

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BROADCAST MUSIC, INC.;
E.O. SMITH MUSIC; UNIVERSAL
MUSIC-Z TUNES LLC d/b/a
UNIVERSAL MUSIC Z SONGS;
EMI BLACKWOOD MUSIC, INC.;

Plaintiffs/Counter-Defendants,

v

Case No. 1:11-cv-01001-RHB

LADY GODIVA'S, INC., d/b/a
LADY GODIVA'S; MARK LONDON,
individually, and SENSATIONS, INC.,
d/b/a SENSATIONS,

Hon. Robert Holmes Bell
U.S. District Judge

Defendants/Counter-Plaintiffs.

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JOINT STATUS REPORT

A Rule 16 Scheduling Conference is scheduled for December 7, 2011 at 4:00 p.m.

Appearing for the parties as counsel will be:

Attorneys for the Plaintiffs:

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1. Jurisdiction: The basis for the Court's jurisdiction is:

As to Plaintiffs' Complaint: 28 U.S.C. §1338 federal question jurisdiction under the Copyright Act, and 17 U.S.C. §§501 and 502 – Copyright Infringement.

As to Counter-plaintiffs' Counterclaim: Counter-plaintiffs assert that this Court's jurisdiction is based on 28 U.S.C. §1331, federal question jurisdiction. Counter-defendant contests this Court's jurisdiction over the Counterclaim, and has filed a motion to dismiss, which is presently pending before this Court.

2. Jury or Non-jury: This case is to be tried by the Court as a trier of law and fact.

3. Statement of the Case:

a. Plaintiffs' Complaint:

This is a copyright case. Plaintiff Broadcast Music, Inc. ("BMI") is a performing rights organization that represents thousands of songwriters, composers and music publishers who own the copyrights in a variety of musical compositions. The Copyright Act, 17 U.S.C. § 101, grants the copyright owners the right to publicly perform their music, and

to prevent others from doing so without permission. For example, the other Plaintiffs in this case are owners of copyrighted music alleged to be infringed by Defendants.

As matter of custom and practice, the copyright owners transfer their rights to performing rights organizations such as BMI. BMI then in turn licenses entities and people that use or perform the copyrighted music in public place, such as restaurants, bars, nightclubs, retail stores, amusement parks, etc. Once properly licensed, these entities and people are then permitted to publicly play or perform such copyright music in the licensed establishment.

Plaintiff contends that Defendants Lady Godiva's, Inc., d/b/a Lady Godiva's and Mark London owns, operates, maintains and/or controls an adult entertainment establishment with a topless activity permit in Grand Rapids, Michigan, known as Lady Godiva's ("Lady Godiva"). Plaintiffs allege that Lady Godiva has recorded music that is publicly performed. Individual Defendant Mark London is the owner of Lady Godiva.

On numerous occasions, BMI contacted Defendants to discuss a music license from BMI. BMI also asked that Lady Godiva cease publicly performing unlicensed music. Although the parties exchanged correspondence, Defendants never executed a license and Lady Godiva did not cease the public performance of music. As a result, after BMI conducted an investigation and witnessed three (3) acts of public performance of copyrighted music, Plaintiffs filed suit for three (3) counts of copyright infringement.

The Copyright Act provides for, among other things, an injunction (17 U.S.C. § 502), statutory damages (17 U.S.C. § 504), and costs/attorney's fees (17 U.S.C. § 505). For each infringement, the minimum statutory damage is \$750, and the maximum per infringement is \$30,000 (17 U.S.C. § 504(c)(1)). The statute also authorizes the award of attorneys' fees and costs. Further, the statute authorizes an award as high as \$150,000 per infringement if the Court determines the infringement to be willful (17 U.S.C. § 504(c)(2)).

Plaintiffs believe that liability and the award of statutory damages can and should be resolved on motion for summary judgment or, if the Court desires, based on brief oral argument from the parties or a short (a few hours) evidentiary hearing. Authorities within this jurisdiction and outside of this jurisdiction set forth the appropriate framework for the determining the amount of statutory damages, including an award of costs and attorneys' fees.

b. Counter-plaintiffs' Counterclaim:

Counter-plaintiffs have filed a Counterclaim, requesting a declaration that they are not "adult entertainment establishments" under Counter-defendant BMI's blanket licenses or under Grand Rapids City Code §9.140, and determining a reasonable license fee and agreement pursuant to 17 U.S.C. §513.

In response, to the Counterclaim, Counter-defendant BMI has filed a Plaintiff's Combined Motion and Brief for 12(b)(6) Dismissal of Counterclaim ("Motion to

Dismiss"), asserting, among other things, that (a) 17 U.S.C. §513 does not create a private cause of action, (b) that Counter-plaintiffs did not comply with the provisions of 17 U.S.C. §513, (c) the new party Sensations, Inc. was not properly joined, and (d) that there is no case or controversy for purposes of the Declaratory Judgment Act, 28 U.S.C. §2201, with respect to certain of Counter-plaintiffs' requested relief.

c. **Pendent State Claims:** This case does not include pendent state claims.

d. **Joinder of Parties and Amendment of Pleadings:** The parties expect to file all motions for joinder of parties to this action and to file all motions to amend the pleadings by December 31, 2011.

e. **Disclosures and Exchanges:**

The parties have agreed that it would be beneficial to delay the exchange of initial disclosures until resolution of the pending Motion to Dismiss filed by Plaintiff/Counter-defendant BMI. Resolution of that motion may narrow the parties and the claims at issue in the case, and delaying the exchange of initial disclosures until resolution of the motion would provide more efficient and focused initial disclosures and discovery. The parties have agreed to exchange Fed. R. Civ. P. 26(a)(1) disclosures within 30 days from this Court's ruling on the Motion to Dismiss.

f. **Discovery:** The parties believe that all discovery proceedings can be completed by March 31, 2012. The parties recommend the following discovery plan, which may be modified depending on the resolution of the Motion to Dismiss:

The subjects of discovery concern: (a) ownership, control, and management of Defendant's establishment; (b) communications (written and oral) between the parties concerning licensing and infringement; (c) configuration and nature of Defendant's establishment; (d) music performed; (e) damages.

The limits of the Federal Rules of Civil Procedure shall apply.

g. **Disclosure or Discovery of Electronically Stored Information:** The parties have discussed the production of electronically stored information and suggest that such information be handled as follows:

The parties agree to produce only hard copy information.

h. **Assertion of Claims of Privilege or Work-Product Immunity After Production:**

The parties agree to work cooperatively and return any inadvertently produced privileged information.

i. **Motions:** The parties acknowledge that W.D. Mich. LCivR 7.1(d) requires the moving party to ascertain whether the motion will be opposed. All motions shall affirmatively state the efforts of the moving party to comply with the obligation created by Rule 7.1(d).

The following dispositive motions are contemplated by each party:

Plaintiff/Counter-defendant has filed its Motion to Dismiss, which is presently pending before this Court. Plaintiffs will file a motion for summary judgment on liability and damages.

The parties anticipate that all dispositive motions will be filed by April 30, 2012.

j. **Alternative Dispute Resolution:** The parties recommend that this case be submitted to the following method(s) of alternative dispute resolution: None.

k. **Length of Trial:** If the Counterclaim is dismissed, counsel estimate the trial will last approximately one (1) full days total, allocated as follows: one-half (1/2) day for plaintiffs' case, one-half (1/2) day for defendants' case. If the Counterclaim is not dismissed, counsel estimate the trial will last approximately one (1) week, allocated as follows: two and one-half (2 ½) days for plaintiffs' case, two and one-half (2 ½) days for defendants' case.

l. **Prospects of Settlement:** The status of settlement negotiations is:

The status of settlement negotiations is ongoing.

m. **Electronic Document Filing System:** Counsel are reminded that Local Civil Rule 5.7(a) now requires that attorneys file and serve all documents electronically, by means of the Court's CM/ECF system, unless the attorney has been specifically exempted by the Court for cause or a particular document is not eligible for electronic filing under the rule. The Court expects all counsel to abide by the requirements of this rule. *Pro se* parties (litigants representing themselves without the assistance of a lawyer) must submit their documents to the Clerk on paper, in a form complying with the requirements of the local rules. Counsel opposing a *pro se* party must file documents electronically but serve *pro se* parties with paper documents in the traditional manner.

n. **Other:** N/A.

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Dated: December 2, 2011

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Dated: December 2, 2011

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