

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,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
JOAN C. CASSIN,	:	
	:	
Defendant.	:	

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**PLAINTIFFS' OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS THE COMPLAINT**

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Plaintiffs respectfully submit this opposition to Defendant Joan Cassin's motion to dismiss the Complaint. Defendant's motion makes the same arguments that Defendant's counsel has repeatedly made and that have been soundly rejected by Judges Swain, Sweet, McMahon, Howell, Owen, Chin and Buchwald of the Southern District of New York,<sup>1</sup> as well as by Judge Trager of the Eastern District of New York<sup>2</sup> and other courts mentioned below. Because Defendant's arguments have been repeatedly rejected, and because they are without legal merit, Defendant's motion should be denied.

### **BACKGROUND**

Plaintiffs are major recording companies who own copyrights in sound recordings. Collectively, they face a massive problem of digital piracy over the Internet. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs'

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<sup>1</sup> See, e.g., *Loud Records, LLC, v. Does 1-74*, No. 04-CV-9881-RWS (S.D.N.Y. 2005) (See Appendix, Sec. A) (rejecting, among other things, defendant's argument that plaintiffs' had failed to state a claim), appeal dismissed, No. 05-5559 (2d Cir. Nov. 28, 2005); *Elektra Entm't Group, Inc., v. Santangelo*, No. 05-CV-2414-CM (S.D.N.Y. 2005) (See Appendix, Sec. B) (rejecting identical arguments by Defendant's counsel of record that Plaintiffs' complaint should be dismissed); *Atlantic Recording Corp., v. Does 1-25*, No. 05-CV-9111-LTS (S.D.N.Y. 2005) (See Appendix, Sec. C) (holding that the plaintiffs' complaint does not fail to state a claim because the plaintiffs "allege downloading and distribution as well as making copyrighted material available for distribution"); see also *Warner Bros. Records, v. Does 1-149*, 05-CV-8365 (RO) (S.D.N.Y. Jun. 7, 2006) (Owen, J.) (See Appendix, Sec. D) (denying defendant's motion in its entirety, including defendant's argument that plaintiffs failed to state a claim); *Interscope Records v. Does 1-100*, No. 05-CV-7667-RJH (S.D.N.Y. Apr. 6, 2006) (Howell, J.) (same); (See Appendix, Sec. E); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (Chin, J) (holding that the plaintiffs' complaint had "made a concrete showing of a prima facie claim of copyright infringement"); *Motown Records, v. Does 1-99*, No. 05-CV-9112 (CRB) (S.D.N.Y. July 14, 2006) (Buchwald, J.) (See Appendix, Sec. F) (denying defendant's motion in its entirety, including defendant's argument that plaintiffs' failed to state a claim).

<sup>2</sup> See *Maverick Recording Co. v. Goldshteyn*, No. 05-CV-04523-DGT-RML (E.D.N.Y. Jul. 31, 2006) (See Appendix, Sec. G) ("[Plaintiffs'] allegations, pled on information and belief, are...sufficient to state a claim of copyright infringement without supplemental facts indicating the source of plaintiffs' belief").

copyrighted sound recordings over peer-to-peer (“P2P”) networks. *See* Lev Grossman, *It’s All Free*, Time, May 5, 2003. Indeed, the Supreme Court has characterized the magnitude of online piracy as “infringement on a gigantic scale.” *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005).

Peer-to-peer networks involve the use of online media distribution systems (otherwise known as file-sharing programs) that allow users to transform their computers into interactive Internet sites for swapping copyrighted sound recordings with other users. The most infamous P2P network was the Napster system, which was enjoined by a federal court. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other P2P networks, however, have arisen in Napster’s wake, and the Supreme Court has held that these P2P networks are liable for the infringement of Plaintiffs’ copyrighted works. *See, e.g., Grokster Ltd.*, 545 U.S. at 940.

As a direct result of piracy over P2P networks, Plaintiffs have sustained and continue to sustain devastating financial losses. Indeed, the Department of Justice has concluded that online media distribution systems are “one of the greatest emerging threats to intellectual property ownership,” estimated that “millions of users access P2P networks,” and determined that “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” Report of the Department of Justice’s Task Force on Intellectual Property, available at <http://www.cybercrime.gov/IPTaskForceReport.pdf> at 39 (October 2004). As the Seventh Circuit has held, “Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.” *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005). In addition, downloads from P2P networks compete with licensed broadcasts and undermine the income available to authors. *Id.* at 891. Plaintiffs’ losses from online music piracy have resulted in layoffs of thousands of

employees in the music industry. Unfortunately, infringing users of P2P systems are often “disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement,” rendering this serious problem even more difficult for copyright owners to combat. *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

P2P users who disseminate (upload) and copy (download) copyrighted material violate the Copyright Act. *See Grokster*, 545 U.S. at 919-22 (noting that users of peer-to-peer networks share copyrighted music and video files on an enormous scale, and, as such, even the providers of those networks “concede infringement” by the individual users); *Aimster*, 334 F.3d 643. A copy downloaded, played, and retained on one’s hard drive for future use is a direct substitute for a purchased copy — and without the benefit of the license fee paid to the broadcaster. *See Gonzalez*, 430 F.3d at 891.

On four separate occasions (June 13, 2005, July 28, 2005, August 19, 2005, and August 26, 2005), Plaintiffs’ investigators located an individual with the screen name “omc@KaZaA” using the Kazaa file sharing program to engage in copyright infringement on a massive scale. Plaintiffs’ investigators detected the infringement by logging onto the P2P network in the same fashion as any Internet user and viewing the files that this individual was distributing to other users. This individual had as many as 349 music files on her computer and was distributing them for free to millions of others using similar peer-to-peer networks. On information and belief, this individual downloaded all or many of these 349 music files without the permission of the record company copyright owners. In short, as an active user of a P2P network, this individual was distributing copyrighted sound recordings stored on her computer to others and downloading copyrighted sounds recordings from other users of the P2P network.

Plaintiffs' investigators further ascertained that this individual used Internet Protocol ("IP") addresses 68.160.209.185, 68.161.86.238, 68.161.69.154; and 68.160.194.37<sup>3</sup> to connect to the Internet. Accordingly, Plaintiffs filed separate "John Doe" Complaints against this individual and, after obtaining a court order, issued subpoenas to Verizon Internet Services, Inc. ("Verizon") in order to determine who used the above-referenced IP addresses at the dates and times in question. Verizon subsequently identified the Defendant, Joan Cassin, in response to each of the four subpoenas, eliminating any chance of misidentification here. On April 21, 2006, Plaintiffs filed their Complaint against Defendant for copyright infringement.

In their Complaint, Plaintiffs define "Copyrighted Recordings" to be the sound recordings found on Exhibit A and certain sound recordings listed on Exhibit B. (*See* Complaint, ¶ 12). Exhibit A is a sample of the sound recordings that Defendant had distributed without authorization and is a subset of Exhibit B. (*See* Exhibit A to the Complaint). Exhibit B is a screen capture of the files found in Defendant's "share folder," including hundreds of digital audio files. (*See* Exhibit B to the Complaint). Plaintiffs specifically allege that the Copyrighted Recordings "are owned by or exclusively licensed to one or more of the Plaintiffs or Plaintiffs' affiliate record labels." (*See* Complaint, ¶ 12). Plaintiffs further allege that "Defendant, without the permission or consent of Plaintiffs, 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." (*See* Complaint, ¶ 14).

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<sup>3</sup> These IP addresses correspond to the dates in the preceding paragraph, respectively.

For the reasons discussed below, Plaintiffs have satisfied all of the pleading requirements applicable to copyright claims, and this Court should join every other court that has addressed virtually identical Rule 12(b)(6) motions and deny Defendant's motion to dismiss here.

## ARGUMENT

### **I. LEGAL STANDARD FOR MOTIONS TO DISMISS.**

When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the Court must accept "all factual allegations in the complaint and [draw] all reasonable inferences in the plaintiff's favor." *ATSI Communs. Inc. v. Shaar Fund, LTD.*, 2007 U.S. App. LEXIS 16382, at \*17 (2d Cir. 2007) The allegations found in the Complaint "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (requiring plaintiff to plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [her claim]"). Ultimately, a court should not dismiss a complaint for failure to state a claim unless the complaint fails to include "plausible grounds" for relief. *Id.*

### **II. PLAINTIFFS' COMPLAINT IS LEGALLY SUFFICIENT.**

#### **A. Defendant's arguments have been consistently rejected by numerous courts around the country, including this Court.**

Defendant concedes that numerous courts in this District and in the Eastern District of New York have rejected the very same arguments that she is making here. (*See* FN 1 & 2 *supra*). The fact is that numerous courts throughout the United States have rejected the very same arguments. (*See BMG Music, v. Conklin*, No. H-05-1482 (N.D.Tex. Sept. 16, 2005) (*See* Appendix, Sec. H); *Arista Records LLC. v. Greubel*, 453 F. Supp. 2d 961 (N.D.Tex. 2006); *Fonovisa, Inc. v. Alvarez*, No. 1:06-CV-0011-C (N.D.Tex. July 24, 2006) (*See* Appendix, Sec. I); *Warner Bros. Records Inc., v. Jose Duarte*, No. SA-06-CV-615 (W.D.Tex., May 2, 2007) (*See*

Appendix, Sec. J); *Warner Bros. Records v. Payne*, 06-CV-0051 (W.D. Tex., Jul. 17, 2006) (Appendix, Sec. K); *Interscope Records, v. Duty*, No. 05-CV-3744-PHX-FJM (D.Ariz. Apr. 14, 2006) (*See* Appendix, Sec. L)). Indeed, every court to have addressed the arguments made by Defendant to date has rejected them.

With respect to cases in this District, in *Loud Records*, Defendant's counsel, who was representing the defendant in that case, made the very same arguments regarding the sufficiency of Plaintiffs' Complaint. Judge Sweet flatly rejected those arguments, finding instead that Plaintiffs' Complaint was sufficient. *See Loud Records* No. 04-CV-9881-RWS, at 1.<sup>4</sup> Similarly, in *Santangelo*, Judge McMahon summarily denied the motion to dismiss, finding that "Plaintiffs Complaint satisfies Rule 8's pleading requirements, as applied to copyright infringement claims." *Santangelo*, No. 05-CV-2414-CM, at 3. In *Atlantic Recording Corp.*, Judge Swain denied counsel's third swing at dismissal, finding, "Here, Plaintiffs have sufficiently pled a copyright claim. The Complaint, therefore, does not fail to state a claim because Plaintiffs allege downloading and distribution as well as making copyrighted material available for distribution." *Atlantic Recording Corp.* No. 05-CV-9111-LTS, at 2. *Accord Warner Bros. Records* 05-CV-8365-RO, at 1 (denying defendant's motion in its entirety, including defendant's argument that plaintiffs failed to state a claim); *Interscope Records*, No. 05-CV-7667-RJH, at 1 (same); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d at 565 (holding that plaintiffs had "made a concrete showing of a prima facie claim of copyright infringement"); and *Motown Records*, No.

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<sup>4</sup> Indeed, Defendant's counsel recognized the import of Judge Sweet's holding on his "blog," available at <http://recordingindustryvspeople.blogspot.com/2005/10/jane-doe-motion-to-quash-subpoena.html>: "The judge concluded that plaintiffs' alleging 'continuing infringement' from the date of the complaint is sufficient." *See id.* at October 14, 2005.

05-CV-9112, at 1-2 (*See* Appendix, Sec. F) (denying the defendant's motion in its entirety, including defendant's argument that plaintiffs failed to state a claim).

The Eastern District of New York has reached the same conclusions, also on a motion filed by Defendant's counsel in this case. In *Maverick Recording Co.*, Defendant's counsel filed a virtually identical motion to dismiss. Judge Trager denied the defendant's motion finding that "[plaintiffs'] allegations, pled on information and belief, are...sufficient to state a claim of copyright infringement without supplemental facts indicating the source of plaintiffs' belief." *Maverick Recording Co.* 05-CV-04523-DGT-RML, at 12.

Finally, district courts around the country have denied nearly identical motions to dismiss. *See Conklin*, No. H-05-1482 (denying motion to dismiss failure to state a claim); *Greubel*, 453 F. Supp. 2d at 965 (N.D.Tex. 2006) ("Plaintiffs' pleading provides a short and plain statement that alleges both their copyright ownership and violation of one or more of the exclusive rights identified in 17 U.S.C. § 106"); *Alvarez*, No. 1:06-CV-0011-C, at 5-6 (finding that plaintiffs' allegations presented a possible ground for liability, which rendered dismissal inappropriate); *Duarte*, No. SA-06-CV-615, at 3, (plaintiffs' evidence confirms that plaintiffs are the owners of the copyrighted material, the infringement originated from [the defendant's] Internet account... and the infringement occurred within three years of the filing of this lawsuit"); *Payne*, No. 06-CV-0051, at 4-5 (holding that plaintiffs had sufficiently alleged ownership and registration of the sound recordings and defendant's reproduction and distribution of plaintiffs' copyrighted works) (Appendix, Sec. K); *Duty*, No. 05-CV-3744-PHX-FJM, at 3 (finding plaintiffs' complaint to be sufficient and further finding that any confusion regarding dates and times of infringement "can be clarified during discovery).

In short, every court that has addressed the issue to date has found that the plaintiff recording companies' complaints were sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Plaintiffs respectfully request that this Court follow each of these courts and reject Defendant's motion to dismiss.

**B. The Complaint complies with the liberal notice pleading requirements of Rule 8.**

Rule 8 (a) requires, in pertinent part, that Plaintiffs' Complaint include "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a). In the context of a copyright claim, a plaintiff need only allege: (1) that the plaintiff owns valid copyrights and (2) that the defendant violated one or more of the exclusive rights set forth in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs' copyrighted works. *See Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991); 4 M. & D. NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2005) ("Reduced to most fundamental terms, there are only two elements necessary to the plaintiffs' case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant").

Here, Defendant does not – and could not – claim that Plaintiffs have failed to satisfy these standards. It is undisputed that Plaintiffs have alleged that they own or control valid copyrights for each of the Copyrighted Recordings at issue. (*See* Complaint, ¶ 12). It is also undisputed that Plaintiffs have alleged that Defendant has violated their exclusive rights of reproduction and distribution with respect to the Copyrighted Recordings at issue. Thus, in Paragraph 14 of the Complaint, Plaintiffs specifically allege "that Defendant, without the

permission or consent of Plaintiffs, 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” and “In doing so, Defendant has violated Plaintiffs' exclusive rights of reproduction and distribution.” . (See Complaint, ¶ 14). In light of the standards set forth above, these allegations are sufficient to state a claim for copyright infringement, and Defendant's motion should be denied.

Notwithstanding the foregoing, Defendant contends that the Complaint is deficient because it fails to allege each individual act of infringement. Defendant further contends that Plaintiffs here failed to specify the dates or times on which the infringements occurred. Both of these arguments are baseless, as this Court and others have consistently found.

As a preliminary matter and contrary to Defendant's assertions, Plaintiffs are not required to allege each individual act of copyright infringement in their Complaint. See *Carell v. Shubert Organization, Inc.*, 104 F. Supp. 2d 236, 251 (S.D.N.Y. 2000) (“Plaintiff's Complaint narrows the infringing acts to the publication of the [copyrights at issue], and their illegal use in certain commercial products . . . . These allegations are sufficiently specific for the purposes of Rule 8, despite the fact that each individual infringement was not specified.”).

Nor are copyright plaintiffs required to specify the dates or times on which the infringement occurred, particularly where, as here, plaintiffs have alleged continuous and ongoing acts of infringement. See *Franklin Elec. Publishers v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991) (holding that the assertion of continuous and ongoing infringement satisfies the pleading requirements applicable to claims for copyright infringement); *Santangelo*, No. 05-CV-2414 (CM) at 4 (same).

Indeed, it makes no sense, generally, in copyright suits to require a plaintiff to allege with specificity when and how an infringement occurred, because such actions are not typically done in plain sight of the copyright holder. Piracy typically takes place “behind closed doors and beyond the watchful eyes of a copyright holder.” *See Payne*, No. 06-CA-051, at 7. Moreover, in cases like this one, Plaintiffs cannot be expected to allege each individual act of infringement, because the infringement has been taking place for as long as the sound recordings have been available on Defendant’s computer, and this information is exclusively within Defendant’s control.

In any event, Defendant’s assertion that “[t]he Complaint makes no attempt to describe the specific acts of infringement” is simply incorrect. (Mem. Supp. Mot. at 3.) As noted above, here, Plaintiffs have alleged that they own valid copyrights in the seven sounds recordings identified in Exhibit A of the Complaint, as well as in a number of the sound recordings set forth in Exhibit B of the Complaint. Plaintiffs have further alleged that Defendant has used and continues to use an online media distribution system to download, distribute, and make available at least seven song recordings identified in Exhibit A, as well as certain of the recordings set forth in Exhibit B, in violation of Plaintiffs’ copyrights and exclusive rights under copyright. Such allegations suffice to establish a copyright claim because they establish Plaintiffs’ ownership of valid copyrights in clearly specified works, and because they expressly state the acts by which and the time during which copyright infringement took place, namely the continuous and ongoing reproduction and distribution of the Copyrighted Recordings using an online media distribution system.

The cases on which Defendant relies to argue that Plaintiffs’ complaint fails to plead an infringement claim with the specificity that Defendant claims is required are all inapplicable. In

*Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000), for example, the court warned against naked legal conclusions without factual support and against “[b]road, sweeping allegations of infringement,” *Id.* at 230. For the reasons set forth above, Plaintiffs here have alleged far more than broad sweeping legal conclusions.

Similarly, in *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, 1999 LEXIS 15837 at \*8, 12 (S.D.N.Y. Oct. 13, 1999), the court denied all but one of the defendants’ motions to dismiss. As to the one defendant whose motion the court granted, the court found that the allegations against this particular defendant were, on their face, vague and conclusory. As to the other defendants, the court found that the plaintiff’s allegations that the defendants had displayed images from the subject documentary on their own website and incorporated portions of the subject work into their own work was sufficient. Again, here, Plaintiffs’ allegations are neither vague nor conclusory. Indeed, Plaintiffs’ allegations are far more detailed than the allegations found to be sufficient in *Lindsay*. As such, Plaintiffs’ allegations suffice to state a claim here.

Finally, Defendant cites *Brought to Life Music, Inc. v. MCA Records, Inc.*, 2003 WL 296561, \*1 (S.D.N.Y. Feb. 11, 2003), for the proposition that “a complaint must therefore allege... ‘by what acts during what time [the defendant] infringed the copyright.’” (Mem. Supp. Mot. at 2.) In *Brought to Life*, however, the plaintiff literally included *no* allegation in its complaint that the defendant had “violated any of its alleged exclusive rights in its works.” Specifically, “[the defendant was] not alleged to have (i) reproduced plaintiffs work; (ii) prepared derivative works based on plaintiffs work; (iii) distributed copies of plaintiffs work to the public for sale; or (iv) performed plaintiffs work publicly by means of digital audio transmission.” *Brought to Life Music, Inc.*, 2003 WL 296561 at \*1. Here, unlike *Brought to Life*,

Plaintiffs have expressly alleged that Defendant violated Plaintiffs' exclusive rights of reproduction and distribution through her use of an online media distribution system — precisely the sort of allegations that were missing from the complaint in *Brought to Life*.

For all of the foregoing reasons, the Complaint in this case adequately pleads all of the requisite facts and elements of a claim for copyright infringement and then some, and Defendant's Motion to Dismiss should be denied.

**III. THIS COURT NEED NOT REACH DEFENDANT'S MAKING AVAILABLE ARGUMENT, BUT, EVEN IF IT DID, PLAINTIFFS HAVE PROPERLY PLED A COPYRIGHT CLAIM.**

Defendant next argues that “merely offering files or making them available for distribution to others does not constitute copyright infringement.” (Mem. Supp. Mot. at 5). In their Complaint, Plaintiffs allege that Defendant infringed their copyrights in the Copyrighted Recordings by using an online media distribution system to download (copy) those Recordings, to distribute those Recordings to the public and/or to make those Recordings available for distribution to others. (*See*, Complaint ¶ 14) Plaintiffs further allege that these actions violate their exclusive rights of copying and distribution. *Id.* Because Plaintiffs have directly alleged that Defendant has infringed on, among other things, their exclusive right of distribution, this Court need not reach the question of whether the distribution right subsumes the so-called right of “making available.” Indeed, several courts have so held. *See, e.g., Greubel*, 453 F. Supp. 2d 961; *Payne*, No. 06-CV-0051; and *Duty*, No. 05-CV-3744-PHX-FJM. For this reason alone, Defendant's motion based on “making available” should be denied.

Even had Plaintiffs only alleged that Defendant was making the Copyrighted Recordings available, however, thereby necessitating that the Court reach this issue, Defendant's argument would still fail, because the text of the copyright statute, the applicable legislative history, prevailing case law and the United States' actions with respect to certain international treaties all

demonstrate that making files available for distribution is a violation of the copyright owner's exclusive right of distribution.

**A. The Text of The Copyright Act and the Legislative History Establish that "Making Available" is an Exclusive Right of the Copyright Owner**

The exclusive right of distribution is significantly broader than Defendant suggests. Section 501(a) of the Copyright Act provides, in relevant part, "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright or right of the author, as the case may be." One of the exclusive rights referred to in that section is the right of distribution that is set forth in 17 U.S.C. § 106(3). That section provides:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following...

(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....

Reading sections 501 and 106(3) together shows, first, that it is an actionable infringement for one to violate a copyright owner's exclusive right to authorize the distribution of copies or phonorecords of a copyrighted work. Thus, contrary to Defendant's position, the distribution right does not require a consummated transfer of the copyrighted work at issue. Here, Defendant authorized distribution by placing Plaintiffs' copyrighted works in her shared folder, where they were then available to other P2P network users. This violates the express language of § 106(3).

Moreover, in adopting the language of § 106(3), Congress specifically noted that that section established the exclusive right of publication and gave the copyright owner the right to control the first public distribution of an authorized copy of the work. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675-76. This determination has

led various courts and commentators to find that distribution and publication are synonymous. See, e.g., *Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995); *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 299 (3d Cir.), *cert denied*, 502 U.S. 939 (1991); NIMMER ON COPYRIGHT § 8.11(A) (2005) (noting that the right of distribution “is a right to control the work’s publication . . . . The term ‘distribution’ rather than ‘publication’ was used merely ‘for the sake of clarity.’”).

“Publication,” in turn, is defined as:

[T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.

17 U.S.C. § 101 (emphasis added). Accordingly, under the clear language of the statute, the making available of a work (i.e., the offering to distribute that work) falls within the exclusive right of distribution.

The United States Copyright Office has reached precisely the same conclusion. The Register of Copyrights addressed the issue of offering copyrighted works on a peer-to-peer network directly: “[M]aking [a work] available for other users of a peer to peer network to download. . . constitutes an infringement of the exclusive distribution right, as well of the reproduction right.” Letter from Marybeth Peters to Rep. Howard L. Berman 1 (Sept. 25, 2002) (citing *Napster*, 239 F.3d at 1014), *reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks. Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary 107th Cong. 114-15 (2002)*. The Copyright Office’s interpretation of the Act is entitled to deference where, as here, it is a reasonable one. See *Bonneville International Corp. v. Peters*, 347 F.3d 485, 490 & n. 9 (3d Cir. 2003); *Batjac*

*Productions Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999) (“[T]he Register [of Copyrights] has the authority to interpret the copyright laws and [] its interpretations are entitled to judicial deference if reasonable.”) (citations omitted).

For all of the foregoing reasons, the language of the Copyright Act demonstrates that the exclusive right of distribution is violated where, as here, a defendant uploads a copyrighted work and makes it available for download by other users on a P2P network

**B. Case Law Supports The Principle That The Exclusive Right of Distribution Subsumes The Right of Making Available**

Courts have found that, even in the absence of proof that a copyrighted work has actually been fully transmitted to another, the § 106(3) right is violated when a copyrighted work is made available for others. For example, the Ninth Circuit in *A&M Records, Inc. v. Napster, Inc.*, found that “making available” constituted copyright infringement. 239 F.3d 1004 (9th Cir. 2001). In *Napster*, the court evaluated the situation where an individual made copyrighted sound recordings available for distribution on a peer-to-peer program, but did not submit evidence of actual distribution. The court held that “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.” *Id.* at 1014. Similarly, in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, the defendant obtained unauthorized copies of a work, added a listing of the unauthorized copies to its index, and made the unauthorized copies available for the public to check out of its library. 118 F.3d 199 (4<sup>th</sup> Cir. 1997). The court held that, even in the absence of proof the work had actually been provided to the public, the work had been distributed within the meaning of 17 U.S.C. § 106(3). *See id.* at 203. It was sufficient that the title of the work had been included in an index and that the work could have been

checked out by a member of the public. It was not necessary for the plaintiffs to show that work had ever actually been checked out.

Here, as in *Hotaling*, Plaintiffs' copyrighted works have effectively been included in an index and can be downloaded by any member of the public who wishes to do so. For the reasons set forth in *Hotaling*, this violates the exclusive right of distribution. Accord *United States v. Shaffer*, 2007 U.S. App. LEXIS 65, at \*10-11 (10th Cir. Jan. 3, 2007) ("We have little difficulty in concluding that [the defendant] distributed child pornography" by placing the pornography "in his computer's Kazaa shared folder") (emphasis added); *Motown Record Co. v. DePietro*, 2007 U.S. Dist. LEXIS 11626, \* 12-13, FN 38 (E.D.Pa. 2007) ("A plaintiff claiming infringement...can establish infringement by...proof that the defendant 'made available' the copyrighted work"); *Duty* No. 05-CV-3744-PHX-FJM, at 4 ("[T]he mere presence of copyrighted sound recordings in [defendant's] share file may constitute copyright infringement."); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 402 (S.D.N.Y. 2002) ("[M]erely by accessing [copyrighted material on] a webpage, an Internet user acquires the ability to make a copy of that webpage, a copy that is, in fact, indistinguishable in every part from the original. Consequently, when a website goes live, the creator loses the ability to control either duplication or further distribution of his or her work. A webpage in this respect is indistinguishable from photographs, music files or software posted on the web—all can be freely copied"); *Marobie-FL, Inc. v. National Association of Fire & Equipment Distributors & Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1180 (N.D. Ill. 1997) (granting summary judgment based on defendant's admission that "once the files were uploaded, they were available for downloading by Internet users"); *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) ("Defendants disseminated unlawful copies of PET

photographs to the public by adopting a policy in which [defendant's] employees moved those copies to the generally available files instead of discarding them").

Because Plaintiffs have properly alleged that the actual digital audio files were available for download (i.e., there were files behind the index), the cases cited by Defendant are inapposite, and Defendant has violated Plaintiffs exclusive right of distribution in this case.

**C. The WIPO Digital Treaties Support Plaintiffs' Position Here**

The plain language of two World Intellectual Property Organization ("WIPO") treaties, both of which the United States has ratified and implemented, also provide strong support for the conclusion that the right to "make available" is part of the distribution right.

The United States has entered into two treaties that directly address the right of "making available": the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), or together the "WIPO digital treaties." Those treaties make clear that a right of making available is protected. Indeed, if the Copyright Act did not protect this right—as Congress clearly stated it did—the United States would be out of compliance with its treaty obligations.

The WCT provides:

Authors of literary and artistic works shall enjoy the **exclusive right of authorizing the making available to the public** of the original and copies of their works through sale or other transfer of ownership. (Article 6)

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, **including the making available to the public of their works** . . . (Article 8)

WIPO Copyright Treaty, Dec. 20, 1996, arts. 6 & 8, WIPO Doc. CRNR/DC/9 (emphasis added).

The provisions in Articles 6 and 8 of the WCT (and the corresponding Articles 12 and 14 in the WPPT) guarantee copyright owners the right to authorize the making available for their

works and sound recordings in both traditional and electronic formats. This right is invoked (and infringed if undertaken without authorization) whether or not a tangible copy is actually transferred, transmitted or distributed. Thus, the right of “making available” is provided for on the face of the WCT and WPPT treaties.

The United States, upon ratification of these treaties, was required to take whatever steps were necessary to bring U.S. law into compliance with the treaties’ terms. In other words, if existing U.S. law did not include the same making available right, then U.S. law would have had to been amended to include that right before the U.S. could ratify the treaties. As part of implementation process, the U.S. Department of Commerce transmitted to Congress the text of the treaties. Congress then, itself, reviewed the treaties and U.S. law in order determine if U.S. law already included a right of making available, or if U.S. law needed to be appropriately amended. Both Congress and the Executive branch agreed that no changes were necessary to U.S. law to protect the exclusive rights (including “making available”) required by the treaties, finding that the existing right of distribution subsumed a making available right. Government witnesses and copyright experts from many agencies, including the Commerce Department (and PTO),<sup>5</sup> the State Department,<sup>6</sup> and the U.S. Copyright Office,<sup>7</sup> all concurred in the decision to

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<sup>5</sup> Statement of Bruce Lehman, PTO Commissioner, WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 & HR. 2180 Before the House Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, 105th Cong. 87(1997).

<sup>6</sup> Testimony of Alan P. Larson, Assistant Secretary of State, *WIPO Copyright Treaty (WCT) (1996) and WIPO Performances and Phonograms Treaty (WPPT) (1996)*, Hearings Before the Senate and the Committee on Foreign Relations, 105<sup>th</sup> Cong. (Sept. 10, 1998).

<sup>7</sup> On the subject of controlling access to a work, the Copyright Office concluded that “[i]t has long been accepted in U.S. law that the copyright owner has the right to control access to his work, and may choose not to make it available to others or to do so only on set terms.” Statement of Mary Beth Peters, Register of Copyrights, *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on HR. 2281 & HR. 2180 Before the House*

ratify the treaties without amending Section 106. As such, upon implementing the treaties, the House and Senate were in unanimous agreement that the then-existing Copyright Act already protected the right of making available.

Moreover, since the implementation of the treaties, the United States Copyright Office has taken the position that the exclusive right of distribution in the Copyright Act grants a copyright owner the exclusive right of “making available” copies of a copyrighted work. As noted above, the Register of Copyrights addressed the issue of offering copyrighted works on a peer-to-peer network directly: “[M]aking [a work] available for other users of a peer to peer network to download. . . constitutes an infringement of the exclusive distribution right, as well of the reproduction right.” Letter from Marybeth Peters to Rep. Howard L. Berman, *supra*.

Thus, the United States has made a clear determination that no alterations were needed to the exclusive rights in Section 106 in order to fully protect all of the rights delineated in the WIPO treaties, including the right of making available. As such, the Copyright Act includes the exclusive right of “making available.”

For all of the foregoing reasons, even if it were necessary for the Court to reach the question of “making available,” the Legislative, Executive and Judicial Branches of government have all recognized that such a right exists as part of the exclusive right of distribution, and, for this reason, as well, Defendant’s motion is groundless.

### CONCLUSION

For all of the foregoing reasons, Defendant’s motion to dismiss is baseless and should be denied.

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*Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, 105<sup>th</sup> Cong. 43 (1997).*

Dated: New York New York  
August 3, 2007

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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,	:	X
	:	
Plaintiffs,	:	
-against-	:	
JOAN C. CASSIN,	:	
Defendant.	:	X

Civil Action No.: 06-cv-3089 (SCR)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT** has been served upon the following non-CM/ECF participants by United States mail, properly addressed and postage prepaid, on this 3<sup>rd</sup> day of August, 2007:

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