

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ NOV 21 2008 ★

BROOKLYN OFFICE

Case No. **08-4740**

VITALIANO, J.

LEVY, M.J.

THEODORE VANN,

Plaintiff,

v.

TIME WARNER, INC., NEW LINE CINEMA
CORPORATION, NEW LINE RECORDS, and
JOHN WATERS,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Theodore Vann ("Mr. Vann" or "Plaintiff"), by and through his undersigned counsel, hereby submits this Complaint and Demand for a Jury Trial against Defendants Time Warner, Inc., New Line Cinema Corporation, New Line Records (the "Company") and John Waters (the Company and Waters are collectively referred to herein as "Defendants"), alleges as follows:

NATURE OF THE CLAIMS

1. This is an action brought by Plaintiff Theodore Vann against Defendants for declaratory, injunctive and equitable relief, as well as monetary damages, liquidated damages, punitive damages, and attorneys' fees and costs, to redress Defendants' copyright infringement of Mr. Vann's rights in a musical composition he authored, "Santa Claus is a Black Man," pursuant to 17 U.S.C. §§ 101, *et. seq.*

2. Defendants' conduct was intentional, knowing, malicious, willful and wanton and/or showed a reckless disregard for Mr. Vann, which warrants an award of punitive damages, and which has caused and continues to cause him to suffer substantial

economic and noneconomic damages, and permanent harm to his professional and personal reputations.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1338(a) as it arises under the Copyright Act of 1976, 17 U.S.C. §§ 101, *et. seq.*

4. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400 because a substantial part of the events or omissions giving rise to this action, occurred in this district. This Court has supplemental subject matter jurisdiction over Plaintiffs' related claims arising under state law pursuant to 28 U.S.C. § 1367(a).

PARTIES

5. Plaintiff Theodore Vann resides in Brooklyn, New York, and he is a producer and Grammy-winning songwriter with over 30 years of experience in the music recording industry.

6. Defendant Time Warner, Inc., d/b/a New Line Cinema Corporation and New Line Records, is a Delaware corporation with a principal place of business at One Time Warner Center, New York, New York, 10019. Defendant Time Warner is a multinational entertainment company, whose businesses include interactive services, cable systems, films, television networks and publishing.

7. Defendant John Waters is an artist and performer with New Line Cinema Corporation and New Line Records, with his principal place of business at One Time

Warner Center, New York, New York, 10019. Defendant Waters, a well known celebrity, has produced numerous films, Broadway productions and musical albums.

FACTUAL ALLEGATIONS

Background

8. Plaintiff Theodore Vann wrote the song “Santa Claus is a Black Man” for the holiday season in 1973, as a gift to his daughter, Akim. Mr. Vann’s goal in writing “Santa Claus is a Black Man” was to show his daughter to be proud of her African-American heritage and to demonstrate that Christmas was a holiday that she should feel entitled to celebrate.

9. “Santa Claus is a Black Man” was released in or around November 1973 by Simtone Records, for whom Mr. Vann occasionally worked. Both Mr. Vann and his daughter Akim sang vocals on the song.

10. Mr. Vann was the sole writer and copyright holder of the musical composition of “Santa Claus is a Black Man” at all times.

Mr. Vann’s Refusal To Grant Permission To Use His Song

11. A few years ago, representatives of Defendants made contact with Mr. Vann and informed him that they wanted to use “Santa Claus is a Black Man” in a proposed holiday album by Defendant Waters.

12. Because of Defendant Waters’ reputation in the entertainment industry of producing works that do not always appeal to general mainstream audiences, and, in fact,

are considered by many to be odd or a “fetishist,” Mr. Vann was understandably concerned about having his important work associated with any album that Defendant Waters intended to produce.

13. Mr. Vann therefore refused to give his permission to Waters, any of his representatives or any representative of any of the Defendants, to include his song, “Santa Claus Is A Black Man,” in Waters’ holiday album.

14. Shortly thereafter, Defendant Waters himself personally reached out to Mr. Vann to tell him how much he enjoyed the song in an effort to convince him to allow “Santa Claus is a Black Man” in the holiday album Defendants intended to release.

15. However, Mr. Vann remained firm in his refusal and told Defendant Waters in no uncertain terms that he was not to use “Santa Claus is a Black Man” under any circumstances.

Defendants’ Wrongfully Misappropriate “Santa Claus is a Black Man”

16. After informing both Defendants’ representatives and Defendant Waters personally that he did not want “Santa Claus is a Black Man” used in any album released by Defendants, Mr. Vann was never contacted again concerning the use of his song.

17. As a point of fact, Mr. Vann never signed any documents licensing “Santa Claus is a Black Man” to any organization or individual associated with Defendants.

18. Accordingly, Mr. Vann was shocked to read in a newspaper interview with Defendant Waters that Defendants had purposefully ignored Mr. Vann’s objections

and unilaterally decided to use “Santa Claus is a Black Man” in the album they released, “A John Waters Christmas.”

19. At no time did Defendants ever receive a license from Mr. Vann to use, manufacture, reproduce or distribute “Santa Claus is a Black Man,” nor have Defendants obtained a license from Mr. Vann to include a performance of “Santa Claus is a Black Man,” in any format.

20. Indeed, Defendants admit that they did not receive any license from Mr. Vann insofar as Mr. Vann’s name is not listed anywhere in the credits of the album, nor do Defendants claim to have received permission from Mr. Vann to use the song, despite the fact that Mr. Vann was the sole copyright holder in the musical composition at all times.

21. Mr. Vann was further troubled by the fact that Mr. Waters repeatedly disparaged and ridiculed the song in various media outlets while publicizing or promoting “A John Waters Christmas.”

22. By way of example only, Mr. Waters disparagingly referred to “Santa Claus is a Black Man” as “the mother lode of Christmas lunatic songs.”

23. Similarly, Mr. Waters has also ridiculed the song as “a crackpot Xmas carol.”

24. These statements, which have degraded the nature of Mr. Vann’s work, have clearly caused significant damage to the goodwill and value of Mr. Vann’s copyright.

25. Moreover, Defendants' wrongful conduct has deprived Mr. Vann of the benefit of selling "Santa Claus is a Black Man."

26. As a result of Defendants' willful and malicious infringement of Mr. Vann's copyright, Plaintiff has lost, and will continue to lose, revenues from any potential sale of "Santa Claus is a Black Man" and has had the value of his copyright diminished.

AS AND FOR A FIRST CAUSE OF ACTION

(Copyright Infringement)

27. Mr. Vann hereby repeats and realleges each and every allegation in paragraphs 1 through 26, inclusive, as if fully set forth herein.

28. Mr. Vann was the sole owner and administrator of the copyright in the musical composition, "Santa Claus is a Black Man." Further, Mr. Vann and his daughter, Akim, produced and performed the song.

29. Plaintiff holds the sole right to authorize the manufacture, license, synchronization and distribution of "Santa Claus is a Black Man."

30. Defendants infringed on Mr. Vann's copyright interest in "Santa Claus is a Black Man," by reproducing and selling the song as a part of the album, "A John Waters Christmas," and by including reprints of the song's lyrics without permission or authorization from Mr. Vann.

31. By their actions, Defendants have infringed and will continue to infringe on Mr. Vann's copyright interests in and relating to "Santa Claus is a Black Man" by

producing, distributing and placing upon the market products which contain recordings and lyrics of Mr. Vann's copyrighted work.

32. As a direct and proximate result of Defendants' conduct, Mr. Vann has suffered and continues to suffer, substantial monetary and/or economic damages, including, but not limited to, loss of goodwill, loss of present and future revenue and loss of value to his copyright.

AS AND FOR A SECOND CAUSE OF ACTION
(Willful Copyright Infringement)

33. Mr. Vann hereby repeats and realleges each allegation contained in paragraphs 1 through 32, inclusive, as if fully set forth herein.

34. Mr. Vann was the sole owner and administrator of the copyright in the musical composition, "Santa Claus is a Black Man." Further, Mr. Vann and his daughter, Akim, produced and performed the song.

35. Plaintiff holds the sole right to authorize the manufacture, license, synchronization and distribution of "Santa Claus is a Black Man."

36. Defendants knowingly and willfully infringed on Mr. Vann's copyright interest in "Santa Claus is a Black Man" by reproducing and selling the song as part of their album, "A John Waters Christmas" despite the fact that Mr. Vann had repeatedly expressly told Defendants that he refused to grant them permission to use the song.

37. By their actions, Defendants have infringed and will continue to infringe on Mr. Vann's copyright interests in and relating to "Santa Claus is a Black Man" by

producing, distributing and placing upon the market products which contain recordings and lyrics of Mr. Vann's copyrighted work.

38. As a direct and proximate result of Defendants' conduct, Mr. Vann has suffered and continues to suffer, substantial monetary and/or economic damages, including, but not limited to, loss of goodwill, loss of present and future revenue and loss of value to his copyright for which he is entitled to damages, including punitive damages.

AS AND FOR A THIRD CAUSE OF ACTION

(Accounting)

39. Mr. Vann hereby repeats and realleges each allegation contained in paragraphs 1 through 38, inclusive, as if fully set forth herein.

40. Pursuant to 17 U.S.C. § 504, Plaintiff is entitled to recover all of Defendants' profits attributable to their acts of infringement.

41. Pursuant to 17 U.S.C. § 504, Plaintiff is entitled to recover all the actual damages he sustained attributable to Defendants' acts of infringement.

42. The amount of money due from Defendants is presently unknown to Plaintiff and cannot be ascertained without a detailed accounting by Defendants of all profits obtained from their marketing, distribution, and sale of "A John Waters Christmas."

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that an award be issued in his favor containing the following relief:

- A. A declaratory judgment that the actions, conduct and practices of Defendants complained of herein violate the copyright owned by Plaintiff as well as the laws of the United States;
- B. A declaratory judgment that Defendants are likely to continue to willfully infringe on Plaintiff's copyright interest in "Santa Claus is a Black Man" unless enjoined from doing so;
- C. An order enjoining Defendants from directly or indirectly infringing on Plaintiff's copyright interest in "Santa Claus is a Black Man" or from continuing to market, offer, sell, dispose of, license, lease, transfer, display, advertise, reproduce, develop or manufacture any works derived or copied from "Santa Claus is a Black Man" or from participating or assisting in any such activity;
- D. An order requiring Defendants, their directors, officers, agents, servants, employees and all other persons in act of concert or privity with them, to return to Plaintiff any and all originals, copies, facsimiles or duplicates of "Santa Claus is a Black Man" in their possession, custody and/or control;
- E. An award of actual damages in an amount to be determined at trial, plus prejudgment interest, for the monetary and/or economic damages Plaintiff suffered as a result of Defendants' copyright infringement;
- F. An award of punitive damages per Defendant for Defendants' knowing and willful infringement of Plaintiff's copyright pursuant to 17 U.S.C. § 504;

G. An award of costs and expenses, as well as reasonable attorneys' fees, that Mr. Vann incurred in this action to the fullest extent permitted by law;

H. An award of damages for any and all other monetary and/or non-monetary losses suffered by Mr. Vann in an amount to be determined at trial, plus prejudgment interest;

I. An order requiring Defendants to deliver, upon oath, to be impounded during the pendency of this action and destroyed pursuant to judgment herein, all originals, copies, facsimiles, or duplicates of any work shown by the evidence to be the willful infringement of any copyright in "Santa Claus is a Black Man;"

J. An order requiring Defendants to account for all gains, profits and advantages derived from their willful acts of infringement and for their other violations of the law;

K. Pre-judgment interest on all amounts due; and

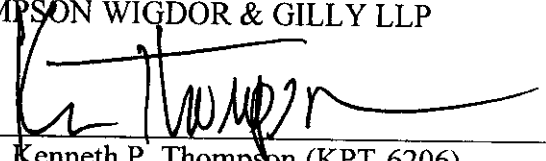
L. Such other and further relief as the court may deem just and proper.

New York, New York
November 21, 2008

Respectfully submitted,

THOMPSON WIGDOR & GILLY LLP

By: _____


Kenneth P. Thompson (KPT-6206)

85 Fifth Avenue, Fifth Floor
New York, NY 10003
Telephone: (212) 257-6800
Facsimile: (212) 257-6845

COUNSEL FOR PLAINTIFF

TMZ