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 6 and SCORPIO MUSIC (BLACK SCORPIO) S.A.

7
 8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

11 SCORPIO MUSIC (BLACK SCORPIO) S.A.
 and CAN'T STOP PRODUCTIONS, INC.,

Case No. 11CV1557 BTM RBB
 Honorable Barry T. Moskowitz

12
 13 Plaintiffs,
 14 vs.
 15 VICTOR WILLIS, an individual,
 16 Defendant.

AMENDED
 MEMORANDUM OF POINTS IN
 OPPOSITION TO MOTION TO
 DISMISS COMPLAINT FOR
 DECLARATORY RELIEF

Date: November 18, 2011
 Time: 11:00 a.m.
 Ctrm: 15

ORAL ARGUMENT REQUESTED

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 19 ***AMENDED ONLY TO INCLUDE SIGNATURE OF COUNSEL THAT WAS***
 20 ***INADVERTENTLY OMITTED FROM FILING DATED NOVEMBER 4, 2011.***
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1 I. SUMMARY OF ARGUMENT

2 Defendant VICTOR WILLIS ("Willis") argues that even though he is provably and
3 admittedly a "joint author" of each of the songs at issue, he is not required to comply
4 with the provisions of the Copyright Act which govern the termination of copyright grants
5 by authors of joint works.¹

6 The question of who has the right to terminate a grant of copyright in a Joint
7 Work (defined under copyright law as works created by more than one person with
8 each contributor's part "merged into inseparable or interdependent parts of a unitary
9 whole." 17 U.S.C. Section 101) is answered by the Copyright Act – which
10 unambiguously requires the agreement of the majority of authors who executed grant(s)
11 in the work on or after January 1, 1978, in order to invoke the statutory right to
12 termination provided by 17 U.S.C. §203(a)(1).

13 In fact, the 1976 revision to the Copyright Act, which took effect on January 1,
14 1978, specifically changed Section 203 to require that a grant of copyright in a joint
15 work executed on or after January 1, 1978, may be terminated only by a majority of the
16 joint authors who granted rights. This is a significant change from the 1909 Copyright
17 Act.²

18 Willis attempts to return to the 1909 Copyright Act by arguing that *the right to*
19 *transfer*, grant, assign or sell his interest in the copyrights without the consent of his co-
20 authors under Section 201(d) of the 1976 Act is co-extensive with his *right to terminate*

21 _____
22 ¹ Plaintiffs reserve, but put aside for now, the issue of whether any of the
23 copyrights which Willis seeks to recapture were works for hire. The unassailable fact is
24 that each song had more than one author, each of whom executed grants of copyrights
in the songs they wrote together. This alone is dispositive of this motion.

25 ² The rationale for the distinction relates to the legal consequences of the failure
26 of a grantor of renewal rights to survive until such rights vest. The heirs of an author
27 that died in the first term of the copyright would automatically inherit the author's rights
upon commencement of the renewal term whereas the surviving author would have had
28 no right to terminate but for the provisions of the 1909 Copyright Act. 3-11 *Nimmer on*
Copyright, §11.03[A][1].

1 those same grants, assignments or sales under Section 203(a)(1) of the 1976 Act
2 without the co-authors' consent. However, the two concepts, grants of rights in Joint
3 Works and the termination of grants of copyright in Joint Works, involve different
4 statutory provisions and legislative goals.

5 As far as the grant of a right to transfer, a joint author may not transfer a greater
6 copyright interest in the work than he or she owns. Thus, a Joint Work's co-author may
7 transfer to another his or her share of the copyright and may grant a non-exclusive
8 license in the entire work without the consent of any other joint author (subject only to a
9 duty to account to the non-granting joint authors). The author may not, however, grant
10 an exclusive license of rights, nor may he or she transfer more than a proportionate
11 interest in the work." 3-11 *Nimmer on Copyright*, §§ 11.03[A][1], 6.10[A], and 6.11.

12 With regard to the right to terminate grants or licenses of Joint Works, Section
13 203(a)(1) of the Copyright Act provides that a majority of the co-authors who made the
14 grants or otherwise exploited their undivided interest (as Willis and his co-authors have
15 done) must agree and join in the termination in order for the statutory conditions of
16 Section §203 to be met. ³

17 In an effort to circumvent this obvious mandate of the Copyright Act, Willis has
18 misconstrued and taken out of context a quote from *Nimmer on Copyright* (see
19 Memorandum Of Points And Authorities In Support Of Motion To Dismiss Complaint
20 ("Willis Memo"), p.11, ll 10-18) to attempt to establish the proposition that he can
21 terminate his grant because he executed a separate document from the other joint
22 authors. (See Willis Memo, p. 12, ll 17-22 where Willis asserts that it is the right of the
23 majority of authors that executed a particular grant being terminated, rather than a
24 majority of the authors who granted rights in the work, "that is the requirement of a valid

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26 ³ Willis never actually commits to a position as to whether he is just one author of the
27 Joint Works involved in this action, but the complaint herein clearly so alleges. (See Complaint,
28 ¶¶ 20 through 23). See also Declaration of Robert S. Besser, filed and served concurrently
herewith, which attaches copies of the Records of the United States Copyright Office identifying
each of the authors for each of the 33 compositions involved in this action.

1 notice of termination"). The point that Professor Nimmer makes in the language quoted
2 by Willis is simply that a majority of authors who have granted rights in the creation of
3 the joint work must join in the termination. Those who have not made grants do not
4 need to do so. That this is what Professor Nimmer meant is made clear later in the
5 same section relied upon by Willis where Professor Nimmer in the context of explaining
6 the differences between the 1909 Act and the 1976 Act states:

7 "As indicated above, if this were a grant executed on
8 or after January 1, 1978, no termination could occur
9 because the consent of a majority of joint owners is
10 required for this purpose."

11 Thus even the authority relied upon by Willis recognizes that it is a majority of the
12 joint owners (i.e., authors) that is essential to terminate a grant of copyright in a joint
13 work.

14 Moreover, it has long been established that form will not be favored over
15 substance to defeat the obvious policy behind the Copyright Act. In *Sweet Music, Inc.*
16 *v. Melrose Music Corp.*, 189 F.Supp. 655 (SD Cal. 1960) this Court soundly rejected the
17 idea that it mattered whether "granting documents" were signed on the same piece of
18 paper by all joint authors. The *Sweet Music* case arose in the context of the
19 determination of the effect under the 1909 Copyright Act of authors who had assigned
20 their renewal rights and did or did not survive into the renewal term.⁴ In response to the
21 argument that it mattered that both authors (only one of whom survived to the renewal
22 term) had executed the same document rather than separate assignments, the Court
23 stated:

24 "Plaintiff's argument overlooks the fact that the
25 renewal provisions of § 24 of the Act (17 U.S.C. § 24)

26 _____
27 ⁴ Under the 1976 revisions to the Copyright Act, there are no longer "initial" and
28 "renewal" terms of copyright, so the rationale that would permit only one author to terminate as
to his contribution no longer exists.

1 were designed to protect only the classes of
2 persons specifically designated therein, and not
3 a surviving co-author. If Sweet and Grant each had
4 executed separate assignments of their respective
5 interests in the renewal copyright, it is beyond
6 argument that both Sweet and plaintiff, as his
7 transferee with notice, would be bound under
8 the rationale of the Fisher case. The mere
9 circumstance that they happened to join in the
10 same assignment agreement should not dictate a
11 different result in the face of the policy declared
12 in § 28 of the Act.” (Emphasis added) *Sweet, supra.*, at 658.

13 Here, the “mere circumstance” is that the authors of all 33 Joint Works involved
14 in this action happened to execute separate granting documents. The clear purpose
15 and policy of the revisions to the termination provisions under the 1976 Act was to
16 make termination only available to a majority decision where Joint Works are
17 concerned. Thus, Willis’ argument is fundamentally flawed because it attempts to
18 defeat the policy of the 1976 revision by relying on the proposition that it matters
19 whether all the authors of a joint work executed the same document when granting the
20 rights necessary to create the joint work.

21 Willis seems to admit that he is only one of the joint authors who executed the
22 grants necessary to convey the complete copyright in the 33 Joint Works, but claims
23 that he is nonetheless a “majority of one” with respect to each of the 33 jointly authored
24 songs. His notion that he was the “sole grantor” comes from his assertion that *his*
25 songwriting contracts were separate documents granting his interest to one corporation
26 (in the case of YMCA as an example), Plaintiff Can’t Stop Productions, Inc., “Can’t
27 Stop”) while the other authors of the same songs signed with different entities – in most
28 cases with Plaintiff Scorpio Music (Black Scorpio) S.A. This contention is supported

1 with seriously flawed logic and no legal authority whatsoever.⁵

2 To the extent Willis claims that because he and his co-authors signed separate
3 pieces of paper instead of all signing the same piece of paper, such a distinction has
4 never been recognized by any Court and defies logic.

5 If Willis claims that the effect of his Notice of Termination is that he “recaptures”
6 the entire copyright because he is the sole author who granted a copyright in each
7 song, then he must, at the very least, provide evidence to overcome the allegations of
8 the Complaint that he was only one joint author and that the other joint authors made
9 grants of copyright interest in the same songs. This issue cannot be resolved on a
10 pleadings motion.

11 If Willis claims the effect of his Notice to be that Willis recovers “his interest,” i.e.,
12 whatever he granted in the first place, a substantial factual issue arises that cannot be
13 determined by Willis’ Motion to Dismiss.

14 Whatever Willis’ actual contribution to each song may have been, it was by law
15 undivided and cannot be carved out in order to be terminated unilaterally – he must
16 have with him a majority of his co-authors.

17 Finally, it is curious that Willis has brought a motion to dismiss instead of a
18 counterclaim for declaratory relief. Since there is a genuine dispute between the
19 parties as to whom the right to terminate belongs, a dismissal will accomplish nothing
20 because the dispute will remain causing continuing unnecessary cost and uncertainty.

21 II. ARGUMENT

22 A. THE COMPLAINT CONTAINS SUFFICIENT ALLEGATIONS TO STATE
23 A CLAIM FOR DECLARATORY RELIEF

24 Willis moves to dismiss this case with prejudice “and without leave to amend” on

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26 ⁵ For business reasons that were relevant in the 1970's, each co-writer of a
27 song would sometimes literally sign separate pieces of paper with respect to their joint
28 grant of copyright in each particular song. The fact that the grantees may have been
different as to each author is of no relevance whatsoever. The songs are still Joint
Works under the Copyright Act. See, *Sweet Music, infra*.

1 the ground that the Complaint for Declaratory Relief Complaint fails to state a claim for
2 which relief can be granted under *Federal Rules of Civil Procedure* (“*FRCP*”), 12(b)(6).
3 However, Plaintiffs have stated sufficient facts to accomplish what is required by the
4 *FRCP* and its “notice pleading” foundation.

5 A complaint must contain “a short and plain statement of the claim showing that
6 the pleader is entitled to relief.” *FRCP* 8(a)(2). The rules require that this statement
7 constitute a “showing” rather than a blanket assertion of entitlement to relief. *Bell*
8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed. 929 (2007).
9 Specific facts are not necessary; the statement need only give the defendant notice of
10 what the claim is and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89,
11 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081(2007). Plaintiff’s factual allegations need only
12 “be enough to raise a right to relief above the speculative level.” *Twombly*, 127 S.Ct., at
13 1965.

14 In order to survive a motion to dismiss under *FRCP* 12(b)(6), the plaintiff’s
15 obligation to provide the grounds for his entitlement to relief necessitates that the
16 complaint contain “more than labels and conclusions, and a formulaic recitation of the
17 elements of a cause of action will not do.” *Craigslist, Inc. v. Autoposterpro, Inc.*, 2009
18 U.S. Dist. LEXIS 31587 (N.D. Cal. [Oakland]) 2009). The Complaint for Declaratory
19 Relief herein contains far more than labels and conclusions or formulaic recitations of
20 facts. It sets forth a genuine, justiciable dispute that must be decided in order for
21 Plaintiffs to continue to operate their businesses in an orderly manner.

22 In evaluating a motion to dismiss, the Court must accept as true all material
23 allegations of the complaint, as well as reasonable inferences to be drawn from them.
24 *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the
25 light most favorable to plaintiffs. *Id.* Plaintiffs have more than adequately pled their
26 claim that Willis’ purported unilateral “Notice of Termination” of his copyright grants in
27 Joint Works is invalid.

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1 B. WITH RESPECT TO JOINT WORKS, TERMINATION OF THE
2 COPYRIGHT GRANT REQUIRES A MAJORITY OF THE AUTHORS
EXECUTING THE GRANT

3 Willis claims to be the “sole grantor” of his joint copyright interest in each of the
4 33 songs listed in the Notice of Termination. Exhibit “A” to the Complaint (“Cmplt.”);
5 Willis Memo, p. 1, ll. 22-23.

6 The facts alleged by the Complaint herein provide an adequate statement that
7 this claim is untrue:

8 Paragraphs 20 through 23 allege:

9 “20. The Compositions, in their English language versions, are Joint Works
10 written by more than one person.

11 21. In accordance with the Copyright Law Joint Works are considered as a
12 ‘unitary whole’ with each contributor’s part ‘merged into [in]separable or
13 in[ter]dependent parts of a unitary whole.’ 17 U.S. C. Section 101.

14 22. Each of [the] writers of the Compositions granted their copyright interests,
15 if any, either to Can’t Stop, as the agent of Scorpio Music, or to Scorpio
16 Music itself.

17 23. While Defendant Willis signed the Agreements, the other writers of the
18 Compositions signed songwriter agreements with Scorpio Music.”

19 Cmplt., p. 5, ll. 2-10.

20 A “Joint Work” is defined by Section 101 of the Copyright Act as “a work
21 prepared by two or more authors with the intention that their contributions be merged
22 into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. §101. Joint
23 authors co-own the copyright; they are joint owners of the work in undivided shares. 17
24 U.S.C., §201(a); *Eagle Rock Entertainment v. Coming Home Productions, Inc.*, 2004
25 WL 5642002 at *13 (C.D. Cal. 2004). This citation to *Eagle Rock*, also used by Willis
26 (Willis Memo., p. 11, l. 27 - p. 12, l. 3), while correct with respect to transfer rights, has
27 nothing to do with termination rights.

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1 17 U.S.C. §203 provides:

2 "In the case of any work . . . the exclusive or nonexclusive grant of
3 a transfer or license of copyright or of any right under a copyright,
4 executed by the author on or after January 1, 1978 . . . is subject to
5 termination under the following conditions:

6 (1) in the case of a grant executed by one author, termination of the
7 grant may be effected by the author **In the case of a grant
8 executed by two or more authors of a joint work, termination of the
9 grant may be effected by a majority of the authors who executed it."**

10 The Ninth Circuit, as well as the Second Circuit, employs a two part test for joint
11 authorship. The test requires a co-authorship claimant to show that "each of the
12 putative co-authors (1) made independently copyrightable contributions to the work; and
13 (2) fully intended to be co-authors. *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th
14 Cir. 1990); *Robinson v. Buy Rite Costume Jewelry*, 2004 U.S. Dist. LEXIS 16675
15 (S.D.N.Y. 2004). This analysis may not be necessary here because Willis appears to
16 admit that he is a joint author of each of the 33 songs whose copyrights he has
17 purported to terminate.⁶ Willis Memo p. 12, ll. 20-22. However, unless and until Willis
18 concedes that he is only one author of each of the Joint Works involved in this action,
19 an evidentiary hearing will be required to determine authorship of each of the 33
20 compositions.

21 Willis takes a giant and logic defying leap by asserting that he (or any joint
22 author) has the right to recapture his separate grant of copyright without reference to
23 his co-owners' "undivided interests" or their grants of copyright in the same song.

24 Since it is the grant *per se*, and not merely the terminating authors' respective
25 grants of rights therein, that is terminated (3-11 *Nimmer on Copyright* §11.03[A][1]),

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27 ⁶ He also asserts inconsistently that the other writers listed on the copyright registration
28 are "putative" writers and that he therefore is the only writer who can terminate. Motion to
Dismiss, p. 1, ll. 22-23. This raises a factual issue that cannot be resolved on a pleadings motion.

1 Willis' Notice of Termination would terminate the other authors' interests in their grants.
2 As noted above, this result would amount to a rejection of the 1976 revision of the
3 Copyright Act, which was designed specifically to eliminate claims such as Willis makes
4 herein, and be a return to the law as it existed prior to the 1976 revision.

5 C EVEN IF WILLIS' THEORY IS CORRECT, HIS MOTION TO DISMISS
6 CANNOT BE GRANTED BECAUSE THE ISSUE OF WHAT
7 PERCENTAGE OF EACH COPYRIGHT WILLIS SEEKS TO
8 RECAPTURE BELONGS TO WILLIS AND WHAT PERCENTAGE TO
9 HIS CO-AUTHORS WOULD REMAIN UNRESOLVED

8 Even from his moving papers, it is impossible to ascertain what portion of each
9 copyright Willis believes he is entitled to recapture. If Willis is permitted to terminate
10 any grant of a jointly owned copyright at his sole discretion, and in any amount he
11 decides, the result would truly be nothing short of chaos.

12 What exactly would Willis be recovering? In some instances he is credited with
13 having written words and music, but in others only words. He also gratuitously asserts
14 (for no apparent reason) that Mr. Belolo, one of the credited authors, "had no role in the
15 creation of the Compositions" at issue. (Willis Memo, p. 19, footnote 7) Even if this
16 were the case, which it is not, Willis would still not constitute a majority of the authors of
17 any one of the Compositions because they each had at least one more other author.
18 Thus, an evidentiary hearing would be necessary to determine Willis' rights under Willis'
19 novel theory and there would still be no basis for dismissal of the Complaint.

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1 III. CONCLUSION

2 For all the foregoing reasons, Plaintiffs CAN'T STOP PRODUCTIONS, INC. and
3 SCORPIO MUSIC (BLACK SCORPIO) S.A. hereby respectfully request that
4 Defendant's motion be denied in its entirety and that he be ordered to answer the
5 Complaint forthwith.

6 Dated: November 7, 2011

7 LAW OFFICES OF ROBERT S. BESSER

8 By RTB
9 ROBERT S. BESSER

10 Attorneys for Plaintiffs SCORPIO MUSIC (BLACK
11 SCORPIO) S.A. and CAN'T STOP PRODUCTIONS, INC.
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