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April 2, 2008

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, and write in response to the April 2<sup>nd</sup> letter of Victor B. Kao, Esq.

First, we call to Your Honor's attention that Judge Karas agreed with defendant that the "making available" claim was insufficient, and rejected plaintiffs' various arguments for same, including invocation of the "authorizing" clause, an informal letter from the Register of Copyrights referring to the WIPO treaty, the use of the language in the WIPO treaty, the subsequent legislative history arguments, and the Hotaling case.

Second, we call to Your Honor's attention that, in deciding to sustain the sufficiency of the allegations of actual distribution and actual downloading under Twombly, Judge Karas expressly parted company with Interscope v. Rodriguez, 2007 WL 2408484 (S.D. California, August 17, 2007)(March 31, 2008, Opinion and Order, at 9 n.4)(hereinafter "Barker"), and implicitly parted company with Atlantic Recording Corp. v. Brennan, – F.Supp.2d –, 2008 WL 445819 (C. Connecticut, February 13, 2008), which explicitly agreed with Interscope on the Twombly issue (2008 WL at 445819), since Judge Karas indicated familiarity with Brennan at another part his decision. (Barker at 17).

Third, we call to Your Honor's attention that, in granting plaintiffs leave to amend to plead a claim of "offering to distribute for the purpose of further distribution, public

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performance, or public display”, *without having to plead an actual distribution of copies*, Judge Karas expressly parted company with the Nimmer Treatise, the Goldstein Treatise, and Obolensky v. G.P. Putnam’s Sons, 628 F. Supp. 1552, 1555-56 (S.D.N.Y. 1986) (Barker at 14-15), with Atlantic v. Brennan (Barker at 17), and with Arista Records, Inc. v. Mp3Board, Inc., 2002 WL 1997918 (S.D.N.Y. 2002) (Barker at 16). Moreover he implicitly parted company with the Patry Treatise which agrees with the Nimmer and Goldstein treatises, and with the authorities cited at page 6 of our initial memorandum of law in this matter, which we also had cited to Judge Karas.

We respectfully submit that as to the Twombly issue, the Rodriguez and Brennan decisions represent a more correct adherence to the principles enunciated by the high court in Twombly.

And we respectfully submit that, in connection with the “offering” issue, Judge Karas erred in (I) dispensing with the explicit and unambiguous words of the statute, (II) several decades of caselaw requiring actual distribution, and (III) all three of the major copyright treatises, to effect that the 17 USC 106(3) “distribution” must include, as the statute itself says:

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

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We believe it was error to be guided by the legislative history, or “sausage factory”, leading up to the 1976 Copyright Act, when the statute enacted is unambiguous on its face in defining the distribution right: “(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”.

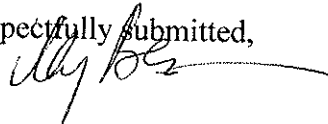
Accordingly, we respectfully ask Your Honor to follow the statute, the caselaw, and the unbroken legal scholarship on the “making available” and “offer to distribute” issue.

And as to the Twombly issue we respectfully ask Your Honor to follow Rodriguez and Brennan, rather than Barker and Elektra v. Schwartz, as being more in keeping with the Twombly guidelines.

In the event that Your Honor agrees with us, the order dismissing the complaint will be appealable of right by the plaintiffs. Should Your Honor, however, sustain any part of the complaint, thus leaving an order which is not appealable as of right, we respectfully request that Your Honor certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

Thank you.

Respectfully submitted,



Ray Beckerman (RB8783)

cc: Victor B. Kao, Esq.  
Fax (212-451-2999)