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November 2, 2007

By Fax (914-390-4179)

The Honorable Stephen C. Robinson  
United States District Judge  
United States District Court for the  
Southern District of New York  
300 Quarropas Street  
White Plains, New York 10601

Re: Warner Bros. Records Inc. v. Cassin  
SDNY No. 06 Civ. 3089 (SCR)

Dear Judge Robinson:

We are attorneys for defendant. We have today received, by email, a copy of a November 1<sup>st</sup> letter from plaintiffs' counsel submitting to Your Honor a copy of a jury instruction from a Minnesota case.

Until the plaintiffs made a similar submission of the same jury instruction in *Elektra v. Barker*, I had never before seen a jury instruction cited as an authority for a dismissal motion. I think it is absurd for plaintiffs to have done so. A busy trial judge having to make hundreds or even thousands of decisions in the course of a trial is under much greater pressures than he is when deciding a written, fully briefed motion. It is our understanding that a motion is being made to set aside the verdict in *Capitol v. Thomas*, and that failing that an appeal will be taken, predicated at least in part upon the very jury instruction plaintiffs submit, which was patently incorrect, since it freed plaintiffs from the burden of proving *any* of the requisite elements of a "distribution" as described in 17 USC 106(3):

– **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

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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”].

Respectfully submitted,

Ray Beckerman (RB8783)

cc: Timothy M. Reynolds, Esq.  
(303-866-0200)