

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	
	§	Case No. 97-41243
ISBELL RECORDS, INC.,	§	
	§	Chapter 7
Debtor.	§	
<hr/>		
	§	
ALVERTIS ISBELL d/b/a ALVERT	§	
MUSIC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adversary No. 04-4242
	§	
DM RECORDS, INC.,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION

Alvertis Isbell (“Isbell”) initiated this copyright infringement action against DM Records, Inc. (“DM Records”) by filing a complaint in the United States District Court for the Northern District of Texas (the “Northern District Court”). On June 4, 2004, the Northern District Court entered a MEMORANDUM ORDER transferring venue to the United States District Court for the Eastern District of Texas (the “Eastern District Court”). Pursuant to an order entered on August 4, 2004, the Eastern District Court referred the dispute to this Court. This Court, having considered the evidence and arguments of counsel in connection with the DEFENDANT’S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT [Adv. Docket No. 63], and for the reasons discussed below, finds that DM Records has overstated and misstated the relevance of the Bankruptcy Code and this Court’s prior orders to the parties’ dispute. This

Court, therefore, recommends that the Eastern District Court *sua sponte* withdraw its referral of the parties' copyright infringement action to this Court.

I. BACKGROUND

1. Isbell, who does business as Alvert Music and is known as "Al Bell," is in the business of publishing and otherwise commercially exploiting musical composition copyrights. Isbell asserts that he owns copyrights in certain compositions, namely "Whoomp! There It Is!" and "Dazzey Duks," (the "Subject Compositions"). Isbell further claims that DM Records has unlawfully exploited the copyrights in these Compositions. DM Records contends that it owns the Subject Compositions and the associated sound recordings of those compositions (the "Subject Recordings"). The Northern District Court transferred the dispute to the Eastern District Court, and the Eastern District Court referred the dispute to this Court, because DM Records claims that it purchased the Subject Compositions and Subject Recordings from Isbell Records, Inc., d/b/a Bellmark Records ("Bellmark") pursuant to a bankruptcy sale approved by this Court on September 8, 1999.

A. Bellmark's Bankruptcy Case

2. Isbell founded Bellmark and served as its President and Chief Executive Officer. Bellmark was a music and record company. On April 18, 1997, Bellmark filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Codes (the "Bankruptcy Code"), commencing Bankruptcy Case No. 97-41243 in this Court.

3. According to motions filed in this Court, Bellmark filed for bankruptcy on the eve of the trial of a lawsuit brought by Bellmark's largest creditor, Independent National Distributors, Inc. ("INDI"), in the 162nd Judicial District Court for the State of Texas. INDI asserted, among other things, fraudulent transfer and *alter ego* claims against Bellmark.

4. On January 7, 1998, the Court converted the Chapter 11 proceeding to a liquidation case under Chapter 7 of the Bankruptcy Code. The Court subsequently appointed an independent trustee (the “Chapter 7 Trustee”) to liquidate and administer the assets of the Bellmark bankruptcy estate. *See* ORDER OF CONVERSION TO CHAPTER 7 [Docket No. 109]. Following his appointment, the Chapter 7 Trustee sought and obtained approval from this Court to license the copyrights in the Subject Recordings.¹ Bellmark’s ownership of the Subject Recordings was undisputed by Isbell or by any other party.

5. The Chapter 7 Trustee received an offer from DM Records to purchase Bellmark’s assets. On June 18, 1999, the Chapter 7 Trustee filed a MOTION TO APPROVE SALE OF ASSETS FREE AND CLEAR OF LIENS AND FOR ORDER AUTHORIZING AND APPROVING AUCTION BIDDING PROCEDURE [Docket No. 171] (the “Sale Motion”), seeking the Court’s approval the sale. The Sale Motion did not contain a specific description or list of the assets the Chapter 7 Trustee proposed to sell. In the Sale Motion, the Chapter 7 Trustee stated that he was seeking to sell only Bellmark’s interest in certain assets and that he had made no representation or warranty to DM Records regarding Bellmark’s interest in any particular asset.

6. Following a hearing on September 8, 1999, this Court entered an order [Docket No. 201] (the “Sale Order”) approving the sale of Bellmark’s assets to DM Records for \$166,000 pursuant to the terms and conditions of a separate Asset Purchase Agreement. The Sale Order incorporates the definitions of terms contained in the Chapter 7 Trustee’s Motion. The Sale Order expressly provides, in pertinent part, that “the sale of the Purchased Assets is made ‘as is, where is’ without any representation or warranties concerning the Estate’s right, title or interest

¹ DM Records asserts that the Chapter 7 Trustee also exploited the Subject Compositions. In its briefing relating to the pending Motion to Dismiss, DM Records relies on several letters executed by the Chapter 7 Trustee to support this assertion. The letters request clearance to use the Subject Recordings (among other recordings) in various musical compilations.

if any, in such assets” The Sale Order further states that “only the [e]state’s interest in the Purchased Assets is being conveyed, and the sale shall not include the interest of any co-owner, owner of any copyright interest, or royalty interest holder who owns an interest in such assets or is entitled to royalties from the future use, sale or marketing of such assets.”

7. DM Records and the Chapter 7 Trustee, as the representative of the Bellmark bankruptcy estate, executed the Asset Purchase Agreement prior to the entry of the Sale Order. The Chapter 7 Trustee introduced a copy of the executed Asset Purchase Agreement, including all referenced exhibits, into evidence at the hearing on September 8, 1999. The exhibits consisted of: (a) a master tape inventory, which included the Subject Recordings; and (b) a master licensing agreements list, which included the Subject Recordings.

8. The Asset Purchase Agreement defines the assets sold to DM Records very broadly. In particular, Paragraph 1.1 of the Asset Purchase Agreement defines the “Property” transferred to DM Records as all property of the Debtor. The exhibits to the Asset Purchase Agreement, which are incorporated in the definition of “property,” include the Subject Recordings and (according to DM Records) the Subject Compositions.

9. Paragraph 2.1 of the Asset Purchase Agreement states that DM Records is purchasing “all of the Estate’s rights, title and interests in and to the Property.” Paragraph 2.4 states that the Chapter 7 Trustee made no representations as to Bellmark’s property and that DM Records had an opportunity to investigate the property and all related matters. Additionally, Paragraph 6.3 states “[a]ny dispute or controversy in connection with the performance or terms of this Agreement . . . shall be brought in the Bankruptcy Court, which shall have exclusive jurisdiction to resolve any such dispute or controversy.”

10. On or about October 4, 1999, the Chapter 7 Trustee and DM Records executed the

necessary documentation to transfer ownership of the assets purchased by DM Records. The Bill of Sale states that the Chapter 7 Trustee is selling “100% of worldwide rights or whatever right title and interest Seller has, to the master recordings as hereinafter defined – See Attached Exhibit “A”” The Chapter 7 Trustee also executed a Copyright Assignment wherein he conveyed Bellmark’s interest in certain master recordings and associated license agreements.

11. On June 20, 2001, the Chapter 7 Trustee filed his SUPPLEMENTAL FINAL REPORT AND ACCOUNT [Docket No. 367] indicating that liquidation of the Bellmark bankruptcy estate and disbursement of the proceeds to creditors was complete. On July 20, 2001, the Court closed Bellmark’s bankruptcy case.

B. District Court Litigation

12. On July 3, 2002, approximately one year after Bellmark’s bankruptcy case was closed, Isbell filed his COMPLAINT against DM Records in the Northern District Court, commencing Civil Case No. 3-02-CV-1408-G.

13. In the Complaint, Isbell asserts that he owns the Subject Compositions through written agreements with the authors of such compositions, namely the 1992 TMR / Bellmark Agreement and the 1993 Tag Team / Bellmark Agreement (collectively, the “Bellmark Agreements”). Isbell seeks a declaratory judgment as to ownership of the Subject Compositions under 17 U.S.C. §§ 101, *et seq.*, the Copyright Revision Act and the Bellmark Agreements. Isbell also seeks damages for copyright infringement and demands a jury trial.

14. On September 10, 2002, DM Records filed its MOTION TO DISMISS, asserting that the Northern District Court lacked subject matter and personal jurisdiction [Adv. Docket No. 6]. On October 23, 2003, DM Records amended its motion to dismiss in the Northern District Court (the “Amended Motion”) [Adv. Docket No. 31]. The Amended Motion included objections to

the Northern District Court's personal jurisdiction over DM Records. DM Records also requested, as an alternative to dismissal, a change of venue to the United States District Court for the Middle District of Tennessee.

15. On November 13, 2003, Isbell filed his response in opposition to DM Record's Amended Motion [Adv. Docket No. 37]. Isbell asserted that the Compositions belonged to Alvert Music, rather than Bellmark, and were never assets of the Bellmark bankruptcy estate. Having never been assets of the Bellmark bankruptcy estate, Isbell asserted that the Subject Compositions could not have been administered, transferred or conveyed in connection with the Bellmark bankruptcy case, including the sale to DM Records.

16. On June 4, 2004, after additional briefing from the parties, the Northern District Court entered its MEMORANDUM ORDER denying the relief requested in the Amended Motion [Adv. Docket No. 49]. The Northern District Court held that Isbell had made a proper *prima facie* showing of personal and subject matter jurisdiction with respect to the Northern District Court. The Northern District Court also found that venue was proper but transferred the matter to the Eastern District Court, because some of the underlying events took place in the Bankruptcy Court for the Eastern District of Texas. The Northern District Court stated that "DM's grounds for asserting ownership over the Subject Compositions arise from the bankruptcy proceeding" and "there are significant questions about the extent to which, if at all, the Asset Purchase Agreement covering assets owned by Bellmark governs this action." MEMORANDUM ORDER at p. 36.

17. In the Eastern District Court, the matter was assigned Civil Case No. 4:04-CV-190. On July 20, 2004, DM Records filed its MOTION TO TRANSFER VENUE to this Court, the United States Bankruptcy Court for the Eastern District of Texas (Sherman Division) [Adv.

Docket No. 56] (the “Referral Motion”).²

18. The Referral Motion asserted that resolution of this matter required interpretation and/or enforcement of the sale proceeding and the Sale Order, but made no averments as to this Court’s subject matter jurisdiction or inability to enter final judgments in matters where a right to a jury trial has been properly invoked. Accordingly, the issue of this Court’s jurisdiction over the matter was not before the Eastern District Court. Isbell filed no response or opposition to the Referral Motion.

19. On August 19, 2004, the Eastern District Court entered its order referring the matter to this Court where the matter was assigned Adversary Proceeding No. 04-4242 in the above-mentioned bankruptcy case of Bellmark [Adv. Docket No. 58].

C. The Adversary Case in the Bankruptcy Court

20. On October 25, 2004, DM Records filed the instant Motion to Dismiss. DM Records argues, among other things, that the Sale Order is *res judicata* as to DM Records’ ownership of the Subject Compositions. Isbell opposes the Motion to Dismiss. The parties have submitted extensive briefing to the Court.

21. On October 17, 2005, after the Eastern District Court referred the parties’ dispute to this Court, Isbell filed a JURY DEMAND in the instant adversary proceeding [Adv. Docket No. 121]. Although DM Records had not objected to the jury demand contained in Isbell’s Complaint, DM Records filed an opposition to the demand filed by Isbell in this Court on November 7, 2005. [Adv. Docket No. 126].

22. The Court conducted a hearing on the Motion to Dismiss and the Jury Demand on January 10, 2006. At that hearing, the Court questioned its subject matter jurisdiction over the

² The appropriate procedural mechanism is not a motion to transfer venue, but a request to refer the case to this Court.

parties' dispute. The Court also questioned its ability to enter a final order regarding the Motion to Dismiss.

23. On February 15, 2006, DM Records submitted a SUPPLEMENTAL BRIEF ON JURISDICTIONAL ISSUES [Adv. Docket No. 141], arguing that the Asset Purchase Agreement grants this Court exclusive jurisdiction over the parties' dispute. DM Records also argues that the ownership of the Subject Compositions is a "core" matter over which this Court has jurisdiction pursuant to 28 U.S.C. §157(b)(2)(A) and (E).

24. On February 17, 2006, Isbell submitted a Memorandum of Law Regarding Lack of Subject Matter Jurisdiction [Adv. Docket No. 142], arguing that this Court lacks subject matter jurisdiction over the parties' dispute.

II. ANALYSIS

A. The Bankruptcy Court's Jurisdiction

25. The first issue to consider in resolving this matter is that of this Court's subject matter jurisdiction over the parties' copyright dispute. The Court raised this issue for the first time at the hearing on January 10, 2006.³

26. "Federal courts are courts of limited jurisdiction, and bankruptcy courts are no exception. Their jurisdiction is wholly 'grounded in and limited by statute.'" *Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1022 (5th Cir. 1999) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995)). The issue of subject matter jurisdiction in a Title 11 bankruptcy proceeding technically involves an analysis of the jurisdiction of the district court. As applicable to litigation brought within the confines of a bankruptcy case, 28 U.S.C. §1334(b) provides, in

relevant part, that:

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings *arising under* title 11, or *arising in or related to* cases under title 11.

(Emphasis added.) If a matter falls within one of those three distinct categories, thereby giving the district court subject matter jurisdiction over that matter, then the district court may thereafter refer the matter to a bankruptcy court for that district under 28 U.S.C. §157(a). Thus, subject matter jurisdiction exists both on the district and bankruptcy court levels if the proceeding falls within one of the three prescribed categories listed in 28 U.S.C. §1334(b). *See generally Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995).

27. A proceeding “arises under” Title 11 if the proceeding is created or determined by a statutory provision of Title 11. A proceeding “arises in” a case under Title 11 if, by its very nature, it could arise only in the context of a bankruptcy case or, in other words, it is a proceeding which would have no practical existence outside of the bankruptcy context, such as a bankruptcy administrative matter. Finally, a proceeding is “related to” a case under Title 11 if its outcome could conceivably have an effect on a bankruptcy estate. *See, e.g., In re Harnischfeger Indus., Inc.*, 246 B.R. 421, 432-33 (Bankr. N.D. Ala. 2000).

28. The parameters of the subject matter jurisdiction possessed by a bankruptcy court, as a unit of the district court, under the “related to” jurisdiction of §1334(b) have been frequently addressed. A matter is “related to” a bankruptcy case if “the outcome could conceivably have any effect on the estate being administered in bankruptcy.” *In re Wood*, 825 F.2d 90, 93 (5th

³ The Northern District Court’s Memorandum Order contains some discussion of the convenience of the Eastern District Court and, by reference, this Court in the context of a motion to transfer venue. The Northern District Court’s discussion suggests that if the Asset Purchase Agreement governs the parties’ dispute, then this Court is the most appropriate forum. As discussed below, however, the Asset Purchase Agreement, the related Sale Order, and the Bankruptcy Code do not govern the parties’ dispute.

Cir. 1987). In later affirming and clarifying that standard, the Fifth Circuit stated that an action is “related to” a bankruptcy case if “the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and ... in any way impacts the handling and administration of the bankrupt estate.” *Walker*, 51 F.3d 562, 569 (5th Cir. 1995) (emphasis added).

1. The Asset Purchase Agreement

29. In this case, DM Records asserts that this Court retained exclusive jurisdiction over the subject matter of the Complaint by virtue of a provision contained in the Asset Purchase Agreement. Particularly, DM Records references section 6.3 of the Asset Purchase Agreement which provides that “[a]ny dispute or controversy in connection with the performance or terms of this [Asset Purchase] Agreement, including enforcement of the remedies provided herein in the event of a default, shall be brought in the Bankruptcy Court which shall have exclusive jurisdiction to resolve any such dispute or controversy.” Notwithstanding this argument, DM Records fails to point to any dispute regarding a term of the Asset Purchase Agreement, any party’s failure to comply with the Asset Purchase Agreement, or the applicability of any remedies provided therein.

30. The terms of the Asset Purchase Agreement are clear and unambiguous. As set forth in Section 2.1 of the Asset Purchase Agreement, the Chapter 7 Trustee, as the representative of Bellmark’s estate, transferred all of the estate’s interest in certain assets. Paragraph 2.4 states that the Chapter 7 Trustee made no representations or warranties regarding the interest of Bellmark’s estate in any particular asset.

31. There is no question that the Chapter 7 Trustee, as the representative of Bellmark’s estate, fully performed his obligations under the Asset Purchase Agreement. The

Chapter 7 Trustee executed the documents necessary to transfer Bellmark’s interest in certain assets to DM Records. Thus, the current dispute – whether Bellmark owned the Subject Compositions when it filed for bankruptcy protection –is not governed by the terms of the Asset Purchase Agreement.

2. The Sale Order

32. DM Records also attempts to portray the parties’ copyright dispute as involving “core” bankruptcy matters -- namely, the interpretation and enforcement of this Court’s Sale Order and the identification of property of Bellmark’s estate. With respect to the Sale Order, DM Records argues that the Court incorporated and approved the Asset Purchase Agreement in the Sale Order. Since the Asset Purchase Agreement included a detailed list of the assets the Chapter 7 Trustee proposed to transfer to DM Records, DM Records argues that this Court has jurisdiction over the parties’ copyright dispute. DM Records argues, in essence, that the Court intended the Sale Order to quiet title to the Subject Compositions.

33. However, the Sale Order does not expressly incorporate the Asset Purchase Agreement. Instead, the Sale Order adopts the definitions of terms set forth in the Chapter 7 Trustee’s Sale Motion. The Sale Order provides that the sale of “Purchased Assets” (as defined in the Sale Motion) to DM Records was made “‘as is, where is’ without any representation or warranties concerning the Estate’s right, title or interest, if any, in such assets.”

34. Even if the Court could somehow construe the Sale Order as adopting the terms of Asset Purchase Agreement, the definition of the transferred “property” set forth in the Asset Purchase Agreement does not specifically mention any composition copyright. Rather, the definition of “property” in the Asset Purchase Agreement simply refers to all of Bellmark’s assets. The definition includes, without limitation, copyrights and licenses in certain sound

recordings listed in Exhibit “A” to the Asset Purchase Agreement.

35. In the context of the Sale Motion, the Court was not required to and did not determine whether particular assets were property of Bellmark’s estate prior to approving a proposed sale of the assets. The Chapter 7 Trustee proposed to sell only the estate’s interest in certain property, whatever that interest might be. The Chapter 7 Trustee made no warranties as to Bellmark’s right, title and interest in any particular asset in the Sale Motion or the Asset Purchase Agreement, and Court made no findings as to Bellmark’s ownership of any particular asset in the Sale Order. The fact that DM Records is now faced with a challenge to its ownership of some of the assets it believed it purchased from Bellmark’s estate is a predicable hazard of any “as is, where is” sale without representations or warranties as to title. The parties’ dispute regarding ownership of the Subject Compositions does not implicate the terms of the Sale Order or the Asset Purchase Agreement.

3. Property of Bellmark’s Estate

36. Section 363 of the Bankruptcy Code only allows a trustee to sell property of the bankruptcy estate. Thus, if the Subject Compositions were not “property of the estate” within the meaning of 11 U.S.C. §541(a) at the time of Bellmark’s bankruptcy filing, then the Subject Compositions could not have been transferred by the Chapter 7 Trustee to DM Records pursuant to the Asset Purchase Agreement and Sale Order. Although this appears, superficially, to be an issue over which this Court has some expertise, the determination of whether an asset is “property of the estate” depends upon non-bankruptcy law.

37. Section 541 of the Bankruptcy Code provides in pertinent part that the commencement of a bankruptcy case --

creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case

11 U.S.C. §541(a)(1). This broad provision encompasses causes of action that belong to the debtor, as well as the debtor's intellectual property, such as interests in patents, trademarks and copyrights. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 367; S. Rep. No. 989, 95th Cong., 2d Sess. 82, U.S. Code Cong. & Admin. News 1978, p. 5787; *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983); *In re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987). However, the threshold issue of whether property belonged to a debtor prior to bankruptcy and became part of the debtor's bankruptcy estate must be resolved by reference to state law. See, e.g., *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986); *Esselen Associates, Inc. v. Crysen/Montenay Energy Co.*, 102 B.R. 25, 28 (S.D.N.Y. 1989). As the Supreme Court has explained, “[p]roperty interests are created and defined by state law,” and “there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.” See *Butner v. United States*, 440 U.S. 48, 55 (1979).

38. While a bankruptcy case is open and pending, the determination of whether an asset is “property of the estate” within the meaning of §541 is a “core” proceeding over which this Court has jurisdiction pursuant to 28 U.S.C. 157(b)(A) and (O). Such a determination obviously concerns the administration and liquidation of the bankruptcy estate. In this case, however, the Court has closed Bellmark's case, and Bellmark's bankruptcy estate no longer exists. See 11 U.S.C. §554(c); *Bass v. Denney*, (*In re Bass*), 171 F.3d 1016, 1022 (5th Cir. 1999). The determination of whether the Subject Compositions were Bellmark's property when it filed a bankruptcy petition is no longer a “core” matter over which this Court has jurisdiction.

39. The parties' dispute regarding ownership of the Subject Compositions does not

“arise under” Title 11, since the dispute was not created by and will not be determined by a statutory provision of Title 11. The parties’ dispute also does not “arise in” a case under Title 11 since copyright infringement suits arise outside of the bankruptcy context. Further, there is no longer any estate to be “related to.” *Id.* at 1021.

40. The Court has not previously determined whether the Debtor owned the Subject Compositions, because the sale of the Debtor’s assets was without representations or warranties as to title. This Court’s orders do not govern the parties’ present dispute. The ownership of the Subject Compositions will not be decided by any provision of the Bankruptcy Code, and the outcome of the dispute will have no effect on Bellmark’s estate or creditors. The Court, therefore, concludes that it does not have subject matter jurisdiction to determine Bellmark’s ownership of the Subject Compositions pursuant to 28 U.S.C. §1334(b). The parties’ dispute should return to the Eastern District Court for resolution.

B. Withdrawal of the Reference to the Bankruptcy Court

41. Even if the Court were somehow to conclude that it has jurisdiction to resolve the parties’ copyright dispute pursuant to 28 U.S.C. §1334(b), “cause” exists to withdraw the reference of the parties’ dispute from this Court pursuant to 28 U.S.C. §157(d).

42. As noted *supra*, 28 U.S.C. §157(a) provides:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Accordingly, pursuant to a general order entered on August 6, 1984, the Eastern District Court has referred all cases under Title 11, or proceedings arising under Title 11, or proceedings arising in or related to cases under Title 11 to this Court for consideration and resolution.

43. In order to avoid the constitutional problems discussed in *Northern Pipeline*

Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), the U.S. Congress limited the jurisdiction of bankruptcy courts by distinguishing between “core” and “non-core” proceedings.⁴ With respect to core proceedings referred to the bankruptcy court pursuant to 28 U.S.C. §157(a), §157(b) provides that this Court has jurisdiction to fully adjudicate the matter. However, with respect to non-core proceedings, §157(c) provides that the Eastern District Court is the final arbiter.

44. In addition to the limits placed on this Court’s authority to finally adjudicate non-core matters, §157(d) of Title 28 provides for the withdrawal of any reference to the bankruptcy court under certain circumstances. Section 157(d) states in relevant part: “[t]he district court may withdraw ... any case or proceeding referred under this section, on its own motion ... for cause shown.” Section 157(d) further states: “the district court shall, on timely motion of a party, withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” *See also In re Moody*, 64 B.R. 594 (Bankr. S.D. Tex. 1986) (recommending withdrawal of the reference *sua sponte*).

45. This provision reflects Congress’ view that the jurisdiction of bankruptcy courts should be limited to areas within the realm of their expertise. *Southern Pac. Transp. Co. v. Voluntary Purchasing Groups*, 252 B.R. 373 (E.D. Tex. 2000). With respect to a timely motion by a party seeking withdrawal of the reference to the bankruptcy court, withdrawal is required when “substantial and material consideration” of a federal statute other than the

⁴ A non-exclusive list of “core” proceedings is set forth in 28 U.S.C. § 157(b). In general, core proceedings are those matters that arise under title 11 or arise in a case under title 11, or those matters that could arise only in the context of a bankruptcy case. Non-core proceedings are those matters that are otherwise related to the bankruptcy estate or that could conceivably have an effect on a bankruptcy estate. *See In re Wood*, 825 F.2d at 93; *In re Walker*, 51 F.3d at 569 (5th Cir.1995).

Bankruptcy Code is necessary to the resolution of a case or proceeding. *Id.* Likewise, whether a proceeding is a “core proceeding” is relevant to a determination of whether “cause” exists to *sua sponte* withdraw the reference. *See Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985). Other factors relevant to the determination of whether “cause” exists include (i) the effect of withdrawal of the reference on judicial efficiency; (ii) uniformity in bankruptcy administration; (iii) reduction in forum shopping; (iv) fostering the economical use of the debtors’ and creditors’ resources; (v) expediting the bankruptcy process; and (vi) whether there is a jury demand. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998-99 (5th Cir. 1985).

46. In this case, reference to state contract law and/or federal copyright law, not the Bankruptcy Code or any substantive rights or provisions therein, will resolve the parties’ dispute. This Court has no particular expertise in determining copyright claims. Further, a final judgment in this proceeding will not affect Bellmark, Bellmark’s creditors, the administration of Bellmark’s bankruptcy estate (which no longer exists), or any prior order of this Court. In short, a successful outcome will not generate additional funds for Bellmark’s creditors, and a negative outcome will not impose any additional liabilities on Bellmark’s bankruptcy estate.

47. Additionally, the Complaint, as originally filed in the Northern District Court, contains a jury demand. DM Records raised no objection to Isbell’s jury demand during the three years this matter was pending before the Northern District Court and the Eastern District Court. Nonetheless, DM Records now argues that Isbell has submitted to the equity jurisdiction of this Court “by invoking the aid of the bankruptcy court.” RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION FOR JURY DEMAND at p. 6 [Adv. Docket No. 126].

48. Whether a party is entitled to a jury trial is governed by the Seventh Amendment

of the United States Constitution, which provides, in relevant part: “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” The Supreme Court, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), formulated a two-prong test for determining if a litigant has a Seventh Amendment right to a jury trial. The trial court must first compare the action to those brought in the courts of England prior to the merger of courts of law and courts of equity and then “examine the remedy sought and determine whether it is legal or equitable in nature.” *Id.* at 41.

49. In this case, the Complaint seeks a declaratory judgment regarding Isbell’s ownership of the Subject Compositions under the Bellmark Agreements and damages for copyright infringement or conversion of property. Ownership and/or title disputes, copyright infringement litigation, and conversion actions all involve legal issues triable by a jury. *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) (discussing a right to jury trial under the Copyright Act); *Ross v. Bernhard*, 396 U.S. 531, 533 (1970) (discussing actions for conversion of personal property); *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891) (discussing ownership and title disputes). Accordingly, the Court concludes that, unless a waiver has occurred, Isbell appears to have a Seventh Amendment right to a jury trial on the claims asserted in the Complaint.

50. With respect to whether Isbell has waived his Seventh Amendment right to a jury trial by submitting to this Court’s jurisdiction, Bellmark is the entity that filed for protection under the Bankruptcy Code, and Bellmark was the debtor-in-possession prior to the conversion of the case to Chapter 7 and the appointment of the Chapter 7 Trustee.⁵ Isbell is not Bellmark.

⁵ In its briefing before the Northern District Court, DM Records incorrectly stated that Isbell “acted as debtor in possession of the Bellmark estate.” [Adv. Docket No. 43.] The term “debtor in possession” means the “debtor” (*i.e.*, the person or entity that filed for relief under the Bankruptcy Code) or a person selected by the bankruptcy court to serve as a trustee in the case. *See* 11 U.S.C. §100(13) and 1101(1). While Isbell may have signed the

Although Isbell was alleged to be the *alter ego* of Bellmark in connection with the conversion of Bellmark's Chapter 11 proceeding to a Chapter 7 case, this Court never determined that Isbell was, in fact, Bellmark's *alter ego*.

51. DM Records also argues that Isbell submitted to the jurisdiction of this Court and waived his right to a jury trial by filing a proof of claim in Bellmark's bankruptcy case. Again, DM Records overlooks the relevance and relationship of the bankruptcy proceedings to the pending copyright dispute. While Isbell may have waived his right to a jury trial with respect to the claims asserted in his proof of claim, DM Records has not alleged or provided any evidence that the proof of claim allegedly filed by Isbell in Bellmark's bankruptcy case bears any relation to the claims asserted in his Complaint. *See, e.g. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

52. The Supreme Court has consistently held that courts should "indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *see also, Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). In this case, for the foregoing reasons, the Court finds and concludes that Isbell appears to have properly invoked his right to a jury trial upon the commencement of this action in the Northern District Court and, further, that Isbell does not appear to have waived such right.

53. Under 28 U.S.C. §157(e), if the right to a jury trial applies in a proceeding, the bankruptcy court may only conduct a jury trial "if specially designated to exercise such jurisdiction by the district court and with the express consent of the parties." 28 U.S.C. §157(e). No such designation to conduct jury trials exists in the Eastern District of Texas, and Isbell has not consented to a jury trial before this Court. Accordingly, the Court's apparent inability to

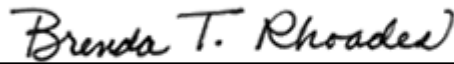
bankruptcy petition for Bellmark as Bellmark's President and Chief Executive Officer, Isbell was neither the debtor nor the debtor-in-possession.

conduct a jury trial in this matter constitutes “cause” for withdrawal of the reference of this adversary proceeding.

III. CONCLUSION

54. Pursuant to 28 USC §157(a), the Eastern District Court has generally referred all cases under Title 11 and all proceedings “arising under” Title 11 or “arising in” or “related to” a case under Title 11 to the bankruptcy judges for the Eastern District of Texas. The Eastern District Court is authorized by 28 USC §157(d) to withdraw the reference as to any case or controversy “for cause shown.” *See* FED. R. BANKR. P. 5011(a) and 9033; *see generally* 1 NORTON BANKR. L. & PRAC. 2d § 8:1 (discussing mandatory and permissive withdrawal from bankruptcy court to district court). In this case, in light of the non-core nature of this proceeding, its lack of any substantive relationship with Bellmark’s bankruptcy, and the pending jury demand, the Court does not have jurisdiction over this dispute and withdrawal of the reference, if not mandatory, is at least permissive. For the foregoing reasons, this Court recommends that the Eastern District Court *sua sponte* withdraw the reference of this adversary proceeding pursuant to 28 U.S.C. §157(d).

Signed on 3/29/2007

 SR
HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE