

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

Civil Action No. _____

TYRONE BANKS,

Plaintiff,

vs.

HURRICANES HOCKEY LP,

Defendant.

COMPLAINT

(Jury Trial Demanded)

Plaintiff Tyrone (“Tye”) Banks, complaining of Defendant Hurricanes Hockey Limited Partnership (hereinafter the “Carolina Hurricanes” or “Hurricanes”), states as follows:

THE PARTIES, JURISDICTION, AND VENUE

1. This is a civil action seeking damages for copyright infringement under the Copyright Act, 17 U.S.C. § 101 *et seq.*, as well as for breach of contract or restitution under North Carolina law.

2. This Court has subject matter jurisdiction over all claims pursuant to 28 U.S.C. §§ 1331, 1338(a), and 1367.

3. Defendant Hurricanes Hockey Limited Partnership is organized under the laws of Delaware. (Copy of Delaware Division of Corporations online record attached as Exhibit 1). Defendant is authorized to transact business in North Carolina pursuant to documents filed with the North Carolina Secretary of State on March 5, 1998 and amended on July 26, 2001. (Copy attached as Exhibit 2).

4. This Court has personal jurisdiction over the Defendant.

5. Upon information and belief, Defendant does business in Wake County North Carolina as the Carolina Hurricanes or the Carolina Hurricanes Hockey Club. At this time, the Plaintiff reasonably believes that the named Defendant is the proper party defendant, although the Plaintiff lacks details about the structure of the Defendant's business. For example, the named Defendant is the owner of the federally-registered trademark CAROLINA HURRICANES. (Copy of one of several federal trademark records attached as Exhibits 3). However, Plaintiff reserves the right to amend this Complaint or to commence another civil action to name another person or entity as a party defendant, if necessary.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391.

RELEVANT FACTS

7. Plaintiff Tye Banks is a musician and recording artist who resides in Wake County, North Carolina.

8. Tye Banks is the owner of the copyright in the music and lyrics of a song, the full title of which is *Tyrone Banks Carolina Hurricanes Song*. In early 2007, Banks produced a sound recording of himself performing the song; specifically, Banks produced two versions of the sound recording, which will be referred to as the "first version" and the "final version." The final version of the sound recording of the *Carolina Hurricanes* song, including the music and lyrics, is the subject of this copyright infringement lawsuit. For purposes of simplicity, the entire composition—the music, lyrics, and sound recording—will be referred to as the "Song." The Song is registered with the United States Copyright Office. (Copy of Certificate and Form CA attached as Exhibit 4).

9. In early 2007, Tye Banks, by and through a friend named Kris Hixson, contacted Pete Soto of the Carolina Hurricanes in order to inquire whether the Hurricanes would be interested in playing the first version of the sound recording in the arena at home games.

10. Hixson provided Soto with a copy of the first version of the sound recording by e-mail.

11. After listening to the first version of the sound recording, Soto informed Hixson that the Hurricanes did not like the recording, at least in part because of its rhythm or “beat,” and Soto told Hixson that Banks would have to submit a re-mixed version in order for the Hurricanes to be interested.

12. Banks created a re-mixed, final version of the sound recording and submitted it to Hixson, who again forwarded it to Soto by e-mail.

13. Soto replied that he liked the final version of the Song and stated that Banks should provide a copy of the Song to Don Sill on a compact disc (“CD”).

14. Upon information and belief, Pete Soto and Don Sill are both employees of Defendant Hurricanes Hockey Limited Partnership and had the actual or apparent authorization of the Defendant to engage in all transactions described herein.

15. Banks thereafter hand-delivered a CD containing the Song to the front desk of the Carolina Hurricanes’ business office, which is located in Wake County, North Carolina.

16. On May 15, 2007, Tye Banks filed an application with the federal Register of Copyrights to register the copyright in the Song. The filing of this copyright application preceded any infringing acts by the Carolina Hurricanes.

17. After Sill received the CD, Banks and Sill spoke by telephone. Sill stated that the Carolina Hurricanes liked the Song, and that they would play the Song during Hurricanes games at the arena.

18. Sill offered to display Tye Banks's name on the hockey arena's large display screens when the Song was played.

19. Banks inquired if he could have the domain name of his web site, www.tyebanks.com, also displayed in the arena along with his name, so that fans would know where to download the Song.

20. Sill agreed that Banks could have certain identifying information displayed whenever the Song was played. Sill then asked what, specifically, Banks wanted to be listed on the arena's display screens. Banks specified that his name and web site should be displayed whenever the Song was played, and Sill agreed that this would be done.

21. Sill then gave Banks two tickets to a game so that he could hear the Song being played at the arena in person.

22. Banks granted the Carolina Hurricanes permission to play the Song at the arena at every home game, but only on the condition that the Hurricanes promote Banks and the Song by displaying information about Banks (including his name and web site) on the arena's display screens whenever the Song was played.

23. The agreement between Banks and Sill was limited to the use of the Song in the arena during games.

24. Banks never gave the Hurricanes permission to use the Song for promotional purposes in other media or contexts, including television commercials or on the Internet.

25. Although Sill gave Banks two tickets to a Hurricanes game, Sill made no representation that the tickets constituted any form of consideration for use of the Song, nor did Banks understand the tickets to be anything other than a means for Banks to attend a game in order to witness the Song being played.

26. Banks attended one home game using the tickets. At the game, the cameras in the hockey arena focused on Banks and showed his image on the arena's large display screens when the Song was playing. No other attribution (including Banks's name or web site) was provided. Since that time, Banks has learned that the Carolina Hurricanes have regularly played the Song at the arena without providing any attribution whatsoever.

27. There are numerous comments by Hurricanes fans (also known as "Caniacs") on the team's official online message board, in which the fans repeatedly state that they like the Song. At least some of the comments suggest that the fans heard the Song at the game, but did not know who wrote the Song. A typical comments is as follows:

Sometime near the end of the game was that a new Cane's song they were playing? If so that is the first time I had heard it played. Always looking for new material to add to our Cane video soundtrack. Do they ever post a playlist of songs they play at the game?

(Copy attached as Exhibit 5; *see* pp. 1-2).

28. Other fans have recognized Banks as the author and have expressed their enjoyment of the Song:

My family enjoys the song—it's available for the cell ringertone, but I had trouble hearing it. We sing it in the van when we go to games or practices. Fun for us, I guess (BTW—Tye Banks was at one of the last games of the 06-07 season. Seems like he's a fan—to write a song for them.) [...] I agree with you liking some of the heavier stuff for hockey, but this song is a winner IMO [in my opinion].

Id. p. 3.

29. Similarly, another fan wrote a post entitled “You know you’re a Caniac when...” (Copy of first post in thread is attached as Exhibit 6). The post lists characteristics of Hurricanes fans, including items such as “You know the Let’s Go Canes song” or “You can name the entire roster.” Notably, item number 281 on the list is “Your cell ringtone is Tye Banks’ song ‘Carolina Hurricanes.’”

30. Many Caniacs have responded well to the use of Tye Banks’s Song. In fact, the fans have noticed that the Song was used by the Hurricanes in television commercials in addition to being played in the hockey arena. A posting on the Hurricanes’ message board states as follows:

Alright, it’s killing me! I need to know who sings the hip-hop song in the goofy Ray Whitney commercial that goes.... “What’s the name of your team? Carolina Hurricanes!” Looking to find a ringtone or make one out of it. Any help would be greatly appreciated. Thanks!

(Copy attached as Exhibit 7).

31. The Carolina Hurricanes never informed Tye Banks that the Hurricanes were using Banks’s Song in television commercials. Tye Banks was alerted to the fact that the Song was being used in television commercials by a friend who saw a commercial on the NHL Network and asked Banks what sort of business deal Banks had with the Hurricanes. It was at this point that Banks learned that the Hurricanes had used the Song in television commercials without Banks’s permission.

32. Internet postings show that the Song was played on television networks, such as after the first period of the Flyers-Hurricanes game on November 28, 2008. Certain online postings by Philadelphia Flyers fans are attached as Exhibit 8, and the reference to the Song appears at pp. 22-23. The line “What’s the name of your team? / Carolina Hurricanes” is one of the principal lyrics in the Song.

33. Upon information and belief, the Carolina Hurricanes have used the Song in other commercials, or in the same commercial aired at other times.

34. Upon information and belief, this is not the first time that the Carolina Hurricanes have taken a recording artist's material and used it in television commercials without permission. Upon information and belief, there exists a pattern or practice in the Carolina Hurricanes' media office of using artists' material for television commercials and in other ways without receiving authorization from the copyright owner. For instance, another recording artist has written as follows:

Hello fellow Caniacs. I have written a song to charge up the fans ... [called] Red, White, and Bruised (Let's Go Canes) and if the ending sounds familiar, that's because you've heard it in at least one Hurricanes TV commercial. The song was passed to the organization sometime late last season with all of my contact info, but I never heard anything...they never let me know they were going to use it.

(Copy of post attached as Exhibit 9).

35. In addition to using Banks's Song in television commercials, the Hurricanes have also published the Song in an online video or videos. Even after Tye Banks sent a cease-and-desist notice to the Hurricanes, demanding that the Hurricanes immediately cease all use of the Song, the Carolina Hurricanes continued to use an excerpt of the Song in an online video that the Carolina Hurricanes published or caused to be published on their official website at <http://hurricanes.nhl.com>.

36. In short, by playing the Song in the arena without giving proper attribution to Tye Banks, by using the Song in numerous ways the exceed that scope of the limited, revocable license given to play the Song at the arena, and by continuing to use the Song even after the Hurricanes acknowledged that the prior oral license had been terminated, the Hurricanes have breached the terms of their agreement with Tye Banks; have infringed upon Mr. Banks'

copyright; and have unfairly benefited from his creative work without providing him proper compensation or attribution.

CLAIM ONE: COPYRIGHT INFRINGEMENT

37. The allegations set forth in paragraphs 1 through 36 are incorporated herein by reference.

38. Without the permission of Tye Banks, the Defendant publicly performed and reproduced or caused to be performed or reproduced the Song in television commercials and on the Internet.

39. In addition to or in the alternative to the preceding paragraph, the Defendant induced and contributed to the public performance and/or reproduction of the Song by a third party or parties in television commercials and on the Internet.

40. The Defendant's acts of infringement have been willful, intentional, and purposeful, in disregard of and indifferent to the rights of Tye Banks.

41. As a direct and proximate result of the Defendant's infringement of Tye Banks's copyright and exclusive rights under copyright, Tye Banks is entitled to the maximum statutory damages pursuant to 17 U.S.C. § 504(c). Alternatively, at Tye Banks's election, pursuant to 17 U.S.C. § 504(b), Tye Banks shall be entitled to his actual damages plus the Defendant's profits from infringement, as will be proven at trial.

42. Tye Banks is entitled to his costs, including reasonable attorneys' fees, pursuant to 17 U.S.C. § 505.

CLAIM TWO: BREACH OF CONTRACT

43. The allegations set forth in paragraphs 1 through 42 are incorporated herein by reference.

44. Tye Banks and the Carolina Hurricanes entered into a contract in which: (1) Banks granted the Carolina Hurricanes a limited, revocable license to play or perform the Song at home games at the Carolina Hurricanes' arena; and (2) in consideration for that limited, revocable license, the Carolina Hurricanes promised to display Banks's name and web site on the hockey arena's display screens whenever the Song was played.

45. The Carolina Hurricanes breached the contract by: (1) failing to display Banks's name or web site on the arena's display screens whenever the Song was played; and (2) playing or using the Song without permission in connection with the Carolina Hurricanes' television commercials on national networks and in connection with the Hurricanes' promotions on the Internet.

46. As a result of the Carolina Hurricanes' breach of contract, Tye Banks has been damaged in excess of \$10,000, with said damages to be proven at trial.

CLAIM THREE: RESTITUTION

47. The allegations set forth in paragraphs 1 through 42 are incorporated herein by reference.

48. In the alternative to Claim Two, in the event that it is determined that all or a part of the preceding transactions occurred in the absence of a contract, Tye Banks says and alleges as follows in Claim Three.

49. Tye Banks allowed the Carolina Hurricanes to play or use the Song at the Carolina Hurricanes' hockey arena for the benefit of the Carolina Hurricanes.

50. Additionally, the Carolina Hurricanes used Banks's intellectual property in the Song on television commercials and on the Internet for the benefit of the Carolina Hurricanes without Banks's permission.

51. Tye Banks did not render confer these benefits or engage in these transactions gratuitously.

52. The benefits provided by Tye Banks to the Carolina Hurricanes were knowingly and voluntarily accepted by the Carolina Hurricanes.

53. The acceptance of such benefits by the Carolina Hurricanes created an implied-in-law contract between Tye Banks and the Carolina Hurricanes, and in order to avoid unjust enrichment, the Carolina Hurricanes are obligated to pay Tye Banks for the reasonable value of the benefits that the Hurricanes received.

54. The reasonable value of the benefits received by the Carolina Hurricanes is in excess of \$10,000, with the exact amount to be proven at trial.

WHEREFORE, Tye Banks prays the Court for judgment against Defendant Hurricanes Hockey Limited Partnership as follows:

- (1) With respect to Claim One, for statutory damages, or in the alternative, for actual damages and for disgorgement of profits by the Defendant;
- (2) With respect to Claim Two, for actual, consequential, and incidental damages in this matter;
- (3) With respect to Claim Three, and in the alternative to Claim Two, for the reasonable value of the benefits that Tye Banks conferred upon the Defendant;
- (4) For attorneys' fees;
- (5) For court costs incurred in this matter;
- (6) For interest on any judgment at the legal rate until paid in full; and
- (7) For such other and further relief as this Court deems just and proper.

The Plaintiff hereby demands a jury trial on all issues so triable.

Respectfully submitted, this the 7th day of August, 2009.

POYNER SPRUILL LLP

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