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UMG RECORDINGS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UMG RECORDINGS, INC., a Delaware corporation, Plaintiff, v. TROY AUGUSTO d/b/a ROAST BEAST MUSIC COLLECTABLES AND ROASTBEASTMUSIC, an individual; and DOES 1 through 10, inclusive, Defendants.	CASE NO. 2:07 CV 3106 SJO (AJWx) Honorable S. James Otero **REDACTED CONSOLIDATED REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT OF PLAINTIFF AND COUNTERDEFENDANT UMG RECORDINGS, INC.**
AND RELATED COUNTERCLAIM.	Date: May 5, 2008 Time: 10:00 a.m. Ctrm: 880

I. PARTIAL SUMMARY JUDGMENT ON UMG'S COMPLAINT

The Uncontroverted Facts. The material facts supporting UMG's motions are uncontroverted. UMG owns the 11 copyrights in issue. Augusto sold, i.e., distributed, the UMG Promo CDs containing those copyrighted works without consent. Promotional CDs differ from commercial CDs UMG sells. The UMG Promo CDs were made in limited amounts and provided for free to select individuals in the music industry for the express purpose of promoting commercial product. The UMG Promo CDs contained restrictive language reserving ownership in UMG and prohibiting their sale or transfer. They state "acceptance … shall constitute an agreement to comply with the terms of this license" (or shorter language Augusto admits has the same meaning. AUG SUF 30). Recipients can accept them or return them to be destroyed. UMG polices its promotional CDs by monitoring eBay (and sending notices) and deleting from its lists of recipients those who violate the license or whose CDs are returned or not deliverable. Augusto cannot state the source ***or*** the original recipients of any particular UMG Promo CD he sold. See Augusto Statement of Genuine Issues ("SGI") on Complaint Nos. 2-7, 9-10, 14, 23, 26-35, 41, 42, 52, 47-49; SGI on Counterclaim Nos. 11-12, 42. These undisputed facts, applied to the law, prove UMG's claim.

Augusto argues (1) UMG does not seek return of the promotional CDs, (2) there is no penalty if they are lost or damaged, and (3) UMG does not keep records. None of these raises a triable issue. No authority requires return as a pre-condition to a license (there are perpetual licenses), and it would be unnecessary, time-consuming, and expensive to do so. The absence of recipients' responsibility for loss, if relevant, evidences a license since it is after a transfer that the ***owner*** is responsible. And UMG ***does*** keep records, although that, too, is irrelevant, particularly as UMG polices its licenses in other ways.

The First Sale Burden of Proof. The first sale affirmative defense does not "extend to any person who has acquired possession of the copy or phonorecord from

the copyright owner, … without acquiring ownership of it." 17 U.S.C. § 109(d). Augusto acquired ***possession*** of the UMG Promo CDs. Augusto has not carried his burden of showing that he acquired ***ownership***. He has not identified any store or individual from which he bought any particular UMG Promo CD; and he kept no records of purchases. His "sample" receipts do not even mention promotional CDs (many refer to "T-shirts"). This hardly shows "good chain of title."

But even if this proved Augusto's immediate source, he must trace each particular UMG Promo CD he sold to the ***original*** recipient ***and*** to a first sale. Augusto ignores the authorities and legislative history that mandate this requirement (UMG Liability Mot. at 10-13), and fails to cite any contrary authority. Instead, he contends that "requiring documentation of each step in the chain of title would lead to absurd results" (positing irrelevant hypotheticals). Aug. Opp. at 6. However, Augusto is the one who knows where he obtained what he sold, and the one who could (and must) prove they were subject to a first sale. See SGI 43-46.

The UMG Promo CDs were licensed. UMG provided free promotional CDs for a limited purpose to music industry professionals (as has been the practice for decades). They state that ownership is reserved to UMG and that acceptance constitutes agreement to the terms. UMG makes clear that only a license is granted and imposes significant restrictions on transfer. That is the "substance" (not just a "label") of a license transaction. See Wall Data v. Los Angeles County Sheriff's Dept., 447 F.3d 769, 785 (9th Cir. 2006); UMG Liability Mot. at 16-18.[1]

Augusto attempts to avoid the software licensing cases as "controversial" and by inaccurate factual distinctions.[2] These cases reflect the law in this Circuit. See

[1] A licensee who sells copyrighted property in violation of a license is an infringer, and so are those (like Augusto) who sell after acquiring possession. UMG Liability Mot. at 18. The cases Augusto cites claiming that the only remedy is in contract (Opp. at 13), involve a "post sale" contractual restriction, not a license.

[2] For example, contrary to Augusto's claim, both Adobe Systems, Inc. v. Stargate Software, Inc., 216 F. Supp. 2d 1051, 1060 (N.D. Cal. 2002) and Adobe Systems, Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1092 (N.D. Cal. 2000) granted (…continued)

Wall Data, 447 F.3d at 785 n.9 (citing One Stop Micro, Inc. with approval). UMG Liability Mot. at 16-18. At the same time, Augusto repeats that "[n]o court has ever extended the rationale of these cases to cover music CDs." (No court has considered the issue.) However, software copies are deemed licensed ***despite*** their sale to the general public and payment for permanent use by millions of consumers. Clearly then, the license of a few thousand copies of each UMG Promo CD to select individuals, for free, and with express restrictions, is a license.[3] The sole software case Augusto relies on, SoftMan Products Co. v. Adobe Systems, Inc., 171 F. Supp. 2d 1075 (C.D. Cal. 2001), and his other authority do not support his contrary position. UMG Opp. at 12-15.

Augusto also makes a convoluted argument about the tax treatment of promotional CDs but cites no case where tax treatment was relevant to the license issue. (None of the software cases discusses tax treatment of licensed copies.) The cases cited deal with whether payments were business expenses or capital expenditures. Tax treatment is simply that – tax treatment: "To call something an 'asset' is an accounting conclusion and not a datum from the real world at all." 53 Tax Notes 463, 478 (Oct. 28, 1991); INDOPCO, Inc. v. Comm'n Internal Revenue, 503 U.S. 79, 87 n.6 (1992) ("[N]otion of an 'asset' is itself flexible and

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(…continued)
summary judgment based on, among other things, the express restrictions placed by the copyright owner, not just because software was involved. Microsoft Corp. v. Harmony Computers & Elec, Inc., 846 F. Supp. 208, 210, 212 (E.D.N.Y. 1994), included legitimate and counterfeit product. Microsoft Corp. v. Software Wholesale Club, Inc., 129 F. Supp. 2d 995, 1007-08 (S.D. Tex. 2000), did not base its analysis on the fact that the product sold was allegedly counterfeit. ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310, 1330-31 (N.D. Ill. 1990), included a distribution claim, not just a reproduction claim.

[3] Augusto cites selected portions of Nimmer that acknowledge, but disagree with, some software cases. Nimmer's reasoning is that "in the case of software, the courts were not dealing with copyrightable works largely retained close to the vest by their proprietors. Instead, the subject software was widely vended in the millions of copies." 2 M. & D. Nimmer, Nimmer On Copyright, § 8.12[B][1][d][i] at 8-166 (2006 ed.); see id. at § 8.12[B][1] at 8-158 (copyright owner has the right to rent, lease or lend, in which case there is no first sale). The parallel here is obvious.

amorphous."). [THE FOLLOWING SENTENCE HAS BEEN REDACTED PURSUANT TO UMG'S APPLICATION TO FILE UNDER SEAL].

The Postal Reorganization Act. Augusto contends (citing legislative history), that Section 3009 was designed to "bring under control the unconscionable practice of persons who ship unordered merchandise to consumers and then trick or bully them." Significantly, he omits the key final words of that sentence, "***into paying for them***." The statute does not apply here. See UMG Opp. at 8-10.

UMG has not abandoned the UMG Promo CDs. UMG did not "intend unequivocally" to abandon the promotional CDs. Augusto cites nothing to support that UMG did. See UMG Opp. at 10-12.

II. SUMMARY JUDGMENT ON THE COUNTERCLAIM.

The VeRO notices. Augusto and eBay admit that eBay's agent registered with the Copyright Office (Mr. Nessary) is ***not*** where the VeRO notices were sent (the VeRO Program); that the address registered with the Copyright Office (registeredagent@ebay.com, changed to copyright@ebay.com) was not the address where the VeRO notices were sent (vero@ebay.com); that UMG's VeRO notices disclaimed application of the DMCA; and that neither eBay's instructions to VeRO members regarding notices nor its "NOCI" reference the DMCA. (eBay's exhibit refers to the DMCA only with respect to seller counternotices.) UMG's VeRO notices ***cannot*** be DMCA notices. UMG Counterclaim Mot. at 7-9.

UMG's good faith. Augusto continues to ignore the Ninth Circuit standard under which UMG had the requisite subjective, good faith belief. Id. at 9-12. His purported evidence of "actual knowledge of misrepresentation" – "UMG's expertise in copyright law, long-standing historical practice of mailing 'promo CDs,' knowledge regarding widespread resale of those CDs, and lack of enforcement efforts" (Aug. Opp. at 20) – is legally and factually unsupported. If expertise in copyright law were the test, copyright holders would need a legal opinion before

sending notice ***and*** would have to waive attorney-client privilege if sued. Moreover, the weight of authority favors UMG. That mailing promo CDs is a long-standing practice is irrelevant or supports UMG; many record companies have done so for decades. There is no evidence of UMG's "knowledge of widespread resale." Rather, most licensees abide by the license. Finally, UMG is permitted to choose how to enforce its copyrights, either by suit, as here, or in other ways, as monitoring eBay and deleting from recipient lists those who violate licenses.

The consent judgment. UMG never contended that Augusto is "estopped" by his consent judgment. Rather, UMG's knowledge, before its notices at issue were sent, of prior litigation where Augusto agreed that the same conduct he engaged in here was infringing, supports UMG's good faith. SGI on Counterclaim 54.

eBays website. UMG apologizes for inadvertently quoting from eBay's Indian site instead of its U.S. site. However, the fact is it is still correct that eBay confirms UMG's good faith, as otherwise established. eBay's U.S. site states: "***[m]any*** rights owners ***believe*** that listing these items infringes on their copyrights." Chesnut Decl., ¶ 12 (emphasis added). At one time its U.S. site contained the same language UMG quoted (available at http://web.archive.org/web/20010805115943/ http://pages.ebay.com/help/community/png-promotional.html). The reason for the change is unknown, but it was not because of a change in the law (there none).

DATED: April 28, 2008

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