

20-3816

ABKCO Music, Inc. v. Sagan

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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5 August Term, 2021

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7 (Argued: March 14, 2022

Decided: October 6, 2022)

8
9 Docket Nos. 20-3816(L), 20-4020(CON), 20-4099(XAP)

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12 ABKCO MUSIC, INC., COLGEMS-EMI MUSIC INC., EMI ALGEE MUSIC CORP., EMI
13 APRIL MUSIC INC., EMI BLACKWOOD MUSIC INC., EMI CONSORTIUM MUSIC
14 PUBLISHING, INC., DBA EMI FULL KEEL MUSIC, EMI CONSORTIUM SONGS, INC.,
15 DBA EMI LONGITUDE MUSIC, EMI FEIST CATALOG INC., EMI ROBBINS CATALOG
16 INC., EMI UNART CATALOG, INC., JOBETE MUSIC Co., INC., SCREENGEMS-EMI
17 MUSIC INC., STONE AGATE MUSIC, STONE DIAMOND MUSIC CORP., IMAGEM MUSIC
18 LLC, PEER INTERNATIONAL CORP., PSO LTD., PEERMUSIC LTD., PEERMUSIC III, LTD.,
19 SONGS OF PEER, LTD., SPIRIT CATALOG HOLDINGS S.A.R.L, SPIRIT TWO MUSIC, INC.,
20 WARNER-TAMERLANE PUBLISHING CORP., WB MUSIC CORP.,

21 Plaintiffs-Counter-Defendants-Appellees-Cross-
22 Appellants,

23 v.

24
25 WILLIAM SAGAN, NORTON LLC, BILL GRAHAM ARCHIVES, LLC,
26 DBA WOLFGANG'S VAULT, DBA CONCERT VAULT, DBA MUSIC VAULT, DBA
27 DAYTROTTER,

28 Defendants-Counterclaimants-Appellants-Cross-
29 Appellees.

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Before: JACOBS, WESLEY, and MENASHI, Circuit Judges.

A collection of music publishers alleged infringement of their copyrights in 197 musical works when a series of live concert recordings was made available by the defendants for download and streaming on their websites. Plaintiffs sought damages and a permanent injunction pursuant to the Copyright Act. The United States District Court for the Southern District of New York (Ramos, J) held on summary judgment that defendants had no valid licenses and therefore infringed each of the musical works, and that the principal was personally liable. The district court denied plaintiffs' request for a permanent injunction. Two years later, after a nine-day damages trial, the jury awarded plaintiffs a minimal \$189,500 in statutory damages. The district court denied plaintiffs' motion for a new trial but awarded them roughly \$2.4 million in attorneys' fees.

Defendants appeal from the district court's summary judgment order and the order granting fees and costs. Plaintiffs cross-appeal from the district court's denial of a permanent injunction, several evidentiary rulings, and the denial of a new trial.

1 We AFFIRM in part, VACATE in part, and REVERSE in part, the grant of
2 summary judgment, and AFFIRM the denial of a permanent injunction; REJECT
3 the challenges to the evidentiary rulings; AFFIRM the denial of plaintiffs' motion
4 for a new trial; VACATE the award of attorneys' fees; and REMAND for further
5 proceedings consistent with this opinion.

6

7 MICHAEL S. ELKIN (Erin R. Ranahan, on
8 the brief), Winston & Strawn LLP, New
9 York, NY, for Defendants-
10 Counterclaimants-Appellants-Cross-
11 Appellees.

12
13 BARRY I. SLOTNICK (Christian D.
14 Carbone, Tal E. Dickstein, Sarah Schacter,
15 and Priy Sinha, on the brief), Loeb & Loeb
16 LLP, New York, NY, for Plaintiffs-Counter-
17 Defendants-Appellees-Cross-Appellants.

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20 DENNIS JACOBS, Circuit Judge:

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22 In 2002, William Sagan acquired a trove of live concert recordings that
23 included performances by The Rolling Stones, The Who, the Grateful Dead, and
24 many others. At the time, the sellers cautioned that Sagan "may be buying the
25 world[']s greatest private collection [of recordings] that no one will ever hear."

1 App'x at 453. But in 2006, Sagan made those and other recordings available to
2 the world through digital download and streaming services offered for a fee
3 through various websites. Sagan did this through his companies Norton LLC
4 and the Bill Graham Archives, LLC (together with Sagan, "defendants").

5 In 2015, a collection of music publishers (together, the "Publishers")
6 brought this suit under the Copyright Act, alleging that defendants infringed the
7 Publishers' copyrights in 197 musical works that were performed in the live
8 concert recordings. The Publishers sought about \$30 million in damages and a
9 permanent injunction. On March 30, 2018, the United States District Court for
10 the Southern District of New York (Ramos, J.) held on summary judgment that
11 defendants had no valid licenses and therefore infringed each of the musical
12 works and that Sagan was personally liable. The district court denied the
13 Publishers' request for a permanent injunction. Two years later, after a nine-day
14 damages trial, the jury awarded the Publishers \$189,500, which was near the
15 minimum statutory damages. The Publishers argued that the minimal award
16 was a rushed and ill-considered result of the encroaching pandemic and moved
17 for a new trial. The district court denied the motion but awarded them roughly
18 \$2.4 million in attorneys' fees.

1 On appeal, defendants challenge the district court’s summary judgment
2 rulings and the order granting fees and costs. The Publishers cross-appeal the
3 district court’s denial of a permanent injunction, several evidentiary rulings, and
4 its denial of the new trial.

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BACKGROUND

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8 Congress has created two types of copyrights in a musical recording. One
9 is for the underlying “musical work,” which encompasses the notes and lyrics of
10 a song. See 17 U.S.C. § 102(a)(2). The other is for the “sound recording,” which
11 covers the rights to a recording of a particular performance by a particular artist.
12 See id. § 102(a)(7). This case concerns the first type of copyright. (The second
13 type was at issue in a prior litigation.)

14 A person seeking to make and distribute phonorecords—that is, material
15 objects in which sounds are fixed—of a previously published musical work can do

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