

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

HEART BEAT RECORDS, INC.,

Plaintiff

v.

DS MUSIC PRODUCTIONS, LLC,
ROSEMARY SCALLON A/K/A DANA,
AND DAMIEN SCALLON,

Defendants

CASE NO. 3:07-cv-00066-CRW-RAW

DS MUSIC PRODUCTIONS, LLC,
ROSEMARY SCALLON A/K/A DANA,
AND DAMIEN SCALLON,

Counterclaim Plaintiffs

v.

HEART BEAT RECORDS, INC.,
CHRISTIAN 1 STOP LLC, SUSAN STEIN,
DR. RONALD STEIN, AND PHILLIP
STEIN

Counterclaim Defendants

DEFENDANTS' TRIAL BRIEF

COME NOW the Defendants DS Music Productions, LLC, Rosemary Scallon a/k/a Dana, and Damien Scallon (“Defendants”), pursuant to Local Rule 16.2(d) and the Court’s Order of December 6, 2007 (Dkt. # 56), and hereby submit the following Trial Brief.

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I. BACKGROUND INFORMATION

A. PROCEDURAL BACKGROUND

On July 20, 2007, Plaintiff Heart Beat Records, Inc. ("Heart Beat") filed a Complaint (Dkt. # 1) against Defendants DS Music Productions, LLC, Rosemary Scallon a/k/a Dana, and Damien Scallon ("Defendants"). Heart Beat's original Complaint alleged copyright infringement (First), defamation/product disparagement/trade libel (Fifth¹), and unfair competition (Sixth²), and sought declaratory judgment as to the validity and ownership of various copyrights (Second), and declaratory judgment that Heart Beat had fulfilled all obligations with respect to the payment of royalties to Defendant Rosemary Scallon a/k/a Dana (Fourth³).

On September 7, 2007, Defendants filed an Answer and Counterclaim (Dkt. # 22), denying the allegations set forth in Heart Beat's original Complaint, and alleging against Heart Beat copyright infringement (Counterclaim II), unfair competition (Counterclaim III), invasion of privacy/misappropriation of likeness (Counterclaim IV), trademark infringement (Counterclaim V), conversion (Counterclaim VI), and breach of oral agreement (Counterclaim VIII), and seeking declaratory judgment as to the ownership of certain copyrights (Counterclaim I), and seeking an accounting (Counterclaim VII). On October 30, 2007, Defendants filed a first amended Answer and Counterclaim (Dkt. # 41), adding allegations of cybersquatting (Counterclaim IX), breach of fiduciary duty (Counterclaim X), and civil conspiracy (Counterclaim XI). Heart Beat answered the same on November 5, 2007 (Dkt. # 44).

¹ At present; this count as originally filed was numbered "Fourth".

² At present; this count as originally filed was fifth and had been mis-numbered "Fourth".

³ At present; this count as originally filed was numbered "Third".

On November 1, 2007, Heart Beat filed its first amended Complaint (Dkt. # 43), adding an allegation of breach of fiduciary duty (Ninth⁴) and seeking declaratory judgment as to the ownership of Heart Beat (Seventh⁵). Defendants answered the same on November 19, 2007 (Dkt. # 49), at which time certain of Defendants' counterclaims were also asserted against Susan Stein, Dr. Ronald Stein, Phillip Stein and Christian 1 Stop LLC, the same being answered on November 30, 2007 (Dkt. # 53).

On November 30, 2007, Susan Stein filed her counterclaims against Defendants (Dkt. # 54), alleging defamation, the same being answered (Dkt. # 58) by Defendants on December 18, 2007. On December 11, 2007, Dr. Ronald Stein, Phillip Stein and Christian 1 Stop LLC filed their counterclaims against Defendants (Dkt. # 57) alleging defamation (Count I) and tortious interference with a prospective business advantage (Count II), the same being answered (Dkt. # 62) by Defendants on January 2, 2008.

Also on January 2, 2008, Heart Beat filed its second amended Complaint (Dkt. # 61), adding allegations of Copyright Infringement (Third), and interference with a prospective business relationship (Eighth). In response thereto, Defendants on January 22, 2008 filed their Answer and Counterclaims (Dkt. # 63).

The parties submitted a joint waiver of jury trial (Dkt. # 64) on April 2, 2008. The remaining deadlines exist in this matter: June 2, 2008 at 10:00 a.m. – Telephonic final pre-trial conference. A bench trial in this matter is set to begin on June 9, 2008, at 9:00 a.m.

B. FACTUAL BACKGROUND

Defendant Rosemary Scallon a/k/a Dana ("Dana") is an accomplished Irish-born musician having gained international acclaim as both a secular and a Roman Catholic recording

⁴ At present; this count as originally filed was numbered "Seventh".

⁵ At present; this count as originally filed was numbered "Sixth".

artist. Dana has a distinguished political career as well, serving as an elected Member of the European Parliament from 1999-2004.

In or around 1988-1989, Dana, along with Dana's husband Defendant Damien Scallon ("Damien"), Dana's sister Susan Stein ("Susan"), and Dana's brother John Brown ("John") formed Plaintiff Heart Beat Records, Inc. ("Heart Beat"). Prior to Heart Beat's formation, Dana had been affiliated with various record companies. Heart Beat was the label under which Dana's musical recordings were produced, distributed and sold until 2005. Dana never entered into any written agreement with Heart Beat regarding any aspect of the relationship, including but not limited to the ownership of copyright or the payment of royalties. Dana granted permission to Heart Beat with respect to Dana's copyrighted works by way of a non-exclusive license.

Between 1989 and 2005 (the "Heart Beat years"), Dana recorded a number of albums⁶ on the Heart Beat label. Most of the albums featured Dana as a solo vocalist. Some of the albums featured spoken words by Damien's brother, Father Kevin Scallon. Dana's albums during the Heart Beat years were typically produced and engineered by another of Dana's brothers, Gerald Brown, who was an employee of Heart Beat. Gerald Brown may have contributed minor vocal and instrumental support on one or more of the albums. Heart Beat helped to market and promote Dana, both through record sales and live performances worldwide. It is beyond dispute that Dana represented, and ostensibly continues to represent, an overwhelming majority of Heart Beat's music catalog and accounts for a commensurate portion of its sales.

Strained by numerous influences, including the non-payment of royalty obligations and mounting corporate debt, the relationship between Dana and Heart Beat and its principals suffered tremendously during the latter portion of the Heart Beat years, family ties

⁶ By Defendants' tally, there are fifteen albums total: thirteen albums in dispute, and two albums not in dispute.

notwithstanding. Ultimately, Dana separated herself in all respects from Heart Beat, with which she never had a written agreement.⁷ In 2005, Dana and Damien formed Defendant DS Music Productions LLC ("DS Music") for the purpose of producing, distributing and selling Dana's musical recordings. This case arises out of a conflict central to the ownership of copyright in Dana's works produced during the Heart Beat years, and the parties' contentions as to if, how and to what extent each may continue to reproduce, distribute, market and sell Dana's recordings. This case also addresses the ownership of Heart Beat Records, Inc., a closely held corporation, in light of various purported transfers of ownership, for which there is also little if any supporting documentation. The remaining causes of action are related, directly or indirectly, to the parties' conduct during and immediately following the Heart Beat years.

II. DEFENDANTS' COUNTERCLAIM I AND HEART BEAT'S SECOND CLAIM FOR RELIEF - DECLARATORY JUDGMENT AS TO COPYRIGHT OWNERSHIP

Both Plaintiff and Defendants are seeking declaratory judgment on the same central issue: who owns copyright in various of Dana's sound recordings. Defendants submit that this determination will need to be made separately for each disputed work, and that each sound recording must be ruled to be one of the following:

- sole copyright owned by Dana
- sole copyright owned by Heart Beat Records, Inc. by assignment
- sole copyright owned by Heart Beat Records, Inc. as work made for hire
- sole copyright owned by Heart Beat Records, Inc. in part by assignment and in part as work made for hire
- joint copyright owned by Dana and Heart Beat Records, Inc. by assignment
- joint copyright owned by Dana and Heart Beat Records, Inc. as work made for hire
- joint copyright owned by Dana and Heart Beat Records, Inc. in part by assignment and in part as work made for hire

⁷ Oral license agreements pertaining to copyright may properly be terminated orally. *See, e.g., Vincent v. City Colleges of Chicago*, 485 F.3d 919, 922 (7th Cir. 2007).

- joint copyright owned by Dana and _____ (any person(s) other than Dana and Heart Beat)
- joint copyright owned by Heart Beat Records, Inc. by assignment and _____
- joint copyright owned by Heart Beat Records, Inc. as work made for hire and _____
- joint copyright owned by Dana, Heart Beat Records, Inc. and _____

The 'disputed works', in Defendants' view, are as follows:

NO.	ALBUM TITLE	YEAR	VOCALS BY FR. KEVIN SCALLON⁸	PRODUCED, ARRANGED and/or PERFORMED BY GERALD BROWN FOR HEART BEAT
1	Dana's Ireland	1991	No	Yes ⁹
2	The Rosary	1991/92	Yes	No
3	Lady of Knock	1992	No	Yes
4	Hail Holy Queen	1993	No	Yes
5	Say Yes	1993	No	Yes
6	Mother of Mercy: A Rosary of Healing	1995	Yes	Yes
7	Dana the Collection	1995/96	No	Yes ¹⁰
8	Forever Christmas	1997	No	Yes
9	Humble Myself	1997	No	Yes
10	The Stations of the Cross	1998	Yes	Yes
11	The Luminous Mysteries of the Rosary	2003	Yes	Yes
12	The Perfect Gift	2004	No	Yes
13	Little Baby: Songs for Life	2006	No	Yes

Defendants note that in response to Interrogatory No. 3, Heart Beat openly and unqualifiedly admitted that "no claim" is being made regarding the albums In Memory of Me (2005) and Good Morning Jesus (2007).

As a preliminary matter, Defendants assert that Counterclaim I is not time-barred, as it was filed within three years of the accrual of a claim in accordance with 17 USC § 507(b). In the

⁸ Admitted by Defendants to be joint works with Fr. Kevin, per Defendants' admission in response to Heart Beat's Requests for Admission Nos. 5-9.

⁹ Not an employee of Heart Beat at the time, per Heart Beat's admission in response to Defendants' Request for Admission No. 18.

¹⁰ Heart Beat claims that Brown produced "all tracks", but Defendants believe that at least one track on this album ("All Kinds of Everything (1970)") was not produced by him.

interest of brevity, Defendants incorporate by reference and re-state the arguments originally presented in their Post-Hearing Brief in Resistance to Plaintiff's Motion for Preliminary Injunction (Dkt. # 19) at pp. 3-8.

A. DANA OWNS AT LEAST A JOINT COPYRIGHT IN ALL OF THE DISPUTED WORKS, THEREBY WARRANTING JUDGMENT IN HER FAVOR ON DEFENDANTS' COUNTERCLAIM I AND HEART BEAT'S SECOND CLAIM FOR RELIEF

1. Works of Sole Authorship¹¹

Ownership of a work, such as a master recording or other physical embodiment, is not equivalent to ownership of copyright. *See, e.g.*, 17 USC § 202. Copyright initially vests in the author (*see* 17 USC § 201(a)), unless the work is one made for hire (*see* 17 USC § 201(b)). In the former case, essentially the only instance in which ownership of copyright may be transferred away from a living author is where there is a written assignment, signed by the author, conveying the same to a third-party. *See, e.g.*, 17 USC § 204(a). The requirements of a writing under § 204(a) have been found similar to the requirements under the Statute of Frauds, including a requirement that the writing identify the subject matter. *Brown v. Flowers*, 297 F.Supp.2d 846, 853 (M.D.N.C. 2003).

As to the latter case, a work is one 'made for hire' where either (1) it is prepared by an employee within the scope of his or her employment; or (2) where the work is specially ordered or commissioned and the parties expressly so agree in writing. *See* 17 USC § 101. Therefore, in the absence of an express written agreement, the only circumstance in which copyright does not belong to the author is where the author was an employee acting in the scope of employment.

The evidence will convincingly establish that Dana never signed any instrument conveying copyright to Heart Beat. Thus, in order for the Court to determine that copyright over

¹¹ Disputed Works Nos. 1, 3-5, 7-9, 12-13.

any work of Dana's authorship vested in Heart Beat, the Court must find that Dana was an employee of Heart Beat and was working within the scope of such employment at the time the disputed work was authored. As will be shown, the great weight of authority compels a finding that she was not.¹²

In *Community for Creative Non-Violence v. Reid*, 490 US 730 (1989), the US Supreme Court imported from the law of agency a number of criteria to be considered when determining whether, for purposes of the Copyright Act, a relationship could be categorized as that of employer-employee. The *Reid* factors include "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." 490 US at 751-2 (footnotes omitted).

The Court of Appeals for the Second Circuit has held that five of the *Reid* factors merit special consideration:

We begin our analysis by noting that the *Reid* test can be easily misapplied, since it consists merely of a list of possible considerations that may or may not be relevant in a given case. *Reid* established that no one factor was dispositive, but gave no direction concerning how the factors were to be weighed. It does not

¹² For a detailed and thorough scholarly analysis of works made for hire in the context of the music recording industry, see Daniel Gould, "Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry", 31 COLUM. L.J. 91, 109-110 (2007)("Most commentators have concluded that recording artists will not be deemed by courts to be employees of record labels under the Reid and Aymes line of cases"); Scott T. Okamoto, "Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free", 37 USF L. REV. 783, 796-801 (2003)("[U]nder the Aymes test and applying the Reid factors, a recording artist will likely not be found to be an employee of the record company for the purposes of the work for hire doctrine.")

necessarily follow that because no one factor is dispositive all factors are equally important, or indeed that all factors will have relevance in every case. The factors should not merely be tallied but should be weighed according to their significance in the case.

...

Some factors, therefore, will often have little or no significance in determining whether a party is an independent contractor or an employee. In contrast, there are some factors that will be significant in virtually every situation. These include: (1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party. *These factors will almost always be relevant and should be given more weight in the analysis*, because they will usually be highly probative of the true nature of the employment relationship.

Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992)(emphasis added).

In the present case, the evidence will show that each of the *Aymes* factors favors Dana with respect to the determination of whether any of Dana's works were made for hire. With respect to (1), Heart Beat exercised only *de minimis* control over Dana's work. Even assuming that Heart Beat supplied producers, engineers and backing musicians, Dana was free to artistically express herself through her music. Turning to *Aymes* factor (2), Dana's talents and skills are of course natural to her person and cannot in any way be attributed to Heart Beat. Regarding *Aymes* factors (3) and (4), Dana was not paid a salary by Heart Beat, and Heart Beat did not treat Dana as an employee for any tax purposes whatsoever.¹³ Finally, *Aymes* factor (5) absolutely favors Dana because there is no evidence of any agreement (i.e., a record contract) that Dana was obligated to record any number of albums or that Dana's responsibilities could be unilaterally expanded by Heart Beat.

Even considering the remaining *Reid* factors, there is no escaping the conclusion that

¹³ "The importance of these two factors is underscored by the fact that every case since *Reid* that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes." *Aymes*, 980 F.2d at 863 (emphasis added).

Dana was at all relevant times an independent contractor and not an employee vis-à-vis Heart Beat. Dana was the source of the 'instrumentalities and tools', namely her vocal and songwriting talents. Dana was paid not through a salary or payroll, but instead through advances and royalties. To the extent that the recordings were produced at Heart Beat's recording facilities, and the extent that Heart Beat was regularly engaged in the music business, Defendants concede that these factors favor Heart Beat. On balance, however, Heart Beat simply cannot produce evidence that would refute Defendants' overwhelming evidence that, under *Reid*, Dana was not an employee and that her recordings were not works made for hire.

In the absence of a finding of joint authorship, then, Dana is the sole author and sole copyright owner of the disputed works, and an Order declaring the same is proper.

2. Works of Joint Authorship¹⁴

The only possible claim Heart Beat could have to copyright is where works were jointly prepared, and a joint author other than Dana either assigned copyright to Heart Beat in writing, or was an employee of Heart Beat acting in the course of his or her employment.

A co-authorship claimant must establish that each co-author (1) made independently copyrightable contributions to the work; and (2) the authors fully intended there to be co-authorship. *Price v. Fox Entertainment Group, Inc.*, 473 F.Supp.2d 446, 454 (S.D.N.Y. 2007). Mere collaboration alone is not enough. *Id.* The contribution of each joint author must itself be independently copyrightable. *Id.*, citing *Thomson v. Larson*, 147 F.3d 195, 200 (2d. Cir. 1998).

As to the intent element, "[t]he touchstone of the statutory definition [of joint authorship] is the intention at the time the writing is done that the parts be absorbed or combined into an integrated unit." *Price v. Fox Entertainment Group, Inc.*, 473 F.Supp.2d 446, 454 (S.D.N.Y.

¹⁴ Disputed Works Nos. 2, 6, 10-11.

2007), *citing Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998). Criteria to be considered can include "billing and credit, decision-making, and the right to enter into contracts." *Price*, 473 F.Supp.2d at 454, *citing Thomson*, 147 F.3d at 201. The evidence at trial will show that with respect to the disputed works, no employee of Heart Beat received such 'billing and credit', enjoyed decision-making authority or had a right to independently contract.

Co-authors/co-owners of a copyright in a work each own an undivided equal interest in the work. As such, each may freely exercise the exclusive rights conferred by statute (e.g., reproduce, prepare derivatives, distribute, perform, display), grant third-parties a license to do the same, and unilaterally enforce copyright. Co-owners are subject to an obligation of accounting to the other joint owner(s) for any profits made. "One joint owner is accountable to the others for their rateable share of the profits that he has realized from licensing of the work." *Guardian Music Corp. v. Guercio Enterprises, Inc.*, 459 F.Supp.2d 216, 221 (S.D.N.Y. 2006), *citing* Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT, § 6.12[B] (2006). Co-authors/co-owners may only grant, of course, *non-exclusive* licenses so as not to diminish the rights of their co-owners. *See, e.g., Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007).

Because of this conferral of a substantial property right, the mere involvement of one or more third-parties in the preparation of a work is not enough to establish joint authorship.

A 'joint work' under the Copyright Act is one prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.'...In order to find joint authorship, the Court must also find that the putative co-authors, at some time, shared an intent to be co-authors.

Ulloa v. Universal Music and Video Distribution Corp., 303 F.Supp.2d 409, 418 (S.D.N.Y. 2004)(citation omitted). Moreover,

equal sharing of rights should be reserved for relationships in which all participants *fully intend to be joint authors*. The sharing of benefits in other

relationships involving assistance in the creation of a copyrightable work can be more precisely calibrated by the participants in their contract negotiations regarding division of royalties or assignment of shares of ownership of the copyright.

Id. (emphasis added). Heart Beat had no such negotiations with Dana.

Notwithstanding Heart Beat's self-serving claims that its employee Gerald Brown "produce[d], arrange[d] and/or performe[d]" some or all of tracks on certain of the disputed works (*see* Heart Beat's Response to Interrogatory No. 3), merely engineering or producing songs is not per se sufficient to establish joint authorship of the recordings. This is particularly so where the only basis for the claim of joint authorship is "a reference...to [putative co-author's] creative contribution [as] 'work[ing] as a recording engineer and producer of the tracks produced pursuant to the Hectic Records partnership.'" *Brown v. Flowers*, 297 F.Supp.2d 846, 852 (M.D.N.C. 2003)(noting that merely contributing ideas is not enough, and that "the audience appeal of the work [must] turn[] on both contributions"); *see also Ulloa*, 303 F.Supp.2d at 417-8 (noting only that such contributions by "*may* result in a joint ownership", and refusing to extend joint authorship to a guest present in a recording studio who created a countermelody and spontaneously began singing)(emphasis in original). Moreover, by Heart Beat's admission, Gerald Brown was not an employee when he made his contribution to disputed work (1).

The evidence at trial will demonstrate that Gerald Brown's contributions were neither independently copyrightable nor intended to be merged, that Gerald Brown is not a co-author, and that Dana is the sole copyright owner in the disputed works not involving Fr. Kevin. In any event, Dana owns at least a joint copyright in each of the disputed works in this case, and an Order declaring no less than the same is warranted.

3. Uncertainty Regarding the Father Kevin Agreement

Heart Beat will introduce evidence of a signed agreement with Fr. Kevin Scallon in

which Fr. Kevin purportedly assigned his copyright interest in disputed works (2), (6), (10) and (11) to Heart Beat in exchange for future payment of royalties. However, there is evidence that will call into question the legitimacy and efficacy of the written agreement, including evidence that the document, while dated June 1, 1991, was not signed until some time in 1995. Fr. Kevin expressly rescinded the agreement in July, 1998. Thus, Defendants submit that the Court must consider the possibility that Heart Beat has a joint copyright interest in some, but not all, of the disputed works in which Fr. Kevin participated as an author.

It is beyond dispute that agreements affecting the ownership of copyright *must* be *in writing*. See, generally, 17 USC § 204(a); *Lyrick Studios, Inc. v. Big Idea Prod's, Inc.*, 420 F.3d 388, 392 (5th Cir. 2005) (“a transfer of copyright is simply ‘not valid’ without a writing.”) However, *post facto* writings may be upheld insofar as they “memorialize or confirm an earlier oral agreement.” *Davis v. Blige*, 505 F.3d 90, 101 (2d Cir. 2007); see also *Billy Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003).

Purely retrospective transfers, however, are disfavored, especially where fewer than all co-owners are transferors. To the extent that the rights of a third-party co-owner to proceed against the grantee would be adversely affected, such a transfer is invalid. See, e.g., *Davis*, 505 F.3d at 101 *et seq.* “Licenses and assignments...are prospective; they permit use by a non-owner who would not otherwise have a right to use the property....A retroactive license or assignment purports to authorize a past use that was originally unauthorized....A retroactive license or assignment that purports to eliminate the accrued causes of action for infringement held by a co-owner who is not party to the license or agreement also violates the fundamental principle of contract law prohibiting the parties to a contract from binding nonparties....Accordingly, **we hold that a license or assignment in copyright can only act prospectively.**” *Id.* at 101-4

(emphasis added).

Therefore, Defendants submit that the Court may reasonably find that the only disputed works for which Heart Beat can properly claim a joint interest in copyright via assignment from Fr. Kevin are those created between 1995 (when it was actually signed) and 1998 (when it was expressly rescinded), while the purported agreement was in effect: (6) Mother of Mercy: A Rosary of Healing, and (10) The Stations of the Cross. In other words, disputed works (2) The Rosary and (11) The Luminous Mysteries of the Rosary are not subject to any written assignment, and copyright therein is jointly owned by Dana and Fr. Kevin.

4. Terminability of Assignments

In the event that the Court finds that copyright ownership in any of the disputed works was transferred from the author to another party by assignment, Defendants request that the Court's Order expressly find that such assignments are fully subject to termination by the author pursuant to 17 USC § 203.

III. DEEFNDANT'S COUNTERCLAIM II - COPYRIGHT INFRINGEMENT

A. INsofar as Heart Beat does not own a valid copyright, Heart Beat is liable for infringement and Defendants are entitled to judgment in their favor for Counterclaim II

The evidence will show that, at least as late as mid-2005, Dana had terminated any and all licenses, agreements or other grants under which Heart Beat could colorably have had authorization to reproduce, distribute or sell Dana's copyrighted works. Therefore, any such conduct by Heart Beat occurring after mid-2005, in works for which Heart Beat does not have copyright ownership, constitutes copyright infringement under 17 USC § 501, for which Dana is entitled to collect damages. Moreover, any such conduct by Susan Stein, Dr. Ronald Stein, Phillip Stein, or Christian 1 Stop, LLC not otherwise lawful under the first sale doctrine also

constitutes copyright infringement.

IV. DEFENDANTS' COUNTERCLAIMS III, IV, V AND IX - 15 USC § 1125; INVASION OF PRIVACY/APPROPRIATION OF LIKENESS

The gravamen of Defendants' claims under the Lanham Act and common law invasion of privacy/right of publicity¹⁵ is that Heart Beat and/or Christian 1 Stop, LLC improperly trading on Dana's name, likeness and good will, thereby creating a likelihood of confusion as to Dana's present affiliation, connection or association with Heart Beat and/or Christian 1 Stop, LLC, in violation of various provisions of 15 USC § 1125. Defendants do not deny a past affiliation between Dana and Heart Beat, nor do Defendants contend that Heart Beat or any other party is or should be barred from the nominative fair use of Dana's name and likeness in conjunction with the lawful sale of Dana's recordings. However, the evidence will show that, particularly with respect to on-line advertising and the use of potentially confusing Internet domain names, the actions of Heart Beat and/or Christian 1 Stop, LLC are actionable. For example, Heart Beat claims that it owns the copyright to all or a substantial part of the Dana music catalogue, a statement that may alone be sufficient to create a likelihood of confusion or mistake as to the origin, sponsorship, approval or availability of Dana's goods.

With respect to cybersquatting under 15 USCA § 1125(d), Defendants have a burden to show that one or both of Counter-Defendants Phillip Stein and Christian 1 Stop LLC "has a bad faith intent to profit from [Dana's trade] mark, including a personal name which is protected as a mark under this section; and (ii) registers, traffics in, or uses a domain name that-- (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or

¹⁵ Under RESTATEMENT (SECOND) OF TORTS § 652C, "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Comment *b* thereto recognizes that "[t]he common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose."

confusingly similar to that mark." Evidence of bad faith includes the alleged infringer's intent to divert consumers to a site that could harm the goodwill associated with the mark. The Internet domain names and accompanying Web-sites at issue are DSMUSICSHOP.COM,¹⁶ DSMUSICSTORE.COM,¹⁷ and SHOPDSMUSIC.COM,¹⁸ each domain having been registered on or about October 16, 2006, after Defendant DS Music Productions LLC was formed and well into the present dispute. Each of these domain names is identical or confusingly similar to the trade name of Defendant DS Music Productions, LLC, or a substantial portion thereof. Defendants will present evidence that Internet searching for Dana will in fact divert consumers away from Defendants' site, and that this was a carefully selected marketing strategy employed by Christian 1 Stop, LLC, intentionally and in bad faith.

Finally, as respects Defendants' common law claim for violating Dana's right of publicity, the Northern District of Iowa has held that a plaintiff must prove "(1) the defendant appropriated the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose; (2) the plaintiff can be identified from the publication; and (3) there was some advantage or benefit to the defendant." *Sharp-Richardson v. Boyds Collection, Ltd.*, 1999 WL 33656875, * 15 (N.D.Iowa 1999), *citing Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir 1994). "The 'right of publicity' protects pecuniary, not emotional interests...and is designed to protect the commercial interests of celebrities in their identities. Such celebrities

¹⁶ Registered in the name of "Support Service" in Donnellson, IA, the same small town as Heart Beat and the Counter-Defendants, and having a contact e-mail address in care of "c1stopshop.com".

¹⁷ Registered in the name of "Customer Service" in Donnellson, IA, and having a contact e-mail address (in care of Team AMD) that is similar in name to Phillip Stein's former employer (AMD).

¹⁸ Registered in the name of "Customer Service" in Donnellson, IA, and having a contact e-mail address (in care of Team AMD) that is similar in name to Phillip Stein's former employer (AMD).

have an exclusive legal right to control and profit from the commercial use of their name, personality, and identity." *Id.* (citations omitted). Defendants state that the evidence will clearly demonstrate that Heart Beat's and/or Christian 1 Stop, LLC's unauthorized use of Dana's name and likeness satisfies these requirements, and that Defendants are entitled to judgment accordingly.

V. DEFENDANTS' COUNTERCLAIM VI - CONVERSION

Under Iowa law, "the exercise of 'wrongful control or dominion over another's property contrary to that person's possessory right to the property' is conversion. *Agriliance, L.L.C. v. Farmpro Services, Inc.*, 328 F.Supp.2d 958, 965 (S.D.Iowa 2003), citing *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999). "[N]o conversion may be found where the exercise of control was not wrongful. Furthermore, liability for conversion may only be imposed when the intentional and wrongful interference with the property is so serious that the actor may justly be required to pay full value." *Hanson v. Hancock County Memorial Hosp.*, 938 F.Supp. 1419, 1438 (N.D.Iowa 1996)(citations omitted).

"Citing § 222A of the Restatement, Iowa courts list the following factors as appropriate to consider whether the interference is sufficiently serious to find a conversion:

- (a) the extent and duration of the actor's exercise of dominion or control;
- (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
- (c) the actor's good faith;
- (d) the extent and duration of the resulting interference with the other's right of control;
- (e) the harm done to the chattel;
- (f) the inconvenience and expense caused to the other.

Id. at 1438-9.

Defendants' evidence will demonstrate that Heart Beat's conduct with respect to the physical master recordings owned by Dana - to be distinguished from Dana's claimed copyright

ownership over sound recordings - and persistent refusal to return various masters upon demand constitutes wrongful conversion.

VI. DEFENDANTS' COUNTERCLAIMS VII, VIII - ACCOUNTING BETWEEN SHAREHOLDERS, BREACH OF AGREEMENT; AND HEART BEAT'S FOURTH CLAIM FOR RELIEF - DECLARATORY JUDGMENT AS TO PAYMENT OF ROYALTIES

A. ABSENT AN ACCOUNTING, DECLARATORY JUDGMENT IS UNAVAILABLE TO EITHER PARTY AS TO THE PAYMENT OF ROYALTIES

Defendants assert two, independent grounds upon which the Court should order an accounting by Heart Beat. First, to the extent that joint ownership is found as to the copyright in any disputed work, Dana as co-owner is entitled to an accounting for profits. *See* Section II(A)(2), *supra*. Second, as shareholders in an Iowa corporation, Dana and/or Damien¹⁹ are entitled by statute to annual financial statements. *See* IOWA CODE § 490.1620, Financial statements for shareholders. For these reasons, Defendants are entitled to an accounting for, *inter alia*, all sales made by Heart Beat of any disputed work or other work in which Defendants have an interest, as well as all royalties paid and royalty payments due and outstanding. Only then can a determination be made as to whether Heart Beat is entitled to a declaratory judgment that its royalty payment obligations have been fulfilled, and only then can Defendants' cause of action for breach by Heart Beat of its royalty payment obligations be resolved.

VII. DEFENDANTS' COUNTERCLAIM X - BREACH OF FIDUCIARY DUTY

As shareholders, Defendants Dana and/or Damien assert that Susan Stein and Dr. Ronald Stein, as directors and/or officers of Heart Beat Records, Inc., are under both a common law and a statutory fiduciary duty to shareholders. *See, e.g.*, IOWA CODE §§ 490.830 Standards of conduct for directors, 490.842 Standards of conduct for officers. The evidence at trial will

¹⁹ Disputed ownership in Heart Beat Records, Inc. will be discussed at Section XIII, *infra*.

demonstrate that through usurping corporate opportunity, denying shareholders' requests for accounting, violating an oral agreement with Dana regarding the payment of royalties, operating a discount music sales web-site at a confusingly similar Internet domain, infringing copyright and conversion, Susan Stein and Dr. Ronald Stein have, with malice and in bad faith, breached this duty.

VIII. DEFENDANTS' COUNTERCLAIM XI - CIVIL CONSPIRACY

“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he does a tortious act in concert with the other or pursuant to a common design with him....” RESTATEMENT (SECOND) OF TORTS § 876(a) (1979). Expanding on these principles, the Supreme Court of Iowa has explained that “[a] conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful.” *Brown v. Kerkhoff*, 504 F.Supp.2d 464, 525 (S.D.Iowa 2007).

A prerequisite to a conspiracy is an agreement between at least two persons to engage in conduct resulting in a wrong against another. *Id.* The agreement alleged “must involve some mutual mental action coupled with an intent to commit the act that causes injury.” *Id.* A plaintiff must allege “knowing and voluntary participation in a common scheme [by each defendant] to take action, lawful or unlawful, that ultimately subjects the actor to liability to another.” By contrast, mere “[s]peculation, relationship, or association and companionship do not establish a conspiracy.” *Id.* (citations omitted).

Because “[c]ivil conspiracy is not in itself actionable” but “is merely an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert,” another prerequisite to relief is the existence of “acts causing injury

undertaken in furtherance of the conspiracy.” It is not necessary for the underlying wrongful act to be an intentional tort, but it must be in some way actionable in the absence of the conspiracy. The conspiracy must also result in some cognizable harm to the plaintiff. “[U]nless actual damage has resulted from something done by one or more of the conspirators in furtherance of the object of the conspiracy, no civil action lies against anyone.” *Id.* at 526 (citations omitted).

Defendants assert that the foregoing acts by Heart Beat, Susan Stein, Dr. Ronald Stein, Phillip Stein, and/or Christian 1 Stop, LLC constitute a civil conspiracy, substantially as pleaded in Defendants' Counterclaim, and that Defendants are entitled to recover damages therefor.

IX. HEART BEAT'S FIRST CLAIM FOR RELIEF - COPYRIGHT INFRINGEMENT

A. EVEN IF HEART BEAT'S JOINT COPYRIGHT REGISTRATIONS ARE VALID, A JOINT COPYRIGHT OWNER CANNOT BE LIABLE FOR INFRINGEMENT, AND HEART BEAT'S FIRST CLAIM FOR RELIEF MUST FAIL AS A MATTER OF LAW

In April, 2005, as the Heart Beat years were nearing a rather disharmonious conclusion, Heart Beat registered a number of the disputed works with the US Copyright Office. In light of the circumstances, and the fact that Heart Beat had not previously registered any works, Defendants presume that this step was deliberately taken to enhance Heart Beat's position in its dealings with Dana and to posture for anticipated litigation. Heart Beat identified itself as the author/claimant on the applications for registration, and identified Dana's sound recordings as works made for hire.

Defendants submit that Heart Beat's copyright registrations are invalid, as the works were most certainly not made for hire, and Heart Beat was not an "owner" entitled to register Dana's works of sole authorship under the Copyright Act. Defendants believe that Heart Beat does not own a joint copyright in any work(s) otherwise entitling it to registration. Any purported registrations thereof would of course be invalid and of no legal effect.

Even if the Court should find one or more works of joint authorship, Heart Beat's infringement claims against Dana must fail as a matter of law because she is a joint copyright owner and thus cannot be liable for infringement. *See, e.g., Weissmann v. Freeman*, 120 F.R.D. 474, 475 (S.D.N.Y. 1988); *SBK Catalogue Partnership v. Orion Pictures Corp.*, 723 F.Supp. 1053, 1062 (D.N.J. 1989).

X. HEART BEAT'S THIRD CLAIM FOR RELIEF - COPYRIGHT INFRINGEMENT

A. HEART BEAT'S THIRD CLAIM FOR RELIEF MUST FAIL AS A MATTER OF LAW

In its Second Amended Complaint (Dkt. # 61), filed on January 2, 2008, Heart Beat for the first time alleged copyright infringement against Defendants arising out of Defendants' "unauthorized" copying of "the copyrighted artwork associated with Heart Beat's copyrighted recordings in connection with their offering for sale". *See* Dkt. # 61 at pp. 4-5. The subject "artwork" includes jackets and packaging. *Id.* However, Heart Beat has not offered copies of any registration certificates, nor has Heart Beat presented any evidence or even any indication that the 'artwork' is *registered*, which of course is a prerequisite to suit on infringement. *See, e.g., 17 USC § 411(a)*. The failure to do so is fatal to Heart Beat's claim. *See, e.g., Burns v. Rockwood Distributing Co.*, 481 F.Supp. 841, 845 (N.D.Ill. 1979)("The complaint in the present case does not include a copy of the registration certificate, nor has compliance with the registration provisions of the Copyright Act otherwise been indicated. Said complaint, therefore, is defective and *must be dismissed.*")(emphasis added).

XI. HEART BEAT'S FIFTH CLAIM FOR RELIEF - DEFAMATION/PRODUCT DISPARAGEMENT/TRADE LIBEL; SUSAN STEIN'S COUNTERCLAIM AND RONALD STEIN, PHILLIP STEIN AND CHRISTIAN 1 STOP, LLC'S COUNTERCLAIM COUNT I - DEFAMATION

"Disparagement of Quality-Trade Libel" is discussed in RESTATEMENT (SECOND) OF

TORTS § 626, which states: The rules on liability for the publication of an injurious falsehood stated in § 623A [One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity] apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property." *Cuba's United Ready Mix, Inc. v. Bock Concrete Foundations, Inc.*, 785 S.W.2d 649, 651 (Mo.App. S.D. 1990), *cited with approval in Brown v. Popular Mechanics*, 37 F.3d 1503 (8th Cir. 1994).

Heart Beat can introduce no evidence at trial that Defendants acted either with knowledge of falsity or in reckless disregard of the truth. As set forth herein, and as will be demonstrated at trial, Defendants own at least a joint copyright - and in many instances a sole copyright - over the disputed works. Defendants' actions have at all times been in good faith and under a belief that their copyright in Dana's sound recordings would be vindicated. Therefore, a showing of trade libel cannot be made, and judgment should be rendered in favor of Defendants.

As for the Counter-Defendants' claims of defamation, "to establish a prima facie case of libel the plaintiff must show the defendant (1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to the plaintiff." *Johnson v. Nickerson*, 542 N.W.2d 506, 510 (Iowa 1996). Moreover, the plaintiff "ordinarily must prove that the statements at issue were made with malice, were false, and caused damage." *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W.2d 410, 418 (Iowa 1997), *citing Jenkins v. Wal-Mart Stores*,

Inc., 910 F.Supp. 1399, 1425 (N.D.Iowa 1995)(emphasis added). The evidence at trial will establish that Defendants' statements were not false, but rather were made in good faith on the belief that Dana's copyright in her recordings was being violated.

Defendants also assert that neither Heart Beat nor Susan Stein, Ronald Stein, Phillip Stein or Christian 1 Stop LLC have introduced any credible evidence that would support a claim for injury due to the alleged conduct, let alone evidence of damages. Furthermore, the Counter-Defendants have unclean hands when it comes to the publication of accusatory statements about the deterioration of the parties' relationship. The evidence at trial will show that Counter-Defendant Phillip Stein communicated pseudonymously with Defendant Damien Stein regarding certain aspects of the dispute, essentially goading Defendants into taking steps to protect and ultimately vindicate Dana's copyright interests. The evidence will also reveal that Phillip Stein himself engaged in a written smear campaign against Defendants within the industry.

XII. HEART BEAT'S SIXTH CLAIM FOR RELIEF - 15 USC § 1125

Defendants first note the entirety of Heart Beat's pleading under the Lanham Act:

39. Defendants' conduct constitutes a violation of the Lanham Act (15 U.S.C. § 1125).

Dkt. # 61 at pp. 7-8. This is deemed by Defendants to be woefully inadequate for purposes of assessing the merits or veracity of Heart Beat's Complaint arising thereunder. Section 43 of the Lanham Act contains numerous provisions relating to, among other things, false designations of origin, false descriptions, trademark dilution, unfair competition, passing off, and cybersquatting. *See* 15 USC § 1125. Nevertheless, Defendants assert that Heart Beat will introduce no evidence that would support a § 1125 cause of action, as Defendants have not aligned or falsely aligned themselves with Heart Beat (obviously, for in reality there has been a separation), and Defendants have likewise not registered an Internet domain or web-site that trades on Heart

Beat's name or good will.

XIII. HEART BEAT'S SEVENTH CLAIM FOR RELIEF - DECLARATORY JUDGMENT AS TO OWNERSHIP OF HEART BEAT RECORDS, INC.

Defendants assert that there is a fundamental disagreement in this case as to the present ownership status of Heart Beat Records, Inc. The evidence at trial will demonstrate that Heart Beat does not maintain comprehensive records of stock ownership. The evidence will further demonstrate that, at a minimum, Defendants Dana and Damien, husband and wife, own fifty percent (50%) of the outstanding shares in Heart Beat Records, Inc., and an order of declaratory judgment holding the same is sought.

XIV. HEART BEAT'S EIGHTH CLAIM FOR RELIEF AND RONALD STEIN, PHILLIP STEIN, AND CHRISTIAN 1 STOP LLC'S COUNTERCLAIM COUNT II - TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

Under Iowa law, in order to succeed on a claim of intentional interference with prospective business advantage, a plaintiff must allege and prove the following:

1. The plaintiff had a prospective contractual [or business] relationship with a third person.
2. The defendant knew of the prospective relationship.
3. The defendant intentionally and improperly interfered with the relationship in one or more particulars.
4. The interference caused either the third party not to enter into or to continue the relationship or the interference prevented the plaintiff from entering into or continuing the relationship.
5. The amount of damage.

Brown v. Kerkhoff, 504 F.Supp.2d 464, 551 (S.D.Iowa 2007), citing *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 283 (Iowa 1998).

In *Financial Marketing Services, Inc. v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 450, 458 (Iowa 1999), the Iowa Supreme Court identified the following factors to be considered in determining whether interference is improper: "(a) the nature of the actor's

conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties." More importantly, "[t]he basic focus of the analysis is 'whether the actor's conduct was fair and reasonable under the circumstances.'" *Id.*, citing *Toney v. Casey's Gen. Stores, Inc.*, 460 N.W.2d 849, 853 (Iowa 1990), quoting RESTATEMENT (SECOND) OF TORTS § 767, comment j (1979)(emphasis added).

For the reasons set forth throughout the present Brief, Defendants believe that neither Heart Beat nor Ronald Stein/Phillip Stein/Christian 1 Stop LLC can prove that Defendants "improperly" interfered with any business relationships. Defendants have at all times maintained a good faith belief that Dana was at least a joint - and in many instances the sole - copyright owner over the disputed works, and that the actions by any third-party (including Heart Beat and Christian 1 Stop) that were inconsistent with or reasonably perceived to be inconsistent with Dana's exclusive rights (and those of her co-authors, in the case of joint works) constituted unlawful infringement. Copyright, first provided for in Art. I, Section 8 of the U.S. Constitution²⁰ and later embodied by Congress in the Copyright Act²¹, is precisely the type of 'social interest' that should be accorded latitude in a determination of propriety. Accordingly, Defendants' motives herein were pure and in the spirit of giving full protective effect to Dana's copyright, and in any event were neither 'improper' nor 'unreasonable under the circumstances'. Defendant is thus entitled to judgment in its favor on Heart Beat's eighth claim for relief and

²⁰ "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

²¹ 17 USC § 101 *et seq.*

Ronald Stein/Phillip Stein/Christian 1 Stop LLC's counterclaim count II.

XV. HEART BEAT'S NINTH CLAIM FOR RELIEF - BREACH OF FIDUCIARY DUTY

In Paragraph 51 of its Ninth Claim for Relief Heart Beat asserts that "Damien has at all relevant times been a shareholder of Heart Beat and has at various time been a director and officer of Heart Beat." Dkt. # 61 at p. 9 (emphasis added). At Paragraph 52, Heart Beat asserts that "Dana claims to be a shareholder of Heart Beat." *Id.* (emphasis added). Heart Beat goes on to allege, at Paragraph 53, that "Damien and/or Dana have breached their fiduciary duty..." *Id.*

It is axiomatic to say that there can be no breach in the absence of a duty. Iowa law imposes a fiduciary duty on directors (IOWA CODE § 490.830) and officers (IOWA CODE § 490.842), but not on shareholders. Therefore, as a matter of law, Dana cannot have breached any such duty. Turning to Damien, in the absence of a more specific pleading, and credible evidence supporting the same, that at the time of any specific act or 'conduct' Damien was in fact a director or officer, and that such act or 'conduct' proximately caused the harm complained of, Defendants do not believe that a cause of action for breach of fiduciary duty has been stated.

XVI. CONCLUSION

For all of the reasons set forth herein, there is substantial evidence in support of Defendants in each of their claims against Heart Beat, Susan Stein, Ronald Stein, Phillip Stein and Christian 1 Stop, LLC, respectively. There is also substantial evidence in support of Defendants in each claim raised against them by Heart Beat, Susan Stein, Ronald Stein, Phillip Stein and Christian 1 Stop, LLC, respectively. Furthermore, there is substantial support for a declaratory judgment in favor of Defendants on copyright ownership with respect to the disputed works, as well as with respect to ownership in Heart Beat Records, Inc. Finally, Defendants assert that they are entitled to an equitable accounting of Heart Beat Records, Inc., to be

undertaken at Heart Beat's expense as soon as practicable. Defendants therefore pray for judgment in their favor on each and every claim and counterclaim, and for any and all relief the Court may deem appropriate upon the conclusion of the trial in this matter.

Respectfully submitted,

/s/ Sean P. Moore

Sean P. Moore AT0005499
Douglas E. Gross AT0003056
BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE and SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2400
Facsimile: 515-283-0231
E-mail: spm@brownwinick.com
deg@brownwinick.com
ATTORNEYS FOR DEFENDANTS