

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UMG RECORDINGS, INC., *et al.*,

Plaintiffs,

vs.

GRANDE COMMUNICATIONS
NETWORKS LLC and PATRIOT MEDIA
CONSULTING, LLC,

Defendants.

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Civil Action No. 1:17-cv-00365-LY

**PLAINTIFFS' OBJECTIONS TO THE REPORT AND RECOMMENDATION
REGARDING PLAINTIFFS' MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT**

INTRODUCTION

Plaintiffs respectfully submit the following objections to the Magistrate Judge's Report and Recommendation (September 20, 2018) [Dkt. 185] ("Report"). Plaintiffs object to the Magistrate Judge's recommendation that Plaintiffs be denied leave to replead their claims against Patriot Media Consulting, LLC ("Patriot") and their vicarious liability claims against Patriot and Defendant Grande Communications Networks LLC ("Grande").

The allegations in Plaintiffs' proposed Amended Complaint are more than sufficient to state claims for which relief can be granted. Plaintiffs acknowledge that there has been extensive prior briefing and oral argument on these two issues, so they will not repeat all of the same points again. Plaintiffs instead highlight the principal grounds for this Court to reject the Report's recommendations and allow Plaintiffs' proposed Amended Complaint.

LEGAL STANDARDS

“The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b). *See, e.g., Koetting v. Thompson*, 995 F.2d 37, 40 (5th Cir. 1993) (“Because [the party] filed written objections to the magistrate judge’s findings, he was entitled to a de novo review by the district court.”).

“When a plaintiff’s complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend under Rule 15(a) before dismissing the action with prejudice.” *Royalty Clearinghouse, Ltd. v. CTS Properties, Ltd.*, No. A-16-cv-1342-LY-ML, 2017 WL 5071340, at *21 (W.D. Tex. July 12, 2017) (Lane, M.J.), *report and recommendation adopted*, 2017 WL 5127241 (W.D. Tex. Aug. 4, 2017) (Yeakel, J.).

“[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Fed. R. Civ. P. 54. *See also Onofre v. C.R. England, Inc.*, No. 5:15-CV-425-DAE, 2017 WL 4082366, at *2 (W.D. Tex. July 24, 2017).

ARGUMENT

I. PATRIOT—THE COMPANY, NOT INDIVIDUAL EMPLOYEES—IS LIABLE AS A JOINT TORTFEASOR WITH GRANDE FOR SECONDARY INFRINGEMENT.

The Report errs in recommending against Plaintiffs’ repleading their claims against Patriot.¹ Plaintiffs’ allegations are sufficient to state a claim against Patriot. At this stage in the case, Plaintiffs are not asking the Court to resolve their claims against Patriot; instead, Plaintiffs

¹ This recommendation compounds the earlier error of recommending that Plaintiffs’ claims against Patriot be dismissed with prejudice, rather than allowing Plaintiffs the opportunity to replead those claims. *See Royalty Clearinghouse, Ltd.*, 2017 WL 5071340, at *21.

merely seek leave to plead and litigate their amended allegations against Patriot, because, accepting the pleaded facts as true, those allegations state actionable secondary infringement claims.

The law of copyright infringement is clear: “***[a]ll participants in copyright infringement are jointly and severally liable as tortfeasors.***”² *Broad. Music, Inc. v. Armstrong*, No. EP-13-CV-32-KC, 2014 WL 2440556, at *8 (W.D. Tex. May 30, 2014) (quoting *Fermata Int’l Melodies, Inc. v. Champions Golf Club, Inc.*, 712 F. Supp. 1257, 1262 (S.D. Tex. 1989) (citations omitted), *aff’d* 915 F.2d 1567 (5th Cir. 1990)).

The Report asserts that “Grande (albeit with employees provided by Patriot) made the decisions of which Plaintiffs complain.” Report at 7. But that is not what Plaintiffs allege in the proposed Amended Complaint, nor what the evidence shows. Plaintiffs allege that ***Patriot***, not its employees, is responsible for formulating and implementing Grande’s policies relating to copyright infringement:

Patriot performs the functions of Grande’s CEO, CFO, and COO; develops Grande’s overall business strategy; and handles various marketing, legal, regulatory, and other functions for Grande. In particular, ***Patriot*** sets Grande’s policies, including policies relating to copyright infringement. ***Patriot*** also has an ownership interest in Grande and has had such an interest since at least 2013.

Because it provided executive and general counsel services to Grande, Patriot is equally liable for Grande’s failure to comply with its legal responsibilities and for the copyright infringement that resulted from those failures. ***Patriot’s*** infringing conduct includes, among other things, formulating and implementing the business policies, procedures, and practices that provide repeat infringers with continued internet service through Grande, without consequence.

Proposed Am. Compl. [Dkt. 85-4] ¶¶ 47, 62. These allegations in the proposed Amended Complaint suffice to plead Patriot’s liability for copyright infringement. “It is well established

² Emphasis added throughout unless otherwise indicated.

that “[a]ll persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers.” *Arista Records LLC v. Lime Grp., LLC*, 784 F. Supp. 2d 398, 437 (S.D.N.Y. 2011) (quoting *Musical Prods., Inc. v. Roma’s Record Corp.*, No. 05–CV–5903, 2007 WL 750319, at *1 (E.D.N.Y. Mar. 7, 2007) (quoting *Syigma Photo News, Inc. v. High Soc’y Magazine, Inc.*, 778 F.2d 89, 92 (2d Cir. 1985)).

And Plaintiffs did not merely plead Patriot’s liability—Plaintiffs presented evidence supporting their allegations. The testimony from senior Grande executives Matt Rohre and Lamar Horton establishes that Patriot “participat[ed] in, exercise[ed] control over or benefit[ed] from [the] infringement” and thus is “jointly and severally liable” as a copyright infringer with Grande. *Arista Records*, 784 F. Supp. 2d at 437. *See also Broad. Music, Inc.*, 2014 WL 2440556, at *8.

Evidence Establishing Patriot Is Jointly And Severally Liable With Grande

Patriot “participat[ed] in” the infringement

Q. What services does Patriot handle for Grande from a management standpoint?

A. They handle overall strategy. It’s basically all of our C-level executives, CFO, CEO, COO. They handle some marketing oversight, legal functions, regulatory functions and programming negotiation support.

Q. So Patriot sets your policy?

A. In many cases, yes.

Q. Policies I meant to say. That’s a yes?

A. Correct.

...

Q. Because Grande concluded that its previous policies did not entitle it to the DMCA safe harbor, Grande changed its DMCA policy in February 2017; is that correct?

A. I don’t know that it was specifically because of the safe harbor, but I do know that we changed our policies in the beginning of 2017.

20 Q. Why?

[...Objection...]

A. I don’t -- I don’t know that I did and I wasn’t part of the decision-making process on changing the policy. **That was done with Patriot employees and folks that actually operationalize it every day.**

Ex. A, Deposition of Matt Rohre (Grande GM) at 35:17-36:2, 119:2-24)

Patriot “exercis[ed] control over” the infringement

Q. So since 2015, at the weekly staff meetings, the subject of the DMCA process at Grande has never been discussed to your recollection?

A. Not that I recall. And if it was, it was not a -- there was no details or making decisions or policy-type discussions. ***Our perspective is that what we’re doing or not doing was started with ABB and transitioned to Patriot.***

...

“[T]hat direction would only come from Patriot, meaning, ***if there was a project to be executed and Patriot wanted Grande to*** [do something], for example, do the same thing that RCN’s doing and let one of RCN’s employees help manage it for us, ***that would be at the direction of Patriot.***”

Ex. B, Deposition of Lamar Horton (Grande DMCA Agent) at 299:25-300:7; 267:23-268:3

Patriot “benefit[ed] from” the infringement

Q. Does Patriot have any ownership of Grande?

A. Yes.

...

Q. So when they were first hired, part of their compensation was ownership as well, some ownership in Grande?

A. Yes, I believe so.

Q. Okay.

A. I don't know the specifics.

Q. Okay. But you think, to the best of your knowledge, in 2013 when Patriot came in, they had some ownership starting in 2013?

A. Correct. Defined as equity interest.

Ex. A, Rohre Dep. at 33:13-34:23.

In light of this unequivocal evidence and case law—none of which the Report addresses³—Patriot belongs in the case as a defendant. Moreover, equitable and practical considerations also weigh

³ The Magistrate Judge appears to rest his conclusion on the notion that individual Patriot employees, not the company, are the ones controlling the infringing activity. That is not what Plaintiffs have alleged nor what Grande witnesses have testified to. But even if it were the case, that would not matter, because “an individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is *personally* liable for infringement.” *Stumm v. Drive Entertainment*

decisively in favor of joining Patriot. Without Patriot at trial, Plaintiffs face the prospect that Grande's witnesses may attempt to disclaim Grande's liability for secondary infringement by pointing to Patriot as the one that called all the shots. That would be highly unfair to Plaintiffs and should not be permitted.

Nor would Patriot's joinder as a defendant disrupt the completion of discovery or the remaining pretrial proceedings. Patriot has participated and will be participating in discovery. In fact, the Magistrate Judge recently ordered Patriot to make Rule 30(b)(6) witnesses and one of its senior executives available for deposition. Order [Dkt. 191] at 7. Thus, Patriot will remain involved in the proceeding regardless of its status as a party or non-party. In sum, Patriot should be joined as a defendant and face joint and several liability along with Grande.

II. PLAINTIFFS' AMENDED COMPLAINT PLEADED THE DIRECT FINANCIAL BENEFIT ELEMENT FOR VICARIOUS INFRINGEMENT LIABILITY.

Plaintiffs should be permitted to replead their vicarious liability claims against Grande and Patriot. The Report concluded that Plaintiffs failed to replead the "direct financial benefit" element for vicarious liability, finding that "Plaintiffs would have had to plead facts showing customers signed up with Grande because Grande did not police infringing conduct by its subscribers." Report at 4. But that conclusion—one for which the Report cites no law—is wrong in at least two respects.

First, the Report confuses the issue. Grande's (or Patriot's) policing of subscribers' conduct goes to the Defendants' right and ability to control the underlying infringement, which is

Inc., No. 00 Civ. 4676, 2002 WL 5589, *5 (S.D.N.Y. Jan. 2, 2002) (emphasis in original). *See also Aram, Inc. v. Laurey*, No. 05 Civ. 8380, 2006 WL 510527, *2 (S.D.N.Y. Mar. 1, 2006). These principles apply equally to claims of direct infringement and claims based on secondary liability. *See Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 284–85 (E.D.N.Y. 2002) (finding that CEO of defendant corporation could be individually liable for contributory and vicarious infringement committed by corporation).

the first element of vicarious infringement liability. There is neither authority nor rationale for the notion that the defendant’s policing, or lack thereof, is a relevant consideration for the direct financial benefit element of vicarious liability. Plaintiffs were required to plead only that the availability on Grande’s network of music files that infringed Plaintiffs’ copyrighted recordings was a “draw” for subscribers. *See Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB SHX, 2014 WL 8628031, at *4 (C.D. Cal. Nov. 14, 2014), *aff’d*, 847 F.3d 657 (9th Cir. 2017) (“Perfect 10 must prove with competent evidence that at least some of Giganews’ customers were ‘drawn’ to Giganews’ services, *in part*, to obtain access to infringing Perfect 10 material.”). Plaintiffs more than adequately pleaded this element of the claim:

Although it failed to terminate any subscribers for copyright infringement from 2011 until June 2017, Grande has tracked and continues to track information received alleging copyright infringement by its users. Grande’s own records reveal that the company knew the specific musical works that its infringing customers were downloading, including specifically Plaintiffs’ Copyrighted Sound Recordings. **This evidence demonstrates that Plaintiffs’ Copyrighted Sound Recordings were a draw to Grande’s infringing customers, including customers Grande has identified as repeat infringers.**

Indeed, **the availability of music—and particularly Plaintiffs’ music—acts as a powerful draw for subscribers to Grande’s service who use that service to download infringing music files using BitTorrent protocols.**

Proposed Am. Compl. [Dkt. 184-4] ¶¶ 67, 77. As even the Report acknowledges, Plaintiffs have evidence supporting these allegations. Report at 5.

Second, the Report effectively ignores Plaintiffs’ other ground to satisfy the financial benefit element: that Grande profits from known repeat infringing customers to whom it provides ongoing internet service, even despite receiving notice of their infringing conduct. The law provides that “[t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff’d sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th

Cir. 2002), and *aff'd sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

That is precisely what Plaintiffs have pleaded in the proposed Amended Complaint (and supported with evidence):

Grande directly profits from repeat infringers. Grande collects significant fees from its subscribers, and subscribers who frequently upload copyrighted content often pay higher monthly premiums for higher bandwidth. **Grande tracks the repeat infringers for whom it has received multiple notices. And Grande also tracks that infringing customers in fact are, predominantly, internet-only a la carte subscribers—Grande’s most profitable customers. Thus, from 2011 until June 2017, a period when Grande refused to terminate a single infringing customer no matter how many notices of infringement Grande received relating to a customer, Grande purposefully reaped substantial profits from knowingly allowing infringing customers to continue to use Grande’s internet service for their unlawful conduct.**

Proposed Am. Compl. [Dkt. 84-4] ¶ 64. *See also* Report at 5 (summarizing evidence supporting these allegations).

The Report does not identify any legal grounds supporting its conclusion that Plaintiffs’ allegations are insufficient (indeed, the Report does not cite a single case in its Analysis section). At most, the Report contends that Plaintiffs’ allegations, if sufficient, would expose any ISP to liability. Report at 5. But that is not the case. In the DMCA, Congress specifically provided ISPs with a safe harbor from infringement liability, if ISPs adopt and reasonably implement a policy for terminating repeat infringing customers. The fact that Grande and Patriot cannot avail themselves of the DMCA safe harbor defense—because of their years-long failure to adopt (let alone implement) a repeat infringer policy (*see* Plaintiffs’ Motion for Partial Summary Judgment as to Grande’s DMCA Safe Harbor Defense [Dkt. 127])—is no reason to reject Plaintiffs’ actionable vicarious liability claims.

CONCLUSION

For the reasons stated herein, Plaintiffs object to the Report's conclusions that Plaintiffs should be denied leave to replead their claims against Patriot and their vicarious liability claims. Plaintiffs respectfully request that the Court reject the Report's recommendations, and allow Plaintiffs' proposed Amended Complaint.

Dated: October 4, 2018

Respectfully submitted,

By: /s/ Robert B. Gilmore

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 4, 2018 all counsel of record who are deemed to have consented to electronic service are being served with through the Court's ECF system.

/s/ Daniel C. Bitting
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