UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RALPH VARGAS, et al.,

Plaintiffs,

v.

04 Civil 9772 (WHP)

BRIAN TRANSEAU, et al.,

Defendants.

----------x

November 3, 2006
11:30 a.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

PAUL A. CHIN, ESQ.,
Attorney for Plaintiffs

ANTHONY T. FALZONE, ESQ.,
Attorney for defendant Brian Transeau

KIRKLAND & ELLIS, LLP
Attorneys for defendant Brian Transeau
Of counsel

ERICK M. STAHL, ESQ., (By telephone)
Attorney for Defendant East West Communications

THE CLERK: In the matter on for argument Vargas against Pfizer.

Will counsel for the plaintiff please state your appearance for the record.

MR. CHIN: Good morning. Paul Chin for the plaintiff.

THE CLERK: Counsel for the defendants.

MR. FALZONE: Good morning, your Honor. Anthony Falzone represented Brian Transeau.

With me at my rights is jULIE Ahrens and Alice Barber also representing Transeau.

If it please the court, I would like Ms. Ahrens to address the motion.

MR. STAHL: I should state my appearance as well. Eric Stahl, East West Communications by telephone.

THE COURT: Good morning to all of you.

This is oral argument on the defendant's motion for summary judgment.

Do you wish to be heard?

MS. AHRENS: Yes, your Honor.

Your Honor, plaintiff's theory of infringement in this case is one of theft. They claim that Brian Transeau BT, that he created his beat by taking plaintiff's vinyl album, copying the track Bust Dat Groove, changing the order of the drum strikes in that song and making his own beat, which he calls Aparthenonia.

Plaintiff has the burden of proving this theory of any copying, but they don't have sufficient evidence to do so. Plaintiff concedes they don't have any evidence of access in this case. They have abandoned that argument entirely in their papers. So they are attempting to prove digital copying with absolutely no evidence that BT ever possessed their album. By so doing plaintiff rests their entire case on the stringent striking similarity test. To avoid dismissal, plaintiffs must demonstrate that the two works are so strikingly similar that all of the evidence, taken as a whole, precludes any reasonable possibility that BT independently created his beat. Plaintiffs don't have sufficient evidence to do so.

Your Honor, this is not a battle of the experts --

THE COURT: The Second Circuit's opinion in Gates at least implies that once there is conflict in expert testimony on striking similarity, it's difficult, if not impossible, to grant summary judgment. How do you deal with that precedent?

MS. AHRENS: Your Honor, the Gast case, and I quote, the quote is, plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation.

This case is not a case of a battle of the experts. Plaintiff's own experts do not support plaintiff's theory.

None of plaintiffs' three experts are capable of

precluding the very reasonable possibility that Aparthenonia was independently created using the specific electronic sound software that BT testified he used to create Aparthenonia. So the question here is whether plaintiffs have sufficient evidence from which a reasonable jury could conclude that there is no possibility that BT independently created his work. The plaintiffs don't have sufficient evidence.

Your Honor, there are several cases where plaintiffs who do not have any evidence of access but do have experts who use the magic works striking similarity, they do not survive summary judgment where there those experts cannot preclude any reasonable possibility of independent creation.

THE COURT: But didn't Ritter testify that the plaintiff and the defendant's works were identical?

MS. AHRENS: Your Honor, Matthew Ritter's conclusion that the works are identical are problematic for a couple of reasons.

First, Mr. Ritter bases his opinion on similarity using only his unaided ear, which by plaintiff's own admission is a less sophisticated method than their other experts, Dr. Smith, which he could not identify a single drum strike in Aparthenonia that is identical or even a direct copy that is in Bust Dat Groove.

But nevertheless, even wholly crediting Mr. Ritter's conclusion that the beats are identical, Mr. Ritter admitted

that he is not sure whether any of those exact same sounds could have been created without copying Bust Dat Groove, and I quote, "for all I know, you know, maybe there is a piece of equipment out there that could take that exact same sound and mimic it or something."

Indeed, Mr. Ritter has no knowledge of the specific technology we are talking about here, which is Propellerhead Reason. Before this case he had never even heard of it. He knows nothing about his capability of producing sound or how sounds generated from that program would compare to the sounds in Bust Dat Groove.

Mr. Ritter admitted, "I don't know enough about the electronic music. I actually know very little about it so I don't know for sure if there is technology that exists that could do that."

That is an admission that it is possible, that there is technology that could have created the work at issue here.

THE COURT: But isn't that an issue of fact for the jury?

MS. AHRENS: Your Honor, it's not an issue of fact because the plaintiffs bear the burden because they have no evidence of access. They are in the narrow circumstances of proving it is so strikingly similar that there is no possibility of independent creation, it had to be copied, and under the case law of TC, Mary and Gimmy, those pieces show

that on summary judgment where a plaintiff's expert admits that it is possible, even if it is unlikely but admits that it is possible, summary judgment can be entered for the defendant because the plaintiffs haven't met their burden. They have not precluded any reasonable possibility of independent creation.

THE COURT: On the question of independent creation, why didn't the defendant submit evidence of re-enactment of the creation of Aparthenonia using the Apple G3 and the Reason software?

MS. AHRENS: Your Honor, during Mr. Transeau's deposition he offered several times to make that demonstration and plaintiffs have turned a blind eye and refused to listen to that.

THE COURT: That doesn't preclude you from putting that very question to the witness in the deposition or offering an affidavit, does it?

MS. AHRENS: It doesn't, your Honor, but we have offered affidavits, we have declarations of Mr. Transeau in the record where he states how he created the beat, what software he used, when he created it, the fact that he didn't own a turntable, he wasn't using vinyl --

THE COURT: I know about all of that, but I am asking, I guess, a simpler question.

When I look at all of this, isn't the real key what a re-enactment of the creation of Aparthenonia would show since

the equipment -- the parties agree that the equipment, the precise equipment that Transeau said he used to create it in the first place still exists? He could have recreated it and then these experts from Berkeley could have done an FFT analysis on it, right?

MS. AHRENS: Yes, your Honor.

THE COURT: So my question is, if you want to establish independent creation, why didn't you submit evidence specifically doing that?

I mean, it's not the plaintiff's burden at a deposition to offer evidence that helps the defendant.

MS. AHRENS: Right, your Honor. But it is the plaintiff's burden in this case to preclude the possibility of independent creation. They have that burden. They have that burden because they have clearly stated their position in this case because they have no evidence of access, only relying on striking similarity. They, under the case law, under the case law of Gast and Republic and all of those cases, clearly state that it is the plaintiff and they cannot survive dismissal unless they preclude the possibility of independent creation, and the evidence of independent creation is unrebutted. BT's declaration states the manner in which he created this work, how he went about making it.

THE COURT: I know he says all of that, but wouldn't the actual recreation of Aparthenonia be, to coin a term, the

very best evidence that could be offered?

MS. AHRENS: Yes, your Honor, as would --

THE COURT: So why not do it?

MS. AHRENS: Your Honor, the corresponding question to that is, why don't defendants -- why can't they preclude it. They have experts. None of their experts have experienced using it and they can't deny what Mr. Transeau has said he has done. No one on the plaintiffs' side can rebut what Mr. Transeau and his corroborating witnesses testified under oath how this beat was made.

THE COURT: Right. But then I'm left with dueling experts, and you may say that it's not really an even dual and I might agree that it's not really an even dual, but it still winds up being a question for a jury.

I mean, at the end of the day, you are the folks who are here moving for summary judgment to avoid going to trial, and is there any reason why the very best evidence that you could offer on the question of independent creation has not been submitted to the court or couldn't be submitted after this argument?

MS. AHRENS: No, your Honor.

The point that I would like to make is it is just that the issue whether it is dueling experts, you don't even have to consider what the defendants' experts say, there is no dual, because the plaintiff's experts admit that they can't -- they

cannot preclude the reasonable possibility of independent creation. Because they can't prove that, that is their burden, it is their burden at summary judgment, and they bear the responsibility of that preclusion, and because they can't and they have not, they do not have sufficient evidence to create an issue for the jury.

THE COURT: All right.

I recognize that you keep saying that and I'm saying something else. So I have tried to be clear. I'm telling you what I am interested in, a recreation.

Can you provide it?

MS. AHRENS: Yes, your Honor, our client can provide that.

THE COURT: All right.

MS. AHRENS: Our client's testimony during his deposition is that he can do that within, you know, five minutes of opening a box of Propellerhead Reason and he is seeking to do that.

THE COURT: Would you be able to provide the FFT analysis of that recreation?

MS. AHRENS: Yes, your Honor.

THE COURT: All right. I am going to let you do that, because I think it's important on this motion.

MS. AHRENS: Okay.

THE COURT: And I am going to give the plaintiff an

opportunity to respond to it.

MS. AHRENS: Okay.

Your Honor, as far as determining the best method and how we can do that, we are open to discuss that, whether it should be in a deposition-like setting or submit it by affidavit of what he says he is doing.

THE COURT: Let me hear from your adversary.

MR. CHIN: Thank you, your Honor.

First I would object to the court's consideration of allowing the defendant at this stage to now do something that the plaintiffs, in fact, did very early on, and that is to take what evidence we had and show how this recreation occurred.

They had that evidence in front of them. They should have said, just as your Honor suggested, why don't we do the same thing. If he got the beat from Propellerhead Reason, which, by the way, has never been produced in this case -- I don't have a copy of it, never received it, requested it but never got a copy of it -- I got this from Propellerhead Reason and then I'll take these beats out and make the same thing again, submit it to my experts, prepare a report, get it to the plaintiffs and they will do the same thing.

But now at the eleventh hour while we are prepared to go to trial, to have them do that now is to set up another long line of discovery that we can certainly avoid for three reasons:

I'm sorry, I didn't mean to interrupt you.

THE COURT: I don't think it would be a long line of discovery. I mean, at the end of the day, I am asked to decide this motion. I'm interested in it. So I think -- I don't understand why you fight it, recognizing the colloquy that I have had here. I mean, look how long it took me to get the defendant to recognize they could provide it. All they want to talk about is what your burden is.

MR. CHIN: I understand and I understand the court's interest in receiving that kind of demonstration, but the point is that Repp v. Webber controls this fact and the facts of this case are very similar and the legal issues in this case are very similar to Repp v. Webber. It says three very important things, Judge:

First, on a motion for summary judgment, the evidence of the non-moving party must be assumed as true.

The second part of that is, any ambiguities in that evidence must be inferred in favor of the non-moving party.

This is not a case where there is no evidence at all. We have a music expert, we have a digital engineer expert and we have an FFT expert who all say that one is indistinguishable from the other. That evidence has to be assumed as true.

Now, the defendants, of course, have said that their experts say something other than that. Well, Repp v. Webber actually better than Gast says what should happen.

The court said, and I quote, it was not for the district court to make this factual finding where such strong competing evidence was before it. The issue of striking similarity by virtue of the supported opinions of the experts, including that of profession Ferrara for the defendants, was shown to be a genuine issue of material fact.

That is on competing evidence of striking similarity and the Second Circuit says when you have that, let the jury decide, let the jury decide.

Finally, with respect to defendants' claim of independent creation, well, I would like to take a quote from Repp v. Webber which says proof of independent creation, whether direct or inferential, should be taken with a gain of salt.

And that adage is particularly applicable in this case. What we have here is Mr. Transeau saying one of two of three of four various scenarios on how he created this. First he created it on the laptop, then he created it on the G3 computer. First it took him an hour to create it, then it took him five minutes to create it.

He submits affidavits of witnesses he claims saw him create it from scratch, but in that same affidavit the witness didn't even meet him until after the music was composed.

I mean, the jury should sit down and listen to this kind of evidence and make a determination as to whether or not

it is believable or not.

The evidence of independent creation, I submit, respectfully, is only the self-serving affidavit of Mr. Transeau and that's all we have here. That's all we have here.

The evidence of our -- and with respect to Dr. Bullinger with the FFT analysis, I did a lot of research when the defendants first offered this evidence to me. I have not found a case in any district court in which FFT analysis has been used as a premise for proving substantial similarity, striking similarity or otherwise.

THE COURT: But in Bullinger's FFT data, is there any sound at all in Bust Dat Groove that corresponds to any sound in Aparthenonia?

MR. CHIN: Absolutely. Absolutely. Dr. Smith's report, which basically took the existing data that Dr. Bullinger had, and analyzed that same data. There is a graph attached to it in which he has the lines corresponding.

THE COURT: I looked at that, but he does -- doesn't Smith say there are similarities?

MR. CHIN: No. What he is saying is, and that is a bit of a strawman in this case only because what the defendants are trying to say is he never found any direct copying, okay, and Dr. Smith says we didn't find any direct copying because we didn't undertake that analysis. What he is saying what an

associated copy is --

THE COURT: Why didn't he look at any direct copies?

MR. CHIN: I don't know. Because Dr. Bullinger's report didn't look for it, either.

What Dr. Smith was saying is that the drum strikes, the first 2.3 second of one drummer playing the drum, so you pay a drum for 2.3 seconds, you have that, that the first 2.3 seconds in Aparthenonia, the drum strikes in that are as similar as the first 2.3 drum strikes in Bust Dat Groove. One drum strike will not be identical to the second drum strike because you are playing it live, but it will be as similar as that second drum strike because it is the same person playing it.

Now, if it were different it would be totally different. It would be a different person playing a drum. Therefore, you wouldn't have the kind of similarity, that indistinguishable similarity, that Dr. Smith identified in his report.

He, in fact, took a drum strike from Aparthenonia and two drum strikes from Bust Dat Groove and showed it to several individuals and they couldn't tell which one was which. That means they are indistinguishable from one another. Therefore, the court does not have to undertake another analysis through a recreation. I think that time --

THE COURT: You are just pointing to it is hearsay,

isn't it?

MR. CHIN: No, it's in his report.

THE COURT: You relied on what somebody else did?

MR. CHIN: No, no, no. What he did -- you mean the comparison?

THE COURT: Yes.

MR. CHIN: Yes, yes, I would say that would be a part of his report. But in his --

THE COURT: But it wouldn't be admissible evidence, it is hearsay.

MR. CHIN: It is hearsay.

THE COURT: I shouldn't consider that on a motion for summary judgment, should I?

MR. CHIN: Absolutely not and you are correct. But what I think you should consider was his conclusion in his report, which is that the two are indistinguishable from each other, that they are an exceptional match and that the evidence is overwhelming, overwhelming that Aparthenonia is a digitally edited copy of Bust Dat Groove. That is his conclusion point blank no matter which way you look at it, and that evidence, I submit, your Honor, should be believed by this court, should be believed by this court.

THE COURT: Doesn't your expert Smith agree that there are only associated copies, not direct copies?

MR. CHIN: That is because nobody undertook that

analysis.

THE COURT: Didn't the defendant's expert look for direct copies and couldn't find any?

MR. CHIN: No, that is not true. In Dr. Smith's deposition he specifically states I didn't look for direct copies because Bullinger didn't look for direct copies.

I think the reason, Judge, you have to understand how it came about that we got Dr. Smith. The defendants, after Rasigliano's testimony which said there was a tom-tom when there was no tom-tom, they came and got this FFT analysis expert, submitted it to me. I said fine, if it's true, I'll dismiss the rests of this case.

I got the report, found Dr. Smith, who has written a book on this, and said, Dr. Smith, could you please tell me whether or not the conclusions in this report are correct because if they are I am dismissing this case, and he said yes, I'll look at it; came back and said not only are the conclusions incorrect, but the way he analyzed the data was improper.

THE COURT: But shouldn't your expert have looked for evidence of direct copying? Shouldn't Smith have done that?

MR. CHIN: I would submit that, no, because all we are doing is submitting an opposition to the report that they submitted. Our prima facie case was established under Ritter, Rodriguez. They submitted -- we had more than adequate

evidence to show that these things are the same.

One point I would like to make, your Honor, and that is Ivan Rodriguez went through in detail format how he digitally sampled Bust Dat Groove and how he could move using this technology one/16th of a note to rearrange and change it and create Aparthenonia which they did, and they were so identical that they began to flange.

I submit that you couldn't take --

THE COURT: Hold on one thing. I thought when Rodriguez manipulated Bust Dat Groove, what he noticed that there were differences --

MR. CHIN: That is not true. He said they were 99 percent the same.

THE COURT: Like I said, there were differences.

MR. CHIN: I'm sorry, I'm sorry, your Honor. The differences that he recognized were --

THE COURT: It's not Ivory Soap, right?

MR. CHIN: No. But it may not be Ivory Soap, but the differences that he recognized were all due to the quality of the recording, not the actual elements of the music. He is saying digital signal processing, reverb, that's what caused the slight differences in the sound, not that there was --

THE COURT: How did he know that?

MR. CHIN: He's the expert. He does this for a living. He does this for a living.

THE COURT: What is his basis for concluding that Transeau somehow manipulated digitally the recording?

MR. CHIN: Well, I would have to go into more detail, it's in my papers, but his position was that there is the exact same snare, the sound of the snare.

What he said was by digitally manipulating Bust Dat Groove to create Aparthenonia, you couldn't do that unless you had the same source sound. Basically you couldn't take, you know, the Star Spangled Banner and turn it into What Has Love Got To Do With It unless they have the same, unless they have the same source sound. And so that's what he showed.

You can't take things apart that don't come from the same place to create an identical copy of it and that is simply what he said that's why I know 98 percent sure.

Now, your Honor asked for a recreation to sort of I suspect that you think that that evidence would kind of put the whole issue to rest. But what would put the issue to rest really without having to go back, what about the master? The master that Ivan Rodriguez asked for, the master. The master has each individual sound on a different track.

Ivan Rodriguez testified I've been in the music industry 20 years, I've never heard, I've never heard of a CD being created, manufactured and distributed without the company or the artist having the master.

Now, the defendants also, they cited a case, I think

it was Glove -- I forgot the name of the case, but I will get it back to you. But in that case they had the master.

THE COURT: But the defendants did offer to give you Transeau's computer, right, for inspection?

MR. CHIN: Yes. They told me the day of the deposition that the computer was there. I'm not a computer expert. I couldn't, I couldn't analyze and look at the hard drive of that computer and, number two --

THE COURT: You could have accepted their invitation on subsequent days, couldn't you, and have an expert look at Transeau's computer?

MR. CHIN: Well, that would have been possible had the discovery deadline been extended, but it was extended three times before then. I deposed him on the last day and it is the last day I find out they have a computer. That is not fair.

THE COURT: Well, do you want to examine the computer?

MR. CHIN: I think that that time is past, that it is a time for a jury to say, Mr. Chin, you are right, or, Mr. Chin, you are wrong.

THE COURT: All right.

I would like some evidence on the recreation of Aparthenonia with the FFT analysis and I will give the plaintiff the opportunity to examine that laptop and respond to the submission. Whether it takes the form of testimony or takes the form of an affidavit with a CD that this court can

listen to with the FFT analysis, I think that's the way it should proceed.

Do you see it any differently? Do you have any suggestions as to how you would like it to proceed?

MR. CHIN: Yes. Two things, your Honor.

Number one, I'm not sure how the court is going to get a copy of Propellerhead Reason because according to the defendant they couldn't produce it to anybody because there is some form of licensing agreement which precludes them to giving it to either to me or the court, apparently, so I don't know how you are going to get a copy of that, and that is in writing from them.

If there is some way that I guess the creators of Propellerhead Reason gives the court approval to get a copy of that, then we would like the same copy and we would like the same recreation and we would have to, of course, go back to Dr. Smith and incur the cost of having him undertake the burden of going through another FFT analysis.

The question that I have for the court is, assuming that this new FFT analysis doesn't prove what defendants say it proves, what is the remedy to the plaintiff for having to undergo yet more costs to disprove something that they could have done during discovery and we could have done that a long time ago?

Dr. Smith, he is very expensive, and so I mean it

seems like the defendants are seeming to be receiving the burden of the benefit as opposed to the plaintiff. That's my only objection, your Honor.

THE COURT: When do you want to submit this?

MS. AHRENS: Your Honor, we would request four weeks to have the recreation. I just want to clarify that you are asking for a recreation of Aparthenonia, you are not asking for a copy of Propellerhead Reason, is that correct?

THE COURT: I am asking for a recreation of Aparthenon.

MS. AHRENS: Okay. We would request four weeks, at least four weeks to have the recreation and then have our expert Dr. Bullinger do his FFT analysis.

MR. CHIN: Judge, if I may, you should also require the defendants to also produce the Pro Tools Session report which will identify exactly what BT did during the recreation. That's what they didn't have before.

MS. AHRENS: Your Honor, just to clarify that, BT does not use Pro Tools the way Mr. Chin is describing. The program that he uses is called Logic. It is equivalent but a different program. We would be willing to produce that.

MR. CHIN: The Logic session report, then.

THE COURT: Fine.

We will do that by December 1.

How much time do you want to respond to it, Mr. Chin?

MR. CHIN: That would all depend, of course, on Dr. Smith's availability. I can't expect longer than 30 days.

THE COURT: January 5.

All right.

With respect to the motion for summary judgment, decision reserved.

Now, this is also a final pretrial conference.

I have the proposed joint pretrial order here. I would like to select a tentative date for trial, subject to my criminal trial schedule.

How many days do the parties anticipate, recognizing that I try a case from 9:45 in the morning until five p.m., we take a luncheon recess from one until 2:15 and a short recess in the morning and the afternoon and I try the case Monday through Thursday. At such time as the jury is deliberating, we will also sit on Friday. That's the schedule.

How many days do you anticipate for plaintiff's case?

MR. CHIN: If I include the cross, anticipating the length of cross, I would say six days.

THE COURT: Six days on plaintiff's case?

MR. CHIN: Only because I anticipated a very long cross. If it's going to be a very short cross, then four days.

THE COURT: How long do the defendants anticipate for their case?

MR. FALZONE: I think we had thought something maybe

closer to four days.

As to the cross on plaintiff's witnesses, again, I have little control over how long the direct lasts, but I will say personally that six days strikes me as quite a long time for plaintiff's case and I would say that if we reserved maybe eight trial days total we should be able to get it done.

THE COURT: I tend to think that we are going to do this in less time than that. I try to run an efficient trial and juries really don't like coming in a second week in a trial.

March 5 for jury selection and trial, subject to my criminal trial calendar.

Now, I currently am scheduled to start a very lengthy trial on February 26, but it has been adjourned several times, and it is entirely conceivable that the case will be put over again because it is currently in the Court of Appeals on an interlocutory appeal, but that gives me the benefit of being able to let you know if that trial starts, you will have at least a week notice it is not going and probably more than that, and if I have any sense that it is going, we will give you as much notice as possible to wave you off and then we will not be in a position to try the case until sometime toward the end of April or early May.

Now, Mr. Falzone, are you going to be trying the case?

MR. FALZONE: I will with assistance from Kirkland and

some colleagues at Stanford. It depends on everybody's schedule, but, yes, I will be here.

THE COURT: Is that going to work for you?

MR. CHIN: Yes, your Honor.

THE COURT: All right.

Are there any other issues that counsel want to raise at this juncture?

MR. STAHL: Your Honor, can I say one thing for the schedule.

The dates you mentioned work with the exception of if we are pushed into April or May. I have an arbitration, a long arbitration April 9 through May 4, so if it does bring us to late April, early May, I ask that that be taken into effect.

THE COURT: The point is, if the criminal case doesn't go on March 5, you will, so you won't have to be worried about being pushed into early April.

MR. STAHL: Okay. We can work that out if you get to that. I understand.

MR. CHIN: With respect to the recreation, I just like to have -- the report should be at least detailed what track from Reason we used, just so there is no speculation where the drum beats came from and so on. It should be detailed so we can kind of follow through.

THE COURT: That's all fair. I mean, if it's not detailed and every T crossed and I dotted, it's not going to be

helpful to the court.

Yes, Mr. Falzone.

MR. FALZONE: Back to the trial schedule briefly.

I assume if we lose the March 5 date and we slip to late April or May we will have another conversation about everybody's calendar.

THE COURT: We will.

MR. FALZONE: Then I will save it for that.

THE COURT: All right. Well, especially for somebody who is coming across country.

MR. FALZONE: Thank you.

THE COURT: All right.

Thank you for your arguments.

Decision reserved.

Have a good afternoon.

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