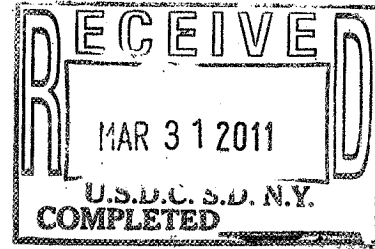


JUDGE CROTTY

11 CV 2226

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
:
BRO 'N SIS MUSIC, INC., :
:
Plaintiff, :
:
- against - :
:
PAPA JOHN'S INTERNATIONAL, INC., and :
PAPA JOHN'S USA, INC., :
:
Defendants. :
----- X

11 Civ.
ECF Case

COMPLAINT AND
JURY DEMAND

Plaintiff, Bro 'N Sis Music, Inc. ("BNS"), for its Complaint against Defendants Papa John's International, Inc. ("PJI") and Papa John's USA, Inc. ("PJUSA") (collectively, "Papa John's"), by its counsel Arent Fox LLP, alleges upon information and belief as to facts concerning others and upon personal knowledge as to facts concerning BNS, as follows:

NATURE OF THE ACTION

1. This action arises from Defendants' willful infringement of Plaintiff's copyright interest in the famous and iconic song, "On! On! U of K."
2. "On! On! U of K" was written in 1923, and was subsequently adopted as the University of Kentucky Fight Song. The musical composition has been continuously

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performed and exploited since that time, and remains a popular and instantly recognizable song. BNS has owned the copyright in "On! On! U of K" since 1999.

3. Precisely because of the popularity of "On! On! U of K," Papa John's has prominently featured BNS's song in a recent television commercial. Papa John's did not, however, seek or obtain a license from BNS for its commercial use of the song.

4. Papa John's has unfairly profited from these acts of infringement, both by avoiding payment of licensing fees for its infringing use of the song, and also by generating revenues from the infringing advertisements.

5. BNS has attempted to negotiate a resolution to this dispute with Papa John's, but was ignored in those efforts.

6. Papa John's steadfast refusal to agree to cease their willful infringement leaves BNS with no choice but to bring this action for copyright infringement, seeking injunctive relief to prevent Papa John's further infringement of "On! On! U of K," and also damages to compensate BNS for Papa John's willful and wanton behavior.

JURISDICTION AND VENUE

7. BNS brings this action for willful copyright infringement in violation of the Copyright Act, 17 U.S.C. §101, et seq.

8. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338(a).

9. This Court has personal jurisdiction over PJI and PJUSA because each of them is continuously and systematically doing business in New York. Additionally, this Court has personal jurisdiction over Papa John's because PJUSA is registered as a

foreign corporation doing business in New York, and as such has subjected itself to the jurisdiction of courts within New York. This Court also has personal jurisdiction over Defendants because their infringing activities have harmed BNS within the State of New York; Defendants regularly do or solicit business and derive substantial revenue from goods used or consumed or services rendered in New York; they expected or should reasonably have expected their infringement to have consequences in New York; and they derive substantial revenue from interstate or international commerce.

10. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 (b)-(c) and 1400(a) with respect to Defendants because each of them, or their agents, reside or may be found within this District, including by virtue of the fact that they are subject to personal jurisdiction within this District at this time.

PARTIES

11. Plaintiff BNS is music publishing company, whose copyrights are administered by Carlin America, Inc. (“Carlin America”). Founded by industry legend Freddy Bienstock, Carlin America is among the world's preeminent independent music publishing companies. Representing the history of American popular music at its finest and most commercial, the Carlin catalog includes over a hundred thousand titles that number such song classics as *Body and Soul*, *Chantilly Lace*, *Dedicated To the One I Love*, *Fever*, *Happy Together*, *I Got You (I Feel Good)*, *Malagueña*, *Manhattan*, *The Twist*, *Under the Boardwalk* and *What A Wonderful World*, in addition to the musical scores of *Cabaret*, *Company* and *Follies*.

12. With many active represented imprints and subsidiaries, including BNS and Edward B. Marks Music Co. (which in 1994 celebrated its 100th Anniversary), and a

constantly expanding catalog of copyrights that continue to excite and attract film and television audiences, record buyers, and product consumers everywhere, Carlin America endures as an industry leader and currently one of the most successful and significant forces in music.

13. BNS is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business at 126 East 38th Street, New York, New York 10016.

14. Defendant PJI is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business at 2002 Papa John's Boulevard, Louisville, Kentucky 40299. PJI is an alter ego of PJUSA, which has registered to do business in the State of New York. PJI has a business presence in New York and regularly conducts business within New York and this District, including through the www.papajohns.com website.

15. Defendant PJUSA is a corporation duly organized and existing under the laws of the State of Kentucky, with its principal place of business at 2002 Papa John's Boulevard, Louisville, Kentucky 40299. PJUSA has registered to do business in the State of New York, has a business presence in New York, and regularly conducts business within New York and this District, including through the www.papajohns.com website.

BNS'S OWNERSHIP OF "ON! ON! U OF K"

16. The song "On! On! U of K" was written between 1922 and 1923. The music was written in 1922 by University of Kentucky Professor Charles A. Lampert ("Lampert"), at his own instance and expense. The lyrics were written in 1923 by Lampert's friend and student, Troy Perkins ("Perkins"), at Lampert's request and for a

payment of \$5. The song was subsequently adopted as the University of Kentucky Fight Song and has become famous, especially within the realm of collegiate sports.

17. Federal copyright for “On! On! U of K” was secured by publication with copyright notice on January 31, 1925, when the song was first published in *The 1925 Kentuckian*, the yearbook of the University of Kentucky. The claim of copyright for “On! On! U of K” was registered in 1925 and given Registration Number E612080. Lampert’s widow renewed the copyright in 1952, on behalf of herself and Perkins, and was given Registration Number R102891.

18. In 1941, prior to his death, Lampert assigned his copyright interest in “On! On! U of K,” including all renewal terms, to the Thornton Allen Company. BNS is the successor in interest to the Thornton Allen Company with respect to the song.

PAPA JOHN’S INFRINGING ACTIVITIES

19. In or about November 2010, Papa John’s, or entities working on Papa John’s behalf, produced a television commercial featuring John Calipari, Coach of the University of Kentucky men’s basketball team (the “Infringing Commercial”). In its final form, the Infringing Commercial prominently features and incorporates a performance of “On! On! U of K.” Papa John’s began using the Infringing Commercial in December 2010, when the Commercial was first broadcast in connection with college basketball games.

20. At no time did Papa John’s request or obtain a license from BNS for its use of “On! On! U of K.”

21. After becoming aware of Papa John's Infringing Commercial, BNS promptly wrote to Papa John's on January 20, 2011, through counsel, demanding that Papa John's immediately cease its infringing conduct. Papa John's never responded to this letter or otherwise agreed to cease its infringing conduct.

22. Papa John's unauthorized use of BNS's copyrighted work constitutes willful copyright infringement. Papa John's knew, or should have known, that it could not lawfully incorporate "On! On! U of K" within the Infringing Commercial without the permission of that song's copyright owner.

23. Defendants' infringing activities have caused and will continue to cause BNS great and irreparable harm. Unless restrained and enjoined by this Court, Defendants will persist in their unlawful activities, thereby causing further damage and irreparable harm to BNS.

24. Due to this irreparable harm, BNS has no adequate remedy at law.

Count I: Copyright Infringement

25. BNS hereby realleges and incorporates herein the allegations set forth in paragraphs 1 through 24 of this Complaint.

26. This claim is brought pursuant to the Copyright Act, 17 U.S.C. § 101, et seq., seeking injunctive and monetary relief.

27. Under Section 106 of the Copyright Act, 17 U.S.C. § 106, BNS has the exclusive rights to 1) reproduce "On! On! U of K"; 2) prepare derivative works based upon its song; 3) distribute copies of the song to the public; and 4) perform the song

publicly, among other exclusive rights. The aforesaid acts of Defendants constitute willful infringement of BNS's exclusive rights.

28. The aforesaid acts of Defendants have caused, and are continuing to cause, great and irreparable harm to BNS, which cannot be adequately compensated by monetary damages. Unless permanently restrained by this Court, such irreparable harm will continue.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BNS requests judgment against Defendants, jointly and severally, as follows:

1. That Defendants, and each of their officers, directors, agents, servants, employees and representative, and those persons in active concert or participation with them or any of them, be preliminarily and permanently enjoined and restrained from any copying, performance, preparation of derivative works based upon, distribution or any other use or exploitation of "On! On! U of K," including in connection with the Infringing Commercial.
2. That Defendants be ordered to destroy all copies of the Infringing Commercial within their possession, custody or control, including all copies residing on digital media or computer hardware.
3. That Defendants be directed to file with this Court and to serve upon BNS within thirty (30) days after service upon Defendants of this Court's order or injunction issued in this action, a written report by Defendants, signed under oath, setting forth in detail the manner in which Defendants have complied with the injunction and order of destruction.

4. That BNS be awarded its actual damages and Defendants' profits from the infringement in an amount to be proven at trial, or, at BNS's election, statutory damages of not less than \$150,000, pursuant to 17 U.S.C. § 504.

5. That BNS be awarded its costs, including reasonable attorneys' fees, pursuant to 17 U.S.C § 505.

6. That the Court award BNS any and all further relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff BNS hereby demands trial by jury, pursuant to Fed. R. Civ. P. 38(b), for all issues so triable.

Dated: March 31, 2011
New York, New York

ARENT FOX LLP

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