



# COPYRIGHT CLAIMS BOARD

Docket number: 22-CCB-0205

April 21, 2023

Leslie M. Fradkin and RRO Entertainment

CLAIMANTS

v.

Spirit Music Group, Julie A. Schwartz, EMI /  
Capitol Records, Shami Music Group, Inc.,  
and Universal Music Group

RESPONDENTS

## SECOND ORDER TO AMEND NONCOMPLIANT CLAIM

The Copyright Claims Board finds that your claim, as amended, still does not comply with the requirements of the CASE Act and related regulations. The claim cannot move forward unless it is properly amended.

If you wish to proceed with this claim, you must file a second amended claim by **May 22, 2023**. If you do not, the Board must dismiss your claim without prejudice, although you may file again in the future before the Board or in federal court. There is no additional filing fee for an amended claim. If you file a second amended claim and it is found compliant, you will be notified and directed to proceed with service. However, if your second amended claim also is found not to comply, the Board will dismiss the proceeding without prejudice. 17 U.S.C.

§ 1506(f)(1)(B); [37 C.F.R. § 224.1\(d\)](#).

To make your second amended claim compliant, you must resolve the issues identified below. [37 C.F.R. § 224.1\(c\)\(2\)](#). You may also choose to correct or edit any errors or other information in your amended claim before you file it again. You do not need to provide a legal argument in your claim – just a statement of facts and circumstances. Being specific in your description gives the other party and the Board more information about your claim. There is no character limit so please be as detailed as possible.

### Copyright Infringement – Limitation on Damages

Your amended claim alleges infringement of a musical work and a sound recording, both titled “I’ll Be There Tonight” (“Tonight”). You allege that in 1972, claimant Les Fradkin wrote the song, recorded a demo version, and left it at the office of Laurie Records (Laurie) to evaluate for a possible recording agreement. You allege that “in or around early 1973,” Laurie released the demo recording as a single under the performing name The Global Gonks, without a recording agreement and without Fradkin’s knowledge or consent; and that Laurie issued a different single with the same catalog number as the Global Gonks record “to disguise the theft” and obscure its release, never disclosing the existence of the infringing single to Fradkin.

The claim is not raised against Laurie, which seems to be out of business. Instead, the respondents are:

- Julie Schwartz, Laurie’s executive producer as of 1992, and daughter of its late co-founder,
- EMI/Capitol Records, which bought Laurie’s catalog in 1992, including the “Tonight” single,

- Universal Music Group, which purchased the single from EMI in 2012,
- Shami Media Group, which purchased or licensed the single from Universal in 2016, and
- Spirit Music Group, which purchased several Laurie-related entities' publishing interests "either in 1992 or in or around 2005."

The Board follows the copyright law of the jurisdiction in which the claim could have been brought if it had been filed in federal court. 17 U.S.C. § 1506(a)(2). If it could have been brought in more than one jurisdiction, the Board follows the law of the jurisdiction that has the most significant ties to the parties and conduct at issue. *Id.* Both claimants are based in Colorado. EMI and Universal are based in California, while the other three respondents are in New York. Of the jurisdictions where the claim might have been brought in court, New York has the strongest connections to the parties and conduct at issue. Fradkin recorded the demo and provided it to Laurie in New York, and the infringing activity allegedly began in Laurie's New York office. Schwartz, the respondent most directly related to Laurie, and Shami and Spirit, whose alleged activities are the most recent, are all New York residents. While the amended claim contends that the respondents are engaging in unfair competition and refers to California's unfair competition law, the Board cannot hear such claims. 17 U.S.C. § 1504(d)(1). Accordingly, the applicable federal jurisdiction for this federal copyright infringement claim would be that of the United States Court of Appeals for the Second Circuit, which includes New York. Moreover, if the claims against each respondent were to be separately evaluated for purposes of section 1506(a)(2), the claims against Schwartz, Shami, and Spirit would be governed by the law of the Second Circuit.

In a copyright infringement claim in New York, any recovery is limited "to damages incurred during the three years prior to filing suit." *Hayden v. Koons*, No. 21 Civ. 10249 (LGS), 2022 WL 2819364, \*6 (S.D.N.Y. July 16, 2022). New York courts apply a "three-year lookback period from the time a suit is filed to determine the extent of relief available," and that "time limit on damages" is separate from the Copyright Act's statute of limitations. *Sohm v. Scholastic Inc.*, 959 F.3d 39, 52 (2d Cir. 2020). Fradkin initiated this proceeding on October 13, 2022. Applying the lookback period to the claim under New York law, the Board cannot award any damages incurred before October 13, 2019.

There are no allegations of any damages incurred due to any respondent's activities after that date. Allegations that third parties have performed infringing copies on YouTube and other websites, and offered copies of the single for sale on eBay from France and the United Kingdom, do not plausibly connect those allegations with any respondent here. Infringing acts by a subsequent distributor, within three years of the claim, cannot revive a time-barred claim against the initial infringer. *Mount v. Book-of-the-Month Club, Inc.*, 552 F.2d 1108, 1110 (2d Cir. 1977); *Byron v. Chevrolet Motor Div. of General Motors Corp.*, No. 93 Civ. 1116 (AJP), 1995 WL 465130, \*3-4 (S.D.N.Y. 1995). The amended claim does not plausibly allege that the infringing 1973 single, released surreptitiously with a duplicate catalog number by a defunct record label, remains in print and available to the public from any Laurie successor fifty years later. Moreover, the claim states that respondents Schwartz and EMI sold the rights to the works many years ago, and no allegations whatsoever of infringing activity at any time are asserted against Universal, EMI,

Shami, or Spirit, apart from conclusory allegations that they are “successors in liability” and “have all benefitted from possession of the stolen property, in particular from the Sales in France.”

If you file a second amended claim against the same respondents, it must include plausible allegations that describe infringing acts (such as copying, distributing, or publicly performing “Tonight”) by each respondent during the three years before this proceeding, and may attach supplemental documents showing such infringement by each respondent during that period. On an infringement claim, the only forms of relief the Board may grant are monetary damages and, if the parties agree to it, a requirement to cease infringing activity. 17 U.S.C. §§ 1504(e)(1) & 1504(e)(2)(A)(i). Neither form of relief would be available against any respondent unless it engaged in infringing activity in the three years before the claim was filed. To maintain a claim against these respondents, your allegations must show how they, not later resellers or online posters, have infringed your copyrights since 2019.

You may also choose to bring your second amended claim against only some of the respondents. Should you choose to file a second amended claim naming as respondents only EMI and Universal, which are both based in California, the law of the United States Court of Appeals for the Ninth Circuit, which includes California, would govern the claim and the three-year lookback period would not apply. In courts in California, recovery is not limited to damages from infringing acts during the three years before an infringement claim is filed. Instead, copyright owners may “recover damages for all infringing acts that occurred before they knew or reasonably should have known of the infringing incidents[.]” *Starz Entertainment LLC v. MGM Domestic TV Distrib., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022). If you choose to amend your claim to name only EMI and Universal as respondents, however, it must also allege plausible facts that show that (1) EMI and Universal both committed infringing acts (for example, selling copies of the 1973 single once they took control of the Laurie catalog), and (2) you did not know, and reasonably should not have known, of their infringing acts more than three years before you filed your claim.

## Final Amendment

Your amended claim resolved some, but not all, of the compliance issues raised in the November 9, 2022 Order to Amend Noncompliant Claim. This order further explains the compliance issue in your amended claim that still must be resolved. **This is your third and final opportunity to submit a compliant claim in this proceeding. If your claim remains noncompliant, the entire proceeding will be dismissed.** 17 U.S.C. § 1506(f)(1)(B).

To submit a second amended claim, log into your eCCB account and take the following steps:

1. From your dashboard, click the “**Amend claim**” button and select your docket number from the dropdown list.
2. Your claim will unlock for editing. The information you originally entered will appear in the same order as in your original claim.

3. Make the necessary edits. If you have filed supplemental documents, you must re-upload any documents you wish to include in the amended claim on the “**Documentation**” page. Please include only documents directly related to your claim, and label them clearly.
4. Once you have completed your edits, continue to click through the fillable claim form until you reach the “**Review**” page. The Review page includes all the information that you have provided in the claim up to this point. Carefully double-check the information on this page. If you have any corrections, you can select “**Edit**” to revise any entries necessary. Each section of information has an “**Edit**” button, which will take you back to that section so you can make changes. After you make changes, you can click “**Save & review**” to return to the Review page. Please review your claim carefully. Once you submit your amended claim, you will be unable to edit the claim while it is in compliance review.
5. Once you have completed your review and any revisions, you must confirm that the information in your claim is accurate and truthful to the best of your knowledge. To complete the declaration, type your full name into the “**Digital signature**” box near the bottom of the “**Review filing**” page and click “**Agree & submit.**”

If you have questions, please contact [asktheboard@ccb.gov](mailto:asktheboard@ccb.gov). Include your docket number in the subject line. The Board is unable to provide legal advice. We can only provide legal information and assistance concerning Board procedures and requirements. If you would like to seek further guidance from a lawyer or a law student at reduced or no cost, please visit the [Pro Bono Assistance](#) page on ccb.gov. You may also refer to the [Compliance Review](#) chapter of the CCB Handbook for more assistance.

Copyright Claims Attorney