

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 CAPITOL RECORDS, LLC, :
 :
 Plaintiff, :
 :
 -against- :
 :
 REDIGI INC., JOHN OSSENMACHER, and :
 LARRY RUDOLPH :
 :
 Defendants. :
 ----- X

12 Civ. 0095 (RJS)

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
INDIVIDUAL DEFENDANTS' MOTION FOR RECONSIDERATION**

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Plaintiff Capitol Records, LLC (“Capitol”) submits this memorandum of law in opposition to the motion by individual Defendants John Ossenmacher and Larry Rudolph (collectively, “IDs”) for reconsideration of the Court’s September 2, 2014 order denying their motion to dismiss.

PRELIMINARY STATEMENT

IDs bring their motion to reconsider for precisely the reasons such motions are disfavored – to relitigate issues correctly decided after due consideration. In denying IDs’ motion to dismiss, the Court overlooked nothing, but rather expressly rejected IDs’ novel attempts to rewrite decades of copyright law about joint and several liability. IDs stubbornly refuse to accept that once Capitol pleads facts supporting their joint and several liability with ReDigi – namely that IDs participated in, or exercised control over and benefited from the infringements of the company they created and run -- nothing more need be plead. There was no basis for the motion to dismiss and even less basis for the instant motion to reconsider.

Beyond merely rehashing their earlier failed arguments, IDs also seem to go out of their way to misstate or ignore settled law regarding the underlying acts of infringement for which they are jointly and severally liable. They quarrel with the theory of “inducement” liability on the basis of Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971), even though the Supreme Court affirmatively adopted this theory in Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). They reinvent the elements of contributory infringement – by their count, it has three rather than two elements -- by citing to a rogue dissenting opinion (never identified as such) contradicted by the Supreme Court, the Second Circuit and this Court itself. In other words, the motion to reconsider is an improper

attempt to revive unsuccessful arguments, augmented only by improper efforts to rewrite copyright law. It should be denied.

ARGUMENT

I. The Stringent Standards for a Motion to Reconsider

A motion for reconsideration “is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.” McRae v. Norton, 2012 WL 1744849, at *1 (E.D.N.Y. May 16, 2012) (citation and internal quotations omitted). “It is black letter law that a ‘motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court.’” Nat’l Union Fire Ins. Co. v. Las Vegas Prof’l Football L.P., 409 F. App’x 401, 403 (2d Cir. 2010). See also Vornado Realty Trust v. Castlton Env’tl. Contractors, LLC, 2011 WL 5825688, at *1 (E.D.N.Y. Nov. 16, 2011) (“Reconsideration is not a proper tool to repackage and relitigate arguments and issues already considered by the court in deciding the original motion.”).

The case law holds that “[r]econsideration is appropriate only where there is ‘an intervening change of controlling law, newly available evidence, or the need to correct a clear error or prevent manifest injustice.’” Sutherland v. Ernst & Young LLP, 847 F. Supp. 2d 528, 531 (S.D.N.Y. 2012) (emphasis added), rev’d on other grounds, 726 F.3d 290 (2d Cir. 2013). Stated otherwise, “reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). In simply rearguing points they lost under non-controversial, controlling authorities, IDs satisfy none of these stringent standards. See Williams

v. Regus Mgmt. Group, LLC, 2012 WL 1711378, at *8 (S.D.N.Y. May 15, 2012) (denying motion for reconsideration where “dissatisfied with the Court’s first ruling, [the movant] merely seeks a second bite at the apple”).

II. The Standards For IDs’ Joint and Several Liability With ReDigi

Although one would hardly know from reading IDs’ papers in support of its motions to dismiss and now to reconsider, the standards for holding corporate officers liable for the infringements of their corporations are settled beyond dispute. As this Court reiterated, “[i]t is well established that [a]ll persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers” and that ‘an individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for infringement.’” Opinion and Order (Docket No. 3) (the “Order”) at 4 (citing Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398, 437 (S.D.N.Y. 2011)).¹

These basic principles of joint and several copyright liability “apply equally to claims of direct infringement and claims based on secondary liability.” Lime Group, 784 F.2d at 437-38. Thus, for example, in Lime Group, where corporate defendant’s CEO directed and approved the corporation’s infringing activities, he was held jointly and severally liable for the corporation’s

¹ See also Sygma Photo News, Inc. v. High Soc’y Magazine, 778 F.2d 89, 92 (2d Cir. 1985) (“All persons and corporations who participate in, exercise control over, or benefit from the infringement are jointly and severally liable as copyright infringers”); Broadcast Music, Inc. v. Haibo, Inc., 2012 WL 843424 (W.D.N.Y. Mar. 12, 2012); Centrifugal Force, Inc. v. Softnet Communications, Inc., 2011 WL 744732 (S.D.N.Y. March 1, 2011); Yash Raj Films (USA), Inc. v. Adda Rong, Inc., 2010 WL 1270013 (E.D.N.Y. March 12, 2010); BMG Music v. Roma’s Record Corp., 2009 U.S. Dist. LEXIS 87588, at *8 (E.D.N.Y. August 19, 2009); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 158-59 (S.D.N.Y. 2009); Musical Prods., Inc. v. Roma’s Record Corp., 2007 WL 750319, at *1 (E.D.N.Y. Mar. 5, 2007); Michael Aram, Inc. v. Laurey, 2006 WL 510527, at *2 (S.D.N.Y. Mar. 1, 2006); Capitol Records, Inc. v. Wings Digital Corp., 218 F. Supp. 2d 280, 285 (E.D.N.Y. 2002).

“inducement” of infringement – a theory of secondary liability. See 784 F. Supp. 2d at 438. In parallel fashion, the sole shareholder of a corporation was held jointly and severally liable for the direct infringement of the corporation. See Broadcast Music, Inc. v. Haibo, Inc., 2012 WL 843424 (W.D.N.Y. Mar. 12, 2012). See also Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 158 (S.D.N.Y. 2009) (director and shareholder held jointly and severally liable with corporation for direct, inducement, contributory and vicarious infringement). The import of these cases is clear. If Capitol has plead sufficient facts to show that IDs either personally participated in or had the ability to supervise and an interest in ReDigi’s infringing activity, they are jointly and severally liable for ReDigi’s infringements, whether direct or secondary and without regard to whether IDs separately would satisfy the standards for the underlying infringement.

Despite this very clear authority, IDs persist in the mistaken assertion that Capitol must additionally and redundantly plead each and every element of each species of infringement against each of them personally: “... because Plaintiff’s Amended Complaint is devoid of facts in support of each of the elements of each of the copyright infringement claims against the Individual Defendants, the Court should dismiss these claims with prejudice.” ID’s Br. At 1. Imposing such a requirement would of course render completely superfluous the established theory of joint and several liability. By IDs’ logic, they could only be held jointly and severally liable with ReDigi if they are also separately liable for infringement on their own. Joint and several liability would then be a pointless add-on, applicable only to those already liable for infringement. No case supports such an absurd result. To the contrary, the cases noted above amply support the Court’s correct conclusion that “there is no need to separately plead the

elements of the infringing activities as to the Individual Defendants: their liability is predicated on their direction of and supervision over ReDigi's infringing activity.” Order at 5.

Since this erroneous logic is the crux of IDs’ entire motion, reconsideration should be denied on this ground alone. However, because IDs seem to be at pains to reimagine copyright law in other respects, several other points warrant comment.

III. Inducement to Infringe Is Recognized by the Supreme Court

IDs accuse the Court of overlooking “controlling authority in this Circuit” that inducement to infringe is a “non-existent claim.” IDs’ Br. at 6-7. That “controlling authority,” Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971), in fact says nothing of the sort, but rather establishes the familiar elements of contributory and vicarious infringement.² More important, more than three decades later, the Supreme Court affirmatively endorsed the theory of inducement. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936-37 (2005) (“... the inducement rule, too, is a sensible one for copyright. We adopt it here ...”). Indeed, Grokster even cited Gershwin with approval as authority for the preexisting theories of contributory and vicarious infringement, so there can be no disharmony between the opinions. Moreover, Courts in this District have necessarily followed suit in adopting an inducement theory. See Lime Group, 784 F. Supp. 2d at 434 (defendant liable for inducement where it engaged in purposeful conduct that encouraged copyright infringement, with the intent to encourage such infringement); Usenet.com, Inc., 633 F. Supp. 2d at 150-51 (Grokster announced “new theory of secondary copyright liability:

²Indeed, if anything, Gershwin supports “inducement” as a theory of secondary liability: “a person who has promoted or induced the infringing acts of the performer has been held jointly and severally liable as a ‘vicarious’ infringer”; “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” 443 F.2d at 1162 (emphasis added).

inducement of infringement”). Needless to say, there is no need for any lower Court to “reconsider” the viability of a theory of liability the Supreme Court has expressly adopted.

And, while allegations of IDs’ joint and several liability with ReDigi are sufficient standing alone to support their liability, IDs are in any case wrong that Capitol has failed to allege that they personally undertook intentional acts to encourage infringement sufficient to support an inducement claim. See IDs’ Br. at 8. For example, the First Amended Complaint (“FAC”) (Docket No. 118) alleges that “Ossenmacher and Rudolph ... personally conceived of the infringing business model and technology at issue,” and that “Defendants’ business model was designed to build a customer base and earn profits by infringing and encouraging ReDigi users to infringe copyrighted sound recordings.” See FAC ¶¶ 29, 37. Taken together, those allegations state clearly that IDs created a business model with the intent and function of inducing infringement.

Elsewhere, the FAC describes various acts of intentional inducement committed by “Defendants,” who are of course not some undifferentiated crowd, but simply ReDigi and the two individuals who created and run it. See, e.g., FAC at ¶ 26 (“Defendants offered ReDigi users various incentives to encourage and induce them to participate in the unauthorized reproduction and distribution of Plaintiffs sound recordings”); ¶32 (“By urging users to upload their content for resale, Defendants encouraged those users to infringe copyrights”); ¶ 36 (“Defendants knowingly and willfully offered them financial incentives for participating in unauthorized reproductions and distributions of Plaintiff s sound recordings”); ¶ 45 (“Defendants’ acts of infringement are willful, intentional and purposeful”). These allegations more than amply satisfy the pleading requirements for holding IDs liable for inducement.

IV. The Court Should Reject IDs' Novel Invention of New Elements of Contributory Infringement

With even less fidelity to established precedent, IDs announce a new, three-part test for contributory copyright infringement, requiring proof of “(1) actual knowledge of direct infringement, (2) the ability to police the infringing conduct and (3) derivation of substantial benefit from the actions of the primary infringers.” IDs’ Br. at 9. IDs’ authority for this test is Judge Sweet’s dissenting opinion (never identified as such) in Matthew Bender & Co. v. W. Publ’g Co., 158 F.3d 693, 710 (2d Cir. 1998), which purportedly supplied the “acknowledged standard” for contributory infringement, albeit according to a 1994 District of Massachusetts case.

Relying upon both recent and venerable authority in this Circuit and, indeed, the Supreme Court in Grokster, this Court has already stated that “[c]ontributory infringement occurs where one . . . with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” March 30 Memorandum and Order Granting Capitol’s Motion for Summary Judgment (Docket No. 109), at 15 (citations and quotations omitted). That test is the one and only test for contributory infringement, and imposes no requirements of “policing” infringement or “derivation of a substantial benefit.” IDs should know better than to propose as an “acknowledged standard” a test so at odds with clear authority.

Insofar as IDs’ analysis is predicated on this irrelevant set of elements, it bears little comment. In any case, as set forth in Capitol’s opposition to IDs’ original motion to dismiss, the FAC pleads facts that support both IDs joint and several liability with ReDigi and their personal role in knowingly and materially contributing to infringement. See Memorandum of Law in Opposition to Individual Defendants’ Motion to Dismiss First Amended Complaint (“Capitol’s Original Opp. Br.”) (Docket No. 133) at 16-17, 18-19.

V. The FAC Amply Pleads Facts Supporting IDs' Liability for Vicarious and Direct Infringement

The remainder of IDs arguments are no different than with those discussed above. Capitol need not, but in any case has, plead facts satisfying the elements of IDs' joint and several liability and independent liability for vicarious and direct infringement. See Capitol's Original Opp Br. at 16-18. With respect to direct infringement, IDs argue vociferously that they cannot be held liable for ReDigi's acts of direct infringement based upon their joint and several liability with ReDigi. IDs' Br. at 14-15. According to IDs, direct infringement "requires that the defendant actually engage in infringing conduct, not that another person whom the defendant 'supervises' engages in infringing conduct." Id. at 16. They cite no case supporting that proposition and, as noted above and confirmed by countless cases, the principles of joint and several liability apply equally to direct and secondary liability. Moreover, IDs' distinction makes no logical sense, as it would again defeat the very purpose of joint and several liability as to individuals who should be held responsible for the torts of companies they create, operate, and direct in every sense.

CONCLUSION

For the foregoing reasons, IDs' motion to reconsider should be denied.

Dated: New York, New York
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