

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

**PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT**

Plaintiffs respectfully submit this sur-reply in opposition to Defendant Joan Cassin's motion to dismiss the Complaint. Plaintiffs submit this sur-reply to address three issues raised in Defendant's Reply which were not raised in Defendant's motion.

ARGUMENT

First, Defendant's Reply relies heavily on selected portions of the transcript of the oral argument in *Elektra Entertainment Group v. Barker*, Case No. 05-cv-7340 (KMK). Plaintiffs respectfully submit that the cherry-picked portions of an oral argument in an unrelated case should not be considered by this Court in connection with Defendant's motion. As the Court knows, oral argument is an opportunity for the judge to question each side's arguments on a pending motion. Such questions do not reflect or represent the court's ultimate decision on the motion. The limited portions of the *Barker* hearing transcript selected by Defendant are one-

sided and do not in any way reflect the tone of the hearing. Nor do they reflect the judge's ultimate ruling, which has not yet been made.

Second, contrary to Defendant's assertion (Reply at 1), *United States v. Shaffer*, 2007 U.S. App. LEXIS 65 (10th Cir. Jan. 3, 2007), is not a drug case. *Shaffer* is a child pornography case where the Defendant was held criminally liable for using Kazaa to distribute child pornography. The defendant argued on appeal that making the images available to others by placing them in his Kazaa "shared" folder should not be considered a distribution. The court rejected this argument and, adopting a common sense approach, found "little difficulty in concluding that [the defendant] *distributed* child pornography" by placing the pornography "in his computer's Kazaa shared folder." *Shaffer*, 2007 U.S. App. LEXIS 65, at *10-11. Plaintiffs respectfully submit that the *Shaffer* court's analysis is instructive in the context of copyright infringement, *i.e.*, that placing an electronic file into a Kazaa shared folder from which such files can easily be downloaded by potentially millions of other Kazaa users constitutes a distribution of the file. In addition, other courts have adopted exactly this reasoning. (See Pls.' Resp. at 15-17.)

Third, Defendant apparently contends (Reply at 1) that decisions, in which there was a pro se defendant, somehow carry less weight or controlling authority. This contention is without merit for at least two reasons. First, there is no reason to discount a court's ruling on a matter simply because one of the parties was pro se. Second, every court to consider the issue including Judges Swain, Sweet, McMahon, Howell, Owen, Chin and Buchwald of the Southern District of New York, as well as by Judge Trager of the Eastern District of New York, none of which involved pro se defendants (most of these were cases in which current defense counsel represented one or more defendants), has determined that Plaintiffs' complaint is sufficient, and has specifically rejected one or all of Defendant's arguments. (See Pls.' Resp. at FN 1, 5-7.)

CONCLUSION

For all of the foregoing reasons, as well as those stated in Plaintiffs' Response,
Defendant's motion to dismiss should be denied.

Dated: New York New York
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