

08-2376-cv

United States Court of Appeals for the Second Circuit

LAVA RECORDS, LLC, a Delaware limited liability company,
WARNER BROS. RECORDS, INC., a Delaware corporation,
CAPITOL RECORDS, INC., a Delaware corporation,
UMG RECORDINGS, INC., a Delaware corporation,
SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership,
ARISTA RECORDS LLC, a Delaware limited liability company, and
BMG MUSIC, a New York general partnership, doing business as The RCA Record Label,

Plaintiffs-Counter-Defendants-Appellees,

-against-

ROLANDO AMURAO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

Defendant-appellant Rolando Amurao, by his attorney, Richard A. Altman, submits this reply brief in response to the brief submitted by the plaintiffs-appellees, and in further support of his appeal.

POINT I

MR. AMURAO IS THE PREVAILING PARTY AND THAT STATUS IS SUFFICIENT TO ENTITLE HIM TO FEES. HIS CONDUCT IN DEFENDING THE ACTION IS IRRELEVANT AND IN ANY EVENT CANNOT BE RE-LITIGATED HERE. CONVERSELY, APPELLEES' CONDUCT AND MOTIVATIONS ARE HIGHLY RELEVANT.

Although appellees' brief is nearly twice as long as appellant's, there is little that needs to be said in reply. In the course of re-litigating its abandoned district court case in this Court, and seeking to blame the victim for their own lack of due diligence, appellees essentially ask to continue their campaign of suing first and asking questions later, without ever bearing any consequences. To permit them to walk away from this case without making Mr. Amurao whole would only encourage the continuation of this campaign.

These record company file-sharing cases are in many ways *sui generis*, and the fee-shifting rules which apply to copyright infringement cases generally should be cautiously applied here. This appeal urges the Court to consider the need to examine

more closely the policy behind 17 U.S.C. § 505, the Supreme Court's analysis of it in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), and the line of cases in this Court interpreting it. The decision to award fees should not be left solely to the discretion of the district court, without any guidance as to how that discretion should be exercised. There should be a presumption in favor of a prevailing defendant, especially where, as here, the admitted motivation for bringing these cases is primarily to send a message to the public.

Plaintiffs would have this Court believe that they have been grievously damaged by the advent of file-sharing over the internet. But even if they have, it still does not answer the question of whether suing one's customers for recorded music is the solution to the problem, and whether the U.S. District Courts are the appropriate forum to address it. After all, "the RIAA—the lobbying group for the world's big four music companies, Sony BMG, Universal Music, EMI and Warner Music—admits that the lawsuits are largely a public relations effort, aimed at striking fear into the hearts of would-be downloaders." Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (accessed September 12, 2008). Moneys recovered from this campaign do not seem to have made their way to creative artists, but only

are used to continue the campaign.¹ It should be a source of concern to this Court, and to district courts everywhere, that they are being used primarily to further a public relations effort, instead of adjudicating cases and controversies properly before them in general, and advancing copyright law by encouraging creativity in particular. Powerful and wealthy litigants who bring cases primarily to intimidate innocent people (and then keep the money instead of turning it over to the people who deserve it) should not expect sympathy when they blithely walk away after doing damage, and they should be compelled to make their victims whole.

Considering that plaintiffs' primary motivation is to frighten people, and not to recover money, it seems entirely appropriate that they should pay fees when they lose. It is that simple, because a copyright plaintiff's motivation matters, especially if the defendant prevails. *See Fogerty, supra*, 510 U.S. at 535 n.19; *Bond v. Blum*, 317 F.3d 385 (4th Cir.2003)(valid fair use defense; fee award would deter meritless actions); *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir.2003)("for a copyright owner to use an infringement suit to obtain property protection...that copyright law clearly does not confer, hoping to force a settlement

¹ *See Chasick, RIAA Pockets Filesharing Settlement Money, Doesn't Pay Artists Whose Copyrights Were Infringed*, <http://consumerist.com/368663/riaa-pockets-filesharing-settlement-money-doesnt-pay-artists-whose-copyrights-were-infringed> (accessed October 17, 2008).

or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process.”).

Appellees completely ignore the Seventh Circuit cases in our main brief (at 16-17) which are the principal authority for urging reversal. Although they are not controlling authority in this Court, a presumption in favor of prevailing defendants is closer to fulfilling the policy behind fee-shifting than is leaving it to the discretion of the district court. In other words, it is sometimes appropriate for a district court to put a thumb on the scales in favor of prevailing defendants, in order to comply with the *Fogerty* standard.

Appellees make much over the district judge’s passing mention that Mr. Amurao did not deserve a fee because he had unclean hands. But this is erroneous as a matter of law, and cannot be a proper basis to deny fees to a prevailing defendant. Defendants can’t have unclean hands; only claimants seeking equitable relief can.

The guiding doctrine in this case is the equitable maxim that “he who comes into equity must come with clean hands.” This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.

Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945).

Unclean hands is an “*equitable* defense[] to an *equitable* remedy, sought in connection with an *equitable* doctrine.” *New Era Publications. Int’l v. Henry Holt & Co.*, 873 F.2d 576, 589 n. 5 (2d Cir.1989)(Oakes, C.J., concurring)(emphases in original). It is a shield against a plaintiff, not a sword to punish a defendant who defends himself.

If Mr. Amurao or his counsel had truly acted improperly in defending this action, then appellees’ motion for discovery sanctions would have been granted. But because the district court denied that motion, and appellees did not cross-appeal, they are barred from arguing the point here. To conclude otherwise would mean that every defendant must immediately plead guilty as charged and cooperate fully with the person suing him, or lose the opportunity to recover fees even if he wins. *See Diamond Star Bldg. Corp. v. Freed*, 30 F.3d 503 (4th Cir.1994)(prevailing defendant was entitled to defend and its refusal to settle was not grounds for denying fees); *Edwards v. Red Farm Studio Co.*, 109 F.3d 80, 83 (1st Cir.1997)(“plaintiff’s claim was so poor that we consider it would be an abuse of discretion not to award fees; the only question should be the amount.”).

All that matters in this case is that appellees “threw in the towel” (*Riviera Distributors, Inc. v. Jones*, 517 F.3d 926, 928 [7th Cir.2008]), walked away from their

own case, and thereby rendered Mr. Amurao the prevailing party. Their doing so should *ipso facto* be sufficient to entitle Mr. Amurao to fees.

POINT II

RECENT CASE LAW UNDERMINES THE THEORY OF THESE CASES, BECAUSE “MAKING AVAILABLE” SONG FILES IS NOT ACTIONABLE.

The appellees also completely ignore a recent significant development in the only one of these cases to go to trial. That development casts grave doubt on the validity of the basic legal strategy in these RIAA cases. In the case, the district judge reversed the jury’s verdict of \$222,000 against a woman who had downloaded 24 songs, and ordered a new trial. In *Capitol Records v. Thomas*, No. 06-1497 (D.Minn. Sept. 24, 2008)(copy in appendix), the Court had *sua sponte* informed the parties after the verdict that it might have erred in a crucial jury instruction regarding the scope of the distribution right, and asked for submissions from the parties.² There was also significant briefing from *amici curiae* on both sides of the issue. In its thorough and detailed decision, the Court said, “the plain meaning of the term ‘distribution’ does not including making available and, instead, requires actual dissemination... Plaintiffs’ interpretation of the distribution right is simply not reasonable....Liability

² That order is in the appendix to appellant’s main brief.

for violation of the exclusive distribution right found in § 106(3) requires actual dissemination. Jury Instruction No. 15 was erroneous and that error substantially prejudiced Thomas's rights." Slip op. at 19 and 40.

The district court then cited as controlling authority *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir.1993), which held that "[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords," 991 F.2d at 434 (citation and quotation marks omitted), and noted that it had been "relied upon by numerous district courts in the peer-to-peer network downloading context." Slip op. at 32 (citing cases).

While significant because it followed a full-blown trial, and extensive briefing, this is only the latest in a line of cases to the same effect. *See generally* Patry, *Atlantic Recording Corp. v. Howell*, available at <http://williampatry.blogspot.com/2008/04/atlantic-recording-corp-v-howell.html> (April 30, 2008)(accessed on July 29, 2008):

From the beginning of copyright law, copyright owners have had the burden of proving their case, and rightly so. What we are seeing now in the making available cases and in other areas is not only an attempted reversal of centuries of copyright law, but of civil procedure as well...I do not condone infringement of copyright whether by P2P or any other means, and believe that copyright owners have every right to bring litigation against those who have infringed their rights (and here I mean

infringed an actual section 106 right, not fabricated rights like attempted distribution). But I do believe that copyright owners must prove their case the old fashioned way.

See also Patry, *The recent making available cases*, <http://williampatry.blogspot.com/2008/04/recent-making-available-cases.html> (*available at* <http://recordingindustryvspeople.blogspot.com/2008/08/patry-copyright-blog-shuts-down.html>).

The complaint in this action alleges that “[p]laintiffs are informed and believe 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.” (A-29). Even leaving aside whether this vague allegation, devoid of both direct knowledge and specific facts, can satisfy the heightened pleading regime imposed by *Bell Atlantic v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), it is clear from the *Thomas* decision (and many others as well³), that merely making available files for

³ *See, e.g., London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D.Mass.2008)(“the defendants cannot be liable for violating the plaintiffs’ distribution right unless a ‘distribution’ actually occurred.”); *Atlantic v. Brennan*, 534 F.Supp.2d 278 (D.Conn.2008) (refusing to enter a default judgment because allegations of complaint insufficient under *Twombly*; “[W]ithout actual distribution of copies.... there is no violation [of] the distribution right.”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 at 981 (D.Ariz.2008)(collecting cases; denying summary (continued...))

distribution is *not* copyright infringement, as a matter of law. Thus the complaint failed to state a claim.

Appellees' error is apparent from the first sentence of its statement of the case (Br. at 2): "This case arose out of the substantial copyright infringement that took place on a computer in Amurao's home and through his Internet account." But computers do not get sued for copyright infringement⁴, and the mere possession of a computer and an internet account does not automatically render the person who has them liable as either a contributory or vicarious infringer, anymore than does owning a copying machine or a video cassette recorder. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) at 930:

One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it. Although the Copyright Act does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability emerged from common law principles and are well established in the law. (citations, quotation marks and footnote omitted).

³(...continued)

judgment)("The general rule, supported by the great weight of authority, is that infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords....The court agrees with the great weight of authority that § 106(3) is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public."). 554 F. Supp. 2d at 981(quotation marks omitted).

⁴ *But see* Appellant's Brief at 21 n. 10 (DMCA takedown notice sent to a laser printer).

The complaint in this action makes no mention of either contributory or vicarious infringement. It simply alleges that Mr. Amurao is the primary direct infringer (A-29). Thus, when they sued Mr. Amurao, plaintiffs made the automatic assumption that he was a direct infringer. They were completely and utterly wrong, and they, not Mr. Amurao, should bear the consequences of that error.

Ultimately, what this case and the thousands of others like it are about is whether defendants should be able to level the playing field, and whether lawyers should be encouraged to defend them by the possibility of a fee if they succeed.⁵ This is the theory behind fee-shifting statutes in civil rights and other litigation where the

⁵ There are many other ways to level the playing field. A list of suggestions for the judiciary to consider in these cases was recently published in the ABA Judge's Journal. Beckerman, *Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations*, 47 ABA The Judges' Journal, Summer 2008. With respect to attorney's fees, Beckerman says:

In view of the virtual impossibility of defendants finding counsel willing and able to represent them in these proceedings, and in view of the novelty of the legal issues that the RIAA is presenting, the award of attorney fees to those few defendants who somehow manage to fight back and win is crucial. Otherwise, it will continue to be virtually impossible for the courts to hear the "other side of the story." Each defendant who fights back is fighting on behalf of hundreds of thousands of other people, and each attorney who represents such a defendant, at the risk of being unpaid or of being very poorly paid, is doing an important service to the development of copyright law. Suggestion 10: The court should award attorney fees, in most cases with a multiplier. In every instance in which a defendant wins on the merits, the plaintiffs voluntarily dismiss with prejudice, or the plaintiffs dismiss without prejudice but have forced the defendant to incur significant attorney fees, the court should deem the defendant a "prevailing party" under the Copyright Act and award attorney fees. In most cases, there should be a multiplier due to the financial risk taken by the attorney.

parties are likely to be in widely disparate economic circumstances, and the public policy issues significant. It should be equally applicable here. Given the concerns that “in these lawsuits, potentially meritorious 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,” *Elektra v. O’Brien*, 2007 ILRWeb (P&F) 1555 (C.D.Cal., March 2, 2007)(copy annexed), there is only one way to address those concerns and to remedy that enormous imbalance, and that is to award fees to prevailing defendants, almost as a matter of course, as is already done in the First, Sixth and Seventh Circuits. This Court, as “the nation’s premier copyright court” (*Gracen v. Bradford Exch.*, 698 F.2d 300, 305 [7th Cir. 1983][Posner, J.]) should adopt this view.

While the Fifth Circuit rule appears to be to the contrary (*Virgin Records America Inc. v. Thompson*, 512 F.3d 724 [5th Cir.2008], *cert.den.* ___ U.S. ___, 128 S.Ct. 2096 [2008]), the presumption in favor of prevailing defendants seems to be the majority view. And this makes sense, despite the language of *Fogerty* that prevailing plaintiffs and defendants are to be treated alike, because the only way to treat them alike is, perhaps paradoxically, to lean in favor of a party who wins, especially one who had nothing to gain from the litigation, and is left with nothing but a lawyer’s bill.

“Defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Fogerty, supra*, 510 U.S. at 527. Simply leaving matters to the essentially unreviewable discretion of the district court is not enough; attorneys should be encouraged by the likelihood of a fee award to defend these cases. Their absence as advocates in nearly all of them has resulted in the serious distortion of copyright law in the digital age.

CONCLUSION

A well-known copyright scholar recently said in the Wall Street Journal:

This war must end. It is time we recognize that we can't kill this creativity. We can only criminalize it. We can't stop our kids from using these tools to create, or make them passive. We can only drive it underground, or make them “pirates.” And the question we as a society must focus on is whether this is any good. Our kids live in an age of prohibition, where more and more of what seems to them to be ordinary behavior is against the law. They recognize it as against the law. They see themselves as “criminals.” They begin to get used to the idea. That recognition is corrosive. It is corrupting of the very idea of the rule of law. And when we reckon the cost of this corruption, any losses of the content industry pale in comparison...The war on peer-to-peer file-sharing is a failure. After a decade of fighting, the law has neither slowed file sharing, nor compensated artists. We should sue not kids, but for peace, and build upon a host of proposals that would assure that artists get paid for their work, without trying to stop “sharing.”

Lawrence Lessig, *In Defense of Piracy*, Wall Street Journal, Oct. 11, 2008, *available at* <http://online.wsj.com/article/SB122367645363324303.html> (accessed October 16, 2008).

Based upon the foregoing, this Court should reverse the district court's denial of attorney's fees and remand the action for a determination of the amount of a reasonable fee, in both the district court and on this appeal. It should also, as argued in the principal brief, reverse so much of the district court's holding that copyright misuse does not state a claim upon which relief can be granted, and uphold the validity of such a claim.

Dated: New York, New York
October 19, 2008

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October 19, 2008

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