Electronically Filed
Docket: 22-CCB-0098
Filing Date: 09/18/2023 12:34:30 PM EDT

UNITED STATES COPYRIGHT CLAIMS BOARD

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JOE HAND PROMOTIONS, INC.,

Claimant,

vs. DOCKET NO. 22-CCB-0098

ARIF SKYLINE CAFÉ LLC, et al.,

Respondents.
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CLAIMANT'S RESPONSE IN OPPOSITION TO PROPOSED DEFAULT DETERMINATION

Claimant Joe Hand Promotions, Inc., (hereinafter "Claimant" or "JHP") filed its Default Direct Party Statement against Respondents Arif Skyline Café LLC d/b/a Arif Skyline Café and Hellen Abera Kassa ("Respondents") requesting damages for their unauthorized and illegal receipt and exhibition of the *Ultimate Fighting Championship® 241: Daniel Cormier vs. Stipe Miocic 2* broadcast, including all undercard bouts and commentary, on August 17, 2019 (hereinafter "Event") at Arif Skyline Café (hereinafter "Establishment"), a commercial business, without paying the sublicense fee to Claimant. On July 3, 2023, the Copyright Claims Board issued an Order to Submit Additional Evidence for Claimant to submit additional evidence in support of individual liability against Respondent Hellen A. Kassa ("Respondent Kassa"). Claimant submitted its Supplement on July 14, 2023. On August 18, 2023, the Copyright Claims Board (hereinafter "Board") issued its Notice Regarding Proposed Dismissal, Notice of Proposed Default, and Proposed Default Determination. The Board's proposed determination includes a finding that "the presented evidence is insufficient to support a finding in favor of Claimant against Hellen A. Kassa and proposes a dismissal of the claim against Kassa without prejudice." *See* Case

Doc. #37. Pursuant to 37 C.F.R. 227.3(a)(2), Claimant hereby submits this Response in Opposition to the Proposed Default Determination (hereinafter "Determination").

I. ARGUMENT

A. Eastern District of Virginia Copyright Law precedent supports finding Respondent Hellen A. Kassa individually liable for the underlying claims.

"[A] party may be guilty of vicarious infringement if it: '(1) possessed the right and ability to supervise the infringing activity; and (2) possessed an obvious and direct financial interest in the exploited copyrighted materials.'" *Universal Furniture Int'l, Inc. v. Frankel*, 538 Fed. Appx. 267, 272 (4th Cir. 2013) (quoting *Nelson–Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 513 (4th Cir. 2002)).

While the Board's Determination accurately states the copyright vicarious liability standard, the Board thereafter relied largely on non-copyright infringement and/or out-of-District case law to determine Respondent Kassa was not individually liable in this matter. *See* Case Doc. #37 at pp. 7-9 (citing *Zuffa, LLC v. Ferrell*, No. 8:20-cv-0273, 2021 WL 2315458, at *3-4 (D. Md. June 7, 2021), *J&J Sports Productions, Inc. v. Mayreal II, LLC*, 849 F. Supp. 2d 586, 590-91 (D. Md. 2012), *Scurmont LLC v. Firehouse Restaurant Group, Inc.*, No. 4:09-cv-00618-RBH, 2010 WL 11433199, at *15-16 (D.S.C. May 19, 2010), *Worsham v. Travel Options, Inc.*, No. JKB-14-2749, 2016 WL 4592373, at *5 (D. Md. Sept. 2, 2016), *Joe Hand Promotions, Inc. v. Up at Night LLC*, No. GJH-21-580, 2023 WL 375188, at *2-3 (D. Md. Jan. 23, 2023), *Joe Hand Promotions, Inc. v. Bowers*, No. 1:18-CV-3859-MHC, 2020 WL 4557072, at *3 (N.D. Ga. Feb. 25, 2020), *Joe Hand Promotions, Inc. v. Sharp*, 885 F. Supp. 2d 953, 957 (D. Minn. 2012), *Joe Hand Promotions, Inc. v. Murray*, No. 5:15-cv-5631, 2016 WL 3903205, at *4-5 (E.D. Pa. July 18, 2016), *Joe Hand Productions, Inc. v. Yakubets*, 3 F. Supp. 3d 261, 292-301 (E.D. Pa. 2014), *Joe Hand Promotions, Inc. v. Disla*, No. 19-CV-788, 2020 WL 2572268, at *3 (E.D.N.Y. Feb. 3, 2020)). It appears the

Board relied on the name of the Claimant to determine the controlling law instead of applying copyright law from the appropriate jurisdiction.

Had this claim been brought in federal court, jurisdiction would have been proper, and the case thus would have been filed in the Eastern District of Virginia. Case law in the Eastern District of Virginia for vicarious liability under the Copyright Act is clear from *EMI April Music, Inc. v. White*, 618 F. Supp. 2d 497, 506-07 (E.D. Va. 2009). "There seems to be no dispute among courts that a person can, in certain circumstance, be found to have infringed a copyright based on the acts of another." *Id.* at 506. After stating the standard enumerated above, the Court in *EMI April Music, Inc.* continued stating a "lack of knowledge that the primary actor is actually engaged in infringing activity is not a defense where both elements are satisfied." *Id.* at 507.

In analyzing vicarious liability for copyright infringement under similar circumstances, the Court in *EMI April Music, Inc.* found the restaurant owner vicariously liable where (1) the facts were undisputed that a band performed copyrighted music in his establishment, and (2) the complaint stated the defendant "did and still does own, control, manage, operate" the establishment where the copyright infringement took place. Here, the facts are undisputed that the Event was broadcast in the establishment and the Claim clearly states, "Respondents Arif Skyline Café LLC and Hellen Abera Kassa . . . owned, operated, maintained, and controlled the commercial business known as Arif Skyline Café located at 3811 S. George Mason Drive, Suite C, Falls Church, VA 22041 . . . on the date of the [Event]." *See* Case. Doc. #1. Additionally, Claimant has provided evidence that Respondent Kassa holds herself out to the public as "Owner at Arif skyline bar and restaurant" on her personal Facebook page. Case Doc. #33. Further, the Claim alleges Respondent Hellen Abera Kassa "including their agents, servants, and/or employees, took affirmative steps to circumvent the commercial licensing requirement and unlawfully obtained the [Event] and

exhibited it in their Establishment . . . , willfully engaged in illegal acts to receive the [Event] for free or at nominal cost while Claimant's legitimate customers paid several thousand dollars . . . , [and] intentionally pirated the [Event] for the sole purpose of their own economic gain." *See id.*

The Court in *EMI April Music, Inc.* continued their analysis finding:

> The facts before the Court, as admitted, also reflect that the infringing music was being performed at Defendant's restaurant/pub for entertainment purposes, thus giving Defendant an obvious and direct financial interest in the exploitation of copyrighted material. Even when a restaurant proprietor instructs band members not to perform copyrighted music at his establishment, or inserts a provision to that effect in the band's contract, such proprietor cannot escape vicarious liability when he has a right to supervise and a financial interest in such performance. Furthermore, the fact that hired performers are mere independent contractors will not absolve a proprietor from vicarious liability.

EMI April Music, Inc., 618 F.Supp.2d at 507 (internal citation omitted). Here, the facts surrounding the infringement are even simpler as they do not involve a third party (i.e., the band). Further, the Fourth Circuit has recognized "that the imposition of liability upon a copyright infringer under a theory of vicarious liability serves an important public interest—it prevents an entity that profits from infringement from hiding behind undercapitalized 'dummy' operations when the copyright owner eventually sues." *Nelson-Salabes, Inc.*, 284 F.3d at 513 (cleaned up). It is clear from the evidence provided by Claimant that Respondent Kassa is the owner of the Establishment and as such, had a right to supervise and a financial interest in the infringement in line with the Eastern District of Virginia's precedent in *EMI April Music, Inc.*

"If it appears that there may be conflicting judicial precedent on an issue of substantive copyright law that cannot be reconciled, the Copyright Claims Board shall follow the law of the Federal jurisdiction in which the action could have been brought if filed in a district court of the United States." 17 U.S.C. § 1506(a)(2). As stated above, the Board largely relied on non-copyright infringement and/or out-of-District and extreme outlying case law to determine Respondent Kassa

was not individually liable when following the precedent in the Eastern District of Virginia would lead to a finding of liability. Therefore, Claimant requests the Board reconsider its Determination and find Respondent Kassa vicariously liable for the infringement in accordance with the precedent set by the Court in *EMI April Music, Inc.*

B. In its Proposed Default Determination, the Board improperly conflates vicarious copyright infringement with contributory copyright infringement when each has separate and distinct elements to prove liability.

Multiple times throughout the Determination, the Board states elements of contributory liability when explaining the ruling to deny individual liability against Respondent Kassa; however, Claimant pled and has shown that Respondent Kassa is vicariously liable for the infringement. *See* Case Doc. #37 at pp. 4 ("Joe Hand has provided no evidence showing that Kassa had any direct involvement with the alleged infringement"), 6 ("Claimant offers no information linking Kassa to the infringement") ("There are no facts alleged in the claim or in any submitted evidence to suggest what, if anything, Kassa did to advance the infringement").

Unlike vicarious copyright infringement, "[a] contributory infringer is one who, (1) with knowledge of the infringing activity, (2) induces, causes or materially contributes to the infringing conduct of another." *Sony Music Ent. v. Cox Commc'ns, Inc.*, 464 F. Supp. 3d 795, 815 (E.D. Va. 2020) (cleaned up). Claimant claims Respondent Kassa is vicariously liable for the infringement, not that Respondent Kassa is a contributory infringer. As discussed *supra*, under the vicarious liability standard, a "lack of knowledge that the primary actor is actually engaged in infringing activity is not a defense where both elements are satisfied." *EMI April Music, Inc.*, 618 F.Supp.2d at 507. Thus, Respondent Kassa is vicariously liable for the infringement at issue in this matter as they possessed the right to supervise and a financial interest in the infringement.

For the reasons set forth herein, Claimant respectfully requests the Board reconsider its Proposed Default Determination and find Respondent Hellen Abera Kassa individually liable for the infringement at issue in this matter.

Respectfully,

Dated: September 18, 2023

By: /s/ Ryan R. Janis

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Proof of Delivery

I hereby certify that on Monday, September 18, 2023, I provided a true and correct copy of the Claimant's Response in Opposition to the Proposed Default Determination to the following:

Hellen A. Kassa, represented by Hellen A. Kassa, served via USMAIL

Signed: /s/ Ryan R. Janis