

EXHIBIT 14

Not Reported in F.Supp., 1997 WL 158364 (S.D.N.Y.), 1997 Copr.L.Dec. P 27,639, 42 U.S.P.Q.2d 1398
(Cite as: **1997 WL 158364 (S.D.N.Y.)**)

H

United States District Court,
S.D. New York.

TUFF 'N' RUMBLE MANAGEMENT, INC., d/b/a
Tuff City Records, Plaintiff,

v.

PROFILE RECORDS, INC., Landmark Distribut-
ors, Inc., Promuse, Inc., Protoon, Inc., Steve Plot-
nicki, "John Doe" & "Richard Roe," Defendants.

No. 95 Civ. 0246 (SHS).

April 2, 1997.

OPINION

STEIN, District Judge.

*1 Plaintiff in this copyright infringement action claims that it owns the copyright in the sound recording and the musical composition entitled "Impeach the President" and that "certain drum tracks" of that work have been improperly copied by defendants in their recordings entitled "Back from Hell" and "Dana Dane with Fame."

Defendants now seek summary judgment dismissing the complaint pursuant to [Fed.R.Civ.P. 56\(c\)](#) on the ground that plaintiff cannot establish the essential elements of its claim of copyright infringement. In response, plaintiff has cross-moved for an order striking defendants' answer and granting plaintiff judgment by default. For the reasons set forth below, defendants' motion is granted in its entirety, plaintiff's motion is denied, and the complaint is dismissed.

I. Factual Background

Tuff 'N' Rumble Management, Inc. d/b/a Tuff City Records ("Tuff") is a record company that sells rap music. Defendant Profile Records, Inc. ("Profile") is also a record company that sells rap music and is

affiliated with defendants Promuse, Inc. and Protoons, Inc. Defendant Landmark Distributors, Inc. ("Landmark") was, until it ceased operations in April 1994, a record distributor that distributed records for Profile and other independent record companies, including Tuff. Defendant Steven Plotnicki is an officer and shareholder of each of the corporate defendants.

Tuffs complaint contains two causes of action. Count I alleges that defendants are liable for copyright infringement based on their release of a sound recording entitled "Back from Hell" by the group Run DMC because that work "incorporates portions of the original sound recording of the drum track" of a work entitled "Impeach the President." (Compl.¶ 15(a).) Count II makes the same charge with respect to a sound recording entitled "Dana Dane with Fame" by the recording artist Dana Dane. (Compl.¶ 24(a).) More specifically, Tuff alleges that "[t]he sound recordings of certain drum tracks found in 'Dana Dane With Fame' and 'Back From Hell' were copied/sampled directly from a phonorecord containing the sound recording and musical composition entitled 'Impeach the President.'" (Pl.'s Pre-Trial Order ¶ 5(G).)

Tuff also alleges it owns the copyright in the sound recording and the musical composition of "Impeach the President," as recorded in 1973 by the artists known as the Honey Drippers. (Compl. ¶ 10 & Exh. A.) Tuff registered the copyright in "Impeach the President" on November 25, 1991, four years after Profile released "Dana Dane with Fame" and one year after it released "Back from Hell." (Compl., Exh. A; Jacobs Aff., Exh. G.) Tuffs copyright registration names Roy C. Hammond as the author of "Impeach the President" and states that the copyright was transferred to it "by written agreement." (Compl., Exh. A.)

II. Discussion

A. Defendants' Motion for Summary Judgment

The standards governing defendants' motion are well settled. Summary judgment may be granted “only when the moving party demonstrates that ‘there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ ” *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir.1995) (quoting Fed.R.Civ.P. 56(c)). The Supreme Court has held that “the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact for trial. *Id.* at 323, 106 S.Ct. at 2553. To defeat a motion for summary judgment, the non-moving party must come forward with specific facts that raise a genuine issue for trial. Fed.R.Civ.P. 56(e). Finally, in considering defendants' present motion, this Court must “view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when ‘no reasonable trier of fact could find in favor of the non-moving party.’ ” *Allen*, 64 F.3d at 79 (citation omitted) (quoting *Lund's. Inc. v. Chemical Bank*, 870 F.2d 840, 844 (2d Cir.1989)).

*2 In the context of copyright infringement, courts have regularly granted summary judgment where it is “clear” that the plaintiff cannot make out the essential elements of the claim. *See Repp v. Lloyd Webber*, 858 F.Supp. 1292, 1300 (S.D.N.Y.1994); *Favia v. Lyons Partnership*, No. 94 Civ. 3277, 1996 WL 194306, at *2 (S.D.N.Y. Apr.23, 1996); *Siskind v. Newton-John*, No. 84 Civ. 2634, 1987 WL 11701, at *4 (S.D.N.Y. May 22, 1987). A party suing for copyright infringement “must show ownership of a valid copyright and the defendant's infringement by unauthorized copying.” *Laureyssens*

v. Idea Group. Inc., 964 F.2d 131, 139 (2d Cir.1992); *see also M.H. Segan Ltd. Partnership v. Hasbro, Inc.*, 924 F.Supp. 512, 518 (S.D.N.Y.1996) (“To succeed in its copyright infringement claim, plaintiff must demonstrate: (1) ownership of a valid copyright; (2) that the defendant has actually copied the plaintiff's work; and (3) the copying is illegal because a substantial similarity exists between the defendant's work and the protectible elements of plaintiff's.”).

In this case, plaintiff has demonstrated neither that it owns a valid copyright nor that defendants engaged in unauthorized copying.

1. Ownership of a Valid Copyright

17 U.S.C. § 410(c) provides that “[i]n any judicial proceeding the certificate of a registration made before or within 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,” but “[t]he evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.”

Tuff asserts that it is entitled to the presumption of copyright validity provided for in section 410(c). However, Tuff registered its copyright for “Impeach the President” on November 25, 1991; that registration states that the date of first publication of the work was October 1, 1973, more than 18 years earlier. (Compl., Exh. A.) Accordingly, the registration does not constitute *prima facie* evidence that the copyright is valid, and Tuff has the burden of proving the validity of its copyright. *See Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851, 854 (6th Cir.1991) (Where a work was first published in 1982 and the copyright was registered in 1988, the “district court was not bound to accept the validity of the copyright.”); *Dollcraft Indus., Ltd. v. Well-Made Toy Mfg. Co.*, 479 F.Supp. 1105, 1114 (E.D.N.Y.1978) (Where a work falls outside the statutory presumption of 17 U.S.C. § 410(c),

plaintiff carries the burden of proving ownership of a valid copyright, including its originality.).^{FN1}

FN1. Tuff also contends that it is entitled to a presumption of copyright validity pursuant to [section 410\(c\)](#) with respect to the musical composition aspect of the 1991 copyright registration, even if it is not entitled to that presumption with respect to the sound recording. Tuff, however, not only admits that it has no personal knowledge of when or if the musical composition of “Impeach the President” was initially published, (*see* Fuchs Aft. ¶ 7(c)), but also set forth on the 1991 copyright registration only one date of initial publication-1973-not separate dates for publication of the sound recording and musical composition of the work. (Compl., Exh. A.) The Court therefore rejects this argument for a presumption of copyright validity as well.

Tuff has not sustained that burden. As noted above, Tuff’s copyright registration names Roy C. Hammond as the author of “Impeach the President” and states that the copyright was transferred to Tuff “by written agreement.” Tuff, however, has offered no evidence to substantiate that assertion. Tuff has produced copies of two written agreements, both signed by Hammond as licensor. The first agreement, dated March 22, 1988, licenses Tuff’s predecessor to use “Impeach the President” in exchange for \$100. (Jacobs Aff., Exh. H.) The second agreement, dated July 24, 1990, purports to make Tuff the exclusive licensee of “Impeach the President.” (Jacobs Aff., Exh. I.) Yet, Tuff has produced no evidence affirming that Hammond *himself* had any rights to convey the work. According to Fuchs, he and Hammond never discussed whether Hammond had a copyright interest in “Impeach the President,” (*see* Fuchs Dep. at 231), nor did Tuff ask Hammond in what form the song was first published or conduct any inquiry of its own. *Id.* at 233.

*3 However, there is evidence available on the re-

cord itself as to who possessed the original copyright in “Impeach the President”—the sound recording contains the letter “P” in a circle, the date “1973,” and the name “Alaga.” (Jacobs Aff., Exh. J.) According to [17 U.S.C. § 402\(b\)](#), these elements are the exact ones required to appear on a sound recording in order to provide notice to the public of the work’s copyright protection.^{FN2} Thus, the only sound evidence before this Court that indicates who owned the original copyright in “Impeach the President” is that “Alaga” was that owner. It should also be noted that the top of the label on the sound recording states, in bold letters, “Alaga Records.” Tuff offers no proof explaining how, when, or if Alaga transferred copyright ownership to Hammond, which would have had to occur by written instrument memorializing such a transfer. *See* [17 U.S.C. § 204\(a\)](#). And, of course, Hammond could not have transferred copyright ownership to Tuff unless copyright ownership had been transferred to him by Alaga.^{FN3}

FN2. According to the historical and statutory notes following [17 U.S.C.A. § 402](#) (West 1996), the requirements included in section (b) are the same as those in the version of the copyright law in effect in 1973.

FN3. In an effort to avoid the conclusion that Hammond did not own the copyright in “Impeach the President” and therefore was legally incapable of transferring that copyright, Tuff argues that there is no proof that Alaga owned the copyright in the song. In support of this argument, Tuff relies on a 1982 agreement that Fuchs purportedly entered into with Hammond which surfaced for the first time in Tuff’s answering papers to defendants’ motion for summary judgment, long after lengthy discovery proceedings had concluded. Even had the 1982 agreement been produced by Tuff in a timely manner—which it was not (*see* May 31, 1995 Order of Judge Michael B. Mukasey, Jacobs Reply Aff., Exh.

Not Reported in F.Supp., 1997 WL 158364 (S.D.N.Y.), 1997 Copr.L.Dec. P 27,639, 42 U.S.P.Q.2d 1398
(Cite as: 1997 WL 158364 (S.D.N.Y.))

B)-the agreement does not provide any evidence that the copyright in “Impeach the President” did not belong to Alaga or did belong to Hammond.

Because Tuff has no direct knowledge of who owned the original copyright in “Impeach the President,” cannot explain why the copyright notice on the 1973 single states Alaga is the owner, and produces no contrary evidence from any person qualified to testify about these matters, the Court concludes that Tuff has not met its burden of proving it is the owner of a valid copyright.

2. Unauthorized Copying

The Court also finds that Tuff has failed to produce competent evidence that defendants participated in unauthorized copying of “Impeach the President.” In order to establish unauthorized copying, a plaintiff claiming copyright infringement must show (1) actual copying, and (2) unlawful appropriation. *Laureyssens v. Idea Group, Inc.*, 964 F.2d at 139-40; *Arden v. Colombia Pictures Indus.*, 908 F.Supp. 1248, 1257 (S.D.N.Y.1995); *Denker v. Uhry*, 820 F.Supp. 722, 728 (S.D.N.Y.1992), *aff'd*, 966 F.2d 301 (2d Cir.1993). There is no evidence in this case that defendants participated in either activity.

A plaintiff alleging copyright infringement can establish actual copying by offering “direct evidence or by proof of defendant's access to plaintiff's work and sufficient similarity between the works to support an inference of copying.” *Arden v. Colombia Pictures, Indus.*, 908 F.Supp. at 1257; *see also Tienshan, Inc. v. C.C.A. Int'l (N.J.), Inc.*, 895 F.Supp. 651, 656 (S.D.N.Y.1995). In this case, Tuff presents *no* direct evidence of actual copying or of any facts that would support an inference of copying. In order to prove copying by inference, Tuff would have to show that defendants or the artists who wrote “Back from Hell” and “Dana Dane with Fame” had access to “Impeach the President.” Access to a plaintiff's work will not be presumed.

Rather, “[a] plaintiff must offer significant, affirmative and probative evidence to support a claim of access. Conjecture or speculation of access will not suffice.” *Intersong-USA v. CBS, Inc.*, 757 F.Supp. 274, 281 (S.D.N.Y.1991) (citations omitted); *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir.1988) (“Access must be more than a bare possibility and may not be inferred through speculation or conjecture.”); *Repp v. Lloyd Webber*, 858 F.Supp. at 1301.

*4 As proof of access, a plaintiff may show that “(1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to the work.” *Favia v. Lyons Partnership*, 1996 WL 194306, at *3. In this case, there is no evidence that the allegedly infringed work was widely disseminated. *See, e.g., ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir.1983). In addition, by Tuff's own admission, copies of “Impeach the President” have become “rare” since the record's release in 1973. (Fuchs Dep. at 44.) In sum, there is no basis from which the Court can infer that the authors of “Back from Hell” and “Dana Dane with Fame” had access to “Impeach the President.” *See Favia v. Lyons Partnership*, 1996 WL 194306, at *3. Tuff has offered nothing more than conjecture and speculation as evidence of the defendants' (or the artists') access to the work, which fails to establish an essential element of its claim of copyright infringement.

Moreover, neither “Dana Dane with Fame” nor “Back from Hell” are so strikingly similar to “Impeach the President” that they must have been copied from it and could not have been independently created. *Stratchborneo v. Arc Music Corp.*, 357 F.Supp. 1393, 1403 (S.D.N.Y.1973) (“To prove that similarities are striking, claimant must demonstrate that such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source.”); *see also Tienshan, Inc. v. C.C.A. Int'l (N.J.), Inc.*, 895 F.Supp. at 656 (“If the Court finds ‘similarities that, in the normal course of events,

Not Reported in F.Supp., 1997 WL 158364 (S.D.N.Y.), 1997 Copr.L.Dec. P 27,639, 42 U.S.P.Q.2d 1398
(Cite as: 1997 WL 158364 (S.D.N.Y.))

would not be expected to arise independently in the two works,' " copying can be inferred.). To the extent that "Dana Dane with Fame" and "Back from Hell" have anything in common with "Impeach the President," neither song is so strikingly similar to "Impeach the President" as to preclude the possibility that they could be the product of anything but copying. The Court therefore finds that there is no basis for finding copying on the part of defendants.
FN4

FN4. The Court rejects Tuff's attempt to avoid summary judgment by proffering-as an expert's report-an unsigned, apparently draft letter without any letterhead from an entity identified simply as "Sound Associates." (See Fuchs Aff., Exh. B.)

Finally, even had plaintiff been able to substantiate its claim that defendants copied its work, it would be unable to establish defendants' improper appropriation. As the Second Circuit has held, "if actual copying is established, a plaintiff must then show that the copying amounts to an improper appropriation by demonstrating that substantial similarity to protected material exists between the two works." *Laureyssens v. Idea Group, Inc.*, 964 F.2d at 140; see 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.03[A][2], at 13-54 to 13-55 (1996); *Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d 231,242 (2d Cir.1983).

The requirement that substantial similarity be shown in order to establish copyright infringement is therefore applicable to plaintiff's allegations in this case. The test for determining whether substantial similarity is present is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.1966); accord *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir.1986); *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765 (2d Cir.1991); *M.H. Segan Ltd. Partnership v. Hasbro, Inc.*, 924 F.Supp. at 519. A determination of substantial similarity may properly be made by

the Court on a summary judgment motion. *Walker v. Time Life Films, Inc.*, 784 F.2d at 48 ("A district court may determine noninfringement as a matter of law on a motion for summary judgment ... when no reasonable trier of fact could find the works substantially similar."); *Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d at 240.

*5 Finally, in assessing substantial similarity, courts look at the works as a whole, as opposed to dissecting a work into its constituent elements or features. See *M.H. Segan Ltd. Partnership v. Hasbro, Inc.*, 924 F.Supp. at 521; accord *Tienshan, Inc. v. C.C.A. Int'l (N.J.), Inc.*, 895 F.Supp. at 658.

Having carefully assessed the three musical works, the Court concludes that neither "Back from Hell" nor "Dana Dane with Fame" is substantially similar to "Impeach the President." Therefore, summary judgment is granted in favor of defendants.

B. Plaintiff's Cross-Motion

Finally, plaintiff cross-moves to strike defendants' answer and to enter judgment by default based on defendants' alleged failure to comply with the discovery rules of Fed.R.Civ.P. 34. Plaintiff has made this argument to the Court three previous times and has been denied relief each time. (See Orders dated Mar. 7, Mar. 30, and May 9, 1996.) Even if plaintiff's discovery grievances had not already been resolved repeatedly by this Court, plaintiff has not shown that additional discovery could help it avoid summary judgment. See Fed.R.Civ.P. 56(f); *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 422 (2d Cir.1989). Accordingly, plaintiff's cross-motion is denied.

III. Conclusion

For the reasons set forth above, defendants' motion for summary judgment is granted in its entirety, plaintiff's motion to strike the answer and for judgment by default is denied, and the Clerk of Court is directed to enter judgment dismissing the com-

Not Reported in F.Supp., 1997 WL 158364 (S.D.N.Y.), 1997 Copr.L.Dec. P 27,639, 42 U.S.P.Q.2d 1398
(Cite as: **1997 WL 158364 (S.D.N.Y.)**)

plaint.

S.D.N.Y.,1997.

Tuff 'N' Rumble Management, Inc. v. Profile Records, Inc.

Not Reported in F.Supp., 1997 WL 158364
(S.D.N.Y.), 1997 Copr.L.Dec. P 27,639, 42
U.S.P.Q.2d 1398

END OF DOCUMENT