



COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0058
April 3, 2024

Michelle Shocked

CLAIMANT

v.

James Billington

RESPONDENT

FINAL DETERMINATION

This matter has been fully submitted by the parties. For the reasons that follow, the Copyright Claims Board (“Board”) finds in favor of Respondent James Billington (“Billington” or “Respondent”) and dismisses the claim against Billington with prejudice. As Billington has informed the Board that he wishes to dismiss his counterclaim, Billington’s counterclaim is dismissed without prejudice.

I. Procedural History

Michelle Shocked (“Shocked” or “Claimant”) filed the initial claim in this proceeding against Billington on July 15, 2022. (Dkt. 1). Shocked’s second amended claim, Claim (Dkt. 5), was found compliant and allowed to proceed. After being served, Billington did not opt out. Billington filed his response on May 2, 2023. Response (Dkt. 19).

On December 5, 2023, the Board issued an order closing discovery and ordering the filing of written testimony. (Dkt. 74). As part of written testimony: Claimant filed an evidence list (Dkt. 76), referring to evidence previously filed (Dkt. 6, 7, 64), and a Claimant Party Statement (Dkt. 75); Respondent filed an evidence list (Dkt. 78), referring to both evidence previously filed (Dkt. 22, 25, 27, 31, 34, 37-39, 41-44, 48-49) and Claimant’s interrogatory responses, which he also filed (Dkt. 79), and a Respondent Party Statement (Dkt. 80). Claimant filed a Reply Party Statement (Dkt. 88) that did not comply with the Board’s regulations, at least for the reason that it went well beyond the maximum seven pages allowed. 37 C.F.R. § 222.15(c)(3).

Claimant also filed evidence (Dkt. 82-87, 89-90) that did not comply with the Board’s regulations, both because the evidence was never served on Respondent in discovery and because it was well outside the scope of Respondent’s written response testimony. 37 C.F.R. § 222.15. Therefore, Claimant’s reply papers are rejected.

However, a review of those papers shows that they would not have been material to or changed the Board's determination. This case is now ready for final determination.

Billington also filed what is labeled as a "Proposed Counterclaim" on August 15, 2023, Counterclaim (Dkt. 50), which has been stayed pending the resolution of Shocked's claim. At an April 3, 2024 status conference, Billington informed the Board that he wished to dismiss the Counterclaim.

II. Factual History

The facts relevant to this Final Determination are largely uncontested, or where contested are still clear.

Shocked is the copyright owner of twelve musical works listed in the Claim, and verified by the Board, with Reg. Nos. PA0000374069 ("The Hep Cat"), PA0000374064 ("The Incomplete Image"), PA0000374063 ("The Secret Admirer"), PA0000374071 ("(Don't You Mess Around With) My Little Sister"), PA0000374065 ("Who Cares"), PA0000374062 ("5 A.M. in Amsterdam"), PA0000374066 ("Down on Thomas Street"), PA0000374073 ("The Secret to a Long Life (Is Knowing When It's Time to Go)"), PA0000374067 ("Fogtown"), PA0000374068 ("Steppin' Out"), PA0000374070 ("Necktie"), and PA0000374072 ("The Ballad of Patch Eye and Meg")) registered by the U.S. Copyright Office on various dates in 1988 ("the Songs"). Recordings of each of these Songs can be found on the album "The Texas Campfire Tapes" ("the Album"), of which Shocked is also the copyright owner, and which was registered by the U.S. Copyright Office on July 15, 1988 (Reg. No. SR0000096727) (collectively, the "Works," with the registrations for the Works referred to as the "Registrations"). The Registrations name the original copyright claimant of the Songs as PolyGram Music Publishing, Ltd. ("Polygram Publishing") and the original copyright claimant of the Album as PolyGram Records, Inc./Mercury Records ("Polygram Records"). The copyright registration for the Album states that it was first published on April 18, 1988.

To show her copyright ownership of the Works (and to use the Registrations to satisfy the requirements of the CASE Act for bringing an infringement claim before the Board), Shocked submitted exhibits indicating that, on January 22, 1999, Polygram Records transferred all rights in the sound recordings embodied in the Album to Shocked (Dkt. 6, the "1999 Assignment") and that, on June 18, 2002, Universal Music Publishing Limited ("Universal," formerly Polygram Publishing) transferred all rights in the Songs to Shocked (Dkt. 7, "the 2002

Assignment”). Based on the language in those assignments, and Shocked’s submission of them to show the transfers of copyright ownership, it is the only logical conclusion (and one relied on by Shocked) that, prior to January 22, 1999, Polygram Records was the copyright owner of the sound recordings embodied in the Album, and prior to June 18, 2002, Polygram Publishing/Universal was the copyright owner of the Songs embodied in the Album. In fact, a January 22, 1988 Agreement between Shocked and Polygram Publishing specifically assigned the rights in all of the Songs at issue to Polygram Publishing (the “1988 Agreement”). *See* 1988 Agreement at §§ 1(1)(b) & 3 and Schedule 1A. (Dkt. 7). Shocked has not submitted her 1988 recording agreement with Polygram Records, although, if she still has a copy of it, presumably she could have submitted it—and it was likely responsive to the Board’s standard document requests in discovery. It is highly likely that the recording agreement would shed further light on the circumstances under which Polygram Records released the Album.

Shocked’s papers, and her interrogatory responses, suggest that the sound recordings of the Songs were first released on a bootleg album called “The Texas Campfire Tapes” by a United Kingdom independent record label called Cooking Vinyl in 1986. (Claimant Party Statement, at 1-2); Interrogatory Response # 6b (Dkt. 79). Shocked states that the distribution by Cooking Vinyl was done without a license or permission. Interrogatory Response # 6b. The evidence, however, strongly tends to also show that a second identical album called “The Texas Campfire Tapes”—which is the Album at issue here—was, as Ms. Shocked states, “distributed by PolyGram while I was an artist there” (Claimant Party Statement, at 2), and was first distributed, as per the copyright registration, on April 18, **1988** (Reg. No. SR0000096727). The evidence also shows that Polygram Records owned the copyright in the Album and the sound recordings therein until the sound recordings were assigned to Shocked through the 1999 Assignment. The 1988 Agreement with Polygram Publishing (referred to therein as “the Publisher”) is consistent with that conclusion. It provided that “[i]n respect of sales of copies of the Album entitled the Texas Campfire Tapes (hereinafter ‘the Texas Campfire Tapes Album’), the Publisher[’]s right to collect mechanical fees and royalties shall exclude copies of the Texas Campfire Tapes Album sold in the United Kingdom,” but acknowledged “the Publisher[’]s rights in respect of all other uses.” 1988 Agreement at § 3(n) (Dkt. 7). Apparently, Polygram Publishing was not entitled to collect mechanical fees and royalties for the sales in the United Kingdom by Cooking

Vinyl, but, through its agreement with Shocked, was entitled to collect such fees and royalties from sales of the album elsewhere by its sister company Polygram Records.

While, as noted above, Shocked did not provide the Board with her original record contract with Polygram Records (as to the sound recordings, she only provided the 1999 Assignment), the January 22, 1988 Agreement with Polygram Publishing specifically refers to Shocked's compositions, including the Songs, being subject to her November 17, 1987 "Recording Agreement" with Polygram Records (presumably the original Polygram Records contract Shocked did not submit to the Board). *Id.* at § 18. It further states that a "Commercial Release of the Texas Campfire Tapes Album" will not fulfill Shocked's obligations to deliver songs to Polygram Publishing (an obligation that did not start until January 22, 1988, *see id.* at § 8(1)), clearly anticipating the upcoming Polygram Records release of the Album. *Id.* at § 11(2).

On April 15, 2021, Billington purchased various items from the charity Goodwill, including a purchase of the Album for one dollar. Response attachment of Goodwill Receipt (Dkt. 19). A year later—sometime in April 2022—Billington offered for sale the Album he purchased from Goodwill on eBay for \$13.95. Billington Party Statement ¶ 4 (Dkt. 80); Dkt. 48, 57-58. Shocked sent a DMCA takedown notice to eBay on approximately April 29, 2022. (Dkt. 48, 57). eBay took Billington's listing for the Album down and informed Billington that it could not accept a counter-notice for the type of notice Shocked had submitted; however, eBay provided Billington with Shocked's lawyer's email, to enable them to discuss the removal of the Album directly. Claim attachment; Dkt. 32. After some communications between Billington and Shocked's lawyer at the time, as well as between Billington and eBay, Shocked commenced this proceeding.

Shocked seeks statutory damages. Claimant Party Statement, at 2.

III. Defenses

To succeed on a claim for copyright infringement, a claimant must establish "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Billington does not seriously contest Claimant's ownership of the Works (which is documented in the Registrations and the 1999 Assignment and 2002 Assignment). He acknowledges that he offered

the Album for sale on eBay. (Dkt. 80 ¶¶ 3-4). However, Billington claims that his offer for sale—because of Shocked’s DMCA takedown notice, Billington never actually sold the Album—is protected by the first sale doctrine. *Id.* ¶ 1. The first sale doctrine allows an owner of a legitimate physical copy of a copyright-protected work to sell or transfer that physical copy even without authorization of the copyright owner. 17 U.S.C. § 109(a) (“the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord”). Because the Board agrees that Billington’s offer of sale on eBay of the Album (and the Songs embodied in that Album) is protected by the first sale doctrine, it is unnecessary to further address whether Claimant has established a *prima facie* case of infringement.

Claimant’s only response to the first sale defense is a claim that the Album Billington offered to sell was not lawfully made, and therefore Section 109 cannot apply. *See* Claimant Party Statement, at 1-2. Claimant states that, in addition to not authorizing The Texas Campfire Tapes recorded by Cooking Vinyl in 1986, she did not authorize the Album at issue, “distributed by PolyGram while I was an artist there” (*id.*, at 2) in 1988. Claimant even goes so far as to imply that Polygram Records never distributed a second album in 1988, but rather that the Album at issue is either just the supposedly unauthorized Cooking Vinyl distribution or was released at the same time (in 1986, not 1988) by Polygram Records, two years before signing Shocked as an artist, because Billington’s CD has a copyright notice that says 1986. (*Id.*, at 1).

However, Claimant’s timeline and her arguments have little to no credibility. As shown on the CD cover and the CD itself, the Album copy specifically says that it was produced by Polygram Records. (Dkt. 37); Claim attachments. It defies credibility that Polygram Records would have released a bootleg album of an unknown artist at the exact same time that the Cooking Vinyl album was released and two years before it had a relationship with Shocked. Furthermore, Polygram Records registered the copyright in the Album (and Polygram Publishing immediately registered the copyright in the Songs) in 1988, when the Album was released, with an April 18, 1988 publication date. As stated in 17 U.S.C. § 410(c), a copyright registration obtained before or within five years after first publication of the work is *prima facie* evidence of the validity of the copyright and of the facts contained in the

registration certificate; including, in this case, that in 1988, Polygram Records owned the copyright in the sound recording and that the Album was first published on April 18, 1988.

The 1999 Assignment and 2002 Assignment submitted by Shocked do not help her argument. In fact, they severely undermine her argument. Although Shocked asserts that “[t]he basis for the 1999 settlement agreement between me and PolyGram/Universal is that The Texas Campfire Tapes was never authorized to begin with, and so PolyGram/Universal relinquished any claim” to the Works (Claimant Party Statement, at 2), the 1999 Assignment of the sound recordings embodied in the Album makes absolutely no reference to any dispute of ownership. The 1999 Assignment is a pure assignment of rights, signed by both parties, and which Shocked filed to rely on and show a transfer of the copyright registration. (Dkt. 6). There is nothing in the 1999 Assignment to suggest that Polygram Records did not have rights to the sound recordings when it distributed the Album. To the contrary, Polygram Records’ 1988 copyright registration and its assignment of the copyright to Shocked in 1999 are evidence that it did own the copyright from when the Album was first distributed in 1988 through 1999. Likewise, the 2002 Assignment pertaining to the Songs does not suggest that there was ever an argument over whether Polygram Publishing had rights in the Songs (*cf.* Dkt. 75 p. 2), but simply that it and Shocked had a dispute as to when Polygram Publishing’s rights ended; Shocked and Polygram Publishing therefore agreed those rights would expire on June 30, 2002. (Dkt. 7). To expire, they must have existed in the first place.

Moreover, if Polygram Records did not own the copyright in the Album when it submitted its application for copyright registration in 1988, Shocked would not be able to pursue this claim before the Board. The CASE Act provides that a claim alleging copyright infringement “may not be asserted before the Copyright Claims Board unless ... the legal or beneficial owner of the copyright has first delivered a completed application, a deposit, and the required fee for registration of the copyright to the Copyright Office” and “a registration certificate has either been issued or has not been refused.” 17 U.S.C. § 1505(a). The copyright registration that Shocked relied on in her Claim when she identified the Album as one of the works infringed was Reg. No. SR0000096727, the registration obtained by Polygram Records. (Dkt. 5). It is also the only copyright registration of the Album before the Board (and as far as the Board can tell, the only one that exists). If Polygram Records was not the legal or beneficial

owner of the copyright in 1988 when it submitted the application for registration, then the requirement of Section 1505(a) has not been satisfied, and Shocked's infringement claim would have to be dismissed. The same conclusion follows regarding Shocked's reliance on Polygram Publishing's registrations for the Songs.

This is a case that should not have been commenced and, in any future filings, Shocked should consider whether she is attempting to stretch copyright law too far. It is clear that Billington simply bought what he rightfully had reason to believe was a legitimate copy of a Michelle Shocked album distributed by a major label, and then later attempted to lawfully resell the Album for a small amount on eBay. It is also clear that Billington had almost nothing to gain, and Shocked suffered no loss.

Arguably, Claimant should be found in bad faith and have to pay Respondent's costs (although it is unclear Respondent incurred any costs). 17 U.S.C. § 1506(y)(2). However, given that Claimant is pro se and truly seems to believe her asserted, albeit meritless, reasons for bringing this case, the Board declines to make such a finding at this time.

IV. Conclusion

The Board dismisses the claim against James Billington with prejudice. As Billington has informed the Board that he wishes to dismiss his Counterclaim, the Counterclaim is dismissed without prejudice.

Copyright Claims Board