

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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WARNER BROS. RECORDS, INC., a  
Delaware corporation; CAPITOL RECORDS,  
INC., a Delaware corporation; UMG  
RECORDINGS, INC., a Delaware corporation;  
SONY BMG MUSIC ENTERTAINMENT,  
a Delaware general partnership; MAVERICK  
RECORDING COMPANY, a California joint  
venture; and ARISTA RECORDS, LLC, a  
Delaware limited liability company,

06-cv-3089 (SCR)

Plaintiffs,

-against-

JOAN C. CASSIN,

Defendant.

-----x

**MEMORANDUM OF LAW OF  
DEFENDANT IN SUPPORT  
OF MOTION TO DISMISS COMPLAINT**

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**Preliminary Statement**

Defendant respectfully submits this memorandum of law in support of her motion for an Order, pursuant to Fed. R. Civ. P. 12(b)(6), dismissing the Complaint on the ground that it fails to state a claim upon which relief can be granted. A copy of the Complaint is annexed to the accompanying declaration of Ray Beckerman.

The complaint alleges in purely conclusory terms that defendant has used, and continues to use, an online media distribution system to *download* the Copyrighted Recordings, to *distribute* the Copyrighted Recordings to the public, and/or to *make* the Copyrighted Recordings *available* for distribution to others. In doing so, Defendant has violated Plaintiffs' exclusive rights of reproduction and distribution. (Italics supplied)

(Complaint, paragraph 14).

The complaint annexes as exhibit A a list of song names, and as exhibit B a longer list of song names.

The complaint nowhere sets forth

- what exhibit A is;
- what exhibit B is;
- where the lists come from;
- what an "online media distribution system" is;
- what acts were committed with it;'
- when those acts were committed;
- how those acts were committed;

- any instance or example of “downloading” a recording;
- any instance or example of “distributing” a recording;
- any instance or example of “making [a recording] available”;
- any of the requisite elements for infringing the § 106(3) distribution right; or
- what law would support a claim for “making [a recording] available”.

Under well settled principles, the complaint fails to satisfy notice pleading standards for alleging copyright infringement.

### ARGUMENT

#### **THE COMPLAINT MUST BE DISMISSED BECAUSE IT DOES NOT STATE A CLAIM FOR COPYRIGHT INFRINGEMENT**

Although the complaint conclusorily claims infringement of plaintiffs’ rights of “reproduction”<sup>1</sup> and “distribution”<sup>2</sup> it does not sufficiently plead the elements of either.

It is well established that a complaint alleging copyright infringement must “plead with specificity the acts by which a defendant has committed copyright infringement”, alleging “by what acts during what time the defendant infringed the copyright.” Brought to Life Music, Inc. v. MCA Records, Inc., 2003 WL 296561 (SDNY 2003) (granting Rule 12(b)(6) motion where “[p]laintiff ha[d] not attempted to describe ‘by what acts and during what time’ [the defendant] infringed the copyright”); Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 230 (SDNY. 2000); DiMaggio v. International Sports Ltd., 1999 WL 675979 (SDNY. 1999); Lindsay v. The Wrecked

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<sup>1</sup> 17 USC 106 (1) “to reproduce the copyrighted work in copies or phonorecords”

<sup>2</sup> 17 USC 106 (3) “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”

and Abandoned Vessel R.M.S. Titanic, 1999 WL 816163 (SDNY, 1999) (dismissing copyright infringement claim pursuant to Rule 12(b)(6); vague and conclusory allegations of infringement pleaded using “and/or” do not satisfy requirement of pleading particular infringing acts with specificity); Tom Kelley Studios Inc. v. Int’l Collectors Society Inc., 1997 WL 598461 (SDNY 1997); Franklin Electronic Publishers v. Unisonic Prod. Corp., 763 F. Supp. 1, 4 (SDNY 1991); Calloway v. Marvel Entertainment Group, 1983 WL 1141 at 3 (SDNY 1983). *Accord*, Stampone v. Stahl, 2005 WL 1694073 at 2 (D. New Jersey 2005) (dismissing copyright claim pursuant to Rule 12(b)(6) where complaint failed “to set out particular infringing acts with some specificity”); Gee v. CBS, Inc., 471 F. Supp. 600, 643-44 (ED Pennsylvania 1979), *aff’d*, 612 F.2d 572 (3d Cir. 1979).

The instant complaint must be dismissed since its sole allegation of copyright infringement – that defendant used an online media distribution system “to download [certain allegedly copyrighted recordings], to distribute [them] to the public *and/or* to make [them] available for distribution to others,” Complaint, ¶ 14 (italics supplied) – is made in a purely conclusory manner. The Complaint makes no attempt to describe the specific acts of infringement or the dates and times on which they allegedly occurred. Not a single actual instance of downloading or distribution is alleged. Neither are any of the indispensable elements of an infringement of the 17 USC 106 (3) distribution right alleged:

– *distribution* [there must be *actual dissemination of physical copies*. See, e.g. 2 Goldstein on Copyright § 7.5.1; 2 Nimmer on Copyright § 8.11[A} at 81-149]

– *of copies or phonorecords* [See, e.g. 2 Goldstein on Copyright § 7.5.1 at 7:127 “Section 106(3) is unequivocal that, for the distribution right to be infringed, copies or phonorecords must be distributed. The technologies of the Internet present a challenge...[but] [h]owever deeply Internet

Technologies may have undermined the economies of the public distribution right, it should be self-evident that it is the role of Congress, not the courts, to repair the omission....”]

– to the *public* [See, e.g., 2 Nimmer on Copyright § 8.11[A], at 81-148. “[I]t is not any distribution of copies or phonorecords that falls within this right, but only such distributions as are made ‘to the public’ ....[A] limited publication, i.e., a distribution made to a limited group for a limited purpose and not made to the public at large, should not infringe this right.”]

– by *sale, other transfer of ownership, rental, lease, or lending* [See, e.g. 2 Goldstein on Copyright § 7.5.1 at 7:125-126: “an actual transfer must take place; a mere offer of sale will not infringe the right”.].

Plaintiffs have not alleged, and cannot allege, any of the foregoing.

The exhibits annexed to the Complaint do not make up for the lack of specificity in alleging copying (downloading)<sup>3</sup> or distributing to the public, as they consist merely of lists of songs, and contain no information as to “by what acts during what time the defendant infringed the copyrights”. According to the Complaint, Exhibit A is a list of recordings whose copyright is allegedly owned by plaintiffs. Neither the Complaint nor Exhibit A itself sets forth allegations

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<sup>3</sup> The music files in plaintiffs’ lists could just as well have been copied legally from compact discs or purchased from an authorized online service. It would be pure speculation for plaintiffs to try to claim that one or more of the files in one or the other of their lists were illegally downloaded. “While complaint allegations must generally be taken as true for purposes of a motion to dismiss, it does not follow that conclusory allegations and speculation... will defeat such a motion.” Gmurzynska v. Hutton, 257 F.Supp.2d 621, 631 (SDNY 2003).

regarding actual copying or distribution of any specific recordings to the public. Exhibit B is a printout of a longer list, similarly unexplained.<sup>4</sup>

To the extent that these lists are intended to identify sound recordings made *available* for downloading, such allegations fail to state a cognizable claim of copyright infringement, since it is well established that no copyright infringement liability can be predicated upon making the works *available* unless there was *actual dissemination of unauthorized copies*. Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4<sup>th</sup> Cir. 1997) (“In order to establish ‘distribution’ of a copyrighted work, a party must show that an unlawful copy was disseminated ‘to the public.’”); National Car Rental System, Inc. v. Computer Associates International, Inc., 991 F.2d 426, 434 (8<sup>th</sup> Cir. 1993); Musical Productions, Inc. v. Roma’s Record Corp., 2007 WL 750319 at 1 (EDNY March 7, 2007); Arista Records, Inc. v. MP3Board, Inc., 2002 WL 1997918 at 4 (SDNY 2002)(“[i]nfringement of the distribution right requires an actual dissemination of ... copies”) (emphasis added); In re Napster, Inc., 377 F.Supp.2d 796, 802 (ND.California 2005) (copyright owner must prove that defendant “actually disseminated” copies of the copyrighted work to members of the public or that the copies being offered were illegal copies); 2 Nimmer on Copyright § 8.11 [A]

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<sup>4</sup>To the extent that plaintiffs claim that *they themselves* (or their agents) downloaded actual copies of these recordings, such activity still would not involve distribution or dissemination “to the public” and involved no “actual transfer” and thus would not constitute copyright infringement. U.S. Naval Institute v. Charter Communications, Inc., 936 F.2d 692, 695 (2d Cir. 1991) (“It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him”); RSO Records v. Peri, 79 Civ. 5098, 1980 U.S. Dist. LEXIS 13490 at 8 (SDNY 1980) (Appendix 1) (complaint alleging that *plaintiffs* participated in reproduction and distribution of infringing copies failed to state valid infringement claim against *defendants*; “a copyright owner cannot infringe his own copyright”); Higgins v. Detroit Education Television Foundation, 4 F.Supp.2d 701, 705 (ED Michigan 1998) (“[a] plaintiff may not claim to have been damaged by reason of a defendant’s sale of alleged infringing copies if the copies were sold to plaintiff’s agent because such a sale prevents the distribution of such copies to the general public”).

at 81-149; 2 Goldstein on Copyright § 7.5.1 at 7:127. As Hotaling explained: “Generally, as permitted by what is known as the first-sale doctrine, the copyright owner's right to distribute a copyrighted work does not prevent the owner of a lawful copy of the work from selling, renting, lending, or otherwise disposing of the lawful copy. 17 U.S.C. § 109(a); see Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 52, 113 S.Ct. 1920, 1923-24, 123 L.Ed.2d 611 (1993)”. 118 F. 3d at 203.

Merely making copyrighted works *available* does not violate the copyright owner’s right of distribution. In re Napster, Inc., *supra*, 377 F.Supp.2d at 802, 805 (granting summary judgment on this issue); Arista Records, *supra*, at 13-14 (posting on MP3Board website of links leading to infringing audio files does not establish unlawful dissemination of copies of such files to the public). See also Obolensky v. G.P. Putnam’s Sons, 628 F.Supp. 1552, 1555-56 (SDNY), *aff’d*, 795 F.2d 1005 (2d Cir. 1986)(publisher did not infringe on copyright owner’s right of distribution of copyrighted book by listing the book in a trade publication as belonging to publisher where publisher neither copied the book nor sold any copies of the book; “there is no violation of the right to vend copyrighted works ... where the defendant offers to sell copyrighted materials but does not consummate a sale”); 2 Goldstein on Copyright § 7.5.1 at 7:125-126 (“an *actual transfer* must take place; a mere *offer of sale* will not violate the right”)(italics supplied); SBK Catalogue Partnership v. Orion Pictures Corp., 723 F.Supp. 1053, 1064 (D. New Jersey 1989) (merely “authorizing” a third party to distribute copyrighted works without proof that the third party *actually did so* does not constitute copyright infringement)(italics supplied); CACI Intern., Inc. v. Pentagen Technologies Intern., 1994 WL 1752376 at 4 (ED Virginia 1994) (marketing of software package *without actually distributing copies* of it does not constitute copyright infringement)(italics supplied).

As they did at oral argument, plaintiffs will cite a group of six *nisi prius* decisions determining, in their favor, six of the seven 12(b)(6) motions made within months of each other in 2005 and early 2006, all directed to the identical boilerplate complaint utilized by the RIAA in the instant case. (The “First Six RIAA 12(b)(6) Decisions”) These decisions all

(a) declined to rule one way or the other on whether the plaintiffs’ “making available” claim stated a claim for relief under the Copyright Act,

(b) held, with respect to actual distribution and actual downloading, that the absence of any allegations of any specific date, time, or place, or of any of the requisite elements of distribution right infringement, was cured by plaintiffs’ conclusory allegation that the infringement was “continuous”,<sup>5</sup> and

(c) being non-appealable, have never been subject to the crucible of appellate review.

As to the “making available” issue, the First Six RIAA 12(b)(6) Decisions are of course no authority at all, having declined to rule on the issue.<sup>6</sup>

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<sup>5</sup> Maverick Recording Co. v. Goldshteyn, 2006 WL 2166870 (EDNY 2006); Warner Bros. Records, Inc. v. Payne, 2006 WL 2844415 (WD Texas 2006); Arista Records LLC v. Greubel, 453 F. Supp. 2d 961 (ND Texas 2006); Fonovisa, Inc. v. Alvarez, 1:06-CV-011 (NDTex. 2006) (Appendix 2); Interscope Records v. Duty, 2006 WL 988086 (D. Arizona 2006); Elektra Entertainment Group Inc. v. Santangelo, 2005 WL 3199841 (SDNY 2005). As the Court knows, these decisions denying motions to dismiss were not appealable.

<sup>6</sup> It perhaps bears noting that their failure to rule on this issue, despite the undeniable authority that there can be no infringement of the distribution right without “actual dissemination of unauthorized copies”, without an “actual transfer”, and without dissemination to “the public at large”, was absolutely erroneous. As to those Courts which said they did not “understand” plaintiffs’ claim, that should have been seen as grounds for *granting* the dismissal motion, not for denying it. It was *plaintiffs’* burden to plead a cognizable claim, not defendant’s burden to explain plaintiffs’ inexplicable boilerplate, which defies (a) copyright law, (b) science, and (c) common sense.

As to the “specificity” issue, they are contrary to the great weight of authority. They all relied upon language mechanically culled from a single, 1991, *nisi prius* decision, Franklin Electronic Publishers, *supra*. There are no other known cases saying such a thing.<sup>7</sup> Meanwhile, the passage which they cite from Franklin (a) cited no authority, (b) has never been cited by any other authority, (c) is contrary to all other known authorities, and (d) in the factual and procedural context of Franklin, was virtual dictum, and was certainly unnecessary to the Court’s holding. The complaint in Franklin dealt with *physical copying of copyrighted electronic spelling correction aids*. The complaint actually annexed, as exhibits, *photos of the infringing materials being sold in stores*. In the context of that case, where the complaint actually contained evidence of physical copies being sold in the marketplace, the failure to allege the date and time of the infringement was a purely technical omission which could easily have been cured by inserting the dates and times.

In sum, the First Six RIAA 12(b)(6) Decisions erred in relying upon that single, out of context, and probably incorrect, passage from Franklin, while defying all of the holdings from all of the other authorities to the contrary, which held that a copyright complaint must specifically describe the acts of infringement, and their dates and times.

No negligence or other tort complaint would ever survive a dismissal motion if it alleged that the defendant was committing a tort on a “continuing” basis, but could not allege a single instance in which the tort had actually been committed, or what the tort was exactly. There is no reason to create a special exception for mass copyright infringement litigation.

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<sup>7</sup> Or at least it can be said that neither defendant’s counsel, nor plaintiffs’ counsel, nor any of the seven Judges to have heard the seven RIAA 12(b)6 motions, have found any.

The seventh RIAA 12(b)(6) motion, Elektra v. Barker, 05-CV-7340 (KMK) (USDC) (SDNY) remains pending, having been fully briefed in May, 2006, and argued on January 26, 2007.

**CONCLUSION**

Under well settled principles of copyright law, the complaint fails to state a claim for for infringement of either plaintiffs' "reproduction" right or their "distribution" right. And contrary to their pleading, there is no claim under the Copyright Act for "making available".

The Court should grant the within motion in all respects.

Respectfully submitted,

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**Appendix 1**

RSO Records v. Peri, 79 Civ. 5098, 1980 U.S. Dist. LEXIS 13490 (SDNY 1980)

1980 U.S. Dist. LEXIS 13490, \*; Copy. L. Rep. (CCH) P25,187

3 of 3 DOCUMENTS

**RSO RECORDS, INC., MCA RECORDS, INC., WARNER BROS. RECORDS, INC., RCA CORPORATION, CBS, INC., CASABLANCA RECORDS AND FILMWORKS, INC., ELEKTRA/ASYLUM/NONESUCH RECORDS, a division of WARNER COMMUNICATIONS, INC., Plaintiffs, against JOSEPH PERI, CARL FEUERSTEIN, SAM PERI, DYNASTY GRAPHICS, INC., CREATIVE DISC, INC., Defendants.**

**No. 79 Civ. 5098-CSH**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

*1980 U.S. Dist. LEXIS 13490; Copy. L. Rep. (CCH) P25,187*

**September 5, 1980**

**OPINIONBY:** [\*1]

HAIGHT

**OPINION:**

MEMORANDUM OPINION AND ORDER  
HAIGHT, District Judge:

Plaintiffs, owners of registered copyrights in sound recordings and album graphics, move pursuant to *F.R.Civ.P.* 8, 11 and 12(b)(6) to dismiss the counterclaim interposed by defendants. The action arises from defendants' alleged infringement of plaintiffs' exclusive rights to reproduce and distribute their copyrighted works. Defendants contend that their counterclaim, challenging the cleanliness of plaintiffs' hands and demanding compensatory and punitive damages, is adequately pleaded and defend its sufficiency. For the reasons stated, plaintiffs' motion to dismiss the counterclaim is granted.

This action was commenced on September 25, 1979 on the heels of defendant Joseph Peri's plea of guilty to wire fraud and wilful infringement of plaintiff RSO Records, Inc.'s (RSO) copyrighted sound recording "Shadow Dancing." *United States v. Peri*, 79 Cr. 237(CES). RSO and six additional co-plaintiff recording companies claim herein respective sole ownership of copyrights held pursuant to certificates of registration issued by the Registrar of Copyrights and allege full compliance with all pertinent provisions of the [\*2] Copyright Act, 17 U.S.C. § 101 et seq. and other applicable law.

The complaint charges Joseph Peri, two other

individual defendants and two corporate defendants with continuing infringements of plaintiffs' copyrights through unauthorized reproduction and distribution of plaintiffs' respective works to the public. Plaintiffs seek damages; permanent injunctive relief against further infringement; and seizure and forfeiture of defendants' inventory of allegedly counterfeit recordings and labels and the means used in the production of such goods. Plaintiffs' prior ex parte application for a writ of seizure of the infringing goods and defendants' machinery and equipment was granted on September 25, 1979, pursuant to 17 U.S.C. § 503(a) and Rules 3-13 of the Supreme Court's Rules of Practice for Copyright Cases.

Defendants Joseph Peri, Carl Feuerstien, Sam Peri and Dynasty Graphics, Inc. served their answer on December 19, 1979. Defendant Creative Disc, Inc. has yet to appear or answer the complaint.

The answer denies the material allegations of the complaint and alleges several affirmative defenses. The fifth affirmative defense, also denominated a counterclaim, states in [\*3] full:

"11. Upon information and belief, plaintiffs, through their employees, agents, or others acting under their direction or control, have solicited, importuned, aided, abetted, or otherwise participated with the answering defendants in the acts complained of to the extent that such acts occurred.

"12. Plaintiff [sic] are therefore barred from obtaining the relief sought by their unclean hands.

"13. The aforesaid acts of plaintiffs were committed in disregard and derogation of the rights of the defendants and have injured defendants in their business and in their reputation in the community, all to defendants' damages in the amount of \$2,000,000.00.

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"14. The aforesaid acts of plaintiffs were committed willfully, knowingly, and in malicious disregard and derogation of the laws of the United States, the common law, and the rights of the general public, and by reason thereof, punitive damages should be assessed in the amount of \$2,000,000.00."

Contending that the counterclaim is interposed merely for purposes of delay and that it violates the pleading requirements of the Federal Rules of Civil Procedure, see *F.R.Civ.P. 8* and *11*, as well as failing to state a claim, [\*4] plaintiffs move to dismiss the counterclaim. Plaintiffs argue that the only operative paragraph of the counterclaim alleges that plaintiffs themselves "participated" with defendants "in the acts complained of" in the complaint, i.e., in the counterfeiting of plaintiffs' own copyrighted property. Plaintiffs' Memorandum of Law at 7. In plaintiffs' view, "[this] allegation either makes no sense at all or if intended by defendants to be understood as it reads, gives no basis for a counterclaim which demands from plaintiffs damages of \$4,000,000." *Id.* Further, plaintiffs advert to prejudice they will suffer if they are compelled to respond to the counterclaim as presently pleaded; in view of their perception that the counterclaim sets forth neither a "short and plain statement" of anything, as required by the pleading rules, to which they might make a meritorious response, nor does it independently show how defendants may be entitled to relief. *Id.* at 8. Rather, plaintiffs maintain, the counterclaim was laid solely for its in terrorem and dilatory effect and is "sham and false on its face. Accordingly, plaintiffs seek dismissal of the counterclaim for its failure to assert any [\*5] claim upon which relief can be granted. *Id.*

Viewing the instant motion as an attempt by plaintiffs "to either avoid discovery of their own actions or to obtain premature discovery of defendants," defendants' Memorandum of Law at 4, defendants contend that "the counterclaim is simply stated and requires only that plaintiffs inspect their own pleadings to determine the very wrongdoing they are alleged to have participated in." *Id.* Defendants therefore conclude that:

"[This] motion represents an attempt by plaintiffs to preclude inquiry into an area that defendants are entitled to explore. To the extent that additional information regarding the counterclaims [sic] is possessed by defendants, plaintiffs obviously can obtain such information through discovery." *Id.*

The heart of an affirmative federal pleading need consist only of a "short and plain statement of the claim showing that the pleader is entitled to relief." *F.R.Civ.P. 8(a)*. With the demise of technical forms of action the objective of the federal rules is to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the

claim and a general indication [\*6] of the type of litigation involved. C. Wright and A. Miller, 5 *Federal Practice and Procedure: Civil* § 1215 at 108-110 (1969) (hereinafter "Wright and Miller"). By their express incorporation of the body of the complaint, the allegations of the counterclaim adequately apprise plaintiffs of the subject matter of the claim and the grounds for relief. The "essence" of the counterclaim, according to defendants, is:

"... that plaintiffs, or others acting under their control, induced and participated with the defendants in the wrongdoing now complained of to the extent that any such wrongdoing occurred. Thus, it is claimed, upon information and belief, that plaintiffs were at least partly responsible for such wrongdoing." Defendants' Memorandum of Law at 2.

Typically then, it would remain for plaintiffs to develop the factual underpinnings of the claim by means of discovery. See Wright and Miller, *supra* at 110-112. In the present circumstances, however, it is wholly disingenuous for defendants to rely on their pleading by pointing plaintiffs to the avenue of discovery as a means for eliciting the further factual detail they seek by way of the instant motion.

The Court is advised [\*7] without contravention that at their depositions held on March 3, 1980, both defendants Joseph Peri and Carl Feuerstein invoked a purported Fifth Amendment privilege and refused to answer questions posed by counsel for plaintiffs or to produce any documents relating to their defenses or counterclaim.

Given the view I take of the legal sufficiency of the counterclaim, I need not resolve the parties' differences over its adequacy as a matter of pleading; nor am I requested to impose sanctions for defendants' refusal to respond to plaintiffs discovery requests. For assuming the adequacy of the pleading of the counterclaim even without the further illumination which pre-trial discovery might have shed, I find the allegations of paragraphs 11 through 14 insufficient in law to constitute a claim upon which relief could be granted.

Alleged wrongdoing on the part of a plaintiff in a copyright action may bar relief where the plaintiff's misconduct "affects the equitable relations between the parties in respect of something brought before the court for adjudication," and the defendant can show that as a result he has been injured in his personal capacity. *Mitchell Bros. Film Group v. [\*8] Cinema Adult Theater*, 604 *F.2d* 852, 863 (5th Cir. 1979), quoting *Keystone Driller Co. v. General Excavation*, 290 *U.S.* 240 (1933). Thus, while the allegation of paragraphs 11 through 14 of the answer adequately raise the doctrine of unclean hands as a defense to the relief sought by plaintiffs, see *Mitchell Bros.*, *supra*, 604 *F.2d* at 865 *n.26*, viewed as an affirmative claim and even assuming

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the truth of these allegations in the context of plaintiffs' motion to dismiss pursuant to *F.R.Civ.P. 12(b)(6)*, the counterclaim sets forth no substantive right to recovery.

As noted, the complaint charges defendants with injuring plaintiffs' copyrights by reproducing and distributing counterfeit renditions of plaintiffs' protected works. Since it is well established that a copyright owner cannot infringe his own copyright, see, e.g., *Richmond v. Weiner*, 353 F.2d 41 (9th Cir. 1965), cert. denied, 384 U.S. 928 (1966); *Donna v. Dodd, Mead & Co., Inc.*, 374 F.Supp. 429, 430 (S.D.N.Y. 1974), allegations of plaintiffs' "inducement" or "participation" in the infringements charged in the complaint states no valid claim upon which relief can be granted.

Since defendants offer no alternative theory [\*9]

under which plaintiffs' participation in defendants' alleged acts of infringement would be actionable, it follows from the foregoing that plaintiffs' motion pursuant to *F.R.Civ.P. 12(b)(6)* to dismiss the counterclaim must be granted. Accordingly, to the extent that paragraphs 11 through 14 purport to allege an affirmative counterclaim against plaintiffs, the allegations and accompanying ad damnum clause are stricken; the answer will be deemed to allege at paragraphs 11 through 14 only the affirmative defense of unclean hands.

It is So Ordered.

**Appendix 2**

Fonovisa, Inc. v. Alvarez, 1:06-CV-011 (NDTex. 2006)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
ABILENE DIVISION

FONOVISA, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
LARRY ALVAREZ,	)	
	)	Civil Action No. 1:06-CV-011-C
Defendant.	)	ECF

**ORDER**

On this date, the Court considered:

- (1) Defendant's Motion to Dismiss, filed March 6, 2006;
- (2) Plaintiff's Response to Defendant's Motion to Dismiss, filed April 3, 2006;
- (3) Supplement to Plaintiff's Response, filed April 20, 2006;
- (4) Defendant's Reply Memorandum in Support of Motion to Dismiss, filed April 28, 2006;
- (5) Statement of Interest of the United States, filed May 16, 2006;
- (6) Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant's Motion to Dismiss, filed June 15, 2006;
- (7) Plaintiff's Brief in Response to Amicus Curiae Brief of the Electronic Frontier Foundation, filed July 5, 2006; and
- (8) Second Supplement to Plaintiff's Response, filed July 19, 2006.

**I.**  
**PROCEDURAL HISTORY**

Plaintiffs, Fonovisa, Inc.; BMG Music; UMG Recordings, Inc.; Interscope Recordings; Arista Records LLC; Atlantic Recording Corporation; and Elektra Entertainment Group, Inc. (“Plaintiffs”), filed Plaintiffs’ Original Complaint for Copyright Infringement against Larry Alvarez (“Defendant”) on January 23, 2006. Defendant was served through personal service upon Defendant on February 14, 2006, and return of service was filed February 27, 2006. On March 6, 2006, Defendant filed his Motion to Dismiss. On March 24, 2006, Plaintiffs filed an Unopposed Motion to Extend Time to File a Response to Defendant’s Motion to Dismiss Plaintiffs’ Complaint, which was granted on March 30, 2006. On April 3, 2006, Plaintiffs filed a Response to Defendant’s Motion to Dismiss. On April 3, 2006, Plaintiffs BMG Music and Arista Records, LLC, by and through their attorneys, voluntarily dismissed their claims against Defendant without prejudice.

The Court granted Defendant’s Motion for Leave to File Reply on April 20, 2006. On May 16, 2006, the United States of America filed a Statement of Interest in Opposition to Defendant’s Motion to Dismiss the Complaint. On June 15, 2006, the Court granted the Motion of Electronic Frontier Foundation for Leave to File Amicus Curiae Brief in Support of Defendant’s Motion to Dismiss the Complaint. Plaintiffs filed their Response to the Amicus Brief on July 5, 2006. On July 19, 2006, Plaintiffs filed a Second Supplement to their Response—a copy of an order entered in the United States District Court for the Western District of Texas by the Honorable Walter Smith relating to the very issues raised in Defendant’s Motion to Dismiss.

**II.**  
**FACTUAL BACKGROUND**

Plaintiffs allege that they are, and at all relevant times have been, the copyright owners or licensees of exclusive rights under United States copyright to certain copyrighted sound recordings (the “Copyrighted Recordings”). (Pls.’ Compl. at Ex. A (of the eleven specific songs listed on Exhibit A, Plaintiff Fonovisa, Inc. claims to be the copyright owner of two)). In the Complaint, Plaintiffs allege that among the rights granted to each Plaintiff under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, are the exclusive rights to reproduce the Copyrighted Recordings and to distribute the Copyrighted Recordings to the public. Plaintiffs allege upon information and belief that Defendant, without permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download the Copyrighted Recordings in order to distribute the Copyrighted Recordings to the public. Plaintiffs allege that Defendant’s actions constitute infringement of Plaintiffs’ copyright and exclusive rights under copyright. Plaintiffs further allege that Defendant’s actions have been willful and intentional in disregard of, and with indifference to, the rights of Plaintiffs. Plaintiffs allege that they should be entitled to injunctive relief, statutory damages, costs of the action, and reasonable attorneys’ fees under the copyright laws of the United States.

Defendant contends that Plaintiffs have failed to state a claim upon which relief can be granted. Defendant contends that Plaintiffs failed to (1) completely plead specific works and ownership, (2) properly allege registration in sound recordings, and (3) allege any specific acts of infringement. Defendant further contends that section 106(3) of the Copyright Act does not

apply to electronic transmissions and that “merely making works available” does not violate right of distribution.

### **III. STANDARD**

#### **Rule 12(b)(6) Failure to State a Claim**

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) “is viewed with disfavor and is rarely granted.” *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court as follows: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir. 1997). “A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

Subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff’s complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Further, “the plaintiff’s complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true.” *Oppenheimer v.*

*Prudential Sec. Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). In other words, a motion to dismiss an action for failure to state a claim “admits the facts alleged in the complaint, but challenges plaintiff’s rights to relief based upon those facts.” *Tel-Phonic Servs., Inc. v. TBS Int’l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). Finally, when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court must examine the complaint to determine whether the allegations provide relief on any possible theory. *See Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

#### IV. DISCUSSION

Defendant argues that Plaintiffs have failed to state a valid copyright infringement claim. Defendant contends that “merely making works available” does not violate the right of distribution. The Court has considered Plaintiff’s listed authorities from other jurisdictions and has determined that the allegations provide a possible theory of a right to relief. *See, e.g., Interscope Records v. Duty*, 2006 WL 988086 (D. Ariz. April 14, 2006). Moreover, a federal district court in this circuit has now ruled on the very arguments raised by Defendant and found that dismissal is not warranted on the allegations contained in the pleadings. *See, e.g., Warner Bros. Records et al. v. Payne*, C.A. No. W-06-CV-051 (W.D. Tex. July 17, 2006). This Court is not making a determination as to whether “making works available” violates the right of distribution. However, as stated by the two courts cited directly above, at this stage of the proceedings, Plaintiff’s “making available” theory *may* impose a possible ground for liability.

Defendant further argues that, by contending that section 106(3) of the Copyright Act is not applicable to “electronic transmissions,” Plaintiffs have failed to state a valid copyright infringement claim. (Def.’s Mot. Dismiss 9.) Plaintiffs assert that unauthorized distribution of copyrighted sound recordings over P2P networks violates the exclusive right of distribution. (Pls.’ Resp. 17.) Both sides have provided authorities on this issue. However, at this point, the Court will not conclude that the mere presence of copyrighted sound recordings in Defendant’s share file constitutes infringement. The Court has an incomplete understanding of the P2P technology at this stage; and the ultimate issue of liability is more appropriately considered on a motion for summary judgment, when the parties will have an opportunity to fully explain the P2P technology and the means by which a file can be made available to distribute for public download on P2P systems.

Defendant also argues that Plaintiffs’ Complaint lacks specificity and is ambiguous and vague because Plaintiffs have not alleged any specific acts of infringement with dates and times. Complaints in copyright infringement actions must comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure, which governs pleadings generally. While Plaintiffs have not alleged the dates and times that Defendant allegedly commenced his infringing activities, Plaintiffs have alleged that Defendant “continues to infringe.” (Pls.’ Compl. at ¶ 15.) Blanket references to “copying, using and/or incorporating” leave the defendant without sufficient notice as to how to answer and defend against the claims in the case. *Marshall v. McConnell*, 2006 WL 740081, \*4 (N.D. Tex. 2006) (reasoning that the decision merely holds plaintiffs to the basic standards of Rule 8(a) that a complaint must give the opposing party “fair notice” of the claims asserted). Plaintiffs need not allege specific acts of infringement, because they have alleged

continuous and ongoing acts of infringement. *Warner Bros. Records et al. v. Payne*, C.A. No. W-06-CV-051 (W.D. Tex. July 17, 2006) (citing *Franklin Elec. Publishers v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991)).

Here, the Court finds that Plaintiffs' pleadings meet the basic standards of Rule 8(a) by giving the opposing party "fair notice" of the claims asserted against him. As is clear from his Motion and Reply, Defendant clearly understands the claims asserted against him. *See Interscope Records*, 2006 WL 988086 at \*2 ("[I]t is clear from [Defendant's] motion to dismiss that she thoroughly understands the claims against her. Therefore, the complaint satisfies the liberal notice pleading standard of Rule 8(a)."). "To the extent that there remains confusion with regard to the exact date or time of the incidences of alleged infringement, that can be clarified during discovery." *Id.*


In passing and in the alternative, Defendant requests the Court to order Plaintiffs to provide a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. Fed. R. Civ. P. 12(e). The Court will not consider this alternative request in this Order because a document that contains more than one pleading or motion must clearly identify each included pleading or motion in its title. LR 5.1(c). Defendant has not clearly identified this request in its title. Had the motion for more definite statement been properly filed, it would still be denied because Defendant has ample notice of Plaintiffs' claims for copyright infringement and there is no basis for requiring a more

definite statement under Federal Rule of Civil Procedure 12(e). Thus, Defendant's request for a more definite statement should be denied.

**IV.  
CONCLUSION**

For the reasons stated above, the Court finds that Defendant's Motion to Dismiss should be **DENIED**. Plaintiffs have met the notice pleading requirements of Rule 8(a) and have possibly stated a claim upon which relief may be granted as to the alleged reproduction and distribution of their copyrighted works.

SO ORDERED this 24th day of July, 2006.

  
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SAM R. CUMMINGS  
UNITED STATES DISTRICT COURT