

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MAVERICK RECORDING COMPANY,
VIRGIN RECORDS AMERICA, INC.,
UMG RECORDINGS, INC., SONY BMG
MUSIC ENTERTAINMENT, ARISTA
RECORDS LLC, BMG MUSIC,
ATLANTIC RECORDING CORPORATION,
CAPITOL RECORDS, INC.,

Plaintiffs,

OPINION AND
ORDER

06-C-216-C

KATHI HALL,

Defendant.

In this civil action, plaintiffs Maverick Recording Company, Virgin Records America, Inc., UMG Recordings, Inc., Sony BMG Music Entertainment, Arista Records LLC, BMG Music, Atlantic Recording Corporation and Capitol Records, Inc. contend that defendant Kathi Hall infringed plaintiffs' copyrighted works when she downloaded and shared nine musical recordings using the peer-to-peer computer network Kazaa. Plaintiffs sue under the United States Copyright Act, 17 U.S.C. § 101, 106, 501-505. Jurisdiction is present. 28 U.S.C. §§ 1331, 1338(a).

Now before the court is plaintiffs' unopposed motion for summary judgment, in which plaintiffs ask the court to enter judgment against defendant and award statutory damages. Because the facts show that defendant copied and distributed musical recordings to which plaintiffs held exclusive rights, plaintiffs' motion will be granted.

From the plaintiffs' proposed findings of fact, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

On June 5, 2006, an investigator hired by plaintiffs determined that an individual using the screen name "ishareituser@KaZaA" and the internet protocol address 24.183.98.49 was distributing songs for which plaintiffs held exclusive reproduction and distribution rights. Defendant's internet service provider, Charter Communications, Inc., identified defendant as the person to whom that internet protocol address was licensed at that date and time. Defendant downloaded and made available for distribution nine songs to which plaintiffs hold exclusive rights to reproduce and distribute.

Plaintiffs placed proper notices of copyright on all published album covers that contained the songs in question. These published notices were widely available and each published copy was accessible by defendant. At no time did any plaintiff agree to allow defendant to copy or distribute any song to which it held exclusive reproduction and

distribution rights.

OPINION

In addressing a motion for summary judgment, a court applies well-established standards. Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). The court examines the facts in the light most favorable to the non-moving party. Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

To prevail on a claim of copyright infringement, a plaintiff must demonstrate two things: "ownership of a valid copyright," and "copying of constituent elements of the work that are original." Incredible Technologies, Inc. v. Virtual Technologies, Inc., 400 F.3d 1007, 1011 (7th Cir. 2005) (citing Feist Publications, Inc. v. Rural Telephone Service Co, Inc., 499 U.S. 340, 361 (1991)). In this case, defendant has admitted to both elements—first when she failed to respond to plaintiffs' requests to admit and again when she failed to respond to facts proposed by plaintiffs in support of this motion.

On August 9, 2006, plaintiffs sent defendant a set of requests for admission, but she failed to respond to any of the requests. As a result, she will be deemed to have admitted all of the statements included in that document. Fed. R. Civ. P. 36(a) ("Each matter . . . is

admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection . . ."). Although defendant's admissions occurred as a result of her failure to respond to plaintiffs' discovery requests, her admissions provide proper grounds for fact-finding at summary judgment. United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987) ("admissions made under Rule 36, even default admissions, can serve as the factual predicate for summary judgment").

Therefore, it is undisputed that defendant downloaded and shared recordings to which plaintiffs held exclusive rights. The remaining question is whether doing so violated the Copyright Act's prohibition on reproduction and distribution by those other than the copyright holder. It did. The Court of Appeals for the Seventh Circuit considered a similar case in BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005), and found that an individual who had downloaded and shared 30 music files using Kazaa had violated the Copyright Act. Id. (rejecting argument that such activities constituted "fair use"); see also In re Aimster Copyright Litigation, 334 F.3d 643, 645 (7th Cir. 2003) (finding that "file swappers" who make and transmit digital copies of music, directly are direct infringers of copyright).

The next matter for consideration is damages. Plaintiffs have requested statutory damages authorized under 17 U.S.C. § 504 (c)(1). The statute provides for damages ranging

from \$750 to \$30,000. A departure downward from this range is allowable only if an infringer can prove that he or she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2). However, a defendant may not prevail on this argument when the copyright notice has been properly displayed on published copies of the recordings and defendant had access to these copies. It is undisputed that copyright notices appeared on the covers of albums that contained the downloaded songs and that defendant had access to these albums. Thus, a departure downward is not appropriate. Because plaintiffs have requested only the minimum damages a jury trial is unnecessary. BMG Music, 430 F.3d at 892 (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998)). At issue are nine songs, subjecting plaintiff to a penalty of \$750 each. Therefore, judgment will be entered for plaintiffs in the amount of \$6,750. 17 U.S.C. § 504 (c)(1). In addition, I will grant plaintiffs' request for an award of costs associated with pursuing this lawsuit, which are \$420. 17 U.S.C. § 505. In the absence of any defense, it would be inappropriate to deny plaintiffs' request for costs in this case.

Finally, plaintiffs have requested entry of a permanent injunction prohibiting defendant from engaging in future infringement. One would hope that the outcome of this case alone would dissuade defendant in her future activities. However, because defendant demonstrated previously that she is unconcerned by the rules governing copyright, I will

grant plaintiffs' motion for entry of a permanent injunction. Plaintiffs have asked for the following injunction:

Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce any of Plaintiffs' Recordings, to distribute any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody or control.

I will make two modifications to the requested language of the injunction. First, I will add defendant's name. Next, I will change the language slightly to reflect the actions in which defendant engaged and which are before the court in this lawsuit. Defendant copied and distributed music through an online media distribution system; she will be enjoined from doing so in the future. The references to copyright law and the internet are unnecessary and suggest that the injunction would cover a broader range of activities than are at issue here.

Undoubtedly, this result will strike defendant as harsh. Defendant downloaded nine songs that would have cost her less than ten dollars had she purchased them from a licensed internet seller such as iTunes. She is hardly the only person who has downloaded music

from a peer-to-peer network. However, defendant violated copyright law and will now face the expensive consequence.

ORDER

IT IS ORDERED that

1. The motion for summary judgment of plaintiffs Maverick Recording Company, Virgin Records America, Inc., UMG Recordings, Inc., Sony BMG Music Entertainment, Arista Records LLC, BMG Music, Atlantic Recording Corporation and Capitol Records, Inc. is GRANTED.

2. Plaintiffs' motion for a permanent injunction is GRANTED.

FURTHER, IT IS ORDERED that defendant Kathi Hall is enjoined from copying and distributing any sound recording, whether now in existence or later created, that is owned or controlled by plaintiffs (or any parent, subsidiary, or affiliate record label of plaintiffs) ("Plaintiffs' Recordings"), by using any online media distribution system to reproduce any of Plaintiffs' Recordings, to distribute any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of plaintiffs. Defendant Kathi Hall shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in defendant's possession, custody or control.

3. Plaintiffs are awarded statutory damages in the amount of \$6,750.00, together with costs in the amount of \$420.00.

4. The clerk of court is directed to enter judgment for plaintiffs and close this case.

Entered this 31st day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge