

Eight Mile Style, LLC et al. v. Apple Computer Inc., et al.
Case No. 2:07-CV-13164

EXHIBIT 1-B

**E-mail between Ramona DeSalvo and Patrick Sullivan,
dated August 27, 2008**

Karen Sager

From: Ramona DeSalvo
Sent: Wednesday, August 27, 2008 11:33 PM
To: 'patrick@rightsflow.com'
Cc: Marc Guilford; Kelly Randall
Subject: RE: Eight Mile declaration
Attachments: Resp Apple Mtn Summ J Sullivan Decl DRAFT 08-27-08.doc

I inserted where I thought it best fit and another sentence to boot. They are highlighted in blue.

P.S. Marc and Kelly: This is Patrick's declaration that is ready to print for Richard.

Ramona P. DeSalvo, Esq.
KING & BALLOW
 1100 Union Street Plaza
 315 Union Street
 Nashville, TN 37201
 (615) 726-5432 (direct)
 (615) 726-5419 (fax)

rdesalvo@kingballow.com

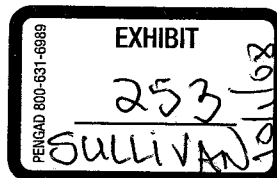
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From: Patrick Sullivan [mailto:patrick@rightsflow.com]
Sent: Wednesday, August 27, 2008 9:22 PM
To: Ramona DeSalvo
Cc: Richard Busch; Marc Guilford; 'Mark Levinsohn'
Subject: RE: Eight Mile declaration

Yes, this is the specific reason why they lost the Farmclub argument and the definitions help differentiate the two types of licenses necessary for each use. Patrick

From: Ramona DeSalvo [mailto:rdesalvo@kingballow.com]
Sent: Wednesday, August 27, 2008 10:14 PM
To: Patrick F. Sullivan
Cc: Richard Busch; Marc Guilford; Mark Levinsohn
Subject: Eight Mile declaration



9/26/2008 **CONFIDENTIAL**

8M - 001010

A "mechanical" license authorizes the mechanical reproduction and distribution of physical configurations while a DPD license authorizes the reproduction and delivery of an ephemeral copy of the sound recording by means of a digital transmission.

We will have to add this sentence at an appropriate spot in your declaration. Thanks.

Ramona P. DeSalvo, Esq.
KING & BALLOW
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
(615) 726-5432 (direct)
(615) 726-5419 (fax)

rdesalvo@kingballow.com

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UNITED STATES DISTRICT COURT
FOR THE IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC, and MARTIN
AFFILIATED, LLC,

Plaintiffs,

vs.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

APPLE COMPUTER, INC. and
AFTERMATH RECORDS d/b/a
AFTERMATH ENTERTAINMENT

Defendant.

Howard Hertz, Esq. (P26653)
Jay G. Yasso, Esq. (P45484)
Hertz Schram PC
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000
hhertz@hertzschr.com
jyasso@hertzschr.com
Attorneys for Plaintiffs

Richard S. Busch (TN BPR#14594)
King & Ballou
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
(615) 259-3456
rbusch@kingballou.com
Attorneys for Plaintiffs

**DECLARATION OF PATRICK SULLIVAN IN OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT OF DEFENDANTS APPLE COMPUTER, INC. AND
AFTERMATH RECORDS d/b/a AFTERMATH ENTERTAINMENT**

I, Patrick Sullivan, having personal knowledge of the facts contained in this declaration,
state as follows:

1. I am the President and CEO of RightsFlow, LLC a music, media and
entertainment-focused Professional Services & Outsourced Music Licensing Company.
RightsFlow specializes in Digital Phonorecord Delivery (DPD) licensing on behalf of over 800
labels that distribute music here in the U.S. through iTunes and similar music retail distributors
such as eMusic, Rhapsody (RealNetworks), Napster, and many more. Further information about
my professional activities is set forth in the "Background and Qualifications" section of my

August 12, 2008 Expert Report which I prepared on behalf of the plaintiffs in this action which is attached hereto as Exhibit 1 as well as set forth in my *curriculum vitae* attached as Appendix B to my report. I am over the age of 18 and competent to testify as to the matters stated herein including matters set forth in my report.

2. Certain paragraphs of my expert report, incorporated herein by reference, are referred to and cited within Plaintiffs' Brief in Opposition to the Defendants Revised Motion for Summary Judgment filed simultaneously with this Declaration.

3. Attached hereto as Exhibit 2 is a summary chart of some of the proffered "licenses" submitted by Defendants in support of their Revised Motion together with my opinion regarding the invalidity of those proffered documents as purported licenses for the Eminem Compositions under question here. These supposed "licenses" must either: not be licenses at all; not be licenses to either one of the Defendants; or simply not be DPD licenses. Mechanical licenses and DPD licenses are non-exclusive licenses and, without the consent of the copyright owners, are not transferable or assignable inasmuch as such licenses convey only a grant of rights (a personal right) and not any ownership (property) rights in the copyright. Thus, if the purported licensee on the proffered "licenses" is any party other than Defendant Aftermath Entertainment doing business as Aftermath Records, a joint venture or Defendant Apple, Inc., the proffered "license" is expressly not a license to these Defendants. In those instances where the proffered "license" purports to authorize DPD exploitation of a co-owner's share of an Eminem Composition, but recordings of that composition have not yet been commercially released, the "first use" of that composition must be authorized by *all* copyright owners, including Plaintiffs. Defendants failed to identify which of the works were "first use" works, but

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it is likely that "first use" compositions include any composition which was first released on an album and made available on iTunes since the launch of iTunes in April 2003.

4. In any instance in which Defendants proffer a controlled composition clause as the equivalent to a DPD license, that argument is invalid. Controlled compositions clauses are explicitly not allowed for digital phonorecord deliveries (DPDs) and thus cannot operate as a DPD license. Further, an author or co-author of a musical composition may not license the composition where the author or co-author has transferred his copyright interest to a music publisher. Based upon the documents provided by Defendants, this appears to have happened in virtually all instances. In these cases, the author no longer has the ability to license the works; that ability resides with the music publisher alone. In those instances where the musical compositions are co-published but the exclusive right to administer the compositions has been assigned to a third party publisher, that co-owner/co-publisher likewise has no authority to license the musical compositions which it no longer controls. Further, the controlled composition clauses upon which Defendants rely are in set forth in contracts between third party recording artists and record labels other than Defendant Aftermath, the joint venture, or Defendant Apple. For example, Exhibit C-1 to the Declaration of Rand Hoffman is an agreement between Shady Records, Inc. and the group D-12 and its individual members with Exhibit C-2 being an agreement between Shady Records, Inc. furnishing the services of (f/s/o) D-12 and Interscope Records, a California general partnership. Attached hereto as Exhibit 3 is a summary chart of the agreements Defendants attach to the Declaration of Rand Hoffman as Exhibits 5A through Exhibit 5E which was prepared by Plaintiffs' counsel. Even if these controlled composition clauses could be considered licenses for DPDs, which they cannot, these third party controlled composition clauses cannot constitute a license to either of the Defendants

to the extent the agreement is with a party other than either Defendant since, as mentioned in paragraph 3, such non-exclusive licenses are not transferable or assignable by the licensee.

5. Defendants also submit that plaintiffs mistakenly listed musical compositions more than once on its list of infringed compositions, being Revised Schedule 1 since "these single compositions require only one license for their distribution." (Doc. No. 66-3 at 1.) This statement is flatly erroneous. When a license is issued for a musical composition, publishers require the licensee to be specific as to which recorded products their compositions will appear, and issue a separate license for each product, even if the recording is the same. Furthermore, as discussed more fully in Exhibit 1, my report, at pages 7-11, it is industry practice that separate licenses are issued for physical product and for DPDs. A "mechanical" license authorizes the mechanical reproduction and distribution of physical configurations while a DPD license authorizes the reproduction and delivery of an ephemeral copy of the sound recording by means of a digital transmission. DPDs are not covered in a standard mechanical license unless the license expressly provides that it does. A license identifies one particular recording of the copyrighted work as performed by a specific artist on a specified album, generally identified by the "Record Number" assigned by the record label and/or UPC number (Uniform Product Code). Thus, for example, a license for plaintiffs' compositions "Cleaning Out My Closet" and "Without Me" must identify the album and record number and/or UPC number upon which it appears because one license does not cover all uses of a particular composition.

6. Defendants produced no licenses for "Cleaning Out My Closet" which appears on at least two different albums in this action, *The Eminem Show* and *Curtain Call*, each of which such albums requires a separate physical configuration license and separate DPD licenses. "Without Me" appears on the same two albums; however, Defendants rely upon a single

purported "license" from Bug Music for both albums. (Doc. No. 66-3 at 2, #17 and at 4, #49.) A review of the proffered document (Doc. No. 62, "Without Me," License/License Request Summary, AFT0058531-532) reveals on the face of the document, "Note: This is a summary of information only and is not a license." The summary also indicates that HFA does not represent 52.92% of the composition as that is controlled by non-HFA publishers on whose behalf HFA cannot grant a license. (See Exhibit 1, Report at 9.) Importantly, the summary indicates that "Without Me" appears on *The Eminem Show (Explicit Version)*, UMG record number 894932902, UPC number 609949329020, released in May 2002 which is unqualifiedly an album different than *Curtain Call – The Hits* which was released in December 2005.

7. With respect to the proffered "licenses" in Section I (third party "licenses") and Section II (HFA Summary of Licenses/License Request Summary) of Exhibit 2, each such document, even if effective as a license, which they are not, are specifically limited to the territory of the United States and in one instance, to the United States, its territories and possessions. In researching the availability of the Eminem Compositions through iTunes, I found that the Eminem Compositions have been reproduced and distributed worldwide by Apple through its iTunes Store. The Apple iTunes Store shows that its music is available in 61 countries worldwide ranging from Argentina to Viet Nam. Attached hereto as collective Exhibit 3(a) through 3(e) are printouts from the Apple iTunes Store in the United States, the United Kingdom, France and Germany, the latter denoted "Deutschland" at the iTunes Store. These print-outs are representative of the availability of the Eminem Compositions worldwide, including both as entire albums for sale at the price of \$9.99 in the United States and individual songs for sale at the price of 99 cents each. As my expert report states, the vast majority of mechanical and DPD licensing outside of the US is handled directly through rights societies who

act on behalf of all publishers within one territory. In the cases of the UK, France, and Germany, each territory has one or more society representing mechanical and DPD rights, among other publisher rights. Online retailers in these territories obtain licenses from the societies and pay royalties directly into the societies, without interacting directly with the local publishers. In order for Defendants to be legally distributing compositions in those territories, they must show proof that proper licensing arrangements have been made with all proper local societies in every territory where Plaintiffs' compositions are available for sale.

8. With respect to the "licenses" proffered in Section III of Exhibit 2, each such document appears to have been prepared by Universal Music Group, is entitled "Mechanical License Notification and Confirmation" and sent to Universal Music Publishing Group for a Universal publisher or a Universal-administered publisher pursuant to controlled composition clauses between certain recording artists and various record labels. These Notices cannot be considered licenses at all, as they lack nearly all of the material terms that should constitute a license. They lack provisions for accountings, audits, territory specification, and term specification, among others. Neither are these Notices in accordance with compulsory licensing procedures set forth in Section 115 of the Copyright Act. With two exceptions, each Notification and Confirmation was issued by Todd Douglas of UMG Recordings, Inc. The other two Notifications, being Bates Numbers AFT0058592 and AFT0058695, were prepared by Leo Ferrante on behalf of UMG Recording, Inc. To the extent any such Notifications and Confirmations were issued pursuant to recording contracts with Interscope Records, Inc., Interscope Records, a California General Partnership, Shady Records, Inc. Shady/Aftermath Records, Shady/Interscope Records, Aftermath/Interscope Records or G-Units Records, such Notifications do not constitute licenses to Defendants herein for several reasons: (1) the

