examine and review over 900 pages of Rule 26(f) disclosures prepared and submitted by the plaintiff, including numerous newspaper articles published in locations other than the Southern District of Ohio, or after the alleged downloading.

Defendant had also prepared and timely served substantial responses to Plaintiffs' discovery, which exhausted the extent of his knowledge and has not been the subject of any informal or formal suggestion of inadequacy.

Again, although early in the procedure, the defendant did bring to the court's attention, at the earliest opportunity, his factual denial of involvement in the claims alleged by the Plaintiff, and the lack of legal authority for the plaintiffs' position. Plaintiffs have offered no factual basis upon which it may be established that the defendant is personally responsible for the alleged infringement.

B. The Magistrate Judge's Legal Conclusion Regarding the Grant of the Motion to Dismiss Without Prejudice Is Incorrect.

We concede that Federal Rule 41(a) 2 permits the plaintiff to seek the permission of the court to dismiss an action without prejudice to the filing of a new action. However, that privilege is not absolute; but is to be conditioned “upon such terms and conditions as the court deems proper”,

The Magistrate Judge incorrectly applied the rule of *Grover by Grover v. Eli Lilly & Co.* 33 F. 3d 716 to this case. Although *Grover*, does recite that “plain legal prejudice” was not presented by the prospect of having to defend a second lawsuit; the **dismissal of plaintiffs’ claim in that case was upheld** on the basis that:

At the point when the law clearly dictates a result for the defendant, it is unfair to subject him to continued exposure to potential liability by dismissing the case without prejudice. *See Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) (“If defendant has already won its case, reimbursement of fees and expenses cannot make it whole from the injury of being sued again, perhaps this time to lose.”); *see also Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 987 (5th Cir. 1989) (loss of absolute legal defense, here statute of limitations, plain legal [**9] prejudice); *Ikospentakis*, 915 F.2d at 176 (loss of forum non conveniens defense plain legal prejudice). *Grover by Grover v. Eli Lilly & Co.* 33 F. 3d 716, 719

In this case, as demonstrated below, the law and the facts clearly dictate a result for the defendant.

The concept of “plain legal prejudice” as may be applied to corporate defendants and other parties of substantial resources and commercial interests is one thing. When measured against the resources available to a high school teacher; whose computer was apparently misused by others; and, as to whom the plaintiff has shown no direct infringing conduct is another.

In this case, plaintiffs’ failure to dismiss the groundless claims against Mr. Licata after September 2007; with prejudice unless he (accurately or inaccurately) identified the

“real infringers” or paid a settlement smacks entirely too much of coercion and pursuit of an ulterior motive to be countenanced by this court

In this case, *Bell Atlantic Corp. v. Twombly*,¹ obligated plaintiffs to “step across some border of plausibility” before a plaintiff could be allowed to take up the time of a large number of other people with the right to do so representing an *in terrorem*, increment of the settlement value. Without having done so plaintiffs’ seek to multiply their *in terrorem* settlement demands, by unfairly prolonging the exposure of the defendant to the Damoclean sword of counsel expense and the uncertainty of litigation for at least another year under circumstances where defendant had no legal liability to begin with and has supported that non-liability with uncontroverted declarations and Rule 56 admissible materials.

This is clearly a case of continuing and further litigation being wielded merely for the purpose of extorting a settlement from the defendant for the conduct of others for whom he is not responsible.

Even if wrapped in the Copyright Act, said conduct is not worthy of the protection of the U.S. District Court.

Plaintiffs’ offer, after maintaining this litigation for six months, of a dismissal with prejudice of Mr. Licata only while maintaining the intention to pursue Mr. Licata’s household (spouse and five children aged 17, 15 12, 8, and 5 at the time of the alleged infringement) underlined the lack of merit in the suit that was filed. The threat of a suit

¹ (2007) __U.S.__, 127 Sup.Ct. 1955, 1966, 2007 U.S. Lexis 5901

that will be filed unless the claims are settled regardless of their merit is more worthy of the Godfather movies or the Sopranos TV series than the United States District Court.²

C. The Magistrate Judge Prematurely And Incorrectly Determined That Defendant Was Not Entitled To Counsel Fees For The Successful Defense Of The Action.

The Magistrate Judge is correct in concluding that Mr. Licata will seek attorney fees under 17 U.S.C. §505 upon termination of this action on the merits. However, his report overrules a motion that has not yet been filed and his memorandum does not address or consider the publication by the Sixth Circuit of its opinion in *Bridgeport Music vs. WB Records Inc. et al*, 520 F.3d, 2008 (6th Cir) on March 25, 2008.

That case construes 17 U.S.C. § 505 to provide that the discretionary award of costs and expenses must be exercised in an evenhanded manner with respect to prevailing plaintiffs and defendants alike.

The grant of fees and costs "is the rule rather than the exception and [they] should be awarded routinely." *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 380 (5th Cir. 2004); *see also Thoroughbred Software Int'l, Inc. v. Dice Corp.*, 488 F.3d 352, 362 (6th Cir. 2007) (same). The *Bridgeport* court requires a plaintiff in a copyright infringement case to sort through its claims and abandon the claims that become futile during the course of litigation as well as those claims that are objectively unreasonable at the outset.

After Mr. Licata's declaration that he did not infringe or know who had used his computer over two years ago. The claim against him was objectively unreasonable. After

² Theresa Poletti, *RIAA Tactics to Combat Piracy Again In Question*, available at dowjonesmarketwatch.com, updated March, 20, 2008.

he made and supported the Motion to Dismiss the continued opposition was objectively unreasonable.

As in this case, the *Bridgeport* litigation was one of hundreds of cases filed and pursued aggressively by Bridgeport on a discredited theory. The Sixth Circuit found that an award was justified when viewed as part of the larger landscape of Bridgeport's litigation strategy, "The unique posture of this case as one of hundreds brought in the same manner and asserting parallel claims, makes deterrence a particularly relevant and appropriate consideration." *Dimension Films*, 410 F.3d at 809. The district court's interest in motivating Bridgeport to sort through its claims and deter it from continuing to engage in questionable litigation applies with equal force to claims that become futile during the course of litigation as it does to claims that are objectively unreasonable at the outset. *Cf. id.* ("It is not the deterrence of objectively reasonable good faith claims, but the interest in motivating plaintiffs to sort through the objectively unreasonable ones and prosecute this at best cumbersome litigation in a way that discriminates between parties and claims.").

The Sixth Circuit ratified the district court's conclusion that Bridgeport continued to press the theory as part of its overly aggressive litigation tactics and not in any hope or expectation of actually surviving summary judgment.

Here, plaintiffs only suspend this litigation, with the promise of its certain renewal against other members of the Licata household in the hope of securing some financial benefit, even if it cannot be determined who infringed plaintiffs' copyrights at 8:05 pm on June 29, 2005. Doc. 19-6).

The publication of the opinion in *Bridgeport Music* on March 25, 2008 preceded by two days defendants offer to dismiss this litigation without prejudice against Mr. Licata only.

IV. THE MAGISTRATE JUDGE'S DECISION OVERRULING DEFENDANT'S MOTION TO DISMISS (DOC. 14) IS INCORRECT.

The motion to dismiss (Doc. 14) was filed January, 2007, immediately after the court's initial conference, and established that plaintiffs' case was impermissibly built upon a cascade of inferences.

Plaintiffs' response to the motion (Doc. 15) clearly addresses defendant's motion under the terms of Rule 56. Filed after the expiration of court's deadline for the filing of amended pleadings, plaintiffs' response clearly raised the motion to dismiss to the standard of a dispositive motion.

The Magistrate Judge's suggestion that a separate motion for Summary Judgment was to have been filed before the August 8, 2008 deadline for the filing of dispositive motions; when the court had before it a fully briefed dispositive motion seeking exactly the same relief and governed by the same procedural considerations.; seems to be entirely inconsistent with common sense, judicial economy and beyond the requirement of the Civil Rules and the Local Rules.

The Magistrate Judge and plaintiffs further observe that: "all defendants in any type of lawsuit could obtain a dismissal with a simple denial of responsibility." (Doc. 28, p29), A proper motion for dismissal supported by evidentiary material in accordance with Rule 12(B)6 and Rule 56 is not "a simple denial of responsibility".

The process of moving for and evaluating a motion for summary judgment and the respective burdens it imposes upon the movant and the non-movant are well settled.

First, "a party seeking summary judgment ... bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); see also *LaPointe*, 8 F.3d at 378; *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. See *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

This is precisely what Mr. Licata has done at no small expenditure of effort and, will have to do again if necessary.

Furthermore, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252; see also *Gregory v. Hunt*, 24 F.3d 781, 784 (6th Cir. 1994). Accordingly, the non-movant must present "significant probative evidence" demonstrating that "there is [more than] some metaphysical doubt as to the material facts" to survive summary judgment and proceed to trial on the merits. *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993); see also *Celotex*, 477 U.S. at 324; *Guarino*, 980 F.2d at 405. In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. See *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). The Court must view all submitted evidence, facts, and reasonable inferences in a light most favorable to the non-moving party. See, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

Plaintiffs' have wholly failed to present any probative evidence that David Licata had engaged in the direct infringement upon which this case was based.

The Copyright Act does not expressly render anyone liable for infringement committed by another”. *MGM Studios v Grokster*, (2005) 545 U.S. 913, 930, citing, *Sony Corp. v. Universal City Studios*, 464 U.S. 417 at 434.

The plain and simple rule of *Grokster* is succinctly stated:

Accordingly, just as Sony did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, 464 U.S. at 439, n. 19, mere knowledge of infringing potential or of actual Infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise. 545 U.S. 913, 937

This point, fully briefed in the defendant’s motion is not addressed by the Magistrate Judge. His adoption of the construction of *MGM Studios v Grokster*, *supra*, found in *Atlantic Recording Corp. v. Heslep*, No. 4:06-cv-132-y, 2007 US. Dist. LEXIS 35824 (Tex. May 16, 2007) is simply wrong.

The court in *Heslep* based its ruling upon “the reasonable inference that Heslep may be guilty of “contributory infringement”. 2007 US LEXIS 35824 [P. 18]. That is both an incorrect reading of *Grokster* and the plaintiffs’ motion papers filed March 3, 2008 which explicitly abandoned claims of contributory infringement, inducement liability and vicarious infringement (Doc. 15 p.11)

“Plaintiffs’ claims against Defendant relate to Defendant’s direct infringement”

It is not even alleged that the allegedly copied files were not lawfully obtained from a source other than the LimeWire account.

No case law holds that the mere ownership of an IP address establishes legal liability for misuse of that address by others.

A proliferation of mistakes by other district court judges should not encourage this court to perpetuate bad law.

The other case cited by the Magistrate Judge, *Sony Pictures Home Entm't v. Lott*, 471 D. Supp.2d 716, 7719 722 (N.D. Tex 2007) is also inadequate authority for the instant case, because in that case:

“Lott failed to show using proper summary judgment evidence that a question material fact existed as to whether he infringed plaintiffs’ rights by downloading and sharing the motion pictures.”

Here defendant has sustained that burden by repeatedly, unequivocally and consistently stating first; he did not use his IP address to install the file sharing software used for the challenged downloading; second; he did not download or otherwise offer the music recordings available; he did not know of the use of his computer for the alleged infringing conduct.

In this case it is the plaintiffs’ who have failed to controvert those declarations with “proper summary judgment evidence”.

The record of this wide spread litigation is a repeat of incidences where the recording industry has attempted to subject IP address holders to liability for the conduct of others including - teen age children- in the absence of any legal authority.³

One must bear in mind that plaintiffs’ first claim of the existence of an occasion of direct infringement occurred over two years after the infringement occurred and called

³ Beckerman, *Large Recording Companies v. The Defenseless Some Common Sense Solutions to the Challenges of the RIAA Litigations*, *The Judges' Journal*, Volume 47, Number 3, Summer 2008. © 2008 by the American Bar Association.

upon the defendant to identify with the precision appropriate to the maintenance to the action in the US District Court of the person who was using his internet, his IP address at 8:29 p.m. on Saturday evening, June 29, 2005.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Memorandum Opinion and Order entered herein (Document 28) should be vacated and that a final judgment granting defendant's Motion to dismiss (Doc. 14) should be entered.

Defendant further requests the court to establish a time table for consideration of defendant's motion for an award of attorney's fees.

The form of a proposed order is submitted herewith.

Respectfully submitted,

s/ Albert T. Brown Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies the on September 15, 2008; a copy of the foregoing Defendant's Motion for an Extension of Time was filed electronically and served upon Plaintiff's counsel via United States Mail as follows:

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