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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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YESH MUSIC, LLC,

Case No.: 21-cv-4

Plaintiff,

ECF CASE

v.

**COMPLAINT AND JURY DEMAND
FOR DAMAGES FOR COPYRIGHT
INFRINGEMENT**

WILLIAM PENN UNIVERSITY,

Defendant.

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Plaintiff YESH MUSIC, LLC, by and through the undersigned counsel, brings this Complaint and Jury Demand against defendant WILLIAM PENN UNIVERSITY for damages based on copyright infringement and related claims pursuant to the Copyright Act and Copyright Revisions Act, 17 U.S.C. §§ 101, et seq. (“the Copyright Act” or “Act”) and violations of the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-05 (the “DMCA”). Plaintiff alleges below, upon personal knowledge as to itself, and upon information and belief as to other matters so indicated.

JURISDICTION AND VENUE

1. This court has Infringing matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1338(a) (jurisdiction over copyright actions).

SPECIFIC JURISDICTION

2. CPLR § 302 (a)(3) authorizes this Court to exercise jurisdiction over nondomiciliaries who commit a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if it: (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

3. At bar, defendant is nondomiciliary headquartered in Oskaloosa, Iowa.

4. Defendant intentionally infringed plaintiff's exclusive rights to its copyrighted recording and composition *Anything You Synthesize* -- U.S. Copyright Registration No. SR 713-287 (the "Copyrighted Track") by, without a license or authorization, copying, distributing, publicly displaying, and synchronizing the Copyrighted Track to a video that defendant posted to its YouTube channel (the "Infringing Videos"); this is a tort committed outside the state.

5. Defendant elected to continue to infringe after multiple notices, knowing its actions would have consequences in this Judicial District.

6. The Copyrighted Track at issue here was commercially exploited by defendant to promote its basketball team and athletic program.

7. Defendant generates substantially all of its revenue from interstate commerce.

8. Defendant regularly does or solicits business, or engages in any other persistent courses of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state.

9. Defendant routinely seeks students from the New York area. In 2019, 53% of the student body at defendant were from out of state.

10. Jurisdiction is conferred over defendant pursuant to CPLR §§ 302(3)(i) and (ii).

VENUE

11. A plaintiff may bring a case in: “(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. . . ; or, (3) if there is no district in which an action may otherwise be brought . . . a judicial district in which any defendant is Infringing to the court’s personal jurisdiction with respect to such action.” 28 U.S.C. § 1391(b)(1)-(3).

12. At bar, a substantial part of the events or omissions giving rise to the claim occurred in this Judicial District.

DUE PROCESS

13. There are no due process concerns in light of the fact that defendant committed an intentional tort that it knew had an effect in this Judicial District.

14. Defendant frequently contracts with companies in this Judicial District and aims its marketing at this Judicial District such that it reasonably knows it may be haled into this forum.

PARTIES

15. Plaintiff YESH MUSIC, LLC is a New York limited liability company with a headquarters located at 75-10 197th St, 2nd Floor, Flushing, NY 11366.

16. Upon information and belief, Defendant William Penn University is a private university located at 201 Trueblood Avenue, Oskaloosa, Iowa 52577.

FACTS

17. Plaintiff is the sole owner by assignment of an original musical recording and composition titled *Anything You Synthesize* -- U.S. Copyright Registration No. SR 713-287. See

Exhibit 1.

18. Defendant is a small liberal arts college.

19. To attract students, defendant creates videos emphasizing the success of its athletic program.

20. Defendant caused to be created a video titled “William Penn Basketball Preaseason” (the “Infringing Video”).

21. Defendant copied, publicly performed, publicly displayed, and synchronized the Copyrighted Track to the Infringing Video without a license or authority. Defendant also uploaded a copy of the Infringing Video to the WPU Basketball YouTube page located at <<https://www.youtube.com/watch?v=yYQ506-egfI>>.

22. The Copyrighted Track is synchronized from the start to the end of the 2:40 Infringing Video.

23. Plaintiff conducts dozens of searches of YouTube each year for unlicensed content. The Infringing Video did not appear in any search.

24. Plaintiff discovered the Infringing Video in October 2020 after hiring a third-party search company capable of identifying concealed infringements.

25. Plaintiff notified defendant of its infringements on October 14, 2020 that there was no license for the Copyrighted Track. See **Exhibit 2.**

26. Defendant ignored the notice from plaintiff.

27. Plaintiff notified defendant of its infringements a second time through counsel, and a demand was made to cease and desist on December 27, 2020. See **Exhibit 3**.

28. Defendant ignored the notice from plaintiff's counsel and continued to infringe.

29. As of the date of this Complaint, the Infringing Video is active on YouTube.

30. At no time did the defendant seek a license for its commercial exploitation of the Copyrighted Track.

31. Defendant knew it was infringing plaintiff's exclusive rights to the Copyrighted Track when it copied, publicly performed, and then synchronized the Copyrighted Track to the Infringing Video.

32. Defendant knew it was infringing plaintiff's exclusive rights to distribute and publicly display the Copyrighted Track when it uploaded the Infringing Video to its YouTube page.

33. Defendant knew it was infringing plaintiff's rights to the Copyrighted Track when it received the October 14, 2020 notice from plaintiff that there was no license for defense use of the Copyrighted Tracks.

34. Defendant knew it was infringing plaintiff's rights to the Copyrighted Track when it received the December 27, 2020 demand to cease and desist from plaintiff's counsel.

35. Defendant infringed plaintiff's exclusive rights as set forth in Section 106 of the Act, and its knowledge of the infringement and failure to comply with multiple notices satisfies the "reckless disregard" standard entitling plaintiff to seven enhanced statutory damage awards as set forth in Section 504(c)(2) of the Act.

36. Defendant did not include any identifying information in the Infringing Video which would have allowed plaintiff to identify defendant's use of the Copyrighted Tracks.

Specifically, the Infringing Videos omits the Copyrighted Tracks' title, album name, author, label, and copyright owner.

37. Defendant's removal of the copyright management information (CMI"), and failure to include any CMI after each notice are separate violations of 17 U.S.C. § 1202 – the DMCA. Plaintiff is entitled to up to \$25,000 for each violation of the DMCA pursuant to Section 1203 of the DMCA, plus reasonable costs and attorneys' fees.

**FIRST CLAIM FOR RELIEF
COPYRIGHT INFRINGEMENT**

38. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth here at length here.

39. It cannot be disputed that plaintiff has valid, registered copyrights, and owns all rights to the Copyrighted Track.

40. Defendant without license or authority from plaintiff, reproduced, distributed, publicly performed, publicly displayed, and synchronized plaintiff's Copyrighted Tracks to the Infringing Video.

41. Defendant created and displayed the Infringing Video for the sole purpose of commercial gain.

42. Defendant refused to cease and desist after multiple demands from plaintiff directly, and through counsel.

43. Defendant's use of the Copyrighted Track was not for criticism, comment, news reporting, teaching, scholarship, or research.

44. Defendant's use was not transformative.

45. Defendant elected to reproduce, synchronize, and/or distribute plaintiff's Copyrighted Track, using the entirety, or the majority, of each, without a license.

46. As a direct and proximate result of defendant's infringement of plaintiff's exclusive rights to the Copyrighted Track as set forth in Section 106 of the Act, plaintiff has incurred damages, and requests an award of defendant's profits in excess of plaintiff's compensatory damages, and plaintiff's compensatory damages, plus costs, interest, and reasonable attorneys' fees. Plaintiff may also elect to recover seven enhanced statutory damage awards pursuant to 17 U.S.C. § 504(c)(2) for the willful infringement or reckless disregard of plaintiff's rights of up to \$150,000, but not less than \$30,000 plus costs per award, plus interest, and reasonable attorneys' fees.

**SECOND CLAIM FOR RELIEF
VIOLATION OF DMCA OF 1998, AS AMENDED,
17 U.S.C. §§ 1201, et seq.**

47. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth at length here.

48. Plaintiff always distributes its copyrighted recordings, including the Copyrighted Track here, with CMI including the title, author, label, and name of the copyright owner.

49. Defendant could not have obtained a copy of the master recording for the Copyrighted Track without this information.

50. Master recordings are tightly controlled by plaintiff to prevent unauthorized commercial use – like the Infringing use at issue here.

51. A master recording is an authenticated and unbroken version of a musical recording (typically 96 kHz / 24 bit) with the highest-possible resolution—as flawless as it sounded in the mastering suite.

52. Defendant's Infringing Video is synchronized to a very high-resolution copy of the Copyrighted Track. This high-resolution version cannot be obtained without copyright management information being included.

53. Defendant removed plaintiff's CMI, and then made duplicate copies, synchronized, publicly displayed, and/or distributed the Copyrighted Tracks without plaintiff's CMI.

54. Defendant failed to include any information which identified the Copyrighted Track, the author of the Copyrighted Track, the owner of any right in the Copyrighted Track, or information about the terms and conditions of use of the Copyrighted Track.

55. Defendant continued to publicly display the Infringing Video with no attribution after YouTube, plaintiff, and plaintiff's counsel separately informed defendant that it was infringing plaintiff's rights to the Copyrighted Track.

56. Defendant violated the DMCA each time it wrongfully distributed the Infringing Videos.

57. Defendant did the forgoing with the intent to conceal the infringements.

58. Plaintiff seeks award of statutory damages for each violation of Section 1202 of the DMCA in the sum of \$25,000.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment against defendant, and awarding plaintiff as follows:

1. restitution of defendant's unlawful proceeds in excess of plaintiff's compensatory damages;
2. compensatory damages in an amount to be ascertained at trial;
3. seven statutory damage awards to plaintiff according to proof, including but not

limited to all penalties authorized by the Copyright Act (17 U.S.C. §§ 504(c)(1), 504(c)(2));

4. an award of statutory damages for each violation by defendant of the DMCA, 17 U.S.C. § 1202;
5. reasonable attorneys' fees and costs (17 U.S.C. § 505);
6. pre- and post-judgment interest to the extent allowable; and,
7. such other and further relief that the Court may deem just and proper.
8. Plaintiff hereby demands a trial by jury of all issues so triable.

Dated: January 2, 2020
New York, New York

GARBARINI FITZGERALD P.C.

By: 
Richard M. Garbarini (RG 5496)