

Federal Court



Cour fédérale

**Date: 20240606**

**Docket: T-173-23**

**Citation: 2024 FC 861**

**Ottawa, Ontario, June 6, 2024**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**RANDY WILLIAMS**

**Applicant**

**and**

**MUSIC AND ENTERTAINMENT RIGHTS  
LICENSING INDEPENDENT NETWORK LTD.,  
CD BABY, AND JIOSAAVN**

**Respondents**

**JUDGMENT AND REASONS**

[1] Mr. Williams' written submissions are a challenge to a reader trying to understand the substance of his complaint. However, the 10,758 pages of the Applicant's Record does disclose a single issue that requires the Court's attention: Whether the Respondents used the Applicant's musical content without his consent, in contravention of the *Copyright Act*, RSC 1985, c C-42 [the Act].

[2] For the reasons that follow, I find that the Respondents have not.

I. Background

[3] Audio and Visual Labs, Inc. dba CD Baby [CD Baby], the Respondent, is an American-based physical and digital distributor of independent music. As part of its digital distribution strategy, it facilitates licenses to use artists' content for licensed digital service providers [DSPs], which it refers to as its "distribution partners."

[4] In 2016, CD Baby became a member of the Music and Entertainment Rights Licensing Independent Network [MERLIN], the co-Respondent. MERLIN is a digital music rights licensing organization for independent record labels, distributors, and other rights holders. It primarily negotiates and licenses members' content to licensed DSPs for distribution via their digital music platforms, including online streaming and download services. MERLIN notifies CD Baby of any licensing arrangement that it has offered to a DSP before that deal takes effect. If CD Baby does not wish to participate in the proposed deal, it may opt out during a set period of time before the deal takes place. If CD Baby does not opt out, it authorizes MERLIN to grant a license, on CD Baby's behalf, to the DSP for use of all of the content owned or controlled by CD Baby on that DSP's platforms. CD Baby delivers the digital files of its artists' content directly to its distribution partners.

[5] DSPs pay MERLIN royalties and other fees pursuant to their licensing agreement with MERLIN. Royalties are generally based on the usage of content. MERLIN generally pays royalties to its members, including CD Baby, based on the usage of their content on the DSP.

CD Baby then directly pays the royalties and any other revenues to its artists in accordance with the payment structure outlined in the agreement between CD Baby and the artist.

[6] Randy Bruce Williams, the Applicant, is an independent artist under the name “Geologist”. In 2009, he signed up for CD Baby’s distribution services by creating a free account on CD Baby’s website, [www.cdbaby.com](http://www.cdbaby.com), and agreeing to the terms of the CD Baby Artist Agreement [the Artist Agreement]. From 2009 to 2022, he submitted more than 200 sound recordings to CD Baby for distribution, earning a total of \$649.12 across all distribution channels. All of his submitted content for digital distribution is in English.

[7] Upon every submission of content to CD Baby for digital distribution, the artist is required to re-accept the Artist Agreement and accept the Digital Distribution Addendum to the Artist Agreement [Digital Addendum]. To date, Mr. Williams has accepted the terms of the Artist Agreement and Digital Addendum at least 60 times.

[8] The Artist Agreement appoints CD Baby as the authorized representative for the sale and distribution of the artist’s content. It grants CD Baby and its licensees the non-exclusive right to, among other things, distribute the content in accordance with any applicable addendum. Licensees are defined as “any third party licensee that [CD Baby] may authorize to carry out the marketing, distribution, licensing, and sale or other use of [artists’ content] pursuant to the terms of [the] Agreement, including, by way of example and not limitation, Apple iTunes, MediaNet, Rhapsody, Napster, online streaming services (e.g., webcasters), and others that CD Baby may chose [sic] in its sole and absolute discretion.”

[9] The Digital Addendum provides additional rights to CD Baby including the rights to reproduce, supply, perform, communicate, make available, and deliver the artist's content to purchasers and resellers; use and authorize others to distribute the artist's content as downloads; stream and authorize others to stream the artist's content; and fully sublicense, through single or multiple tiers, any of the authorized rights.

[10] CD Baby's submission process also requires artists to make choices about how the submitted content may be digitally distributed. Among other things, an artist may choose (a) the types of digital music platforms on which the content will be made available (i.e., the distribution level); (b) to opt out of having the submitted content distributed by any particular DSP that is a CD Baby distribution partner at the time of submission; and (c) whether to restrict digital distribution of the submitted content to specific territories.

[11] CD Baby currently offers the following three distribution levels:

**Downloads + Streaming services:** Includes all download partners, plus services like Spotify, Tencent, YouTube Music, TikTok, and more.

**Downloads Only:** Includes partners that offer Downloads only like Apple Music and Amazon Music's MP3 store (with and without cloud-access features). No streaming platforms are included that provide users with tracks they haven't bought or previously downloaded.

**Do it all. Even unpaid:** Includes places that offer free downloads and streaming.

[12] Previously, CD Baby offered the following five distribution levels:

**CD Baby Only (No distribution):** You can still sell digital downloads of your music on CD Baby, but we won't send you anywhere else unless you specifically ask us to.

**Only sales. (No streams. no subscription services):** This option only includes sites that pay 60 cents per track and over. (Download/kiosk/etc.)

**Only traditional:** Only the mainstream business models: selling downloads, streaming, ringtones, kiosks, etc. If a new company comes along with a very different business model, you will NOT be included. This option includes subscription services, which means along with paid downloads, your music will be available for full length streaming to their members (each stream pays a fraction of a penny per listen).

**Everything that pays:** As long as it pays, you'll take it. There are always new forms of income for your music in the digital world, and we'll make sure it is sent to partners that use innovative models. This option includes paid streams, as well as services that may pay less than more traditional sites for downloads. Option D is great for exposure, and will ensure that your music is delivered to a vast majority of our digital partners!

**Do it all, even unpaid:** You'll take everything that pays AND you want us to send it to places that get you extra exposure, even if it doesn't pay. This level includes services that may, under certain circumstances, offer free downloads. Don't worry though, we're not here to just give your music away for free; CD Baby only enters partnerships that we feel will ultimately provide value. Choosing this option means you'll be delivered to every single digital retailer that we are partnered with!

[13] Saavn Media Limited, a co-Respondent, operates an online music streaming service based in India under the name JioSaavn (formerly operating under the name "Saavn" until 2018). JioSaavn's music catalogue primarily consists of music in various regional Indian languages, although it does offer some content in non-Indian languages, including English. The record before the Court establishes that its non-Indian language content can be accessed by users only in India and select South Asian countries. Since joining MERLIN in 2016, CD Baby authorized MERLIN to grant a license to JioSaavn to offer CD Baby's content on its music service.

[14] When CD Baby brings on a new distribution partner, its standard procedure is to authorize the new distribution partner's use of *all* content that CD Baby digitally distributes at that time, depending on the distribution level for any such content. Therefore, by default, content that artists submitted to CD Baby at the "Downloads + Streaming services" level prior to JioSaavn becoming a distribution partner was authorized by CD Baby to be offered on the JioSaavn music platform.

[15] Artists are able to opt-out of having their content offered on any DSP's platform, with 24-hour notice, through their user account or contacting CD Baby directly.

## II. The Dispute

[16] Around April 22, 2022, JioSaavn notified CD Baby and MERLIN about a complaint it received from the Applicant claiming that MERLIN did not have the right to distribute his content to JioSaavn, particularly his work, "My I Love You" [MILY]. The complaint, dated March 14, 2022, reads as follows:

My previous email was sent to you on February 4, 2022. You did not respond to my complaint that you were using my work on your site without paying for it. In particular, I mentioned details surrounding the Single release "My "Love You" [*sic*], by artist "Geologist" and others.

Rather than respond to the details I provided for your explanation, you've removed the song from your website on or about February 25, 2022. Since you've chosen not to pay for my work that you are using, this is a demand Notice for payment.

Unless you pay for my work that you have used, I will file a claim against you in court and serve you forthwith.

[17] On April 22, 2022, CD Baby notified the Applicant that it had been informed of a rights dispute being lodged against JioSaavn regarding MILY. It asked if the Applicant wished to assert his rights and, if so, what documentation he had that states that he owns the rights and the “claimant” does not.

[18] The Applicant replied on the same day, stating:

I did not authorize CD Baby to release my pre-2018 products to JioSaavn or to Merlin. My CD Baby documentation proves that JioSaavn and Merlin were not among my list of distributors for my pre-2018 products. It is a clear case of copyright infringement and trademark infringement.

You have until June 22, 2022 to provide strict documentary proof that CD Baby was authorized by me to distribute my pre-2018 products to Merlin and JioSaavn. In the absence of that proof, you have infringed the copyrights and trademark of at least 201 product releases owned by me. I will be seeking all legal remedies.

After June 22, 2022, in the absence of a reasonable settlement offer from CD Baby, Merlin, and JioSaavn for infringing my products, I will file my claim in court.

[19] The Applicant sent a further email to CD Baby on July 1, 2022, explaining that his distribution agreement with CD Baby does not allow anyone to stream his products for free. He provided a screenshot of his account with CD Baby from March 8, 2011, when he submitted MILY, which shows that he selected the “Everything that pays” digital distribution option for MILY. The screenshot also shows that the Applicant authorized CD Baby to distribute his music to certain companies that he checked off. JioSaavn (or “Saavn”) was not included on this list, as this predates when JioSaavn became a distribution partner.

[20] For each of his submissions for digital distribution, the Applicant only selected one of the following three distribution levels: “Downloads + Streaming Services,” “Downloads Only,” and “Everything that pays.” He did not select the “Do it all, even unpaid” option for any of his submissions.

[21] The record also demonstrates that, on occasion between 2019 and 2022, the Applicant did select “Saavn” as a distribution partner for some of his submitted content to CD Baby.

[22] The Applicant claims that CD Baby’s Digital Distribution Sales [DDS] reports, available on his user account, reports over 117,000 unpaid streams by Saavn. He asserts this is contrary to his agreement with CD Baby that he is to be paid for all distribution.

[23] The DDS report dated August 22, 2018, demonstrates that the Applicant earned some royalties from JioSaavn as early as January 2018. However, DDS reports starting June 30, 2020 indicate that, in addition to royalties, there were streams in the hundreds and thousands paid out at a \$0.00 rate. According to the DDS reports, there are approximately 40,439 “unpaid” streams by JioSaavn between 2011 and 2022.

[24] On May 3, 2022, CD Baby ceased distribution of MILY, removing it from all distribution channels. On July 12, 2022, CD Baby reached out to the Applicant to freely reinstate MILY for distribution and followed up with this request on October 25, 2022. CD Baby continued to distribute the Applicant’s other submissions until January 30, 2023, when it sent notice to the Applicant that it would cease working with all of his content.



### III. Analysis

[25] The parties do not dispute that the Applicant retains copyright in the content at issue, including MILY.

[26] The Applicant makes many submissions against the Respondents. He submits, among other things, that the Respondents knowingly violated subsections 13(1) and 14.1(1) of the Act, pertaining to ownership of copyright and moral rights, acted in bad faith, violated the law of estoppel of licenses, and infringed his copyright upon repudiating the Artist Agreement. He requests various declarations from this Court to these effects, and an order for statutory damages under section 38.1(1)(a) of the Act.

[27] I need not explore all of the Applicant's submissions in detail. There is no dispute over the Applicant's ownership of the copyright in the content at issue, and his arguments to this effect arise under a misunderstanding over the Respondents' rights of takedown under the Artist Agreement. There is similarly no basis for the Applicant's claim of moral rights infringement. His other claims, including that CD Baby committed a wrongdoing by closing its online retail store, are also doomed to fail as they are not grounded in any cause of action by statute or at common law, or otherwise lack merit. For example, the Applicant provides no basis to support his broad accusations that the Respondents engaged in activities that were "illegal" or in "bad faith."

[28] I find that the only potential issue between the parties pertains to the scope and validity of the Artist Agreement, which the Court may assess under its federal jurisdiction insofar as it

relates to the Applicant's claim of copyright infringement. Under subsection 27(1) of the Act, it is an infringement of copyright for a person who is not the copyright owner to engage in activities that only the copyright owner has the right to do, absent consent from that owner. In other words, the Court may only find proof of infringement where the applicant demonstrates proof of a lack of consent for the purported infringement activities: *Albian Sands Energy Inc v Positive Attitude Safety System Inc*, 2005 FCA 332 at para 39.

[29] The Respondents submit that the Applicant provided them with consent to engage in the purported infringing activities, as the Applicant repeatedly accepted the Artist Agreement, and its incorporating Digital Addendum. They say that this is a full defense because the Artist Agreement and Digital Addendum cover all the complained activities.

[30] The Applicant does not contest that he signed the Artist Agreement on numerous occasions nor does he allege that he was unaware of its terms. Indeed, he claims to consider himself as one of Canada's most educated recording artists, in that he holds a law degree from the University of Alberta. His submissions in his Memorandum of Fact and Law are mostly confined to claiming that CD Baby repudiated the Artist Agreement on April 22, 2022, and May 3, 2022, thereby any of the activities that the Respondents took afterwards are infringing.

[31] I find that the Artist Agreement was not, and in fact has never been, repudiated or terminated by either party to it. Provisions that dictate the termination of the Artist Agreement are contained within it. Section 3 provides that the agreement will continue in effect "unless and until terminated by either you or us, upon twenty-four (24) hours written notice."

Paragraph 10(c) further provides that mere removal of an artist's content from its website or licensee's website or services does not constitute termination of the Artist Agreement:

**10. (c) No Termination Due to Removal.** This Agreement shall not be terminated automatically by CD Baby's removal of Your Content from the Website or Licensee's websites or services. In order for you to terminate this Agreement following the removal of any of Your Content, you must send CD Baby a Termination Notice.

[32] Contrary to the Applicant's submission, the Artist Agreement was not automatically terminated upon CD Baby's notice to the Applicant that it received the rights dispute complaint from JioSaavn, dated April 22, 2022, and its subsequent notice to the Applicant of the takedown of MILY, dated May 3, 2022. As the Respondents submit, CD Baby continued to distribute the rest of the Applicant's content, and even redistributed MILY once it confirmed that the Applicant was the copyright holder, up until January 30, 2023, when it notified the Applicant by email that it would cease to distribute his content as he was suing it for copyright infringement. Even this cessation does not amount to termination of the Artist Agreement as paragraph 10(c) of the Artist Agreement explicitly states that removal of an artist's content does not constitute termination.

[33] The Applicant similarly did not terminate the Artist Agreement, as he never submitted the required termination notice. His arguments claiming otherwise are without merit. As such, I find that the Artist Agreement remained in effect on and after those days when the Applicant alleges that the Respondents infringed his copyright by continuing to distribute his works.

[34] The only question that remains is whether the Artist Agreement in fact covered the Respondent's activities.

[35] I note from the outset that the Applicant advances no submissions on this point in his Memorandum of Fact and Law. Although the issue is raised in his Notice of Application, it is trite law that a party before the Court must limit his submissions to those advanced in his Memorandum of Fact and Law: Rule 70(1) of the *Federal Courts Rules*, SOR/98-106; see also *Sibomana v Canada*, 2020 FCA 57 at para 6; *Bigeagle v Canada*, 2023 FCA 128 at para 90.

[36] In any event, I find that there is no copyright infringement under the Act as any alleged infringement that did occur, which the Court does not find, happened outside of Canada, i.e., outside this Court's jurisdictional bounds.

[37] As was described above, the Applicant, through the Artist Agreement (and incorporating Digital Addendum), granted CD Baby and its licensees, including the co-Respondents, the non-exclusive right to distribute the Applicant's content. The Respondents submit that this included CD Baby's right to authorize MERLIN to grant JioSaavn a license to exploit the Applicant's content on its streaming platforms. I agree. Contrary to the Applicant's arguments otherwise, his signing of the Artist Agreement provided CD Baby with the authorization to act as his agent and license his content to DSPs, like JioSaavn. Nothing in the Artist Agreement prevented CD Baby from partnering with organizations like MERLIN to streamline the licensing process. The Artist Agreement further provided CD Baby with the right to take down an artist's content for

whatever reason “in its sole and absolute discretion.” Removing or otherwise making unavailable copyright content, in any event, does not amount to a contravention under the Act.

[38] The Applicant’s main contention is his claim that JioSaavn streamed his works for free, contrary to the distribution levels that he authorized, i.e., Download + Streaming services, Downloads Only, and Everything that pays. On its face, I can agree with the Applicant that if CD Baby distributed, or allowed others like MERLIN to distribute, his content for free, this would be contrary to the Artist Agreement and acting without the Applicant’s consent. However, the evidentiary record does not establish that this is the case.

[39] The Applicant relies on the DDS reports to demonstrate that JioSaavn (operating under the name Saavn) reported streams in the hundreds and thousands with a payout rate of \$0.00. He says that this is sufficient evidence to demonstrate that JioSaavn freely streamed his content. He further says that the DDS reports significantly under-reported the number of JioSaavn’s unpaid streams by over 70,000, and that he caught them decreasing the number of streams on their website.

[40] I agree with the Respondents that the Applicant failed to meet his evidentiary burden of establishing that his copyright was infringed; namely, he failed to prove, on a balance of probabilities, that he was not paid for the distribution of his content per the Artist Agreement. Though the Respondents did not provide a concrete answer as to why some of the streams in the DDS reports show as paid out for \$0.00, they did point out that the record establishes that some DSPs report streams as \$0.00 when they are considered “artificial streams.” CD Baby provided

the Applicant with this possible explanation via email correspondence on October 21, 2022. The record further demonstrates that JioSaavn in fact paid the Applicant for some streams of the same works in issue. The Respondents submit that this is evidence that CD Baby acted within the scope of the Artist Agreement, licensing the Applicant's works to services that pay, regardless of how much they pay. The Applicant did not engage with these explanations, nor did he rely on any strong evidentiary backing such as expert evidence to support his assertion that there was a payment issue breaching the Artist Agreement. In the absence of such clear and convincing evidence, the Court cannot accept as a fact that there was a payment issue and/or that the Respondents breached the Artist Agreement.

[41] Most importantly, as the Respondents point out, JioSaavn cannot have infringed the Applicant's copyright under the Act because it did not offer or provide streams of his content into Canada. As the Supreme Court has held, copyright law respects the territorial principle: *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 at paras 56-57, 63. In other words, if the stream is not sent from or received in Canada, it cannot constitute an infringement of copyright under the Act.

[42] Accordingly, even if JioSaavn did distribute the Applicant's music for free, it did not do so in Canada. Therefore, even if the Respondents' conduct breached the Artist Agreement, to which this Court does not agree, it does not constitute infringement under the Act.

[43] As I have not found infringement, it is unnecessary to evaluate the Applicant's claim for damages.

IV. Conclusion

[44] Having found no infringement of copyright under the Act, nor merit to any of the Applicant's other voluminous submissions, this application will be dismissed in its entirety.

[45] The Respondents are entitled to their costs. As requested at the hearing, I will allow the Respondents to make written submissions on the issue of costs within 14 days of this Judgment, not exceeding 10 pages double-spaced. The Applicant shall have a right to provide his written response within 14 days thereafter, not exceeding 10 pages double-spaced.

**JUDGMENT in T-173-23**

**THIS COURT'S JUDGMENT is that** this application is dismissed with costs to the Respondents, in an amount to be determined, as provided herein.

"Russel W. Zinn"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-173-23

**STYLE OF CAUSE:** RANDY WILLIAMS v MUSIC AND  
ENTERTAINMENT RIGHTS LICENSING  
INDEPENDENT NETWORK LTD., CD BABY, AND  
JIOSAAVN

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** MAY 2 AND 3, 2024

**JUDGMENT AND REASONS:** ZINN J.

**DATED:** JUNE 6, 2024

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