

1 JEFFREY P. THENNISCH
 2 (Michigan Bar Number P51499)
 3 (appearing Pro Hac Vice)
 4 jeff@patentco.com
 5 DOBRUSIN THENNISCH PC
 6 29 West Lawrence Street, Suite 210
 7 Pontiac, Michigan 48342
 8 Telephone: (248) 292-2920
 9 Facsimile: (248) 292-2910
 10 Attorney for Plaintiff GEORGE CLINTON

11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA

13 GEORGE CLINTON, an individual,
 14 Plaintiff,
 15 v.
 16 WILL ADAMS, p/k/a will,I,am
 17 individually and d/b/a will.i.am music,
 18 inc., et al.,
 19 Defendants.

Case No.CV 10-09476-ODW-PLA
 The Honorable Otis D. Wright II

**PLAINTIFF'S MEMORANDUM OF
 CONTENTIONS OF FACT AND
 LAW**

Pretrial Conference: May 22, 2012
 Trial Date: June 5, 2012

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

1. CLAIMS AND DEFENSES 2

2. BIFURCATION OF ISSUES 3

3. JURY TRIAL 4

4. ATTORNEYS’ FEES 4

5. ABANDONMENT OF ISSUES 4

PRELIMINARY STATEMENT

As a threshold matter, the parties jointly state and acknowledge that the scope and content of the present Memoranda of Contentions of Fact and Law of the parties may need to be substantially supplemented, amended, and/or revised depending upon future rulings to be issued by this Court regarding at least: Defendant's Motion for Partial Summary Judgment (Doc. # 75) filed March 7, 2012. It is respectfully submitted that the disposition of this pending motion may result in either the addition or removal of certain claims and defenses in this action as well as impact the ultimate witness lists and exhibit lists to be submitted and relied upon by the parties.

Accordingly, the parties jointly submit that the present memoranda of Contentions of Fact and Law reflects the current status and nature of the action as of this date, but that future rulings may impact both trial preparation and trial strategy for all parties.

Following pretrial proceedings, pursuant to Rule 16, F.R.Civ.P. and L.R. 16,

IT IS ORDERED:

1. CLAIMS AND DEFENSES

Plaintiff:

(a) Plaintiff plans to pursue the following claims against Defendants:

Claim 1: Defendants directly infringed Plaintiff's copyright to the sound recording relating to Knee Deep, 17 U.S.C. §§ 101 *et seq.*

Claim 2: Defendants vicariously infringed Plaintiff's copyright to the sound recording relating to Knee Deep, 17 U.S.C. §§ 101 *et seq.*

Claim 3: Defendants contributorily infringed Plaintiff's copyright to the sound recording relating to Knee Deep, 17 U.S.C. §§ 101 *et seq.*

Claim 4: Defendants innocently infringed Plaintiff's copyright to the sound recording relating to Knee Deep, 17 U.S.C. §§ 101 *et seq.*

Claim 5: Defendants willfully infringed Plaintiff's copyright to the sound recording relating to Knee Deep, 17 U.S.C. §§ 101 *et seq.*

(b) The elements required to establish Plaintiff's claims are:

Claim 1:

Elements Required to Establish Plaintiff's Claim for Direct Infringement

1. Plaintiff is the owner of a valid copyright in Knee Deep, and
2. Defendants copied original and protectable elements from the copyrighted work beyond the scope of a valid license.

Ninth Circuit Manual of Model Jury Instructions: Civil § 17.4 (2007).

Claim 2:

Elements Required to Establish Plaintiff's Claim for Derivative Liability –
Vicarious Infringement

1. Defendants profited directly from the infringing activity of Tercer Mundo, Inc.,
2. Defendants had the right and ability to control the infringing activity of Tercer Mundo, Inc. and
3. Defendants failed to exercise that right and ability.

Ninth Circuit Manual of Model Jury Instructions: Civil § 17.20 (2007).

Claim 3:

Elements Required to Establish Plaintiff's Claim for Derivative Liability –
Contributory Infringement

1. Defendants knew or had reason to know of the infringing activity of Tercer Mundo, Inc. and
2. Defendants intentionally materially contributed to Tercer Mundo, Inc.'s infringing activity.

Ninth Circuit Manual of Model Jury Instructions: Civil § 17.21 (2007).

Claim 4:

Elements Required to Establish Plaintiff's Claim for Innocent Infringement (17
U.S.C. § 504(c)(2))

1. Defendants were not aware that their acts constituted infringement of the copyright; and
2. Defendants had no reason to believe that their acts constituted an infringement of the copyright.

Ninth Circuit Manual of Model Jury Instructions: Civil § 17.26 (2007).

Claim 5:

Elements Required to Establish Plaintiff's Claim for Willful Infringement (17 U.S.C. § 504(c)(2))

1. Defendants engaged in acts that infringed the copyright; and
2. Defendants knew that those acts infringed the copyright.

Ninth Circuit Manual of Model Jury Instructions: Civil § 17.27 (2007).

(c) The key evidence Plaintiff relies on for each of the claims is:

Claim 1:

- | | |
|----------------|---|
| Exhibit 1. | Declaration of George Clinton (Doc. # 86) filed 3/19/2012 |
| Exhibit 2. | Declaration of Eban Kelly (Doc. #87) filed 03/19/2012 |
| Exhibit 4. | State of California corporate database record |
| Exhibit 5. | Judge Real's Order from Case No. 03-cv-08955, issued 06/17/2005 |
| Exhibits 9-12. | Copies of the Copyright Office registrations (Registration Numbers: SR0000347870, PA0001677813, SR0000334398, PA0001158944) |
| Exhibit 13-17. | Copies of the deposit material stored at Library of Congress |
| Exhibit 18-20. | Copies of the Copyright Office's original registration for George Clinton's (Not Just) Knee Deep sound recording registration (Registration Numbers: SR000011150, SR000013919, SR000138279) |
| Exhibit 22-24. | Copies of the Defendants' musical and DVD works containing the Defendant's Shut Up musical work. |
| Exhibit 25. | April 21, 2005 email correspondence involving the licensing of the (Not Just) Knee Deep musical work. |

Claims 2 and 3 concerning derivative liability:

- Exhibit 1. Declaration of George Clinton (Doc. # 86) filed 3/19/2012
- Exhibit 2. Declaration of Eban Kelly (Doc. #87) filed 03/19/2012
- Exhibit 5. Judge Real's Order from Case No. 03-cv-08955, issued 06/17/2005
- Exhibit 21. Internet websites selling Black Eyed Pea's Shut Up Remixes

Claims 4 and 5 concerning damages:

- Exhibit 1. Declaration of George Clinton (Doc. # 86) filed 3/19/2012
- Exhibit 3. Declaration of Jeffrey P. Thennisch (Doc. #88) filed 03/19/2012
- Exhibit 5. Judge Real's Order from Case No. 03-cv-08955, issued 06/17/2005
- Exhibit 6. Statement from the website of SoundScan service provider, Neilson Data (Ex. C to Doc. #88)
- Exhibit 7. SoundScan data provided to Plaintiff by Defendant's counsel on 10/12/2011
- Exhibit 8. Defendants' Discovery Response to Plaintiff by Defendant's counsel on 10/12/2011
- Exhibit 21. Internet websites selling Black Eyed Pea's Shut Up Remixes
- Exhibit 22-24. Copies of the Defendants' musical and DVD works containing the Defendant's Shut Up musical work.
- Exhibit 25. April 21, 2005 email correspondence involving the licensing of the (Not Just) Knee Deep musical work.

(d) Defendants' affirmative defenses pleaded and plan to pursue

Affirmative Defense: Plaintiff's claims are barred because Defendants had valid license.

(e) The elements required to establish Defendants' defenses are:

The existence of a valid license from the Copyright Owner.

(f) Key evidence Plaintiff relies on in opposition to each counterclaim:

Exhibit 1. Declaration of George Clinton (Doc. # 86) filed 3/19/2012

Exhibit 2. Declaration of Eban Kelly (Doc. #87) filed 03/19/2012

**Exhibit 5. Judge Real's Order from Case No. 03-cv-08955, issued
06/17/2005**

(g) Anticipated evidentiary issues and opposition to the issues:

Plaintiff anticipates that Defendants will object to Plaintiff's presentation of Exhibit 7. SoundScan data under Rule 408. But Rule 408 should not bar this Exhibit because of the following reasons:

(a) Rule 408 does not apply to factual material which is otherwise discoverable.

The SoundScan data can be and was ordered from a third party Nielsen who states on their website: "Nielsen's tracking of music sales data is used by all major and most independent record companies as well as distribution companies, artists managers, booking agents, concert promoters, performing

rights organizations, government agencies, venue owners, traditional retailers, online retailers, and digital delivery companies.” This statement confirms that this third party “music sales data” are objective facts.

(b) The SoundScan data was provided to Plaintiff’s counsel by Defendants’ counsel on October 12, 2011. This was before Defendants articulated their request to place this data under protective order November 7, 2011. This data was created and was provided to Plaintiff’s counsel before settlement negotiations started.

(h) Issues of law:

Plaintiff does not anticipate any issues of law, such as the proper interpretation of a governing statute, which are germane to the case.

2. BIFURCATION

Plaintiff does not request bifurcation of any issues.

3. JURY TRIAL

Plaintiff made a timely demand for a jury trial. (Doc #1).

The following is triable to a jury as a matter of right: Issue of damages in copyright infringement - 17 U.S.C.A. § 504, *see also Feltner v. Columbia Pictures TV, Inc.*, 523 U.S. 340 (1998) (Seventh Amendment provides right to jury trial on all issues pertinent to award of statutory damages in copyright infringement action, including

amount itself).

4. ATTORNEYS' FEES

Plaintiff's attorney may recover attorneys' fees in a civil action for copyright infringement in the following manner:

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C.A. § 505 (West). *See also Milton H. Greene Archives, Inc. v. Julien's Auction House LLC*, 345 Fed.Appx. 244, 249 (9th Cir. 2009)(unpublished) (an award of \$340,000 in attorney fees to copyright holder as prevailing party was not abuse of discretion); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (nonexclusive factors court is to consider in determining whether to award prevailing party attorney fees under Copyright Act include frivolousness, motivation, objective unreasonableness (both in factual and in legal components of case) and need in particular circumstances to advance considerations of compensation and deterrence.).

5. ABANDONMENT OF ISSUES

Plaintiff has not abandoned any claims.

Dated: April 30, 2012

Respectfully submitted,

/s/Jeffrey P. Thennisch
Dobrusin & Thennisch PC
29 W. Lawrence Street
Suite 210
Pontiac, Michigan 48342
(248) 292-2920
(248) 292-2910

CERTIFICATE OF SERVICE

I, hereby certify that on April 30, 2012, I electronically filed the foregoing:

PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW
with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

/s/ Jeffrey P. Thennisch
Jeffrey P. Thennisch (Pro Hac Vice)
Attorneys for Plaintiff
Dobrusin & Thennisch, PC
29 W. Lawrence Street, Suite 210
Pontiac, Michigan 48342
Ph: (248) 292-2920
Fx: (248) 292-2910
jeff@patentco.com