

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DOMINO RECORDING COMPANY, INC., and :
INDEPENDIENTE LTD., :

Plaintiffs, :

v. :

INTERSCOPE GEFLEN A&M RECORDS, a :
division of UMG RECORDINGS, INC., WILLIAM :
B. ROSE, professionally known as AXL ROSE, :
BRIAN P. CARROLL, RON THAL, PAUL HUGE, :
ROBIN FINCK, BRYAN MANTIA, THOMAS :
E. STINSON and DARREN A. REED, :
professionally known as GUNS 'N ROSES, and :
CHRISTOPHER PITMAN, :

Defendants. :

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Case No. 09 Civ 08400 (GBD)

**DEFENDANT INTERSCOPE GEFLEN A&M RECORDS'
REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF ITS MOTION TO DISMISS**

Interscope submits this reply memorandum of law in further support of its motion to dismiss the Complaint of Plaintiffs pursuant to Fed. R. Civ. P. 8(a)(2) and 12(b)(6).¹

PRELIMINARY STATEMENT

This Court should dismiss the Complaint, as Plaintiff's opposition (the "Opposition") fails to address the factual and legal insufficiencies which were raised in Interscope's motion to dismiss. Rather, in the Opposition, Plaintiffs repeat the bare allegations contained in the Complaint and maintain that such allegations satisfy their pleading requirements and are sufficient to overcome a motion to dismiss. However, as Interscope has demonstrated in its moving brief, the broad, sweeping allegations of infringement contained in the Complaint fail to comply with the basic pleading requirements of Rule 8(a) and Plaintiffs' failure to provide any factual foundation for the essential elements of their copyright infringement claim mandate dismissal of the Complaint. In light of these glaring deficiencies, Plaintiffs' copyright infringement claim must fail and the Court should dismiss Plaintiffs' Complaint pursuant to Rules 8(a)(2) and 12(b)(6) of the Federal Rules of Civil Procedure.

ARGUMENT

As Plaintiffs concede, to comply with Rule 8, a complaint "shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In copyright infringement cases, "Rule 8 requires that the particular infringing acts be set out with some specificity. Broad, sweeping allegations of infringement do not comply with Rule 8." *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 n. 3 (S.D.N.Y. 1992), *aff'd*, 23 F.3d 398 (2d Cir. 1994), *cert. denied*, 513 U.S. 950 (1994).

¹ Capitalized terms used herein and not defined shall have the same meaning given to them in Interscope's moving brief.

To meet this standard in a copyright infringement case, the courts in this District have consistently held that the complaint must allege: “(1) which specific original works are the subject of the copyright claim, (2) that plaintiff owns the copyrights in those works, (3) that the copyrights have been registered in accordance with the statute, and (4) by what acts during what time the defendant infringed the copyright. [cit. om.]” *Kelly*, 145 F.R.D. at 35. Accord *Plunket v. Estate of Doyle*, 99 Civ. 11006, 2001 U.S. Dist. LEXIS 2001, at *12 (S.D.N.Y. Feb. 22, 2001); *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 228 (S.D.N.Y. 2000) (“plaintiff’s unadorned allegation in paragraph nine that defendants have published the McNeely photograph ‘beyond the scope ... of the limited license,’ absent any factual support, merely states a legal conclusion insufficient to withstand a motion to dismiss”); *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 (S.D.N.Y. Oct. 13, 1999) (dismissing complaint making the “vague and conclusory” allegations that defendant “did knowingly and willfully infringe upon Plaintiff’s copyright... by unlawfully purchasing and/or otherwise obtaining copies of the Subject Work” and has and will “exploit and profit from the Subject Work”).

Further, in cases involving multiple defendants, as here, Rule 8 requires the complaint to specify the infringing acts, including when they occurred, of each defendant. For example, in *Livnat v. Lavi*, 1997 U.S. Dist. LEXIS 13633, at *5-6 (S.D.N.Y. 1997), although the complaint identified the copyrighted works that were infringed, the Court still held insufficient the allegation that “all defendants infringed said copyrights by publishing and/or having caused the publishing” of the infringing photographs. *Id.* at *5. Applying the pleading standard of Rule 8, the Court found this language to contain no indication of how certain defendants violated any of the specific rights under the Copyright Act. *Id.* at *5-6. The Court stated that the “allegation of

causation as to the Non-Publishing Defendants is not rendered sufficient merely by lumping those defendants together with Amlon, who was directly responsible for the publication of the photographs.” *Id.* at *6.

Indeed, as in *Livnat*, courts have consistently dismissed claims that lumped defendants together without making specific allegations as to each of them. *See Jacobs v. Carnival Corp.*, 06 Civ. 0606, 2009 U.S. Dist. LEXIS 31374 (S.D.N.Y. Mar. 25, 2009) (dismissing complaint and finding that plaintiffs' allegations of infringement against all the other Defendants amounted to nothing more than the sweeping, blanket assertions that “all of the remaining defendants have publicly performed and presented significant portions, and/or all, of Grease and/or other famous and enormously popular Broadway, off Broadway, other plays and other works” and “said remaining defendants . . . planned, prepared, authorized, developed, performed and/or presented such performances and presentations.”); *Brought to Life Music, Inc. v. MCA Records, Inc.*, 02 Civ. 1164, 2003 U.S. Dist. LEXIS 1967 (S.D.N.Y. Feb. 14, 2003) (dismissing complaint against one of several defendants alleging that the moving defendant was an associate of the other defendant, that he provided a copy of the musical track at issue to the other defendant, and that “the defendants have infringed upon the copyright of plaintiff”); *Plunket*, 2001 U.S. Dist. LEXIS 2001 at *16 (dismissing complaint alleging “that defendants have ‘entered into, or have offered, licenses purporting to grant third parties the right to exploit the Literary Properties in various media’” because the allegations lacked sufficient detail as to the alleged infringing acts by each defendant); *see also Marshall v. McConnell*, 05- Civ. 1062, 2006 U.S. Dist. LEXIS 12319 (N.D. Tex. 2006) (dismissing complaint where Plaintiffs alleged “defendants have infringed Plaintiff Land & Cattle's copyrights in those forms and documents by copying, using and/or incorporating those forms in whole or part” and that “defendants' conduct violates . . . copyright of the forms,”

and finding that “[s]uch bare assertions and conclusory allegations do not even come close to satisfying the final element required for pleading this cause of action because they do not specify the time, place and manner of any alleged infringement or which defendant purportedly committed any such infringement” and that “[t]hese ‘group’ pleadings fail to specifically identify what, if anything, the L & M Defendants did to infringe any copyright.”); *Taylor v. IBM*, 54 Fed. Appx. 794 (5th Cir. Dec. 10, 2002) (Table), reprinted at 2002 WL 31845220 (affirming decision to dismiss copyright infringement claims under Rule 12(b)(6), since appellants “failed to allege specific acts of infringement by each defendant, thereby failing to adhere to the requirements of Fed. R. Civ. P. 8(a).”).

Here, as in the foregoing cases, Plaintiffs’ allegations are equally vague and conclusory. Plaintiffs fail to plead specific acts of alleged infringement by each of the Defendants, including the place and manner of alleged infringement. In this regard, Plaintiffs lump all Defendants together and merely state, “Defendants placed into the international marketplace...[the Album]” and that the Album “embodies unauthorized copies, and/or derivative works based upon, the Sound Recordings, as embodied in Track 9 of the Album entitled ‘Riad ‘N the Bedouins.’” Compl. at ¶¶ 23-24. Further, Plaintiffs contend that: (i) the Album and “Riad ‘N the Bedouins” were produced, manufactured, reproduced, distributed, sold and/or released by Defendants on the Geffen record label; (ii) each Defendant participated in and contributed to the creation, production, manufacture and/or distribution of the Album and “Riad ‘N the Bedouins;” and (iii) each Defendant financially benefited from the creation, production, manufacture and/or distribution of the Album and “Riad ‘N the Bedouins.” Compl. at ¶¶ 25, 27-28. Such bare assertions and conclusory allegations do not satisfying the elements required for pleading a copyright infringement claim because they do not specify place and manner of any alleged

infringement or which defendant purportedly committed any such infringement. Indeed, Plaintiffs' "group" pleadings fail to specifically identify what, if anything, Interscope or any of the other individual defendants specifically did to infringe their copyright.

In addition to the foregoing deficiencies which mandate dismissal, the Complaint must be dismissed because Plaintiffs do not plead any facts that would establish a claim of direct copying of protected elements of their alleged copyrighted work. Indeed, as set forth in Interscope's moving brief, the Complaint contains no facts establishing -- even circumstantially -- that any of the creators of "Riad 'N the Bedouins" heard, or otherwise had access to, Plaintiffs' Sound Recordings before creating "Riad 'N the Bedouins" or that the works at issue are substantially similar to one another. A copyright plaintiff must demonstrate access to the allegedly infringed work by the creators of the allegedly infringing work. *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) (citation omitted).

In the Opposition, Plaintiffs erroneously assert that Interscope "essentially demands that Plaintiff meet the requirements of a summary judgment motion in its Complaint" (Opposition at p. 7) and that "there is no requirement that the Complaint contain specific, detailed allegations concerning substantial similarity or access or and above allegations of unauthorized copying" (*id.* at p. 9). However, Plaintiffs are simply wrong.

Indeed, *Martinez v. McGraw*, 08-0738, 2009 U.S. Dist. LEXIS 69862 (M.D. Tenn. Aug. 10, 2009), which was cited by Interscope in its moving brief and ignored by Plaintiffs in the Opposition, is particularly illustrative. In that case, the plaintiff's complaint alleged that the defendants had "access" to his song and that the defendants' song was "substantially similar." *Martinez*, 2009 U.S. Dist. LEXIS 69862 at *11. The court found that "[p]laintiff failed to plead facts that amount to Defendants having access to [plaintiff's song]. Moreover, Plaintiff fails to

plead facts demonstrating that Defendant McGraw's song...is 'substantially similar' to Plaintiff's song...beyond stating that the two works are 'substantially similar.'" *Id.* at *11-12. Relying on the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the *Martinez* court found that "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than . . . a formulaic recitation of the elements of a cause of action." *Id.* at *16 (quoting *Twombly*, 550 U.S. at 555). Accordingly, the court dismissed the complaint on the grounds that plaintiff failed to plead facts that would entitle him to relief for defendants' alleged copyright infringement.²

Here, as in *Martinez*, Plaintiffs do not allege or plead *any* facts whatsoever to show that any of the Defendants had access to Plaintiffs' Sound Recordings. Indeed, Plaintiffs do not even allege that Plaintiffs' sound recordings were ever publicly available. Accordingly, since the Complaint does not set forth *any* factual allegations on an essential element of a copyright infringement claim -- access -- Count I (the sole count) of the Complaint should be dismissed.

Further, as in *Martinez*, the Complaint fails to allege specific and protectable aspects of Plaintiffs' Sound Recordings that are purportedly substantially similar to "Riad 'N the Bedouins." Rather, Plaintiffs merely allege only the bare-bones legal conclusion that the Album "embodies unauthorized copies and/or derivative works based upon, the [Plaintiffs'] Sound Recordings, as embodied in ['Riad 'N the Bedouins']" (Compl. at ¶ 24). Such allegations amount to nothing more than a recitation of an element of Plaintiffs' cause of action.

² It is worth noting that in *Martinez*, as here, the plaintiff asserted that the defendants' motion to dismiss relied primarily on case law involving motions for summary judgment in an attempt to prematurely litigate this case on the merits. *Martinez*, 2009 U.S. Dist. LEXIS 69862 at *16. The court found that "[r]egardless of the cases that Defendants relied on in their Motion, the Court relies exclusively on the standard for a motion to dismiss for failure to state a claim upon which relief can be granted" and that "[u]sing this standard...Plaintiff has failed to plead allegations that raise a right to relief for copyright infringement above the speculative level." *Id.*

In reliance of the widely-criticized Sixth Circuit case *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), Plaintiffs argue in the Opposition that, in actions concerning the copying of sound recordings, questions of substantial similarity and *de minimis* use are thus mooted. However, the Supreme Court has made clear that not all copying is copyright infringement. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) (finding that even where copying has occurred, the Plaintiff must still show substantial similarity, *i.e.* not *de minimis* and originality), *citing Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985).

Further, *Bridgeport* has not been adopted by this Circuit and has been roundly criticized by commentators. In *Bridgeport*, the district court granted defendant's motion for summary judgment holding that the two second sample of a guitar solo admittedly contained in plaintiff's work did not amount to "substantial similarity" and, therefore, did not constitute copyright infringement. The Sixth Circuit reversed and adopted a "bright-line" rule which Nimmer describes as "at odds with the balance of jurisprudence canvassed throughout this section" by ruling that no substantial similarity or *de minimis* inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording. 4-13 Nimmer on Copyright, § 13:03[A][2][b]. By its decision, the Sixth Circuit effectively decided that sound recordings should be governed by different rules and principles than all other works that are protected by copyright, even as to other musical works not sound recordings. Indeed, pre-*Bridgeport*, it was undisputed that the usual principles of "substantial similarity" applied to sound recordings. *See, e.g.*, 1 Patry, Copyright Law and Practice, at 797 (1994) ("Despite these limits [in section 114], the test of substantiality for determining infringement of a sound recording is the general standard for all copyrighted works."); II Goldstein, Copyright, (2d ed.),

Section 52.1 at 5-23 (1998 Supp.) (“[I]f the new recording is not substantially similar to the original, standard copyright infringement principles suggest that it should be held not to infringe.”); *Tuff ‘N’ Rumble Management, Inc. v. Profile Records, Inc.*, 42 U.S.P.Q. 2d 1398, 1402-03 (S.D.N.Y. 1987) (plaintiff could not prove improper appropriation under the traditional substantial similarity test for both the musical composition and the sound recording claims). *See also Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004) (“the principle that the substantiality requirement applies throughout the law of copyright, including cases of music sampling”).

Nimmer and others have unqualifiedly stated that *Bridgeport* was wrongly decided for the following reasons: (1) the Court misinterpreted Section 114(b) of the Copyright Act; (2) the Court ignored the legislative history of Section 114, dismissing it as “irrelevant;” (3) the Court did not mention and, therefore, failed to distinguish why the Supreme Court’s holding in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) was not controlling; (4) the Court misapprehended the statutory structure of The Copyright Act. Seemingly unsure of its own decision, the *Bridgeport* Court ultimately rendered three separate decisions, each affirming in part and reversing in part the decision below. 383 F.3d 390, *superseded* 401 F.3d 647, *superseded* 410 F.3d 792.³ *See also Saregama India Ltd. v. Mosley*, No.: 08-20373 2009 U.S. Dist. LEXIS 119389 (S.D. Fl. Dec. 23, 2009) (applying the substantial similarity requirement to two sound recordings and expressly declining to follow *Bridgeport*).

Moreover, even if *Bridgeport* were to be followed in this Circuit, in the Complaint, Plaintiffs merely allege only the bare-bones legal conclusion that the Album “embodies

³ 4-13 Nimmer on Copyright, § 13:03, n. 183 (“No other case comes to mind in which the same appellate panel issued three rulings, each published in the Federal Reporter, absent intervening action from the District Court, the Supreme Court, or the Court of Appeals *en banc*.”). *See also Patry on Copyright* § 3:163 (*Bridgeport* is “an abysmal decision” and “a sour note.”).

CERTIFICATE OF SERVICE

Carletta F. Higginson, an attorney, hereby certifies and/or states on oath that on this 29th day of March, 2010 the preceding Defendant Interscope Geffen A&M Records' Reply Memorandum of Law in Support of Its Motion to Dismiss was served via this Court's Electronic Case Filing system on the following counsel of record:

BRIAN D. CAPLAN, Esq.
JONATHAN J. ROSS, Esq.
Caplan & Ross, LLP
100 Park Avenue, 18th Floor
New York, New York 10017

s/ Carletta F. Higginson
Carletta F. Higginson