
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 10-1656-JST (RZx)

Date: February 7, 2011

Title: Bryan Pringle v. William Adams, Jr. et al.

Present: **Honorable JOSEPHINE STATON TUCKER, UNITED STATES DISTRICT JUDGE**

Ellen Matheson
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER DENYING PLAINTIFF’S
MOTION FOR PRELIMINARY INJUNCTION (Doc. 73)**

I. INTRODUCTION

Before the Court is Plaintiff’s Motion for Preliminary Injunction. (Doc. 73.) Having considered the papers, heard oral argument, and taken the matter under submission, the Court DENIES Plaintiff’s Motion for a Preliminary Injunction.

II. PROCEDURAL BACKGROUND

On October 28, 2010, Plaintiff Bryan Pringle filed suit for copyright infringement against William Adams, Stacy Ferguson, Allan Pineda, and Jaime Gomez (individually and collectively as the music group The Black Eyed Peas), David Guetta, Frederick Riesterer, UMG Recordings, Inc., Interscope Records, EMI April Music, Inc., Headphone Junkie Publishing, LLC, Will.I.Am Music, LLC, Jeepney Music, Inc., Tab Magnetic Publishing, Cherry River Music Co., Square Rivoli Publishing, Rister Editions, and Shapiro Bernstein & Co (collectively “Defendants”). Plaintiff alleges that Defendants impermissibly and willfully infringed his statutory copyright in the derivative version of the song “Take a Dive,” when they wrote and recorded The Black Eyed Peas’ song “I Gotta Feeling.” (See generally First Amended Complaint, Doc. 9.)

On December 13, 2010, Defendants moved to dismiss the action, for a more definite statement, and to strike portions of the First Amended Complaint (Docs. 52 &

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53), all of which the Court denied. (Doc. 95.) Plaintiff now moves for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 enjoining Defendants from making, distributing, and publicly performing “I Gotta Feeling.” (Pl.’s Not. of Mot., Doc. 73, at 1.) Defendants have filed multiple oppositions (Docs. 81, 83, 84), and Plaintiff replied (Doc. 91).

III. LEGAL STANDARD

“A preliminary injunction is an extraordinary and drastic remedy.” *Munaf v. Geren*, 553 U.S. 674, 676 (2008). “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tx v. Camenisch*, 451 U.S. 390, 395 (1981). A district court should issue a preliminary injunction only “upon a clear showing that the plaintiff is entitled to relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 376 (2008). This requires the district court to making findings of fact and conclusions of law. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007); see *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1155 (9th Cir. 2006).

“[T]he party seeking the injunction . . . bear[s] the burden of demonstrating the various factors justifying preliminary injunctive relief . . .” *Granny Good Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 441 (1974). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 129 S. Ct. at 374. This “requires the plaintiff to make a showing on all four prongs.” *Alliance for the Wild Rockies v. Cottrell*, --- F.3d ---, 2011 WL 208360, at *7 (9th Cir. Jan. 25, 2011). A plaintiff must support such a showing with evidence. *Camenisch*, 451 U.S. at 395.

The Ninth Circuit employs the “serious questions” version of the “sliding scale” approach when applying the four-element *Winter* test. *Id.* at *4, *7. “That is, ‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.*

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IV. DISCUSSION

Because the Court finds that Plaintiff has failed to demonstrate a likelihood of success on the merits, or alternatively to raise serious questions as to the merits, the Court need only consider that prong in denying Plaintiff’s Motion. *Alliance*, 2011 WL 208360 at *7 (requiring a plaintiff to make a showing on all four prongs).

To be successful on the merits of his copyright infringement claim, Plaintiff must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Here, Plaintiff alleges that he owns a valid copyright in both the original and derivative versions of “Take a Dive,” and that Defendants have copied elements of the latter in “I Gotta Feeling.” The Court considers each version of the song in turn.

A. Original Version

Plaintiff has submitted a declaration stating:

In 1998, I wrote and recorded the song “Take a Dive,” an original work . . . I registered a claim for “Take a Dive,” and other songs, contained on a CD entitled *Dead Beat Club: 1998*, with the United States Copyright Office. The Register of Copyrights issued a Certificate of Registration for *Dead Beat Club: 1998* on April 29, 1998, identified as SRu 387-433 (“Take a Dive” is referred to on the Certificate as merely “Dive”).

(Pringle Decl., Doc. 76, ¶ 3.) Plaintiff provided a CD – not the *Dead Beat Club: 1998* CD – containing the original version of “Take a Dive” along with a copy of the Certificate of Registration for *Dead Beat Club: 1998*. (*Id.* Exhs. B, C.)

Plaintiff’s Certificate of Registration serves as prima facie evidence of his valid ownership over *Dead Beat Club: 1998* and the individual songs contained therein. 17 U.S.C. § 410(c); *Cosmetic Idea, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010) (“[I]f a copyright holder secures a registration certificate within five years after

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first publication, such certificate will constitute prima facie evidence of both the validity of the copyright and the facts stated in the certificate.”). However, Plaintiff has not provided evidence that *Dead Beat Club: 1998* actually contains the original version of “Take a Dive.” As Plaintiff acknowledges, the Certificate lists “Dive,” not “Take a Dive” as material in which the copyright is claimed. (*Id.* Exh. C, sec. 6.a.) This alone is not problematic. See *Szabo v. Errisson*, 68 F.3d 940, 944 (5th Cir. 1995) (“[A] copyright of a collection of unpublished works protects the individual works that are copyrightable, regardless of whether they are individually listed on the copyright certificate.”), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010); see *United Fabrics Int’l*, --- F.3d ---, 2011 WL 222996, at *3 (9th Cir. Jan. 26, 2011) (agreeing with *Szabo*’s approach in considering the “unpublished-collection-of-works category of copyright registrations”). But, Plaintiff has not provided a copy of *Dead Beat Club: 1998* to allow the Court to verify that, despite the song’s title being absent from the Certificate, the song nonetheless appears in the CD and is therefore subject to the copyright.

For a collection unpublished works, like *Dead Beat Club: 1998*, 37 C.F.R. § 202.3(b)(4) holds that:

[T]he following shall be considered a single work: . . .

(B) In the case of unpublished works: all copyrightable elements that are otherwise recognizable as self contained works, and are combined in a single unpublished “collection.” For these purposes, a combination of such elements shall be considered a “collection” if:

- (1) The elements are assembled in an orderly form;
- (2) The combined elements bear a single title identifying the collection as a whole;
- (3) The copyright claimant in all of the elements, and in the collection as a whole, is the same; and

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(4) All of the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.

Registration of an unpublished “collection” extends to each copyrightable element in the collection and to the authorship, if any, involved in selecting and assembling the collection.

37 C.F.R. § 202.3(b)(4); see *United Fabrics*, 2011 WL 222996 at *3.

Thus, inherent in determining whether an “element” within a collection is copyrightable is verifying that the element in question appears in the collection. Absent such presumably available evidence, the Court retains only Plaintiff’s declaration, i.e. his word, to support a finding that he owns a valid copyright in the original version of “Take a Dive.” (Pringle Decl., ¶ 3.) Standing alone, this is insufficient to create a presumption of valid copyright ownership and, moreover, to support an “extraordinary and drastic remedy” such as injunctive relief. Thus, Plaintiff cannot establish a likelihood of success for his copyright infringement claim based on copyright ownership in the original version of “Take a Dive.”

B. Derivative Version

1. Valid Copyright

Plaintiff claims to own a valid copyright in the derivative version of “Take a Dive.” (Pl.’s Mot. at 15; Pl.’s Reply, Doc. 91, at 2-4.) Plaintiff relies on two pieces of evidence in support of his alleged ownership: the Certificate of Registration and his own declaration. Defendants argue that Plaintiff cannot establish valid ownership because his Certificate of Registration does not establish ownership and Plaintiff has failed to provide any other evidence as to copyright validity. (Shapiro Opp. 4-8; Adams Opp. 4-10.) The Court agrees.

Here, because Plaintiff registered his Certificate of Registration over ten years after the alleged first publication of the derivative version (*see* Pringle Decl., Exh. D), the Certificate does not serve as prima facie evidence of ownership or create a presumption of validity. 17 U.S.C. § 410(c) (“the certificate of a registration made *before or within*

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five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.” (emphasis added)); *see Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075-76 (9th Cir. 2000). “When a plaintiff does not possess a copyright certificate, she must provide evidence of copyrightability and originality, and compliance with statutory formalities.” *Kimbell v. Rock*, No. CV09-7249, 2009 WL 3248208, at *3 (C.D. Cal. Oct. 8, 2009); *Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir. 1999); *see* 4 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 13.01 (2010) (“Plaintiff’s ownership, in turn, breaks down into the following constituent parts: (1) originality in the author; (2) copyrightability of the subject matter; . . . [and] [3] compliance with applicable statutory formalities . . .”). Defendants argue that Plaintiff has not provided sufficient evidence of originality, i.e. that he authored the derivative version. (Adams Opp. at 8-10.) The Court agrees.

Plaintiff devotes just two sentences in his Motion to his alleged copyright in the derivative version. Plaintiff states:

In addition, Pringle owns a valid copyright for the sound recording of the derivative version of “Take a Dive,” as shown by the Certificate of Registration for the song, entitled “Take a Dive (Dance Version)[.]” (*See* Exhibit D to Pringle Decl.) His copyright registration certificates constitute evidence of the validity of the copyrights and Pringle’s ownership in the copyrights.

(Pl.’s Mot. at 14-15.) Thus, Plaintiff seems to rely solely on the Certificate of Registration to establish copyright ownership. As the Court noted above, however, the Certificate cannot serve as prima facie evidence of a valid copyright in the derivative version. Plaintiff asserts that “[e]ven if the Court were to determine that there is no presumption of validity for Pringle’s creation of the guitar twang sequence, there is no requirement . . . that Pringle must prove the components of his copyright claim.” (Pl.’s Reply at 3.) To be clear, for the Court to issue a preliminary injunction, Plaintiff must show a likelihood of success or raise serious questions as to the merits of his copyright infringement claim. This requires, at minimum, providing evidence, i.e. proof, as to valid copyright ownership.

In his declaration, Plaintiff states, inter alia, that:

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Approximately a year after [“Take a Dive”]’s creation, I made several slightly different derivative versions of “Take a Dive,” one of which consisted of my removing the lyrics from the original version, and adding what can be described as a repeating eight-bar melody, using a “guitar twang” instrument, utilizing a total of four notes (D4, C4, B3, and G3), in the following progression: D4-C4-B3-C4-B3-C4, in the key G3 (the “guitar twang sequence”). I modeled this “guitar twang sequence” after “Take a Dive’s” progression of notes in the chorus vocals of the original version, which I sang

I saved the creation file for the derivative version of “Take a Dive,” which contains the guitar twang sequence, on my personal computer as an NRG. Image File, entitled “Disk05.NRG,” on or around 1999.

Since 1998, I have been and I remain the owner and proprietor of the statutory copyright in the musical composition and sound recording for “Take a Dive,” and its derivative work.

(Pringle Decl. ¶¶ 4-6.) However, Plaintiff has failed to substantiate his declaration with other facts or documentary evidence. Further, Plaintiff’s declaration is so vague that it fails to show that he independently authored the “guitar twang” sequence. Plaintiff merely states that he “add[ed]” the guitar twang sequence using a “guitar twang instrument,” and that he “modeled” the sequence after the chorus in the original version. (*Id.* ¶ 4.) Plaintiff’s bald declaration and the minimal statements therein do not meet Plaintiff’s burden of demonstrating originality, and therefore a valid copyright, and certainly fall short of showing a likelihood of success or raising serious questions as to the merits of his copyright infringement claim.

2. Copying

Plaintiff’s failure to establish ownership over a valid copyright is sufficient to deny his Motion. However, Plaintiff also has failed to show a likelihood of success or raise serious questions as to whether Defendants copied the derivative version in “I Gotta Feeling.” The Court notes that Plaintiff’s Copyright Registration in derivative version only covers the sound recording of the song and not the musical composition. (Pringle

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Decl., Exh. D.) “Sound recordings” are defined as “works that result from the fixation of a series of musical, spoken, or other sounds . . .” 17 U.S.C. § 101. “Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights.” *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1248-49 (C.D. Cal. 2002); *see* 17 U.S.C. §§ 102(a)(2) & (7). While “[a] musical composition’s copyright protects the generic sound that would necessarily result from any performance of the piece,” in contrast “the sound recording is the sound produced by the performer’s rendition of the musical work.” *Id.* at 1249-50.

Because Plaintiff’s copyright only covers the sound recording, 17 U.S.C. § 114 controls the extent to which Plaintiff can bring a copyright infringement claim. Under 17 U.S.C. § 114(a), “[t]he exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106 (4).” 17 U.S.C. § 114(a). Under 17 U.S.C. § 106, the owner of copyright has the exclusive right:

- (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . . (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106. Furthermore, 17 U.S.C. § 114(b) provides in relevant part:

The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an

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independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

17 U.S.C. § 114(b). Thus, to show copying, Plaintiff must establish that Defendants, in duplicating the derivative version or creating a derivative thereof, either “directly or indirectly recaptured the actual sounds fixed in the recording” or “rearranged, remixed, or otherwise altered in sequence or quality” the “*actual sounds* fixed in the sound recording.” *Id.* (emphasis added).

Plaintiff alleges that Defendants “directly sampled” the sound recording of the derivative version, and defines “sampling” as “the practice of directly lifting a portion of an existing sound recording and using it as a component of a new song.” (Pl.’s Mot. at 16.) In support, Plaintiff offers a declaration and an expert report from Mark Rubel, a sound engineer. (Doc. 78.) Based on his own “listening” and a computer waveform analysis, Rubel concluded that Defendants sampled parts of the derivative version in “I Gotta Feeling.” (Rubel Decl., Exh. A, Rubel Report at 9, 19.)

Defendants have provided refuting evidence, however, showing that it would be technologically impossible for Defendants to have sampled the guitar twang from the derivative version. Paul Geluso, a professor and Chief Recording Engineer in the Department of Music and Performing Arts Professions at the Steinhardt School of Education at New York University, found that the guitar twang sequence in the derivative version could not have been sampled because it is layered with other musical elements, while the guitar twang in “I Gotta Feeling” in a number of instances have no other sound elements. (Geluso Decl., Doc. 81-1, ¶ 7.) Based on this observation, Geluso explains that “it would not have been technologically possible to obtain a ‘clean’ guitar twang sequence that appears in ‘I Gotta Feeling’ from the sequence that appears in the derivative version” (*Id.*) Indeed, when Geluso attempted to isolate the guitar twang sequence in the derivative version using an “exhaustive” list of techniques, “none of them yielded an even remotely artifact-free isolated guitar twang sequence, as was present in ‘I Gotta Feeling.’” (*Id.* ¶ 10.) Geluso further explains that this finding was not inconsistent with Rubel’s testimony, as Rubel did not independently confirm whether the isolated guitar twang sequence he analyzed originated from the derivative version and acknowledged on several occasions that the guitar twang in the derivative version is layered with other sound elements not present in “I Gotta Feeling.” (*Id.* ¶¶ 11-12 (citing

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Rubel Decl. ¶ 4 and *id.*, Rubel Report at 17-19.) Plaintiff did not respond to this evidence in his reply.

In light of Defendant's evidence, Plaintiff fails to meet its burden of showing a likelihood of success or raising serious questions as to his claim that Defendants copied the derivative version.

V. CONCLUSION

For the reasons stated above, the Court DENIES Plaintiff's Motion for a Preliminary Injunction.

Initials of Preparer: nkb