

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3505
Summary Calendar

BROADCAST MUSIC, INC., ET AL.,

Plaintiffs-Appellees,

VERSUS

HOBI, INC. D/B/A THE BENGAL and HOANG NGUYEN,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Louisiana
(CA-92-228-A-M2 c/w CA 92-657)

(April 8, 1994)

Before JONES, DAVIS, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Hoang Nguyen and Hobi, Inc. appeal the district court's grant of summary judgment to Broadcast Music, Inc., et al. We affirm.

I.

Broadcast Music, Inc. ("BMI") is a non-profit organization that acquires the non-exclusive public performance rights of copyrighted works. In turn, it grants to music users, such as concert halls, restaurants and night clubs, the right to publicly perform any of the works in BMI's repertoire under its status as a

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

"performing rights society." Copyright Act at 17 U.S.C. § 116(e)(3). This allows the purchaser to avoid the cost of obtaining licenses individually from each owner and provides owners of musical copyrights an efficient way to protect their rights.²

Hoang Nguyen is the sole shareholder in and president of Hobi, Inc., a Louisiana corporation that owns the Bengal, a bar in Baton Rouge that performs recorded music. BMI, through a series of correspondence and phone calls, allegedly informed the defendants that they were violating copyright law by playing BMI-licensed music without authorization. After several months, when defendants failed to respond to BMI's notification, BMI filed suit alleging seven claims of copyright infringement. BMI filed a second suit five months later for two claims of willful copyright infringement. These suits were consolidated.

Both BMI and Hoang Nguyen filed motions for summary judgment. BMI argued that there was no genuine issue of material fact as to the defendants' liability for copyright infringement. Hoang Nguyen argued that he could not be liable individually for any copyright infringement.

The district court granted BMI's motion and awarded statutory damages of \$7,000, \$1000 for each of the seven violations.³ The court also granted attorneys fees and costs as well as issuing a permanent injunction barring the defendants from performing any

² The other plaintiffs are the copyright owners of various compositions that are the subject of this case.

³ The court does not appear to have addressed the two violations in the second complaint. Because BMI did not cross-appeal for statutory damages based on these two infringements, we do not have jurisdiction over them.

further works owned or licensed by BMI without proper licensing.

The plaintiffs subsequently filed a motion to clarify the order because it was unclear whether Hoang Nguyen was jointly and severally liable with Hobi, Inc. The court amended the order and affirmed its judgment against both Nguyen and Hobi, Inc. The defendants filed a motion to correct the record for purposes of appeal because the affidavits of Hoang Nguyen and Paul Stockton were missing. This motion was granted, and the defendants then filed their appeal.

II.

It is a violation of copyright in a musical composition to perform that work publicly without a license. 17 U.S.C. § 106(4). A copyright owner is entitled to recover for each infringement statutory damages of at least \$250 and not more than \$10,000 per violation. 17 U.S.C. § 504. Costs and reasonable attorney's fees are also recoverable at the court's discretion. 17 U.S.C. § 505. In order to prove a copyright infringement claim, BMI must show five elements: 1) originality and authorship of the copyrighted works involved; 2) compliance with the formalities of the Copyright Act; 3) proprietary rights in the copyrighted works involved; 4) public performance of the copyrighted works involved; and 5) lack of authorization for public performance. **Fermata Int'l Melodies, Inc. v. Champions Golf Club, Inc.**, 712 F. Supp. 1257 (S.D. Tex. 1989), **aff'd**, 915 F.2d 1567 (5th Cir. 1990).

Defendants first contend that the district court erred in granting BMI summary judgment because there was an issue of material fact as to whether the Bengal ever publicly performed the

music in question.⁴ Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. If the non-movant is faced with a motion for summary judgment "made and supported" as provided by Rule 56, the non-movant cannot survive the motion by resting on the mere allegations of its pleadings. **See Celotex Corp. v. Catrett**, 477 U.S. 317 (1986); **Slaughter v. Allstate Ins. Co.**, 803 F.2d 857, 860 (5th Cir. 1986).

To prove public performance, BMI introduced the affidavit of its employee, James Hutcherson, who listed all of the songs he heard on three random evening visits to the Bengal. Among them, nine were licensed by BMI.⁵

The defendants offered two affidavits to refute Hutcherson's evidence. One, the affidavit of Hoang Nguyen was not made on personal knowledge, but rather "upon information and belief" as Nguyen was not on the premises on the nights Hutcherson was there. Affidavits not made on personal knowledge cannot serve to defeat a motion for summary judgment. Fed.R.Civ.P. 56; **Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.**, 831 F.2d 77 (5th Cir. 1987).

The defendants also offered the affidavit of Paul Stockton, a

⁴ BMI presented uncontroverted evidence sufficient to establish the other four elements. Therefore, this court need only address whether the works were publicly performed.

⁵ Hutcherson's report shows that the following compositions were played on the following dates: 1) on November 30, 1991, "I Can't Get No Satisfaction" and "Disco Inferno;" 2) on January 30, 1992, "I Can't Get No Satisfaction," "Rocket Man," "Respect," "Good Vibrations," "When a Man Loves a Woman," and "Old Time Rock 'N Roll." These were at issue in the first complaint. Hutcherson testified that on July 1, 1992, the following compositions were played: "I Wanna Sex You Up" and "Now that We Found Love." These last two songs were the basis for the second complaint.

disc jockey at the Bengal, who testified that on one of the three nights in question, two of the songs, "I Wanna Sex You Up" and "Now That We Found Love" were not played. However, the trial court did not address the infringements based on these two songs which were the basis of the second complaint, and BMI has not asked this court to grant damages based on these alleged infringements. Therefore, while this affidavit might raise a genuine issue of material fact as to the infringements based on these songs, these infringements are not properly before this court.

Defendants did not meet their burden of raising a genuine issue of material fact as to whether the seven songs in the first complaint were publicly performed. We therefore affirm the trial court's judgment granting copyright damages.

III.

Nguyen next challenges the liability imposed on him as an individual. While he does not contest that he is the sole shareholder in and president of Hobi, Inc., which owns and operates the Bengal, he contends that he was unable to supervise and direct management operations and that he did not have a financial interest in the Bengal because he did not profit from it.

The test of whether a corporate officer is jointly and severally liable with the corporation for copyright infringement is whether the officer has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities. **Pinkham v. Sara Lee Corp.**, 983 F.2d 824, 834 (8th Cir. 1992); **Crabshaw Music v. K-Bob's of El Paso, Inc.**, 744 F. Supp. 763 (W.D. Tex. 1990). As the sole shareholder in and

president of Hobi, Inc., Nguyen had the ultimate authority to police the conduct of his managers and disc jockeys. Nguyen also had a direct financial interest in the activities, regardless of whether he was making a profit or losing money on the venture.

We therefore affirm the district court's judgment rendering Nguyen jointly and severally liable with Hodi, Inc.

AFFIRMED