

United States District Court, M.D. Florida, Tampa Division.

BROADCAST MUSIC, INC., Ensign Music Corporation, Beechwood Music Corporation, Jondora Music, Tree Publishing Co., Inc., Acuff-Rose Music, Inc., Combine Music Corp., ATV Music, Elvis Presley Music, Lowery Music Company, Inc., Screen Gems-EMI Music, Inc., Maypop Music, Songs of Polygram International, Inc., Top Soil Music, Al Gallico Music Corporation, Irving Music, Inc., Delbon Publishing Company, Stuck on Music, EMI Unart Catalog, Inc., House of Bryant Publications, Maclen Music, Muscle Shoals Sound Publishing, Illegal Songs, Inc., Hip City Music, Inc., Hifrost Publishing, Motley Crue Music Company, Sikki Nixx Music, Mick Mars Music, and Warner-Tamerlane Publishing Corp.

v.

AARTIE RESTAURANT MANAGEMENT, INC., d.b.a. Calico Jack's and Swadesh Manansingh, individually.

**No. 92-486-Civ-T-21C.**

1993 WL 106894, 1993 Copr.L.Dec. P 27,060

Jan. 13, 1993.

NIMMONS, District Judge:

Before the Court is the plaintiffs' motion for summary judgment (Dkt. # 15), filed on October 14, 1992. The defendants filed a memorandum in opposition to the plaintiffs' motion on November 13, 1992. Plaintiffs' supplemental memorandum was filed on December 14, 1992. After thoroughly reviewing the relevant portions of the record, the Court finds that the motion should be granted.

Plaintiffs bring this action for copyright infringement under the Copyright Act of 1976, as amended 17 U.S.C. § 101 *et seq.* Plaintiff, Broadcast Music, Inc. ("BMI"), is a New York corporation which licenses the rights to publicly perform copyrighted musical compositions. The other plaintiffs are the owners of the copyrights for various musical compositions and possess the exclusive right to authorize public performances of their works. BMI, acting on behalf of the copyright owners, enters into license agreements with individuals and establishments which seek to publicly perform the musical compositions.

Defendant, Aartie Restaurant Management, Inc. ("Aartie"), is a Florida corporation which owns and operates a seafood restaurant and oyster bar known as Calico Jack's, which is located at 12741 North Dale Mabry Highway, Tampa, Florida. Defendant, Swadesh Manansingh, a stockholder and officer in the defendant corporation, has primary responsibility for managing Calico Jack's. Manansingh supervises the activities of Aartie and has a direct interest in the corporation.

On December 3, 1991, BMI representative, Randall S. Lee, visited Calico Jack's to investigate potential infringement of copyrighted musical compositions. For a period of several hours, Lee witnessed a disc jockey play recorded music through a jukebox sound system and made a contemporaneous list of the song titles as they were publicly performed. This list included at least 8 musical compositions licensed by BMI. [FN1] On December 5,

1991, Lee returned to Calico Jack's and documented the public performance of 28 copyrighted musical compositions during a "karaoke night" show performed by a group known as Tampa Bay Cabaret. [FN2]

To prevail in an action for copyright infringement by unauthorized public performance, a plaintiff must establish the following five elements: (1) the originality and authorship of the compositions involved; (2) compliance with the formalities required to secure a copyright under Title 17 of the United States Code; (3) plaintiffs' ownership of the copyrights of the relevant compositions; (4) defendant's public performance of the compositions; and (5) defendant's failure to obtain permission from the plaintiffs or their representatives for such performance. *Broadcast Music, Inc. v. Jeep Sales and Service Co.*, 747 F.Supp. 1190, 1192 (E.D.Va.1990); *Boz Scaggs Music v. KND Corp.*, 491 F.Supp. 908, 912 (D.Conn.1980).

BMI has satisfied each of the requisite elements. The first three elements are established pursuant to the affidavit of Judith M. Saffer, Assistant General Counsel of BMI. The public performance element has been satisfied by the affidavit and attached exhibits submitted by BMI's investigator, Lee. Plaintiffs have also met their burden as to the final element with the affidavit of BMI Regional Director Lawrence E. Stevens. The defendants have not come forward with any evidence to contradict the sworn testimony of plaintiffs' representatives.

In response to the plaintiffs' motion for summary judgment, the defendants have raised essentially two defenses. First, the defendants claim that the musical performance on December 3, 1991, falls within the so-called "jukebox exemption" set forth in 17 U.S.C. § 116. This exemption applies, however, only if the jukebox is a "coin-operated phonorecord player" and is "located in an establishment making no direct or indirect charge for admission." According to investigator Lee's affidavit and the exhibits attached thereto, on December 3, the patrons at Calico Jack's could not deposit coins in the jukebox in order to select songs of their choosing; to the contrary, the disc jockey controlled the musical performances. In addition, since the establishment charged a \$2.00 entry fee on that night, the exemption does not apply. See *Chi-Boy Music v. Towne Tavern, Inc.*, 779 F.Supp. 527, 530 (N.D.Ala.1991); *Sweet Summer Night Music v. Aiken*, 659 F.Supp. 52, 53 (D.Alaska 1987).

Second, Manansingh claims in his affidavit that he understood that Tampa Bay Cabaret possessed the licensing required to perform the December 5, 1991, "karaoke night" show and he was unaware of his own need to be licensed. The evidence in the record does not support this contention. Beginning on October 5, 1990, BMI repeatedly told Calico Jack's management that they needed permission to publicly perform copyrighted musical works. During the following year, BMI sent a total of twelve letters urging execution of a

licensing agreement for the restaurant. [FN3] Representatives of BMI also telephoned Calico Jack's on at least ten occasions and personally visited the premises twice, explaining the need to enter into a licensing agreement. BMI's efforts were consistently ignored. Finally, on October 29, 1991, more than a month before its investigator went to the restaurant, BMI sent the defendants a certified letter directing them to cease any further public performances of copyrighted musical compositions licensed by BMI. In light of these circumstances, Manansingh's professed ignorance of the federal copyright laws, based in part upon unsubstantiated hearsay, lacks credibility and does not create a genuine issue of material fact.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265, 276 (1986). The standard of review mirrors the standard for a directed verdict which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). When the moving party carries its initial burden of demonstrating the absence of a genuine issue of material fact, the non-moving party may not rely solely on the pleadings, but must come forward with evidence and show that there are specific factual issues for trial. Although all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, *see Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "the mere existence of a scintilla of evidence in support of the [ ... defendant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [ ... defendant]." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

After thoroughly reviewing the pertinent portions of the record in accordance with the foregoing standards, the Court finds that plaintiffs have sufficiently established that there are no genuine issues of material fact and they are entitled to judgment in their favor as a matter of law.

As for the relief requested, plaintiffs are seeking injunctive relief, statutory damages, costs and attorney's fees, as well as interest thereon. The Court finds that plaintiffs are clearly entitled to an injunction prohibiting defendants from engaging in further acts of infringement pursuant to 17 U.S.C. § 502. Plaintiffs are seeking an award of damages in the amount of \$1,000.00 per act of infringement, for a total of \$36,000.00 in damages.

Under 17 U.S.C. § 504(c), the Court has discretion to award not less than \$500.00 and not more than \$20,000.00 per infringement. In view of the fact that the defendants repeatedly ignored the plaintiff's attempts to enter into a licensing agreement, the Court finds that awarding damages in the amount of \$1,000.00 per act of infringement is appropriate.

Plaintiffs also seek to recover the costs of this action and reasonable attorney's fees pursuant to 17 U.S.C. § 505. See *Original Appalachian Artworks, Inc. v. Toy Loft*, 684 F.2d 821, 832 (11th Cir.1982). According to the Declaration of C. Douglas McDonald, Jr., and the exhibits attached thereto, counsel for plaintiffs has billed 6.9 hours at an hourly rate of \$175.00, for a total of \$1,207.50. Plaintiffs have also incurred costs of \$144.00. Upon review, the Court concludes that the plaintiffs' costs and attorney's fees are reasonable and will be awarded in the total amount of \$1,351.50.

In accordance with the foregoing discussion, it is

ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment is hereby GRANTED. The Clerk is directed to enter the separate Final Judgment being filed simultaneously herewith, entering judgment in favor of the plaintiffs and against the defendants.

DONE AND ORDERED.

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#### Footnotes

FN1. The songs performed on December 3 (and the early morning of December 4) include the following: "Little Help From My Friends," a/k/a "With A Little Help From My Friends"; "We Are The Champions"; "Old Time Rock And Roll," a/k/a "Old Time Rock & Roll"; "Electric Avenue"; "We Will Rock You"; "I Wanna Sex You Up"; "Dr. Feelgood"; and "Home Sweet Home".

FN2. The songs played on December 5 (and the early morning of December 6) include the following: "Gentle On My Mind"; "Crazy Little Thing Called Love"; "Proud Mary"; "He Stopped Loving Her Today"; "Traveling Man"; "Polk Salad Annie"; "Tutti Frutti"; "I Fall To Pieces"; "His Latest Flame"; "Long Tall Sally"; "Walk A Mile In My Shoes"; "Hooked On A Feeling"; "Mountain Music"; "Daniel"; "Crocodile Rock"; "Suspicious Minds"; "Takin' Care Of Business"; "House Of The Rising Sun," a/k/a "The House Of The Rising Sun"; "Surrender"; "Black Is Black"; "Crazy"; "We've Only Just Begun"; "Superstar," a/k/a "Groupie"; "Saturday Night's Alright (For Fighting)"; "Okie From Muskogee"; "Ain't It A Shame," a/k/a "Ain't That A Shame"; "Sitting On The Dock Of The Bay," a/k/a "Sittin' On The Dock Of The Bay"; and "Rocky Top".

FN3. Two of these letters were sent to the Wild Stallion Pub, another establishment operated by Manansingh.