

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

-----X
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

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

**VANDENBERG & FELIU, LLP
110 East 42 Street
New York, NY 10017
(212) 763-6800
Attorneys for Defendant**

TABLE OF CONTENTS

Table of contents i

Table of authorities ii

Preliminary Statement 1

Argument 2

I. The complaint must be dismissed because it does not state a claim
for copyright infringement 2

II. Plaintiffs should not be permitted to expand the scope
of the distribution right by adding “making available” 9

Appendix

TABLE OF AUTHORITIES

Statutes and Rules

17 USC 106(1) 10

17 USC 106(2) 10

17 USC 106 (3) 1, 2, 3, 6, 7, 9, 10

17 USC 106(4) 6, 10

17 USC 106(5) 6, 10

17 USC 106(6) 6, 10

17 USC 201(d)(2) 10

Treaty

WIPO Copyright Treaty, Articles 6 and 8 6, 7

Cases

Arista Records LLC v. Greubel, 453 F. Supp. 2d 961 (ND Texas 2006) 4-5

Atlantic v. Does (Plaintiffs’ Appendix C) 8

BMG v. Conklin (Plaintiffs’ Appendix H) 8

Elektra Entertainment Group Inc. v. Santangelo, 2005 WL 3199841 (SDNY 2005) 4-5

Fonovisa, Inc. v. Alvarez, 1:06-CV-011 (NDTex. 2006)(Appendix 2) 4-5

Franklin Electronic Publishers v. Unisonic Prod. Corp., 763 F. Supp. 1 (SDNY 1991) 5

Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2d Cir. 2005) 7

Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) 7

Interscope v. Does (Plaintiffs’ Appendix E) 8

Interscope Records v. Duty, 2006 WL 988086 (D. Arizona 2006) 4-5

Loud v. Does (Plaintiffs’ Appendix A) 8

Maverick Recording Co. v. Goldshteyn, 2006 WL 2166870 (EDNY 2006) 4-5

Motown v. DePietro, 2007 U.S. Dist. LEXIS 11626 (E.D. Pa. 2007) 8

Motown v. Does (Plaintiffs’ Appendix F) 8

In re Napster, Inc., 377 F.Supp.2d 796 (ND.California 2005) 7

In re Rath, 402 F. 3d 1207 (Fed. Cir. 2005) 7

United States v. Shaffer, 2007 U.S.App., LEXIS 65 (10th Cir. January 3, 2007) 9

Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440 (2d Cir. 2001) 7

Warner v. Does (Plaintiffs’ Appendix D) 8

Warner v. Duarte (Plaintiffs’ Appendix J) 8

Warner Bros. Records, Inc. v. Payne, 2006 WL 2844415 (WD Texas 2006) 4-5

Whitney v. Robertson, 124 U.S. 190, 31 L. Ed. 386, 8 S. Ct. 456 (1888) 7

Other authorities

Goldstein on Copyright 3, 4, 6

Nimmer on Copyright 3, 4, 5-6, 10

Preliminary Statement

Plaintiffs' opposition memorandum repeats the desperate arguments plaintiffs made in Elektra v. Barker, 05 CV 7340 (KMK), that in order for the Court to understand the plain words of a 1976 act of Congress, 17 USC 106(3), it needs to read a 2002 letter from an employee of the Copyright Office to a Congressman and it needs to read plaintiffs' counsel's misleading, surgically altered, excerpts from a treaty which is not even self-executing. This despite the fact that the Barker Court made it clear to plaintiffs' counsel at the January 26, 2007, argument that the statute's words were clear, and even were they not, these types of 'authorities' are entitled to little or no weight in the realm of statutory construction, observations with which plaintiffs' counsel meekly concurred. (Elektra v. Barker Transcript Excerpts, Appendix A, p. 40, li. 22 – p. 43, li. 8)(“Barker Trans.”).

Moreover they continue to cite such oddities as decisions in *pro se* cases, where the issues were never fully briefed, and criminal cases dealing with “distribution” under a drug statute rather than the clearly defined and demarcated “distribution” right described in 17 USC 106(3).

And they continue to pad their briefs with scandalous diatribes against peer-to-peer file sharing and ‘piracy’, unsupported by facts or evidence, and entirely immaterial to the question of the legal sufficiency of plaintiffs’ pleading.

The opposition brief is bereft of any controlling authority for plaintiffs’ cavalier view that (a) the record companies’ vague and conclusory brand of supposedly pleading “uploading” and “distributing” affords sufficient notice or (b) merely “making available” now constitutes, in and of itself, an infringement of the 17 USC 106(3) distribution right notwithstanding the absence of (I) dissemination of (II) actual copies (III) to the public (IV) by sale or other transfer of ownership, or

by rental, lease, or lending -- all as mandated by the statute and by a long line of cases -- simply because the “internet” is invoked.¹

And despite the absence of any controlling authority for their views, they make no effort to say *why*, as a matter of policy, a Court *should* adopt them.

Neither do plaintiffs dispute what defendant pointed out in her moving memorandum, that the complaint fails to set 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”.

ARGUMENT

I. THE COMPLAINT MUST BE DISMISSED BECAUSE IT DOES NOT STATE A CLAIM FOR COPYRIGHT INFRINGEMENT

Plaintiffs’ opposition memorandum follows an ostrich-like strategy, by and large ignoring the two (2) legal issues raised in the moving papers. As we had pointed out, numerous

¹ Although plaintiffs’ counsel conceded at the Elektra v. Barker argument that the “distribution” referred to in the Copyright Act must entail a *sale or other transfer of ownership by rental, lease, or lending* (Barker Trans., p. 38, ll. 20- 23), their opposition memorandum to this Court pretends that there is no such requirement.

authorities over a span of decades have held 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.” (Moving Memorandum, pp. 2-3). Plaintiffs’ counsel cannot with a straight face say that their complaint satisfies that standard, so they spend a great deal of effort making unsupported factual averments in their memorandum of law, apparently in the hope that the Court will not notice that (a) their memorandum of law is not their complaint, (b) it is not even an affidavit, (c) the averments themselves make no sense to anyone remotely familiar with the internet, and (d) the averments have nothing to do with “by what acts during what time *the defendant* infringed the copyright”.

They likewise avoid discussing the essential elements of a claim for infringement of the 17 USC 106(3) distribution right, none of which they have alleged or could allege:

- *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.”²

– 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”.]. (See also plaintiffs’ concession at *Barker Trans.*, p. 38, ll. 20-23.)

See authorities cited in Moving Memorandum, pp. 3-6.

Unable to defend their complaint on its merits, they (a) fabricate an argument for defendant, an argument which defendant never made, and then attempt to shoot it down, (b) fudge separate issues and lump them together, and (c) attempt to play a numbers game, by trying to see how many inapposite citations they can find with which to pad their brief, often in a misleading manner.

They repeatedly refuted defendant’s contention that plaintiffs are required to “allege each individual act of infringement”. (Plaintiff’s Memorandum, p. 9). Of course defendant has never made any such contention; defendant merely cited the hornbook principle that plaintiffs are required to allege “by what acts during what time the defendant infringed the copyright”.

As we indicated in our Moving Memorandum at pp. 7-9, there have been seven (7) fully briefed motions to dismiss the RIAA complaint in lieu of answer, six (6) of which have been decided. The group we referred to as the First Six RIAA 12(b)(6) Decisions (1) *did not decide* the “making available” issue at all, and (2) agreed with plaintiffs, on the scant authority of the Franklin case, that the plaintiffs’ conclusory boilerplate allegation that infringement is “continuing” dispenses

² I.e., a distribution just to Kazaa members, or to some Kazaa members, would not suffice, as it would not be a distribution “to the public”

with the well established requirement that they plead “by what acts during what time the defendant infringed the copyright”. As we indicated in our Moving Memorandum, the First Six RIAA 12(b)(6) Decisions are (a) no authority at on the “making available issue”, and (b) wrongly decided on the ‘continuing’ issue. Plaintiffs make no argument at all as to *why* those decisions are correct or should be followed. We submit that is because there is no argument that could be made in their defense. As Judge Karas observed at the oral argument in Barker,

THE COURT: But let's talk about this continuing allegation. The idea behind Rule 8 is that so that the defendant understands what she's alleged to have done wrong so she can defend herself. I mean, it is simple fairness.

So, what you have done is you have listed what you think she downloaded and then have you this Kazaa copy here that says, okay, these are what is out there. But there is nothing specific as to when any of these things might have been copied by anybody else, anything that she did to herself distribute these things, and it is true, I don't think it can be denied, that that paragraph, the key paragraph that everybody is focused on is, you know, used, it seems, time and again, which is why it is called boiler plate.

So, it doesn't even seem like it is tailored to anything that Ms. Barker is alleged to have done. So, how is she supposed to defend herself? How is she supposed to know when she broke the law?

(Barker Trans., p. 18, li. 17 - p. 19, li. 8.). And as Judge Karas also observed, it is entirely unclear why the other six (6) judges felt that it was within their province to simply refrain from deciding the “making available” issue. (Barker Trans, p. 24, ll. 13-16).

Due to the page limit for reply briefs we will not repeat discussion of the cases and other authorities cited in our Moving Memorandum. The Court will read those, and see that plaintiffs’ counsel’s imaginative interpretations of those cases are mere distortion.

We address some of the inapposite authorities cited by plaintiffs.

They cite, as they have in the past, language culled and misleadingly excerpted from the WIPO Copyright treaty. They cite no caselaw in support of their fanciful argument. That is because the argument has no basis in the law. (A) In the first place, as to article 6, they bizarrely highlight certain language in the treaty and *ignore* the language which stands their argument on its head – **“through sale or other transfer of ownership”**. Since their case has nothing to do with sales or other transfers of ownership they conveniently ignore that language. (B) Secondly, as to article 8, they deceptively *omit altogether* the language which shows what article 8 is all about. Article 8 actually reads as follows (we have italicized the language which plaintiffs’ counsel cleverly omitted):

[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 *in such a way that members of the public may access these works from a place and at a time individually chosen by them* .

I.e., the "making available" referred to in Article 8, as an instance of the right of "communication to the public," is covered by the present public display and public performance rights in sections 106(4)-(6) of the Copyright Act and does not justify a distortion of the distribution right in section 106(3) . (C) In the third place, it is well established that executory treaties (those treaties that are not self-executing) have no effect in the United States unless and until and to the extent they are implemented by domestic law. Whitney v. Robertson, 124 U.S. 190, 31 L. Ed. 386, 8 S. Ct. 456 (1888); In re Rath, 402 F. 3d 1207 (Fed. Cir. 2005). When a treaty is not self-executing, it does not provide independent, privately enforceable rights. Guaylupo-Moya v. Gonzales, 423

F.3d 121, 133 (2d Cir. 2005). The WIPO Copyright Treaty is not self executing. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440 (2d Cir. 2001). Where, as here, “a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively ‘law of the land.’” Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) (emphasis added). The legislation that Congress adopted to implement the WIPO Copyright Treaty *did not* amend section 106 of the Copyright Law. Since section 106 does not make actionable the mere offering or making available of a copyrighted work, plaintiffs’ reliance upon the WIPO Copyright Treaty to resurrect their claim is completely unwarranted. (D) And lastly, Plaintiffs’ argument that section 106, although unamended, should be reinterpreted in light of subsequent congressional implementation of the WIPO Copyright Treaty is unwarranted. The plaintiffs in In re Napster, Inc., 377 F.Supp.2d 796 (ND.California 2005), made a similar argument, contending that the Artists’ Rights and Theft Prevention Act of 2005 called for a reinterpretation of section 106. Judge Patel expressly rejected this argument, holding that the only legislative history and intent that mattered, for purposes of construing section 106, were those of the Congress that passed that section in 1976. In re Napster, supra, 377 F.Supp.2d at 805.

MaryBeth Peters of the Copyright Office is the servant of Congress, not the other way around. Her letter to a member of Congress in 2002, cited by plaintiffs as “legislative history”, is not legislative history. Nor does this Court need Ms. Peters’ expertise in determining the meaning of a very clear statute with no ambiguities.

Plaintiffs cite Loud v. Does (Plaintiffs’ Appendix A), Atlantic v. Does (Plaintiffs’ Appendix C), Warner v. Does (Plaintiffs’ Appendix D), Interscope v. Does (Plaintiffs’ Appendix E), and Motown v. Does (Plaintiffs’ Appendix F), *none* of which was a motion to

dismiss a complaint, all of which related to motions to quash a subpoena or to vacate an ex parte discovery order. As the Court can see from reading these, there was no reason for plaintiffs to cite them other than to pad its brief with nonsense meant to convince the Court that plaintiffs' radical theories of copyright law were by now well accepted.

BMG v. Conklin (Plaintiffs' Appendix H) was a motion to dismiss by a pro se litigant. It was decided by a one-sentence order rendered the day after the plaintiffs submitted their opposition papers. The motion was never fully briefed by any counsel, and the order is entirely silent as to the basis for the Court's ruling; for ought we know it was denied on the ground of untimeliness. Motown v. DePietro, 2007 U.S. Dist. LEXIS 11626 (E.D. Pa. 2007) was another pro se case, one in which the plaintiffs' motion for summary judgment was *denied*. As with Conklin, the motion was never fully briefed. Warner v. Duarte (Plaintiffs' Appendix J), a case with which we were not familiar until receiving plaintiffs' opposition papers, was not a *pro se* case but might just as well have been : the Magistrate Judge to whom the "dismissal motion" was referred noted that the "motion" consisted of "just a simple conclusory argument with no factual support". We performed a PACER search and learned that there was no memorandum of law in support of the "motion", no citations to authorities, and no reply papers. There were no papers at all in support of so much of the "motion" as sought dismissal of the complaint for legal insufficiency. It is an understatement to say that the motion was never fully briefed. Plaintiffs voluntarily dismissed the case with prejudice a month later.

Plaintiffs' citation to United States v. Shaffer, 2007 U.S.App., LEXIS 65 (10th Cir. January 3, 2007), is shamefully inapposite, as it was a criminal drug "distribution" case and had nothing to do with the carefully delineated "distribution" concept in 17 USC 106(3).

II. PLAINTIFFS SHOULD NOT BE PERMITTED TO EXPAND THE SCOPE OF THE DISTRIBUTION RIGHT BY ADDING "MAKING AVAILABLE".

Plaintiffs' proposed expansion of the distribution right would sweep into the reach of copyright law many activities not now covered by copyright law . Under such an elastic interpretation and ill-defined standard, almost all participants in the Internet would become vulnerable to accusations that they "make available" a variety of content, including copyrighted materials, to users. The boundaries of the right would become indeterminate and unpredictable, creating chilling effects.

For example, companies routinely include in their web pages hyperlinks that enable persons to navigate easily to other sites throughout the web by use of browser software . Indeed, the web is a collection of hyperlinks . Even though the use of hyperlinks makes content located elsewhere available to a web user, it does not constitute a *distribution* of that content under section 106(3).

Plaintiffs' "making available" argument would also sweep many activities pertaining to *other* rights of a copyright owner into the concept of "distribution ." This would upset the expectations of, and jeopardize, those who have bargained for licenses of those other rights .

The Copyright Act affords copyright holders not one unitary right but several distinct and severable rights . For example, one person can own the reproduction right in a work under section 106(1) while another person can own the public performance right in the same work under section 106(4). *See* 17 U.S .C. § 201(d)(2) (individual rights under section 106 may be transferred separately) . An owner of all rights can license the reproduction right under section

106(1) but not the derivative works (adaptation) right under section 106(2) . *See* Nimmer on Copyright § 8 .01[A] at 8-17 (2005).

If all instances of "making available" were considered part of the "distribution" right in section 106(3), then licensees of the public performance rights under sections 106(4) or 106(6) or the public display right under section 106(5) would fall into a trap. Notwithstanding those licenses, under Plaintiffs' argument the licensees would be unprotected because they would also be engaging in an unlicensed distribution as a consequence of their making the work available . The Copyright Act should not be construed so expansively as to create a trap for licensees in such circumstances . Many contracts have taken into account clear expectations regarding rights and obligations based on unambiguous statutory language regarding the various rights of a copyright holder.

Respectfully submitted,

VANDENBERG & FELIU, LLP

By: s/Ray Beckerman
Ray Beckerman (RB 8783)
Attorneys for defendant
110 East 42 Street
New York, NY 10017
(212) 763-6800

Of Counsel:

Ray Beckerman
Morlan Ty Rogers

Appendix

Transcript of January 26, 2007, Oral Argument, in
Elektra Entertainment Group, Inc. v. Barker, 05 Civ. 7340 (KMK)(SDNY)

7125ELEA argument

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 ELEKTRA ENTERTAINMENT GROUP,
3 INC., et al.,

4 Plaintiffs,

5 v.

05 Civ. 7340 (KMK)

6 DENISE BARKER,

7 Defendant.

8 -----x

9 January 26, 2007
10 2:27 p.m.

10 Before:

11 HON. KENNETH M. KARAS,

12 District Judge

13 APPEARANCES

14 HOLME, ROBERTS & OWEN, L.L.P.
15 Attorneys for Plaintiffs
15 BY: RICHARD LANCE GABRIEL
16 MATTHEW OPPENHEIM

17 VANDENBERG & FELIU, L.L.P.
17 Attorney for Defendant
18 BY: RAY BECKERMAN

18
19
20
21
22
23
24
25

7125ELEA argument

1 (Case called)
2 THE DEPUTY CLERK: If the parties could state their
3 appearances for the record, please?
4 MR. GABRIEL: Good afternoon, your Honor. My name is
5 Richard Gabriel. I represent the plaintiffs and I would like
6 to introduce my clients at the table, this is Ken Dorso from
7 the recording industry, and Matthew Oppenheim.
8 MR. OPPENHEIM: Good morning, your Honor.
9 THE COURT: Good afternoon.
10 MR. OPPENHEIM: Good afternoon, that's right.
11 MR. BECKERMAN: Ray Beckerman, Vandenberg & Felio for
12 the defendant.
13 THE COURT: Good afternoon, Mr. Beckerman.
14 MR. BECKERMAN: Good afternoon, your Honor.
15 THE COURT: Are there attorneys here for amici who
16 submitted briefs?
17 MS. MARTIN: Your Honor, I am Rebecca Martin with the
18 U.S. Attorney's office and the government submitted a statement
19 of interest.
20 THE COURT: Yes.
21 MS. MARTIN: But we are here merely to observe.
22 MR. ZAVIN: And Jonathan Zavin, Loeb & Loeb, on behalf
23 of the MPAA who submitted amicus brief, also here to observe.
24 THE COURT: Then I will thank you all for your briefs.
25 And to the parties, I have read all the papers including the
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

7125ELEA argument

1 Anything else you want to add on the making available
2 claim?

3 MR. BECKERMAN: No. It is all in our briefs.

4 THE COURT: All right. Thanks.

5 MR. BECKERMAN: Thank you.

6 THE COURT: Good afternoon.

7 MR. GABRIEL: Excuse my back, good afternoon to you,
8 your Honor. May it please the Court, I will try to be brief as
9 well because I think our briefs have covered it fairly well and
10 you have seen plenty of paper.

11 The Court is correct that every issue that the
12 defendant is raising here has been raised by the same defense
13 lawyers numerous times in this Court, has been rejected each
14 and every time by every other judge in this court and in the
15 Eastern District. I can cite all the cases, you have them, it
16 is probably many more than --

17 THE COURT: But let's talk about this continuing
18 allegation. The idea behind Rule 8 is that so that the
19 defendant understands what she's alleged to have done wrong so
20 she can defend herself. I mean, it is simple fairness.

21 So, what you have done is you have listed what you
22 think she downloaded and then have you this Kazaa copy here
23 that says, okay, these are what is out there. But there is
24 nothing specific as to when any of these things might have been
25 copied by anybody else, anything that she did to herself

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300



7125ELEA argument

1 distribute these things, and it is true, I don't think it can
2 be denied, that that paragraph, the key paragraph that
3 everybody is focused on is, you know, used, it seems, time and
4 again, which is why it is called boiler plate.

5 So, it doesn't even seem like it is tailored to
6 anything that Ms. Barker is alleged to have done. So, how is
7 she supposed to defend herself? How is she supposed to know
8 when she broke the law?

9 MR. GABRIEL: We are talking about paragraph 12, the
10 best way is to look at what it does allow. In paragraph 10 we
11 define what the copyrighted recordings are, it is a defined
12 term in the complaint. It lists at least the eight recordings
13 on Exhibit A which are specifically listed by the artist and
14 the title and the publisher.

15 THE COURT: Yes, I don't think that's the crux of
16 this.

17 MR. GABRIEL: And paragraph 12 says that that this
18 defendant, without permission -- it specifically says --
19 downloaded, distributed and/or made available, and that these
20 are violations of the right of distribution.

21 THE COURT: But when?

22 MR. GABRIEL: Well, the issue, we say ongoing because
23 you can't know. It goes on for a long period of time. I
24 submit this is, as you point out, an evidence issue.

25 THE COURT: But there is a difference between even
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300



7125ELEA argument

1 are and, specifically, that this defendant downloaded,
2 distributed them, and made them available.

3 THE COURT: To the extent that you allege that the
4 downloading by your investigator is distribution, and to the
5 extent, assuming just for the sake of argument, that I agree
6 with you that that satisfies the pleadings requirement that you
7 would have in your Rule 8 and elsewhere; do I need to reach the
8 making available question?

9 MR. GABRIEL: No. In fact, we specifically said you
10 don't. And many of the other courts around the country have
11 said that, including Judge Trager in the Eastern District said
12 that and a number of other courts.

13 THE COURT: I read Judge Trager's decision. After he
14 said I don't need to reach it I notice there was no citation
15 that supported that proposition and it is not clear to me
16 exactly why it is.

17 MR. GABRIEL: Well, I may be able to help with that,
18 your Honor.

19 THE COURT: Please.

20 MR. GABRIEL: The other courts -- and we have cited
21 them, there is Arista Records v. Google, Phonovisa v. Alvarez,
22 the Payne case, the Duty case, at least most of these I think
23 were supplemental authority. All of those courts, I believe
24 all of them said we believe at the pleading stage that there is
25 at least an argument here that making available is sufficient

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

7125ELEA argument

1 the case law to support that notion for you to have that making
2 available part survive.

3 MR. GABRIEL: And the issue, but the Court did find
4 the infringement in that case based on the authorization.

5 So, I hear the sentence you are relying on. Again,
6 the Court asked me if I was aware of another case using
7 authorization and I am wracking my brain for it. It comes up
8 in obviously a number of other cases where I don't believe the
9 word authorize is used. Obviously Hotaling. I think the
10 Schaffer case that we cited to you is very instructive.

11 I recognize it was a criminal case and not a copyright
12 case, but it is a use of Kazaa to distribute child pornography.

13 THE COURT: That's why they're back there.

14 MR. GABRIEL: And the Court found in that case that
15 that's a distribution, just the fact that it was there for the
16 taking.

17 And I submit what is telling about that, as your Honor
18 rightly said, distribution is not defined other than there is
19 an analogy to publication and whatever else.

20 THE COURT: It is not defined but it is limited
21 because it is distribution by sale or other transfer of
22 ownership by rental, leasing or lending.

23 MR. GABRIEL: That's correct. And your Honor reminds
24 me of a point I wanted to make on Napster.

25 The Court, in Napster, in the district court case in
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300



7125ELEA argument

1 is kind of an odd disconnect that never gets explained.

2 But, anyway, the Ninth Circuit said it is enough to
3 have it on the index. Getaped, a Southern District case says
4 that. The Marobie case out of the North District of Illinois.
5 Playboy cases do. A lot of cases say if it is there for the
6 taking for anybody, that is making available and it is
7 distribution.

8 So, again, I can't recall if those use the word
9 authorize, they may or may not --

10 THE COURT: I don't think they do.

11 MR. GABRIEL: Okay.

12 THE COURT: But, I will have to review them. I don't
13 think so.

14 MR. GABRIEL: Again, if we get here they do, I submit,
15 do support our position. And I submit there really isn't a lot
16 of law on the other side. The cases defendant and amici cite
17 are distinguishable because in those cases there is nothing
18 behind the index. There is nothing to be taken once it is
19 loaded. That's the facts of our case which we will prove at
20 trial was happening. The Schaffer case. And we have talked
21 about the Napster case.

22 I think it is important to note in terms of it making
23 available, your Honor, that the United States Copyright Office
24 interprets 1063 exactly the same way that we do.

25 We submitted the various statements and letters from
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

7125ELEA argument

1 Mary Beth Peters, the registrar, who specifically says making
2 available is subsumed within distribution.

3 THE COURT: In the spectrum of deference that I'm
4 supposed to give to that testimony, Chevron being the most
5 deferential and denovo being the least, where on the spectrum
6 do you think I'm supposed to be on that?

7 MR. GABRIEL: I believe that the case law is the
8 Batjac case that we cited says that the copyright office's
9 determination on copyright issue are entitled to deference as
10 long as their interpretation is reasonable, it doesn't draw the
11 line, your Honor.

12 THE COURT: That's why I asked the question.

13 MR. GABRIEL: Yes. Is it a dispositive issue. I
14 guess I don't know the answer and shouldn't speculate. I don't
15 know but I think it is entitled to at least some deference.

16 Also, I think highly relevant are the issue -- and
17 this could take a long time and I will summarize it, the WIPO
18 treatise issue I think is very, very important.

19 THE COURT: Let's cut to the chase on that. I mean,
20 the bottom line on that is that the Congressional -- the
21 Senatorial ratification of those treaties is a statement that
22 making available is already covered in the Copyright Act
23 because the treaty would require enabling legislation.

24 MR. GABRIEL: Correct.

25 THE COURT: Doesn't that boil down to the age old

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

*
#

7125ELEA argument

1 argument that what subsequent Congresses have done either is or
2 is not persuasive as to what some other prior Congress did?

3 MR. GABRIEL: There is plenty of law, I know, that
4 says subsequent legislative history is not relevant to
5 interpret a specific provision. This is not quite that issue,
6 I think.

7 This is an issue where the defendant and amici argue
8 why didn't they amend it? They didn't amend it and that is
9 supposed to be telling. I think it responds to that.

10 The issue here is Congress didn't think any amendment
11 was necessary.

12 THE COURT: A subsequent Congress.

13 I mean, the bottom line here is first we will start
14 with the words. Then, to the extent there is ambiguity, we
15 look at the legislative history, not what subsequent Congresses
16 viewed of that statute.

17 To the extent it has some persuasive authority, how
18 much on the continuing, who knows. But, as you point out,
19 there is plenty of cases. And I don't know that this is really
20 any different than other instances where what subsequent
21 Congress has done or not done is or is not relevant. It is not
22 irrelevant because it depends on what they've done.

23 But here really what it comes down to is their view
24 that what the Copyright Act did was covered making available.
25 Period.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

7125ELEA argument

1 MR. GABRIEL: And I take it the Court is being charged
2 with asking what does the copyright statute mean today. And,
3 again, I would submit that it is --
4 THE COURT: No, no, no, no. Because it doesn't
5 change --
6 MR. GABRIEL: No. Then today was in the wrong place
7 in the sentence.
8 THE COURT: Yes. Okay. Careful.
9 MR. GABRIEL: The issue before the Court today
10 involves -- that's what I meant to say. Excuse me.
11 THE COURT: Sure. No problem.
12 MR. GABRIEL: And I think it is at least persuasive
13 authority to say Congress said we don't have to amend it
14 because it is covered. The executive branch said we don't have
15 to amend because it is covered. The copyright office said we
16 don't have to amend because it is covered. And the amici make
17 a big deal about you have to defer to what Congress did and
18 they're arguing why didn't you, did Congress amend in 1995 or
19 2005. If we are going to look at what Congress was intending
20 in 1995 or 2005, I think we then have prior legislative history
21 that's persuasive as to those issues because they're covered.
22 THE COURT: I got you.
23 MR. GABRIEL: I want to make sure I have answered the
24 Court's questions.
25 THE COURT: You have answered my questions. I want to

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300