

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

BROADCAST MUSIC, INC., et al.,)	
)	
Plaintiffs,)	Civil Action No. 5: 18-215-DCR
)	
V.)	
)	
MARY KATHERINE LOCKHART, et al.,)	MEMORANDUM OPINION
)	AND ORDER
Defendants.)	

*** **

This is a copyright infringement action brought against the owner and manager of the Blue Moon in Richmond, Kentucky. Plaintiffs Broadcast Music, Inc. (“BMI”), Del Sound Music, House of Cash, Inc., Warner-Tamerlane Publishing Corp., Eleksylum Music, Inc., No Surrender Music, Muscle Shoals Sound Publishing Co., Peermusic III, Ltd., and ARC Music Corp. have filed a motion for summary judgment, asserting that Defendants Mary Katherine Lockhart and Prentice Richardson knowingly and intentionally infringed upon four copyrights licensed by the plaintiffs. [Record No. 36] The plaintiffs request statutory damages, attorney’s fees, and a permanent injunction.

I.

BMI is a non-profit performing rights organization that licenses the right to perform copyrighted music on behalf of the owners of the copyrights. [Record No. 36-4] BMI has non-exclusive performance rights that have been acquired from copyright owners, including publishing companies and independent composers. [Record No. 36-4] The other plaintiffs in this lawsuit are copyright owners of the various compositions at issue in this lawsuit. [Record

No. 1] After acquiring public performance rights from composers, BMI grants music users such as restaurants and nightclubs the right to publicly perform the copyrighted music. [Record No. 1]

Defendant Lockhart is the sole proprietor of Blue Moon. Her son, Defendant Richardson, helps manage the establishment. [Record No. 36-2, p. 6] Blue Moon is located at 525 East Irvine Street in Richmond, Kentucky. [Record No. 36-2, p. 3] Blue Moon regularly features live and recorded music. [Record No. 36-2, p. 3]

BMI learned that Blue Moon was offering live music without a license and without obtaining permission from the copyright owners prior to September 2014. [Record No. 36-4, p. 3] It repeatedly sent letters and called the defendants to explain that they needed to obtain permission for public performances of the copyrighted music from September 2014 to March 2017. [Record No. 36-5, p. 5] BMI offered to enter into a license agreement with the defendants, but the defendants rejected the offer. [Record No. 36-5, p. 5] The defendants previously held a license from BMI for Blue Moon that expired at the end of 2005. [Record No. 1, p. 3]

BMI notified the defendants on April 9, 2015, that they needed to cease public performances of music licensed by BMI. [Record No. 36-5, p. 5] It then sent follow-up letters on April 11, 2015, October 12, 2016, October 25, 2016, March 3, 2017, and March 6, 2017. [Record No. 36-5, pp. 3-4] However, public performances continued at Blue Moon. [Record No. 36-5, p. 4] A BMI investigator attended a public performance at Blue Moon on April 15, 2017. [Record No. 36-4] The investigator noted that three songs performed were in BMI's repertoire. [Record No. 36-5, p. 4] After, the investigator generated a report, an employee of

BMI confirmed those three songs and a fourth composition were in its repertoire. [Record No. 36-5, pp. 4-5] Those four compositions are the subject of this action.

II.

Summary judgment is appropriate if there are no genuine disputes regarding any material facts and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Chao v. Hall Holding Co.*, 285 F.3d 415, 424 (6th Cir. 2002). A dispute over a material fact is not “genuine” unless a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The determination must be “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251–52; *see Harrison v. Ash*, 539 F.3d 510, 516 (6th Cir. 2008).

Once the moving party has met its burden of production, “its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Keeneland Ass’n, Inc. v. Earnes*, 830 F. Supp. 974, 984 (E.D. Ky. 1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The nonmoving party cannot rely on the assertions in its pleadings; rather, it must come forward with probative evidence to support its claims. *Celotex*, 477 U.S. at 324. In deciding whether to grant summary judgment, the Court views all the facts and inferences drawn from the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 58.

III.

- a. **The defendants violated the Copyright Act by publicly performing four unauthorized works.**

The Copyright Act grants the owner of a copyright the exclusive right to perform or authorize a performance of the copyrighted work. 17 U.S.C. § 106(4). “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright” 17 U.S.C. § 501(a). To establish a claim of copyright infringement, the plaintiffs must demonstrate “(1) the originality and authorship of a composition; (2) a valid copyright under the formalities of the Copyright Act; (3) claimant’s ownership of the copyright at issue; (4) defendant’s public performance of the composition; and (5) defendant’s failure to obtain permission from the claimant for such performance.” *Broadcast Music, Inc. v. Rooster’s, Inc.*, 2006 U.S. Dist. LEXIS 5535 *1, *9 (E.D. Ky. Feb. 14, 2006); *see also Jobete Music Co., Inc. v. Johnson Communications, Inc.*, 285 F. Supp. 2d 1077, 1082 (S.D. Ohio 2003).

The plaintiffs allege that the first three elements of a claim of copyright infringement are satisfied by the Ellwood Declaration. [Record No. 36-1, p. 7] The Ellwood Declaration and corresponding attachments include the names and performers of the works performed, the date of the copyrights, the registration certificates, and documents relating to the chain of ownership of the songs. [Record No. 36-4] “A copyright certificate is prima facie evidence of the first three elements of an infringement claim.” *Broadcast Music, Inc. v. Rooster’s, Inc.*, 2006 U.S. Dist. LEXIS 5535 *1, *10 (E.D. Ky. Feb. 14, 2006). Copyright registration certificates are included in the attachments to the Ellwood Declaration. [*See, e.g.*, Record No. 36-4, p. 36.]

The plaintiffs also include a Certified Infringement Report of Paul Young in support of the fourth element of copyright infringement, public performance. [Record No. 36-5, pp. 7-13] Young was hired to visit Blue Moon and develop a written report of the musical works that were performed. [Record No. 36-5, pp. 4-5] He visited Blue Moon on April 15, 2017,

and made a digital recording of the performance. [Record No. 36-5, p. 13] The defendants explicitly admitted that one of the songs at issue was performed at Blue Moon on April 15, 2017. [Record No. 36-3, p. 4] The defendants also admit that they have no evidence controverting that all of the compositions at issue were performed. [Record No. 36-3, pp. 4-5]

The defendants did not have a BMI license agreement or have the performances authorized. [Record No. 36-5, p. 3] BMI repeatedly offered to enter into a license agreement with the defendants, but the defendants chose not to enter into an agreement and continued to perform the copyrighted music. [See, e.g., Record No. 36-5, p. 29.] The defendants admitted that they were contacted repeatedly by BMI offering to grant Blue Moon a license for public performances. [Record No. 32-2, p. 19] The evidence provided by the plaintiffs demonstrates that the performance was not authorized.

The defendants offer no evidence to dispute the fact that the plaintiffs have satisfied all five elements of copyright infringement. Thus, the plaintiffs have established that no genuine issue of material fact exists regarding the establishment of the five elements of a copyright infringement claim.

- i. The defendants are not exempt from the Copyright Act under 17 U.S.C. § 110(4).

The defendants argue that 17 U.S.C. § 110(4) provides an exemption from the licensing requirements. Title 17 of the United States Code, section 110(4) provides:

- (4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if--
 - (A) there is no direct or indirect admission charge; or

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