

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

1. CAPITOL RECORDS, INC., a Delaware corporation;)
2. UMG RECORDINGS, INC., a Delaware corporation;)
3. MAVERICK RECORDING COMPANY, a California joint)
venture;)
4. BMG MUSIC, a New York general partnership;)
5. ARISTA RECORDS, LLC, a Delaware limited liability)
company;)
6. SONY BMG MUSIC ENTERTAINMENT, a Delaware)
general partnership;)
7. WARNER BROS. RECORDS INC., a Delaware)
corporation,)
Plaintiffs,) Case No. Civ-04-1569-W
v.)
DEBBIE FOSTER,)
Defendant.)

DEFENDANT'S AMENDED ANSWER AND COUNTERCLAIM

Comes now the Defendant Deborah Foster and in accordance with the Court's Scheduling Order amends her (pro se) answer. The following numbered paragraphs correspond to the numbered paragraphs in the Complaint served on the Defendant.

Jurisdiction And Venue

1. ADMITTED.
2. ADMITTED.
3. ADMITTED that the Defendant resides in this District; Denied that the Defendant committed even a single act of infringement.

Parties

4. The Defendant has insufficient information to admit or deny the allegation contained in Paragraph 4.

5. The Defendant has insufficient information to admit or deny the allegation contained in Paragraph 5.
6. The Defendant has insufficient information to admit or deny the allegation contained in Paragraph 6.
7. The Defendant has insufficient information to admit or deny the allegation contained in Paragraph 7.
8. The Defendant has insufficient information to admit or deny the allegation contained in Paragraph 8.
9. The Defendant has insufficient information to admit or deny the allegation contained in Paragraph 9.
10. The Defendant has insufficient information to admit or deny the allegation contained in Paragraph 10.
11. Defendant admits that she resides in this District. *See* Complaint, at ¶ 11.

Alleged Infringement of Copy Rights - Count I

12. Paragraph 12 contains no assertion to be admitted or denied.
13. Defendant has insufficient information to admit or deny the allegations contained in paragraph 13. Although the Plaintiffs assert they have valid Certificates of Copyright Registration, none are attached to the Complaint.
14. Defendant has insufficient information to admit or deny the allegation contained in paragraph 14.

15. Defendant has insufficient information to admit or deny assertions regarding Plaintiffs' information and belief. However, in response to Complaint at ¶ 15, Defendant DENIES each and every assertion of infringement by Deborah Diane Foster aka Debbie Foster and requires strict proof thereof.
16. Defendant has insufficient information to admit or deny assertions regarding Plaintiffs' information and belief. In response to Complaint at ¶ 16, having denied performing any act of infringement, Defendant DENIES willful and intentional infringement and requires strict proof thereof..
17. Because Defendant has done nothing to infringe any copyright materials owned by, or in the custody or control of, the Plaintiffs, Defendant DENIES that Plaintiffs are entitled to any damages of any kind whatsoever and requires strict proof thereof. Moreover, this case is extraordinary so that Plaintiffs should be required to pay Defendant's attorney's fees and costs, 17 U.S.C. § 505. *See*, Complaint at ¶ 17.
18. Because Defendant has done nothing to infringe any copyrighted materials owned by, or in the custody or control of, the Plaintiffs, Defendant DENIES Plaintiffs' assertion of irreparable harm and further Defendant should not be enjoined from acts not committed by Defendant. *See*, Complaint at ¶ 18.

Affirmative Defenses

If further response be necessary, Defendant asserts the following in response to Plaintiffs' Complaint for Copyright Infringement,

1. Defendant is not a necessary and proper party. Plaintiffs have sued the wrong person.

2. The alleged claims made by each Plaintiff against Defendant are neither well grounded in fact nor warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, Rule 11, Federal Rule Civil Procedure.
3. Plaintiffs' Complaint fails to state a claim against Defendant on which relief could be granted.
4. The alleged claims made by each Plaintiff against Defendant are barred by the statute of limitations, 17 U.S.C. § 507 (b) which provides that no civil action may be maintained under the federal Copyright Act unless the same is commenced within three years after the claim accrued.
5. Plaintiffs have failed to mitigate their damages, if any, as required by law.
6. Plaintiffs' claims against Defendant are barred by acquiescence.
7. Plaintiffs' claims against Defendant are barred by estoppel.
8. Plaintiffs' claims against Defendant are barred by estoppel by acquiescence.
9. Plaintiffs' claims against Defendant are barred by laches.
10. To the extent that Plaintiffs' claims accuse Defendant of criminal acts, Defendant specifically denies that she has committed any criminal acts and in addition asserts her fifth amendment rights under the United States Constitution.
11. Defendant reserves the right to add additional affirmative defenses (or cross-claims or counter claims as discovery reveals or as allowed by the Court.¹

¹Each Plaintiff were served with a set of interrogatories, request for production and requests for admissions by Defendant and said responses are presently due on April 4, 2005.

WHEREFORE, Defendant prays that this Court render judgment for defendant, DENY Plaintiffs' request for injunctive relief, DENY Plaintiffs' request for statutory damages, DENY Plaintiffs request for costs, DENY Plaintiffs' request for attorney fees, and DENY Plaintiff's request for any relief whatsoever.

COUNTERCLAIM

The Parties

1. Deborah D. Foster ("Debbie") is an individual residing within this District.
2. Capitol Records, Inc. is a corporation duly organized and existing under the laws of the state of Delaware, with its principal place of business in the State of New York.
3. UMG Recordings, Inc. is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in the State of California.
4. Plaintiff Maverick Recording Company is a joint venture between Maverick Records and Warner Bros. Records Inc., organized and existing under the laws of the State of California, with its principal place of business in the State of California.
5. Plaintiff BMG Music is a general partnership duly organized and existing under the laws of the State of New York, with its principal place of business in the State of New York.
6. Plaintiff Arista Records LLC is a limited liability company duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York.
7. Plaintiff Sony BMG Music Entertainment is a Delaware general partnership, with its principal place of business in the State of New York.

8. Plaintiff Warner Bros. Records Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California.

Jurisdiction And Venue

9. This action arises under the Copyright Laws of the United States for a declaratory judgment of non-infringement pursuant to the Declaratory Judgement Act, 28 U.S.C. §§ 2201 and 2202, because an actual controversy exists between Defendant and Plaintiffs.
10. Jurisdiction in this Court is proper under 28 U.S.C. §1338 by virtue of this action being a question of Federal Law arising under the Copyright Laws of the United States, United States Code Title 17.
11. Venue is proper in this District under 28 U.S.C. §1391(b)(2), as a substantial part of the events or omissions giving rise to the claims occurred in this District.

Facts

12. Deborah Foster (“Debbie”) is an individual who has lived in central Oklahoma for over 47 years.
13. From 1979 to the present Debbie has been and continues to be employed as a registered nurse at an area hospital.
14. From June 10, 1978 until April 2004, Debbie was married to and cohabiting with William Stephen Foster (“Steve”). Steve moved out of their residence in April 2004 and filed a divorce petition in August 2004.
15. Debbie’s name was placed on an account for a subscription to cable television and for (intermittent) internet services from Cox Communications from May 5, 2000 to present.

- a. In May 2000 Debbie and Steve resided at 804 Hawksbury Court in Norman, Oklahoma.
- b. On June 20, 2002, Debbie and Steve moved to 3537 Brookford Drive in Norman, Oklahoma.
- c. On February 11, 2003 Debbie and Steve moved to 2809 Cynthia Circle in Norman, Oklahoma.
- d. From May 5, 2000 to approximately April 2004, Steve was the primary user and operator of any computer located at their residence with internet access through the Cox Communications internet account listed in Debbie's name. Steve utilized the Cox internet account in Debbie's name to perform tasks related to his employment; and, to perform other tasks and for other purposes unknown to Debbie.
- e. From approximately September 2004 through January - February 2005, Debbie had no computer at her residence and no internet usage.
- f. Debbie rarely, if at all, utilized the internet service provided by Cox Communications. Debbie's played a few games located on a computer and
- g. Debbie did not oversee the use of any computer located at her aforementioned residences. **Debbie was merely an account holder with Cox Communications.**
- h. Debbie has and continues to deny that she had any knowledge of KAZAA. Debbie is absolutely without any knowledge of how to download material off of the internet.

16. At the March 2, 2005 Scheduling Conference conducted by the Court, counsel for Debbie, requested that the Plaintiffs voluntarily provide the specific dates of the alleged infringement, but for some reason Plaintiffs are unable (or unwilling) to provide actual dates.
17. In the summer of 2004, Debbie was contacted by telephone by Plaintiffs' settlement representative. Debbie informed Plaintiffs' settlement representative that she did not download any songs from the internet.
18. Thereafter, Plaintiffs' settlement representative telephoned Debbie to demand payment of \$5,000 and further told Debbie that the Plaintiffs will go down to \$3,750. Debbie again informed Plaintiffs' settlement representative that she did not download any songs from the internet.
19. Despite being placed on notice that Debbie did not download any songs, the Plaintiffs filed this action against Debbie and the Plaintiffs continue to impugn Debbie's character and subject her to demands which are closely akin to extortion.
20. Plaintiffs have a pattern and practice of the action complained of by Debbie in her counterclaim. *See, Priority Records LLC et al., v. Ron Pierce*, Case No. Civ-04-1448-R, in the U.S. District Court for the Western District of Oklahoma; and, *Sony BMG Music Entertainment, et al*, Case No. Civ-04-1445-C in the U.S. District Court for the Western District of Oklahoma.

Count 1. Declaratory Judgment For Non-Infringement

Defendant repeats and realleges each and every allegation contained in previous paragraphs of this COUNTERCLAIM as if full set forth herein and further alleges as follows:

21. Because Debbie did nothing improper regarding Plaintiffs' copyrighted materials, Debbie is entitled to a declaratory judgment of non-infringement.

Count 2. Prima Facie Tort

Defendant repeats and realleges each and every allegation contained in previous paragraphs of this COUNTERCLAIM as if fully set forth herein and further alleges as follows:

22. Plaintiffs' conduct constitutes a prima facie tort in that Plaintiffs' conduct is generally culpable and not justified under the circumstances, according to Restatement 2nd of Torts, Section 870. Specifically Plaintiffs brought an action against Debbie Foster with no actual knowledge or information that Debbie Foster either participated in the alleged improper activities or engaged in the alleged improper activities to which internet access was provided. *Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster Ltd, et al.*, 380 F.3d 1154 (9th Cir. 8/19/04) cert granted 125 S.Ct. 686 (12/10/04).
23. Plaintiffs acted maliciously and oppressively in that Plaintiffs, even after being advised of the facts and circumstances of this case, by continuing to press Debbie Foster for money damages for acts she never committed. Plaintiffs acted with willful and conscious disregard of Debbie Foster's rights so as to justify an award of punitive and exemplary damages.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for relief as follows:

- A. Declaratory judgment that Deborah D. Foster aka Debbie Foster has not infringed any of Plaintiffs' copyrighted materials;

- B. Damages, jointly and severally, against the Plaintiffs in an amount to be determined at trial for prima facie tort;
- C. Exemplary damages, jointly and severally, against the Plaintiffs in an amount to be determined at trial;
- D. A finding that this case is extraordinary so that Defendant should receive a judgment for Defendant's attorney's fees and costs against the Plaintiffs; and,
- E. Such other and further relief as is warranted and justified by the pleadings and the evidence.

Dated: April 4th, 2005.

/S/MARILYN D. BARRINGER-THOMSON

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CERTIFICATE OF SERVICE

This is to certify that on this 4th day of April, 2005, I electronically transmitted the Amended Answer and Counterclaim to the Clerk of the Court using the ECF System for filing. Based on the electronic records current on file, the Clerk of the Court will transmit a Notice of Electronic Filing ("NEF") to the following ECF registrants: David L. Kearney, dkearney@gablelaw.com, John Benson, benson@gablelaw.com, Daniel A. Nickel, dnickel@gablelaw.com

/S/MARILYN D. BARRINGER-THOMSON

Marilyn D. Barringer-Thomson

²Pursuant to Oklahoma law, attorney liens are claimed.