

BMG Music et al. v. Gonzalez

03 C 6276

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

2005 U.S. Dist. LEXIS 910

January 7, 2005, Decided
January 12, 2005, Docketed

DISPOSITION: Summary judgment granted for plaintiffs.

COUNSEL: [*1] For BMG MUSIC, A NEW YORK GENERAL PARTNERSHIP, SONY MUSIC ENTERTAINMENT, INC., A DELAWARE CORPORATION, UMG RECORDINGS, INC., A DELAWARE CORPORATION, FONOVisA, INC., A CALIFORNIA CORPORATION, Plaintiffs: Charles B. Sklarsky, Clark Steven Tomashefsky, Darren J Schmidt, Jenner & Block, LLC, Chicago, IL; David A Steinberg, Mitchell, Silberberg & Knupp, Los Angeles, CA.

For ATLANTIC RECORDING CORPORATION, A DELAWARE CORPORATION, Plaintiff: Charles B. Sklarsky, Clark Steven Tomashefsky, Darren J Schmidt, Jenner & Block, LLC, Chicago, IL; David A Steinberg, Mitchell, Silberberg & Knupp, Los Angeles, CA; Geoffrey Andrew Baker, Dowell Baker, Oak Park, IL; Anthony E. Dowell, Jeffrey Allen Hammond, Dowell Baker, Lafayette, IN.

For CECILIA GONZALEZ, Defendant: Geoffrey Andrew Baker, Dowell Baker, Oak Park, IL.

JUDGES: BLANCHE M. MANNING.

OPINION: ORDER

Plaintiffs BMG Music, Sony Entertainment Inc., UMG Recordings, Inc., Fonovisa, Inc. and Atlantic Recording Corp. ("the Recording Companies") brought this action against Defendant Cecilia Gonzalez alleging that she infringed their copyrighted music recordings, in violation of 17 U.S.C. § 101 et seq. [*2] , by downloading 30 songs onto her home computer. After limited discovery, the Recording Companies now move for summary judgment.

The relevant facts in this case are not in dispute. Gonzalez admits that she infringed upon the Recording Companies' copyrights by downloading 30 songs from the internet which she did not own. Numerous courts have held that downloading music from the internet, which the user does not own, constitutes "direct infringement." In re Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003); A&M Records, Inc. v. Napster, 239 F.3d 1004, 1014 (9th Cir. 2001); Elektra Entertainment Group, Inc. v. Bryant, 2004 U.S. Dist. LEXIS 26700, 2004 WL 78123, at *4 (C.D. Cal. Feb. 13, 2004). Gonzalez, however, contends that summary judgment is not appropriate because there are genuine issues of fact as to whether: (1) the "fair use" defense (17 U.S.C. §

107) is applicable; and (2) she is entitled to assert the "innocent infringer" defense with respect to damages.

Gonzalez asserts that the "fair use" defense applies because she: (1) was just "sampling" the songs to determine if she wanted to purchase them; (2) already owned [*3] many of the songs she downloaded; and (3) did not cause any financial harm by downloading 30 songs. These contentions are without merit. First, the Ninth Circuit in *A&M Records, Inc.*, 239 F.3d at 1014-19, rejected the argument that "sampling" by direct infringers is a "fair use." Second, the contention that Gonzalez already owned some of the recordings she downloaded is not relevant because the Recording Companies only seek redress for songs that Gonzalez admits she did not own. Finally, the court in *A&M Records, Inc.* held that the cumulative effect of direct infringers, like Gonzalez, harms the recording industry by reducing sales and "raising barriers" to the recording industry's "entry into the market for digital downloading of music." *Id.* at 1016. Accordingly, the Court GRANTS summary judgment on the infringement claim.

As for Gonzalez's contention that she is entitled to proceed to trial on damages, this argument likewise fails. She contends that even the minimum statutory damages, which are all the Recording Companies are seeking, are too high because there is an issue of fact as to whether she was an "innocent" infringer under 17 U.S.C. 504(c)(2) [*4] , which gives courts "discretion" to award damages of only \$ 200, where the infringer proves that she "was not aware and had no reason to believe that . . . her acts constituted infringement." Under section 402(d), however, the "innocent" infringement defense is not applicable "if a notice of copyright in the form and position specified by this section appears on the published [recordings] to which [the infringer] had access." (Emphasis added.) While it is undisputed that the copyrights of 30 songs at issue were properly noticed on the covers of CDs, Gonzalez contends that she has raised a question of fact as to whether she had access to the notice. Although it is true that Gonzalez did not have actual possession of these CDs, section 402(d) does not require proof that the infringer had "actual possession." 2 *Nimmer on Copyright*, §7.02[C][3], at 7-17 n.25 (2004). Instead, the plaintiff need only show that the CDs with notice "were in circulation [and] available" to the infringer. *Id.* See also *Boisson v. Banian Ltd.*, 280 F. Supp. 2d 10, 17 (E.D.N.Y. 2003) ("innocent infringer" defense not applicable where defendant [*5] "had reason to be aware of the infringement"); *Broadcast Music, Inc. v. Arlos*, 682 F. Supp. 1, 2 (D. Mass. 1986) (finding that simply claiming "ignorance" is not sufficient to raise a genuine issue of fact for a showing under section 402(d)"). Accordingly, because it is undisputed that the copyrights of the 30 songs at issue were properly noticed on the covers of the CDs, there is no question of fact as to whether Gonzalez had "access" to notice of the copyrights. Indeed, Gonzalez admits that she and her husband have legally purchased over 200 CDs. To allow Gonzalez to assert this defense based on her ignorance would eviscerate copyright protection and the old adage that "ignorance is no defense to the law." This Court thus holds that she is not entitled to the innocent infringer defense and awards the Record Companies \$ 22,500 (30 songs times the minimum statutory penalty (\$ 750)).

Finally, Gonzalez contends that injunctive relief is not appropriate because she no longer has on-line access, and therefore, she does not present a risk of future infringement. There is nothing, however, to stop her from reconnecting to the internet and resuming her infringement. Consequently, [*6] this Court follows the lead of other courts and issues an injunction, pursuant

to 17 U.S.C. § 502(a), prohibiting Gonzalez from downloading recordings owned by the Recording Companies. See, e.g., *In re Aimster Copyright Lit.*, 334 F.3d at 654-55; *Elektra Entertainment Group, Inc.*, 2004 U.S. Dist. LEXIS 26700, 2004 WL 78123, at *6-7. The Court therefore GRANTS the Recording Companies' Motion for Summary Judgment [23-1].

BLANCHE M. MANNING

01-07-05