UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

UMG RECORDINGS, INC., *et al.*, *Plaintiffs*, v. KURBANOV, *et al.*, *Defendants*.	Case No. 1:18-cv-00957-CMH-TCB

DEFENDANT'S OBJECTIONS TO MAGISTRATE JUDGE'S DECEMBER 16, 2021 REPORT AND RECOMMENDATION AS TO DAMAGES AND PERMANENT INJUNCTIVE RELIEF

Pursuant to Fed. R. Civ. P. 72(b), Defendant Tofig Kurbanov ("Mr. Kurbanov") hereby submits his objections to the Magistrate Judge's December 16, 2021 Report and Recommendation as to the award of damages to the Plaintiffs and the grant of permanent injunctive relief. In support thereof, Mr. Kurbanov states as follows.

INTRODUCTION

On December 16, 2021, following a default issued against Mr. Kurbanov, Magistrate Judge Theresa Carroll Buchanan entered a Report and Recommendation in which she recommended that this Court award Plaintiffs damages of almost $83 million and issue a worldwide permanent injunction against Mr. Kurbanov. Both recommendations, however, are in direct contravention of the law and should not be adopted by this Court.

In support of their request for damages and permanent injunctive relief, Plaintiffs chose not to provide the Court with evidence of actual damages, instead electing statutory damages under 17 U.S.C. §504. This was, of course, Plaintiffs' right. Having done so, however, it was incumbent

on Plaintiffs to provide evidence to the Court of actual instances of infringement by United States-based visitors to Mr. Kurbanov's websites, www.flvto.biz and www.2conv.com (the "Websites"), as statutory damages are premised on a certain amount being awarded to the Plaintiffs *for each infringement*.

Remarkably, though, despite submitting to the Court more than 450 pages worth of materials, Plaintiffs failed entirely to provide any evidence of the one thing that is a prerequisite to *any* recovery: namely, proof of the existence of even a single improper download of Plaintiffs' copyrighted materials within the United States. This is not mere hyperbole. The Plaintiffs produced *no evidence whatsoever* that even a single person in the United States ever utilized Mr. Kurbanov's Websites to improperly download one of their copyrighted songs.

In her Report and Recommendation, the Magistrate held improperly that Plaintiffs did not need to prove any infringements of their works because such proof was presumed by virtue of her having ordered the default against Mr. Kurbanov. In addition, the Magistrate incorrectly recommended that this Court award Plaintiffs duplicative damages pursuant to two overlapping statutes.

Finally, the Magistrate incorrectly recommended that this Cout issue a broad, worldwide injunction, which is in contravention of the Copyright Act itself as well as the limits on this Court's legal authority.

In further support of his Objection, Mr. Kurbanov states as follows.

ARGUMENT

I. The Magistrate Incorrectly Held That Plaintiffs Did Not Need to Prove Their Entitlement to Statutory Damages.

In their motion, Plaintiffs correctly noted that a successful Plaintiff in a copyright action (who has registered its copyrights) is entitled to elect to receive either an award of actual damages

or an award of statutory damages, as provided for by statute. *Plaintiffs' Request*, p. 14, *citing* 17 U.S.C. §504. For seemingly obvious reasons (namely that Plaintiffs were unable to prove that they suffered any actual damages from the alleged infringement),[1] Plaintiffs elected to receive statutory damages.

[1] *See, e.g.*, The Copia Institute, *The Sky is Rising 2019: A detailed look at the state of the entertainment industry*, pp. 2-3 (April 2019) https://skyisrising.com/TheSkyIsRising2019.pdf ("In January of 2012, we released the very first Sky is Rising report, highlighting how – despite numerous doom and gloom stories about the impact of the internet on the creative communities – nearly all of the actual data showed tremendous, and often unprecedented, growth in both earnings and creative output.... [S]tepping back and looking at the data, frequently from the industry itself, showed that the sky wasn't falling because of the internet – it was rising.... It has been over seven years since that first report, and plenty has changed, so it felt like time to revisit the original questions explored in that original report: how is the global market for entertainment faring – and is the sky now rising or falling? Has the internet decimated entertainment, or enabled a golden era? The data in this report show that, once again, the sky is rising. We are in, as Professor Joel Waldfogel has noted, a true 'Digital Rennaissance.' [Sic] No matter where you look, there are signs of an incredible abundance of not just creation of new content, but myriad ways to make money from that content. Contrary to clockwork complaints of content creation being killed off – all evidence points to an internet that has enabled stunning growth and opportunity for content. The internet has provided new tools and services that have enabled more creation, more distribution, more promotion, more access to fans and more ways to make money than ever before. There is almost no evidence we can find anywhere of the internet decreasing content creation or the size of any aspect of the content creation industry. If anything, the internet has opened up the opportunity for millions of new content creators to create, promote, distribute and profit off their works.... [T]here is no evidence whatsoever to support the idea that either content creators or the general public have been harmed by the internet revolution."); *Newsweek*, "Inside the Piracy Study the European Union Hid: Illegal Downloads Don't Harm Overall Sales" (Sept. 22, 2017) https://www.newsweek.com/secret-piracy-study-european-union-669436 ("Your illegal downloads of video games, top music acts and even e-books don't harm sales, according to a landmark report on piracy that the European Commission ordered but then buried when the findings didn't tell officials what they wanted to hear. The 300-page study offered the counterintuitive conclusion that illegal downloads actually help the gaming industry and have no negative impact on music sales by big stars or on e-book profits."); *BBC News*, "Music sales are not affected by web piracy, study finds" (March 20, 2013) https://www.bbc.com/news/technology-21856720 ("A report published by the European Commission Joint Research Centre claims that music web piracy does not harm legitimate sales.... They also found that freely streamed music provided a small boost to sales figures."); *TechDirt*, "GAO Concludes Piracy Stats Are Usually Junk, File Sharing Can Help Sales Studies" (April 13, 2010) https://tdrt.io/a7q ("The GAO's study unsurprisingly found that U.S. government and industry claims that piracy damages the economy to the tune of billions of dollars 'cannot be substantiated due to the absence of underlying studies.'

Plaintiffs based their request for statutory damages on their assertion that 1,618 copyrighted sound recordings were infringed upon by users of Mr. Kurbanov's Websites. Plaintiffs and their declarants conceded, however, that they are unable to state "the full extent of Plaintiffs' harm from Defendant's infringement." Plaintiffs' Reply, pp. 16-17, *citing* Declarations of Cohen, Lean, and McMullen. Understandably, Plaintiffs attributed their inability to calculate the "full extent" of their damages to Mr. Kurbanov's failure to cooperate with discovery in this case. If the relevant question had been *how many times* each of the 1,618 recordings were infringed, Plaintiffs might have had a point. However, the *scope* of the infringement of each recording only becomes relevant once Plaintiffs have first established that there has been *any* infringement of a given file by a website user within the United States. In other words, if Plaintiffs had proven that a given song had been downloaded by a user in the United States, then an entitlement to statutory damages would be triggered and the scope of the infringement of that song would be relevant to the Court's determination of the precise amount of statutory damages to be awarded. (The statute provides that, in general, an award can range between $750 and $30,000 per file infringed, though that amount can be increased to $150,000 for willful infringement, or reduced to $200 for innocent infringement).

Here, however, Plaintiffs failed to provide evidence that any of their copyrighted works were infringed by even one user of Kurbanov's Websites (much less by a user located in the United States). Indeed, the closest that Plaintiffs come to explaining their assertion that there are 1,618 copyrighted sound recordings at issue in this case is the declaration of their expert witness, Robert Schumann. Mr. Schumann does ***not*** say that he himself downloaded any of the works in suit from

---

The full GAO report ... not only argues that claims of economic impact have not been based on substantive science – but that file sharing can actually have a positive impact on sales....").

the Websites, but rather says that he "understand[s]" that the Plaintiffs' investigator did so. Schumann Declaration, ¶31 (Docket Entry 131-1). Oddly, though, Plaintiffs failed to submit a declaration from their investigator providing this Court with any first-hand evidence that such downloads took place or – ***crucially*** – that they took place from within the United States. *See, e.g., Elsevier Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 402-03 (D. Mass. 2011)(finding no actionable infringement to have occurred where Plaintiff's investigator downloaded copies of works from outside the United States because it "is well established that copyright laws generally do not have extraterritorial application…" and in "order for U.S. copyright law to apply, at least one alleged infringement must be completed entirely within the United States.")

The same holds true here. Plaintiffs provided the Court with no competent evidence from which the Court could conclude that *any* infringement took place at all in connection with the 1,618 works in suit, much less that such infringement took place within the boundaries of the United States. Without such evidence, the Magistrate could not properly find that Plaintiffs were entitled to any statutory damages, since the evidence of actual infringement did not exist.

In reaching her conclusion, however, the Magistrate held that Plaintiffs were absolved of having to provide evidence of the alleged infringements because such infringement could be presumed as a matter of law by virtue of the default entered against Mr. Kurbanov by the Court. *See* Report and Recommendation, p. 19 ("This entry of default judgment is equivalent to a finding of liability on all counts of Plaintiff's Complaint, including the violations alleged under the Copyright Act. … The Plaintiffs therefore do not have the burden of proving the elements of the alleged Copyright Act violations, and merely need to survive, as they have, a 12(b)(6) evaluation

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.