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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Broadcast Music, Inc.; Sony/ATV Songs) CV-11-1980-PHX-BSB
10 LLC d/b/a Sony/ATV Acuff Rose Music;)

ORDER

11 Screen Gems-EMI Music, Inc;)
12 Songpainter Music; Tall Girl Music;)
13 Sony/ATV Songs LLC d/b/a Sony/ATV)
14 Tree Publishing; Universal-Songs of)
15 Polygram International, Inc; Warner-)
16 Tamerlane Publishing Corp; Believus Or)
17 Not Music; Glad Music Co; Paul Simon)
18 Music; Logrhythm Music; Universal-)
19 Millhouse Music, a division of Magna)
20 Sound Corporation; Bar None Music;)
21 Central Songs, a division of Beechwood)
22 Music Corporation,)

23 Plaintiffs,)

24 vs.)

25 McDade & Sons, Inc., d/b/a Norton's)
26 Country Corner; McDade Management,)
27 LLC d/b/a Norton's Country Corner;)
28 Nancy McDade, individually; and Jason)
McDade, individually.)

Defendants.)

24 In this matter, Plaintiffs assert claims of copyright infringement against Defendants.
25 Plaintiffs allege that Defendants infringed copyrights to thirteen musical compositions by the
26 unauthorized public performance of these compositions at Norton's Country Corner
27 (Norton's) in Queen Creek, Arizona, on June 10 and 11, 2011. (Doc. 29.) Plaintiffs have
28 filed a motion for summary judgment and a supporting statement of facts on their claims of

1 copyright infringement. (Docs. 39 and 40.) Defendants have filed a response and a
2 supporting statement of facts opposing Plaintiffs' motion. (Docs. 56 and 57.) Plaintiffs have
3 filed a reply, a response and objections to Defendants' statement of facts, and a motion to
4 strike.¹ (Docs. 60 and 62.) For the reasons set forth below, the Court grants Plaintiffs'
5 Motion for Summary Judgment and enters a permanent injunction enjoining Defendants from
6 further infringement of Plaintiffs' thirteen copyrighted musical compositions and the musical
7 compositions to which Plaintiff Broadcast Music, Inc. (BMI) holds the rights to enter
8 licensing agreements.²

9 **I. Factual and Procedural Background**

10 On March 8, 2012, Plaintiffs filed a First Amended Complaint against Defendants
11 McDade & Sons, Inc., d/b/a Norton's Country Corner, McDade Management, LLC d/b/a
12 Norton's Country Corner, Nancy McDade, and Jason McDade alleging claims of copyright
13 infringement. (Doc. 29.) Plaintiffs allege that these Defendants owned, operated and
14 controlled Norton's in June 2011, at the time of the public performance of the thirteen
15 musical compositions at issue in this matter and, therefore, are liable for copyright
16 infringement. (*Id.*)

17 Plaintiffs allege that they own the copyrights to, or the rights to license the
18 performance of, the thirteen musical compositions at issue and seek the following remedies

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21 ¹ The Court will deny Plaintiffs' Motion to Strike (Doc. 62) for failure to comply with
22 Local Rule of Civil Procedure 7.2(m), which provides that "an objection to . . . the
23 admissibility of evidence offered in support of or opposition to a motion must be presented
in the objecting party's response or reply memorandum and not in a separate motion to strike
or other separate filing." L.R.Civ. 7.2(m).

24 ² The thirteen songs include: "All My Ex's Live in Texas," "Baby Don't Get Hooked
25 on Me," "Betty's Bein' Bad," "Boot Scoot Boogie a/k/a Boot Scootin' Boogie," "Brown
26 Eyed Girl," "Eighteen Wheels and a Dozen Roses," "Fireman" a/k/a "The Fireman," "Race
27 is On" a/k/a "The Race is On," "You Can Call Me Al," "Shake" a/k/a "The Shake," "Ring
of Fire," "One Step Forward," "Only Daddy That'll Walk the Line" a/k/a "The Only Daddy
That'll Walk the Line." (Doc. 40 at ¶ 20, Ex 1 at ¶ 4, Attachment A.)

1 provided by the Copyright Act, 17 U.S.C. §§ 502, 504, and 505: (1) an injunction prohibiting
2 further infringing performances of any copyrighted musical compositions in the BMI
3 repertoire; (2) statutory damages in the amount of not less than \$3,000 for each of the thirteen
4 copyright infringements; (3) costs and reasonable attorneys' fees; and (4) interest from the
5 date of judgment. (Docs. 29, 39.)

6 Plaintiff BMI is a "performing rights society," which is a nonprofit organization that
7 licenses the right to publicly perform copyrighted musical compositions on behalf of its
8 members and collects royalties whenever that music is performed. (Doc. 40 at ¶ 1, Ex. 1 at
9 ¶ 3)³; *see* 17 U.S.C. § 101 ("A 'performing rights society' is an association, corporation, or
10 other entity that licenses the public performance of nondramatic musical works on behalf of
11 copyright owners of such works, such as the American Society of Composers, Authors and
12 Publishers (ASCAP), [BMI], and SESAC, Inc."). The collection of musical compositions
13 that BMI licenses is known as the BMI repertoire. (Doc. 40 at ¶ 3.) The other Plaintiffs are
14 the copyright owners of the musical compositions that are the subject of this matter. (Doc. 40
15 at ¶ 2, Ex. 1 at ¶ 4.)

16 Through agreements with copyright owners, such as the individually named Plaintiffs,
17 BMI acquires non-exclusive public performance rights. BMI has acquired such rights from
18 each of the individually named Plaintiffs in this action. (Doc. 40 at ¶ 3; Ex. 1 at ¶ 2.) In turn,
19 BMI grants music users such as broadcasters, and owners and operators of concert halls,
20 restaurants, nightclubs, and hotels the right to publicly perform any of the works in the BMI
21 repertoire through "blanket license agreements." (Doc. 4 at ¶ 4.) The thirteen songs that are
22 the subject of this action are registered with the Copyright Office and are part of BMI's
23 repertoire. (Doc. 40 at ¶ 17, Ex. 1 at ¶¶ 4-5, Attachment A.)

24 At all times relevant to this matter, Defendant McDade & Sons, Inc. owned and
25 operated Norton's, had the right and ability to direct and control activities at Norton's, and

26 ³ The exhibits to the Statement of Facts in Support of Plaintiffs' Motion for Summary
27 Judgment (Doc. 40), are filed at Docs. 40-48.

1 had a direct financial interest in Norton's. (Doc. 40 at ¶ 6; Doc. 40 at Ex. 4, Resp. to
2 Interrog. 1-5.) At all times relevant to this matter, Defendant Nancy McDade owned 100%
3 of McDade & Sons, Inc., and was its sole officer and director; she had an ownership interest
4 in Norton's, the right and ability to direct and control activities at Norton's, and the right to
5 supervise its employees. (Doc. 40 at Ex. 4, Resp. to Interrog. 1-5; Doc. 57-1 at ¶¶ 2 and 3.)

6 Defendants do not have a license from BMI to publicly perform at Norton's any songs
7 within the BMI repertoire. (Doc. 40 at ¶ 18, Ex. 2 at ¶¶ 4, 13, and 19, Ex. 3, Resp. to Req.
8 for Admission 27.) Between February 2010 and May 2011, BMI repeatedly informed
9 Defendants of the need to obtain permission for public performances of copyrighted music
10 within BMI's repertoire. (Doc. 40 at ¶ 10.) BMI conveyed this information through
11 approximately twenty-nine letters, fifty-three telephone contacts, and at least one in-person
12 visit. (*Id.*) BMI offered to enter into a blanket license agreement with Defendants, but
13 Defendants declined to do so. (*Id.*) In March, April, and May 2011, BMI sent cease and
14 desist letters instructing Defendants to cease public performance of music within the BMI
15 repertoire. (Doc. 40 at ¶ 11.)

16 On June 10, 2011, BMI sent investigator James Snyder to visit Norton's and prepare
17 a report indicating whether copyright infringement was occurring there. (Doc. 40 at ¶ 14.)
18 During his visit, Snyder made an audio recording and later created a certified infringement
19 report of the BMI-licensed songs played at Norton's on June 10 and 11, 2011.⁴ (Doc. 40 at
20 ¶ 14, Ex. 2 at ¶¶ 14-15, and Exs. A and C.) In his report, Snyder personally identified eight
21 musical compositions that were performed at Norton's — "All My Ex's Live in Texas,"
22 "Baby Don't Get Hooked on Me," "Boot Scoot Boogie" a/k/a "Boot Scootin' Boogie,"
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24

25 ⁴ Plaintiffs prepared a schedule of information related to the musical compositions
26 at issue. (Doc. 40 at Ex. 1, ¶ 4 and Attachment A.) Two of the thirteen songs — "Baby
27 Don't Get Hooked on Me" and "Betty's Bein' Bad" — were performed after midnight and
28 are listed on the schedule as having been performed on June 11, 2011. (*Id.*)

1 “Brown Eyed Girl,” “Race is On” a/k/a “The Race is On,” “You Can Call Me Al,” “Shake”
2 a/k/a “The Shake,” and “Ring of Fire.” (Doc. 40, Ex. 2 at Ex. A.)

3 After Snyder submitted his report and the audio recording to BMI, Joannah Carr, a
4 BMI Performance Identification employee, reviewed the audio recording and confirmed the
5 eight musical compositions that Snyder had identified, and she identified five additional
6 musical compositions on the audio recording — “One Step Forward,” “Only Daddy That’ll
7 Walk the Line” a/k/a “The Only Daddy That’ll Walk the Line,” “Betty’s Bein’ Bad,”
8 “Eighteen Wheels and a Dozen Roses,” and “Fireman” a/k/a “The Fireman.” (Doc. 40 at
9 Ex. 2 at Ex. A.)

10 After BMI confirmed that all thirteen songs are part of its repertoire, on June 27 and
11 June 29, 2011, BMI sent letters to Defendants notifying them of the investigation and that
12 BMI believed copyright infringement had occurred at Norton’s on June 10 and 11, 2011.
13 (Doc. 40 at ¶ 19, Ex. 2 at ¶ 16 and Ex. B.) Defendants did not respond. (*Id.*)

14 **II. Summary Judgment Standard**

15 Federal Rule of Civil Procedure 56 authorizes the court to grant summary judgment
16 “if the movant shows that there is no genuine dispute as to any material fact and the movant
17 is entitled to judgment as a matter of law.”⁵ Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
18 *v. Catrett*, 477 U.S. 317, 322-23 (1986). A burden shifting analysis applies to motions for
19 summary judgment under Rule 56. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*
20 (*In re Oracle Corp. Sec. Litig.*), 627 F.3d 376, 387 (9th Cir. 2010).

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23 ⁵ Although Rule 56 was amended in 2010, the amendments did not alter the standard
24 for granting summary judgment. *See* Fed. R. Civ. P. 56 advisory committee’s note (2010
25 amendments) (“The standard for granting summary judgment remains unchanged.”) Because
26 the amendments merely sought “to improve the procedures for presenting and deciding
27 summary-judgment motions and to make the procedures more consistent with those already
28 used in many courts[,]” cases applying the prior version of Rule 56 remain applicable. *Id.*

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