

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 21-cv-60914-CIV-DIMITROULEAS/SNOW

UMG Recordings, Inc.; Capitol Records,  
LLC; Universal Music Corp.; Universal  
Music – Z Tunes LLC; Universal Musica,  
Inc.; PolyGram Publishing, Inc.; Songs of  
Universal, Inc.; and Universal Music – MGB  
NA LLC,

Plaintiffs,

v.

Vital Pharmaceuticals, Inc., *d/b/a* Bang  
Energy; and Jack Owoc, an individual,

Defendants.

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**ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

THIS CAUSE is before the Court upon Defendants Vital Pharmaceuticals, Inc., *d/b/a* Bang Energy (“Bang”) and Jack Owoc (“Owoc”) (collectively, “Defendants”)’s Motion for Final Summary Judgment [DE 60]. The Court has carefully considered the Motion, Plaintiffs UMG Recordings, Inc.; Capitol Records, LLC; Universal Music Corp.; Universal Music – Z Tunes LLC; Universal Musica, Inc.; PolyGram Publishing, Inc.; Songs of Universal, Inc.; and Universal Music – MGB NA LLC (collectively, “Plaintiffs”)’s Response [DE 97], Defendants’ Reply [DE 112], Defendants’ Statement of Material Facts [DE 62], Plaintiffs’ Response to Defendants’ Statement of Material Facts and Additional Facts [DE 98], Defendants’ Reply to Plaintiffs’ Statement of Additional Facts [DE 113], evidence submitted in the record, Defendants’ supplemental filing [DE 200], and is otherwise fully advised in the premises. The Court held a hearing on the Motion on July 8, 2022. *See* [DE 197].

## I. BACKGROUND

Plaintiffs initiated this action on April 28, 2021. *See* [DE 1]. Plaintiffs sued Defendants for direct copyright infringement for videos posted on their own TikTok accounts (Counts I-II). Plaintiffs also asserted claims for contributory and/or vicarious infringement against Bang based on the videos posted by the Bang Influencers on their personal TikTok accounts (Counts III-IV).

Plaintiffs moved for partial summary judgment in their favor as to the issue of liability, *see* [DE 61/82 (sealed)], which the Court granted in part and denied in part by separate Order entered on July 11, 2022. *See* [DE 203] (“Order on Plaintiffs’ Motion for Summary Judgment”). Therein, the Court granted Plaintiffs partial summary judgment as to Counts I and II, as to the issue of liability on their claims against Defendants for direct infringement. *See id.* As to Counts III and IV, the Court ruled that: (a) With regard to the theory of Contributory Copyright Infringement for the Influencer Videos against Bang, Plaintiffs are not entitled to summary judgment; and (b) With regard to the theory of Vicarious Copyright Infringement for the Influencer Videos against Bang, Plaintiffs are not entitled to summary judgment for failure to meet their burden as to the direct financial benefit element; however, Plaintiffs established at the summary judgment the requisite control element of their vicarious infringement claim. *See id.*

The Court assumes the reader’s familiarity with the Order on Plaintiffs’ Motion for Summary Judgment [DE 203]. Several arguments raised by Defendants’ Motion for Final Summary Judgment [DE 60] are foreclosed and/or mooted by the Court’s rulings in the Order on Plaintiffs’ Motion for Summary Judgment [DE 203]. These include Defendants’ arguments regarding both elements of direct copyright infringement, Plaintiffs’ ownership and/or control of the subject copyrights, and the copying of the constituent elements of the works that are original. Accordingly, the instant Order shall be limited to the remaining issues raised in Defendants’

summary judgment motion regarding the theories of indirect liability for influencer videos in Counts III and IV and damages.

## II. STANDARD OF REVIEW

Under Rule 56(a), “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The movant bears “the stringent burden of establishing the absence of a genuine issue of material fact.” *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

“A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law.” *Kerr v. McDonald’s Corp.*, 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, “[a]n issue [of material fact] is not ‘genuine’ if it is unsupported by the evidence or is created by evidence that is ‘merely colorable’ or ‘not significantly probative.’” *Flamingo S. Beach I Condo. Ass’n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App’x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). “A mere scintilla of evidence in support of the nonmoving party’s position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party.” *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly, if the moving party shows “that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party” then “it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact.” *Rich v. Sec’y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

## II. DISCUSSION

In their Motion for Final Summary Judgment, Defendants contend that they are entitled to summary judgment in their favor as to Plaintiffs' claims against Defendants for direct infringement (Counts I and II) and Plaintiffs' claims against Bang for contributory and/or vicarious infringement (Counts III and IV) for the influencer videos. As explained, *supra*, several of Defendants' arguments are foreclosed and/or mooted by the Court's rulings in the Order on Plaintiffs' Motion for Summary Judgment [DE 203]. These include Defendants' arguments regarding both elements of direct copyright infringement -- Plaintiffs' ownership and/or control of the subject copyrights, and the copying of the constituent elements of the works that are original. Accordingly, the instant Order shall be limited to the remaining issues raised in Defendants' summary judgment motion, regarding the theories of indirect liability for influencer videos in Counts III and IV and damages. The Court addresses these issues, in turn.

### *1. Contributory and/or Vicarious Infringement (Counts III & IV)*

As to Counts III and IV, Plaintiffs<sup>1</sup> contend that Bang is liable for contributory and/or vicarious copyright infringement for eight TikTok videos posted by Bang Influencers utilizing Plaintiffs' copyrighted works, including: "Jingle Bell Rock" by Bobby Helms; "Pineapple" by Karol G; "Poof Be Gone" by KyleYouMadeThat; "Me Too" by Meghan Trainor; "Baby Got Back" by Sir Mix a Lot; "Dinero" by Tinidad Cardona; "Como La Flor" by Selena; and "ily (I Love You Baby)" by Surf Mesa. The Court addresses each of these secondary or indirect liability theories, in turn. However, the Court notes that "the Eleventh Circuit recognizes that there are no clear distinctions between these various theories of liability. *Michael Grecco Prods., Inc. v. RGB Ventures, LLC*, No. 3:16-CV-1335-J-34PDB, 2017 WL 4077045, at \*5 (M.D. Fla. Sept. 14,

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<sup>1</sup> Count III is pled by the Record Company Plaintiffs against Bang and Count IV is pled by the Music Publisher Company Plaintiffs against Bang. *See* [DE 1] at ¶¶ 63-70; ¶¶ 71-78.

2017) (citing *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (“[T]he lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn.”)).

*a. Contributory Copyright Infringement for the Influencer Videos*

“One infringes contributorily by intentionally inducing or encouraging direct infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). *See also Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1242 n.6 (11th Cir. 2014) (“A claim of contributory copyright infringement arises against one who intentionally induces or encourages the direct infringement of another.”). *See, e.g., Michael Grecco Prods.*, 2017 WL 4077045, at \*5 (allegations, taken together, of providing the means for the third-party distributors to infringe plaintiff’s copyrights, actually assisting in the distribution of the copyrighted material pursuant to its marketing and sub-license agreements with the third-party distributors, and failing to act to prevent further infringement when it was in a position to do so, sufficient to state a plausible claim for contributory infringement).

In the present case, Plaintiffs claim that Bang is liable for contributory copyright infringement because Bang intentionally induced and encouraged the Bang Influencers to create and post videos on TikTok promoting Bang’s products and incorporating Plaintiffs’ copyrighted music.

In the instant motion, Bang argues that it is entitled to summary judgment as to the contributory copyright infringement theory in Counts III and IV because Plaintiffs have submitted no evidence to support a contributory infringement theory as there is no evidence that Bang took affirmative steps to induce or encourage third-party influencers to infringe Plaintiffs’ copyrights. *See Grokster*, 545 U.S. at 937 (“The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit

violations.”). Rather, Bang submits that Defendants have no part in the production of third-party influencer videos and do not select or have any input regarding the selection of music included in influencers’ TikTok videos.<sup>2</sup>

In response, Plaintiffs do not meaningfully respond to Defendants’ argument in the context of contributory infringement, and instead conflate it with the theory of vicarious infringement, as follows:

Bang contends that it cannot be indirectly liable for the Influencer Videos because it did not produce the videos or select the music. (See Mot. 11-12). However, “vicarious liability may exist even if the third party was in no way directly involved in the actual copying.” *Rams v. Def Jam Recordings, Inc.*, 202 F. Supp. 3d 376, 384 (S.D.N.Y. 2016) (citing *Ez-Tixz, Inc. v. Hit-Tix, Inc.*, 919 F. Supp. 728, 733 (S.D.N.Y. 1996)). Thus, Bang is liable even if the Bang Influencers selected the music and produced the videos.

[DE 97] at p. 12. Because Plaintiffs failed to respond to Bang’s argument directed at the theory of contributory copyright infringement, the Court finds that Bang is entitled to summary judgment as to the contributory copyright infringement theory in Counts III and IV. *See, e.g., Bargoot v. Sch. Bd. of Palm Beach Cty.*, No. 21-80849-CIV, 2022 WL 293313, at \*7 (S.D. Fla. Feb. 1, 2022) (“[B]y virtue of failing to respond or address the argument, Plaintiff has conceded the argument.”); *GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, 277 F. Supp. 3d 1301, 1311 n.7 (S.D. Fla. 2017) (“When a party fails to respond to an argument or address a claim in a responsive brief, such argument or claim can be deemed abandoned.”).

*b. Vicarious Copyright Infringement for the Influencer Videos*

“One infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citations omitted). “[V]icarious liability may exist even if the third party

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<sup>2</sup> *See* [DE 62] at ¶28, citing to Meg Owoc’s Declaration [DE 62-1] at ¶17 (“Bang Energy does not produce or assist in the production of third-party influencer videos and does not select or have any input regarding the selection of music included in third-party influencer videos”).

was in no way directly involved in the actual copying.” *Rams v. Def Jam Recordings, Inc.*, 202 F. Supp. 3d 376, 385 (S.D.N.Y. 2016). Vicarious infringement requires both a direct financial benefit from the direct infringement and the “right and ability to supervise a party responsible for direct infringement.” *Latele Television, C.A. v. Telemundo Commc'ns Grp., LLC*, No. 12-22539-CIV, 2014 WL 7272974, at \*5 (S.D. Fla. Dec. 18, 2014) (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007) “[T]o succeed in imposing vicarious liability, a plaintiff must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement.... [T]he ‘control’ element [is satisfied by a plaintiff showing that] a defendant ... has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.”). The second element of a vicarious infringement claim, direct financial benefit, does not have to be “substantial.” *Rams*, 202 F. Supp. 3d at 385 (citing *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). “Financial benefit exists where the availability of infringing material ‘acts as a draw for customers.’” *Id.* (quoting *A & M Records, Inc. v. Napster Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001)).

In the present case, Plaintiffs contend that Bang is liable for vicarious copyright infringement on the grounds that Bang had the right to stop or limit the infringement by refusing to approve videos and refusing to pay the Bang Influencers and that Bang has profited from the influencer videos.

In the instant motion, Bang argues that it is entitled to summary judgment as to the vicarious copyright infringement theory in Counts III and IV because Plaintiffs cannot meet their burden to show that Bang had the legal right and ability to supervise influencers and/or to stop the posting of the infringing videos. Notably, Bang’s summary judgment motion does not challenge whether the direct financial benefit element of a vicarious copyright infringement

theory is met in this case. *See* [DE 60] at pp. 11-12. On that ground alone, Bang cannot be entitled to summary judgment in its favor as to the vicarious copyright infringement theory in Counts III and IV. Moreover, the Court has already ruled that Plaintiffs have established at summary judgment the requisite control element of their vicarious infringement claim. *See* [DE 203] at pp. 16-18, 19. Accordingly, Bang is not entitled to summary judgment as to the theory of vicarious copyright infringement in Counts III and IV.

## 2. Damages

The Copyright Act permits a copyright owner to pursue one of two groups of damages: (1) actual damages and defendant's profits, or (2) statutory damages. 17 U.S.C. § 504. Only if the plaintiff elects to pursue statutory damages are enhanced damages due to willful infringement available pursuant to 17 U.S.C. § 504(c). *See id.* at § 504(c)(2). As set forth below, the Court finds that disputed facts prevent entry of summary judgment as to either category of damages.

First, Defendants argue in their summary judgment motion that Plaintiffs cannot show actual damages nor a causal connection to Bang's profits, and therefore that Plaintiffs cannot recover damages under 17 U.S.C. § 504(b).<sup>3</sup> The Court disagrees. Plaintiffs have submitted evidence of license agreements establishing what licensors have paid for comparable works. *See, e.g., Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1276 (M.D. Fla. 2008) ("[A] claim for lost profits may include a retroactive license fee measured by what the plaintiff would have earned by licensing the infringing use to the defendant."). That the TikTok videos are approximately 15 seconds may be a basis for Bang to argue to the jury that the actual damages are less than what licensing fees would be for use of full songs; it does not follow that these license agreements

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<sup>3</sup> §504(b) Actual Damages and Profits.--The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.



should not be considered in determining the amount of Plaintiffs' actual damages. Additionally, Plaintiffs have submitted sufficient evidence of a causal connection to Bang's profits to survive summary judgment. Defendants' contentions that the evidence relied upon by Plaintiffs should be given no weight are more appropriately argued to the jury at trial.

Second, Defendants argue that there is no evidence of willfulness and therefore Plaintiffs cannot recover enhanced statutory damages under 17 U.S.C. § 504(c)(2).<sup>4</sup> The Court disagrees. While Defendants have submitted evidence from which a reasonable juror could conclude that Bang reasonably and good faith believed that its use of Plaintiffs' copyrighted works was not barred by law, Plaintiffs have also submitted evidence from which a reasonable juror could conclude that Bang knew that its conduct constituted copyright infringement or acted with reckless disregard of Plaintiffs' rights. Accordingly, Bang has not shown that there is no genuine dispute of material fact as to willfulness and the summary judgment motion is due to be denied in this regard.

#### IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** that Defendants' Motion for Final Summary Judgment [DE 60] is **GRANTED IN PART AND DENIED IN PART** as follows:

1. As to Counts I and II: Defendants' motion for summary judgment is denied as to Plaintiffs' claims against Defendants for direct infringement;
2. As to Counts III and IV:
  - (a) With regard to the theory of Contributory Copyright Infringement for the

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<sup>4</sup> Under the Copyright Act, the range of statutory damages is generally between \$750 and \$30,000 for each infringed work. 17 U.S.C. § 504(c)(1). The Court, however, "in its discretion" may increase the award to \$150,000 for willful infringements or to decrease the award to \$200 for innocent infringements. *Id.* at § 504(c)(2). It is the copyright owner's burden to prove willfulness. *Id.* Willful copyright infringement "encompasses reckless disregard of the possibility that one's actions are infringing a copyright." *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1272 (11th Cir. 2015).

Influencer Videos against Bang, Defendants' motion for summary judgment is granted.

(b) With regard to the theory of Vicarious Copyright Infringement for the Influencer Videos against Bang, Defendants' motion for summary judgment is denied.

3. As to the issues of damages, including the issue of willfulness, Defendants' motion for summary judgment is denied.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida,  
this 12<sup>th</sup> day of July, 2022.

  
WILLIAM P. DIMITROULEAS  
United States District Judge

Copies to:  
Counsel of record