

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CREATIVE ARTS BY CALLOWAY, LLC, :

Plaintiff, :

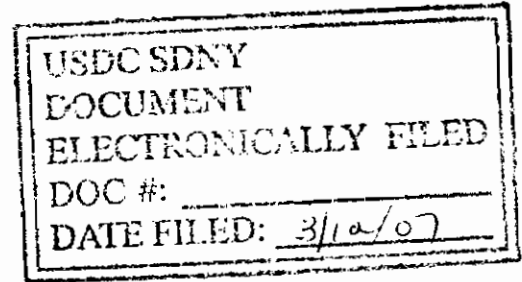
-against- :

CHRISTOPHER W. BROOKS
d/b/a THE CAB CALLOWAY ORCHESTRA, :

Defendant. :

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OWEN, DISTRICT JUDGE:

MEMORANDUM AND ORDER
05-CV-8638



Before me is defendant’s Motion for Summary Judgment. Defendant Christopher W. Brooks is the eldest grandson of the internationally famous jazz musician Cabell “Cab” Calloway, who died in 1994, and Mr. Brooks over the years has sought to preserve his grandfather’s musical legacy. Mr. Brooks founded and performs with The Cab Calloway Orchestra of which he is the sole proprietor, musical director and lead performer. Mr. Brooks performs songs written and/or recorded by his grandfather, other jazz standards, and his own original songs and arrangements.

In 1999, Mr. Brooks began making recordings of his orchestra’s performances and selling compact discs and one or more videotapes of them, which include songs authored by Cab Calloway. Mr. Brooks also maintains a website, cabcalloway.com or cabcalloway.cc, devoted to his orchestra, and on which he has posted the written lyrics of his grandfather’s songs without the music.

Plaintiff Creative Arts By Calloway, LLC is a Delaware limited liability company founded by Cab Calloway’s last wife and widow, Zulme Calloway, and her relatives for the

purpose of managing rights she acquired in Cab Calloway's name, likeness, voice and intellectual property.

In 2001, plaintiff filed suit against defendant in this Court for servicemark infringement, unfair competition, service mark dilution, and unfair business practices (the "Prior Action"). I granted defendant's Motion for Summary Judgment,¹ and was affirmed by the Court of Appeals.²

In the instant case, plaintiff asserts a claim of copyright infringement against defendant in connection with the audio and video recording sales, as well as the lyrics posted on defendant's website. Defendant contends that this copyright infringement claim is barred by the doctrine of *res judicata*, also known as claim preclusion. "Purely legal questions, such as the application of claim preclusion rules[], are properly resolved on motions for summary judgment." Schlaifer Nance & Co. v. Estate of Warhol, 764 F. Supp. 43, 44-45 (S.D.N.Y. 1991). Claim preclusion bars litigation of "any claim for relief that was available in a prior suit between the same parties or their privies, whether or not the claim was actually litigated." Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998). A court may preclude a claim upon a showing that (1) the previous action involved an adjudication on the merits by a court of competent jurisdiction; (2) the previous action involved the same parties or their privies; and (3) the "claims asserted in the subsequent action were, or could have been, raised in the prior action." Monahan v. City of New York Dep't of Corrections, 10 F. Supp. 2d 420, 426 (S.D.N.Y. 1998) *aff'd* 214 F.3d 275 (2d Cir. 2000). Plaintiff does not dispute that the first and second inquiries are met.

This case turns on the third inquiry, whether the claims asserted here "were, or *could have been*, raised in the prior action" Monahan, 214 F.3d at 285 (emphasis added). "New

¹ Creative Arts by Calloway, L.L.C. v. Brooks, No. 01-3192 (S.D.N.Y. Dec. 11, 2001).

² Creative Arts by Calloway, L.L.C. v. Brooks, 48 Fed. Appx. 16 (2d. Cir. 2002).

evidence” does not prevent claim preclusion unless the violation was “fraudulently concealed or... could not have been discovered with due diligence.” Saud v. Bank of New York, 929 F.2d 916, 920 (2d Cir. 1991). During discovery in the Prior Action, plaintiff’s counsel received a letter dated March 26, 2001 explicitly referencing a CD and a videotape of defendant’s music.³ Plaintiff concedes receiving this letter. I find that this letter was enough to put plaintiff on notice that defendant was making audio and video recordings of “his act,”⁴ and the resulting sales could have been discovered with due diligence.

The plaintiff’s complaint in the Prior Action bolsters this conclusion. The complaint refers to “concert (and other) performances... *merchandising*, or anything else, including the sale, manufacture, publication, dissemination, circulation, reproduction, imitating, broadcasting, airing in the media, promotion, marketing and/or advertisement of any such services or *merchandise, including performances...*”⁵ (emphasis added). The complaint in the Prior Action encompassed the audio and video recordings at issue here, and as a result I find that the copyright claim as to these recordings could have been raised therein.

As to the lyrics posted on the defendant’s website, there is an issue of fact as to when the lyrics were posted on the website and therefore whether the plaintiffs could have brought this claim in the prior action.

³ Gourvitz Dec., Exh. 5 (“After speaking with Christopher Brooks, listening to a CD of his music, and watching a videocassette of his act, it was evident that his performances and promotion would add tremendous value to Cab Calloway’s legacy of performance art and music.”).

⁴ Id.

⁵ Brooks Dec., Exh. 9 at 7.

Plaintiff's Motion for Summary Judgment is accordingly granted as to the audio and video recordings and sales thereof, and denied as to the lyrics posted on the website.

So ordered.

Dated: New York, New York
March 12, 2007



UNITED STATES DISTRICT JUDGE