Rupa Marya v. Warner Chappell Music Inc Doc. 64 Att. 1

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Warner/Chappell Music, Inc. and
Summy-Birchard, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GOOD MORNING TO YOU PRODUCTIONS CORP.; ROBERT SIEGEL; RUPA MARYA; and MAJAR PRODUCTIONS, LLC; On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

WARNER/CHAPPELL MUSIC, INC., and SUMMY-BIRCHARD, INC.,

Defendants.

Lead Case No. CV 13-04460-GHK (MRWx)

DECLARATION OF KELLY M. KLAUS IN SUPPORT OF REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Date: September 30, 2013
Time: 9:30 a.m.
Courtroom: 650 (Roybal)
Judge: Hon. George H. King, Chief Judge

Dockets.Justia.com

I, KELLY M. KLAUS, hereby declare:

1. I am a member of the firm Munger, Tolles & Olson LLP, counsel for Defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc. (jointly, "Warner/Chappell"). I am admitted to practice law in the State of California and before this Court. I submit this declaration in support of Warner/Chappell's Reply Memorandum in Support of Warner/Chappell's Motion to Dismiss Second Amended Consolidated Class Action Complaint and/or Motion to Strike Plaintiffs' Proposed Class Definition. I have personal knowledge of the facts stated herein and if called upon as a witness to testify as to them, I could and would competently do so.

2. I participated in a telephonic meet and confer with counsel for Plaintiffs on August 21, 2013, pursuant to Civil L.R. 7-3. During this meet and confer, Warner/Chappell explained the substantive bases on which it was moving to dismiss and/or strike Plaintiffs' consolidated complaint, including Warner/Chappell's position that claims outside the applicable three-year limitations periods are time-barred. Following this meet and confer, Plaintiffs' counsel and I exchanged several emails with authority supporting the parties' stated positions.

3. During the parties' August 21 meet and confer, Plaintiffs' counsel did not inform Warner/Chappell that Plaintiffs contended that the limitations periods are subject to equitable tolling.

4. Attached hereto as **Exhibit A** is a true and correct copy of a post-conference email that I sent to Plaintiffs' counsel requesting any authority supporting Plaintiffs' "proposition that the three-year limitations period in the Copyright Act is inapplicable to a claim for declaratory judgment challenging the validity of a copyright."

5. Plaintiffs never responded to the requests for authority in **Exhibit A**, and prior to their Opposition, Plaintiffs never informed Warner/Chappell, in email

correspondence or otherwise, that Plaintiffs contended that the limitations periods are subject to equitable tolling.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of September, 2013, at San Francisco, California.

By: */s/ Kelly M. Klaus*
KELLY M. KLAUS

Exhibit A

From: Klaus, Kelly
Sent: Thursday, August 22, 2013 4:27 PM
To: Manifold, Betsy; Kaplan, Adam; Pomerantz, Glenn
Cc: Rifkin, Mark; 'Randall S. Newman'; 'mgodino@glancylaw.com'; 'Daniel Schacht'
Subject: RE: HBTY: Follow Up Exchange of Case Law from Meet and Confer

Hi Betsy:

Thanks for sending these.

On the preemption issue, another case you should look at (in addition to the cases I mentioned, and for which you found the cites below) is *Barclays Capital Inc. v TheFlyOnTheWall.com, Inc.*, 650 F.3d 876, 892 (2d Cir. 2011). You should also take a look at Nimmer on Copyright, Section 1.01[B][2], and in particular at the discussion at pages 1-67 – 1-68, and the cases that are cited therein, between footnotes 448-458. As we discussed yesterday, we are not aware of any case or other authority that says Section 301(a) is automatically inapplicable if a party is challenging whether a work is copyrighted (or copyrightable). If you have any authority supporting your position, please provide that so that we can evaluate our argument and the basis for our motion.

Also, Mark said that he might have some authority for the proposition that the three-year limitations period in the Copyright Act is inapplicable to a claim for declaratory judgment challenging the validity of a copyright. If you have any such authority, we would appreciate it if you would send that along, too.

Best regards,
Kelly

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From: Manifold, Betsy [mailto:manifold@whafh.com]
Sent: Thursday, August 22, 2013 12:18 PM
To: Klaus, Kelly; Kaplan, Adam; Pomerantz, Glenn
Cc: Rifkin, Mark; 'Randall S. Newman'; 'mgodino@glancylaw.com'; 'Daniel Schacht'
Subject: HBTY: Follow Up Exchange of Case Law from Meet and Confer

Counsel:

Below is a follow up exchange of cases by plaintiffs based on Wednesday's meet and confer.

RESCISSION IS A CAUSE OF ACTION

On rescission, plaintiffs attach a very recent (July 2013) case from Judge Tucker in a contract/copyright dispute which finds that rescission is a cause of action and denied a motion to dismiss.

STATE LAW CLAIMS NOT PREEMPTTED

On the issue of exemption, plaintiffs provide the following cases holding that contract causes of action are not preempted:

Claim for breach of contract including promise to pay is qualitatively different from suit to vindicate right included in Copyright Act, 17 USCS ** 101 et seq., and is not subject to preemption. *Forest Park Pictures v Universal TV Network, Inc.* (2012, CA2 NY) 683 F3d 424, 40 Media L R 1985, 103 USPQ2d 1122;.

Breach of contract claims, are qualitatively different from copyright infringement claim and therefore are not preempted by Copyright Act. Existence of explicit contractual rights makes breach of contract claim qualitatively different from claim for copyright infringement. *eScholar, LLC v Otis Educ. Sys.* (2005, SD NY) 387 F Supp 2d 329 (criticized in BanxCorp v Costco Wholesale Corp. (2010, SD NY) 2010 US Dist LEXIS 70380);

For preemption purposes, right to receive payment places contract claim outside of scope of rights protected by copyright, since right to be paid for use of work is not one of those rights protected by Copyright Act. *Internet Archive v Shell* (2007, DC Colo) 505 F Supp 2d 755;

District court erred in holding that individual's claim was preempted by Copyright Act, 17 USCS * 301, where individual's claim for breach of implied-in-fact contract alleged extra element (implied promise to pay) that transformed action from one arising under ambit of federal statute to one sounding in contract. *Grosso v Miramax Film Corp.* (2004, CA9 Cal) 383 F3d 965, 72 USPQ2d 1543, and on other grounds, reh den, reh, en banc, den (2005, CA9 Cal) 400 F3d 658, cert den (2005) 546 US 824, 126 S Ct 361, 163 L Ed 2d 68 and reprinted as (2005, CA9 Cal) 2004 US App LEXIS 28043; and

Promise that is implicit in every contract but is not necessary in infringement action provides extra element that precludes pre-emption under Copyright Act, 17 USCS * 301(a). *Torah Soft, Ltd. v Drosnin* (2002, SD NY) 224 F Supp 2d 704.

DEFENDANTS' SUPPLEMENTAL CASES

As to the cases that defendants mentioned and planned to circulate, should we assume that you are referring to: *NBA v. Motorola*, 105 F.3d 841 (2d. Cir. 1997) and *Toney v. L'Oreal*, 406 F.3d 905 (7th Cir. 2005)?

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