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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Atlantic Recording Corp., et al.,

Plaintiffs,

v.

Pamela and Jeffrey Howell,

Defendants.

No. CV 06-02076 PHX NVW

AMICUS CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

HEARING DATE: January 24, 2008
TIME: 2:00 p.m.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Electronic Frontier Foundation (EFF) files this brief as *amicus curiae* in support of *pro se* Defendants Jeffrey and Pamela Howell to address an issue whose importance reaches well beyond the instant case: the proper scope of the exclusive right of distribution as defined in Section 106(3) of the Copyright Act, 17 U.S.C. § 106(3).

Defendants, like more than 20,000 other individuals, have been sued by Plaintiffs for copyright infringement based on their use of peer-to-peer (P2P) file sharing software.[1] Although Plaintiffs' complaint alleges infringement of both their reproduction and distribution rights, Plaintiffs' summary judgment motion is premised solely on the distribution claims and is built around the erroneous contention that "[infringement of] the distribution right does not require a consummated transfer of the copyrighted work at issue." Plaintiffs' Supplemental Brief in Support of Their Motion for Summary Judgment, Doc. # 63, at 5 (hereinafter "Plfs. Supp. Br.").

This proposition, if accepted, would contravene both the plain language of the Copyright Act and applicable precedents, threatening to disrupt copyright law in a variety of contexts beyond this case. As will be discussed further below, several Plaintiffs have already sued a national radio broadcaster, XM Radio, based on a variant of the same "making available" theory that they advance here. *See Atlantic Recording Corp. v. XM Satellite Radio*, No. 1:06-cv-03733-DAB (S.D.N.Y. filed May 16, 2006).[2] Similarly, copyright owners have also pressed this theory against Google, contending that the Internet search engine runs afoul of an expansive "making available" conception of the distribution right. *See Perfect 10, Inc. v. Amazon.com, Inc.*, __ F.3d ___, 2007 WL 4225819, slip op. at 15463 (9th Cir. amended opinion filed Dec. 3, 2007). This Court should reject Plaintiffs' effort to further distort copyright jurisprudence on the backs of the *pro se* Defendants here.

Contrary to Plaintiffs' arguments, an infringement of the distribution right requires the

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[1] For an overview of the history of the recording industry's national litigation campaign against P2P file sharing, *see* EFF, *RIAA v. The People: Four Years Later* (Aug. 2007) (available at <http://w2.eff.org/IP/P2P/riaa_at_four.pdf>).

[2] Complaint available at <http://eff.org/IP/digitalradio/XM_complaint.pdf>.

unauthorized, actual dissemination of copies of a copyrighted work.[3] Because the only evidence here consists of downloads by Plaintiffs' own, authorized investigators, Plaintiffs have failed to shoulder their summary judgment burden, and their motion should be denied.

STATEMENT OF INTEREST

EFF is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents more than 13,000 dues-paying members including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while ensuring broad access to information in the digital age. Because a ruling on this motion may have implications for consumers and new technology innovators, EFF has a strong interest in ensuring that the statutorily limited § 106(3) right is correctly applied in this and other cases.[4]

ARGUMENT

I. The Plain Language of § 106(3) Requires Actual Dissemination of Phonorecords or Copies.

As the Supreme Court has explained, "[a] copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections." *Dowling v. United States*, 473 U.S. 207, 216 (1985). As with

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[3] EFF expresses no view regarding the merits of Plaintiffs' remaining claims for infringement of the reproduction right, nor on any fair use or other defenses that Mr. and Mrs. Howell may have with respect to those reproduction claims.

[4] EFF has appeared as *amicus curiae* in three other district court cases that have addressed the scope of the distribution right, *Elektra Enter. Group v. Barker*, No. 05-CV-7340 KMK (S.D.N.Y. brief filed Feb. 23, 2006); *Fonovisa v. Alvarez*, No 1:06-CV-011 (N.D. Tex. brief filed June 1, 2006); and *Elektra v. Dennis*, No. 07-CV-39 DPJ JCS (S.D. Miss. brief filed Apr. 6, 2007). As in the instant case, those cases also involve individuals accused by record labels of downloading and uploading music over the Internet. In *Barker*, the motion focusing on the proper scope of § 106(3) remains pending, having drawn *amicus* filings from the Motion Picture Association of America (MPAA), the Computer & Communications Industry Association (CCIA), the U.S. Internet Industry Association (USIIA), EFF, and the United States. In *Alvarez*, the defendant's motion to dismiss was denied pending further factual development. *Fonovisa v. Alvarez*, No. 1:06-CV-011, 2006 U.S. Dist. LEXIS 95559 (N.D. Tex. July 24, 2006). In *Elektra v. Dennis*, the plaintiffs voluntarily dismissed their claims without prejudice.

other statutory regimes, "[i]f the text of the statute is clear, [a] court looks no further in determining the statute's meaning." *K and N Engineering, Inc. v. Bulat,* __ F.3d __, 2007 WL 4394416 at *1 (9th Cir. Dec. 18, 2007). Careful attention to the statute is particularly important where the Copyright Act is concerned, as it represents a painstaking set of legislative compromises aimed at balancing the interests of both owners and users of copyrighted works. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984).

Section 106 of the Copyright Act defines the limited exclusive rights granted to copyright owners. See 17 U.S.C. § 106. Although copyright lawyers frequently refer to these rights by the shorthand terms "reproduction, public performance, public display, distribution, and adaptation," the statute defines the scope of the rights with more specificity. Moreover, the scope of each exclusive right is further defined by a web of statutory exceptions, many of which apply differently depending on which exclusive right is implicated.[5] In addition, because each exclusive right can be separately assigned or licensed, many copyright owners and licensees control only a subset of the exclusive rights, which in turn means that many contractual licensing arrangements between private parties depend on a careful parsing of the exclusive rights. Precisely because so much in the copyright system turns on a clear understanding of which exclusive rights are implicated by any particular activity, it is critical that courts attend closely to the statutory scheme, rather than freely embroidering on it based on the equities of any particular case.

A. The Statutory Language and Controlling Ninth Circuit Precedent Make It Clear that § 106(3) Requires Actual Dissemination of Copies to the Public.

Section 106(3) bestows on the owner of a copyright the exclusive right "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." 17 U.S.C. § 106(3). As this language makes clear, the exclusive right granted by § 106(3) encompasses only the distribution of *certain things* ("copies or

[5] See, e.g., 17 U.S.C. §§ 109 (first sale limitation on distribution right); 110 (exceptions to public performance right); 111 (statutory license for public performance by cable television); 114 (statutory license for public performance by webcasters); 118 (statutory license for public performance by nonprofit broadcasters).

phonorecords"[6]), to *certain people* ("the public"), in *certain ways* ("by sale or other transfer of ownership, or by rental, lease, or lending"). The language of § 106(3) does not include any prohibitory language pertaining to *offers* to distribute, *attempts* to distribute, or the "making available" of copyrighted works.[7]

Plaintiffs' effort to rewrite § 106(3) to reach such acts, moreover, is squarely foreclosed by Ninth Circuit authority. In *Perfect 10 v. Amazon.com,* the Ninth Circuit concluded that "distribution requires an 'actual dissemination' of a copy." *Perfect 10 v. Amazon.com,* 2007 WL 4225819, slip op. at 15463, *affirming in relevant part, Perfect 10, Inc. v. Google Inc*., 416 F.Supp.2d 828, 844 (C.D. Cal. 2006). In coming to this conclusion, the Ninth Circuit joins a number of other courts that have addressed this issue in the digital context. *See National Car Rental Sys., Inc. v. Computer Assoc. Int'l*, 991 F.2d 426, 434 (8th Cir. 1993); *In re Napster, Inc. Copyright Litig.*, 377 F.Supp.2d 796, 802 (N.D. Cal. 2005) (collecting authorities); *Arista Records, Inc. v. Mp3Board.com, Inc.*, No. 00-Civ.-4660-SHS, 2002 WL 1997918 at *4 (S.D.N.Y. Aug. 29, 2002). The leading copyright law commentators also unanimously agree that "an actual transfer must take place; a mere offer for sale will not infringe the right." Paul Goldstein, 2 GOLDSTEIN ON COPYRIGHT § 7.5.1 (3d ed. 2007); *accord* Melville B. Nimmer & David Nimmer, 2 NIMMER ON COPYRIGHT § 8.11[A] (2007); William F. Patry, 4 PATRY ON COPYRIGHT § 13:9 (2007) ("[W]ithout actual distribution of copies…, there is no violation of the distribution right.").

Against these controlling authorities, Plaintiffs nevertheless insist that "[infringement of] the distribution right does not require a consummated transfer of the copyrighted work at issue."

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[6] The statute further defines "copies or phonorecords" as limited to "material objects," *see* 17 U.S.C. § 101, thereby excluding all electronic transmissions from the scope of the distribution right. *See* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies*, 2001 U. OF ILL. L. REV. 83, 126-35 (2001). This provides an independent reason to reject Plaintiffs' distribution claim, for the same reasons set forth in EFF's *amicus* brief in *Elektra v. Barker*, appended as Exhibit 1 to Defendants' Reply in Support of Motion for Reconsideration, Doc. # 51.

[7] In both the copyright and patent contexts, when Congress means to prohibit *offers to act*, as well as the *acts* themselves, it has done so expressly. *See, e.g.,* 17 U.S.C. § 901(a)(4) (where semiconductor mask works are concerned, "to distribute means to sell, lease, bail, or otherwise transfer, or **to offer to** sell, lease, bail or otherwise transfer"); 35 U.S.C. § 271(a) (exclusive right of a patent owner reaches anyone who "without authority makes, uses, **offers to sell**, or sells any patented invention….").

Plfs. Supp. Br. at 5. Plaintiffs' view of the distribution right would effectively transform it into an unbounded form of civil attempt liability, where the mere possibility of a dissemination would trigger infringement liability, even where no copies had ever been distributed and thus no harm ever inflicted on the copyright owner. This is not the law.[8]

B. The Statute Will Not Support Plaintiffs' "Making Available" Conception of § 106(3).

Turning first to the language of the Copyright Act, Plaintiffs contend that the "authorization" clause contained in Section 106 somehow expands direct infringement liability to reach those who merely offer or make available copyrighted works. Plfs. Supp. Br. at 5. Not so. Congress intended the "authorization" clause to provide a statutory foundation for secondary liability, not to expand the scope of direct infringement liability. *See* H.R. Rep. 94-1476 at 61, *reprinted in* 1976 U.S.C.C.A.N. 5674 ("Use of the phrase 'to authorize' is intended to avoid any question as to the liability of contributory infringers."); *Venegas-Hernandez v. ACEMLA,* 424 F.3d 50, 57 (1st Cir. 2005). In the words of the First Circuit,

> Mere authorization of an infringing act is an insufficient basis for copyright infringement. Infringement depends upon whether an infringing act, such as copying or performing, has occurred. Therefore, to prove infringement, a claimant must show "an infringing act after the authorization."

Latin Amer. Music Co. v. Archdiocese of San Juan, 499 F.3d 32, 46 (1st Cir. 2007) (citing *Venegas-Hernandez*, 424 F.3d at 57-59) (internal citations omitted); *accord Resnick v. Copyright Clearance Center, Inc.,* 422 F.Supp.2d 252, 259 (D. Mass. 2006) ("[W]rongful authorization alone cannot constitute infringement under the statute.") (internal quotes omitted). In other words, without a direct infringement of § 106(3)—an actual "distribut[ion] of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending"—there can be no claim for "authorization" of distribution. *See* 4 PATRY ON COPYRIGHT § 13:9.

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[8] There is no civil or criminal liability for attempted copyright infringement. The Department of Justice recently proposed amending the criminal provisions of the Copyright Act to provide for attempt liability, but no bill has been yet been introduced. *See* Declan McCullagh, *Gonzales Proposes New Crime: 'Attempted' Copyright Infringement*, CNET NEWS, May 15, 2007 (available at <http://www.news.com/8301-10784_3-9719339-7.html>).

Plaintiffs also point to the statutory definition of "publication" (which expressly encompasses "offering to distribute"), asserting that "publication" and "distribution" have been treated as synonymous for some purposes by some courts and therefore that the definition of "publication" expands the meaning of "distribute." Contrary to Plaintiffs' view, the inclusion of "offering to distribute" in the definition of "publication" actually underscores the fact that Congress knew how to reach mere offers when it wished to do so. In this respect, the two terms are not synonymous, as noted by a leading copyright commentator:

> This statement [that "publication" and "distribution" are synonymous] is not found in any of the legislative reports, and in at least one important respect is incorrect; while the mere offering to sell copies of a novel to bookstores for subsequent sale to customers constitutes publication *due to the statutory definition of publication*, without actual distribution of copies of the novel, there is no violation of the distribution right.

4 PATRY ON COPYRIGHT § 13:9 (emphasis in original).

In addition, if "publication" and "distribution" are truly synonyms, then Plaintiffs' case fails outright, because the legislative history makes it clear that "publication" is limited to distribution of tangible, material objects. *See* H.R. Rep. 94-1476 at 138, *reprinted at* 1976 U.S.C.C.A.N. 5754 ("[A]ny form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed."). Defendants here are not accused of distributing physical goods.

Nor does Plaintiffs' selective citation to a letter written by the U.S. Copyright Office to Congress support their statutory argument.[9] Plfs Supp. Br. at 6 & Exh. D. Nothing in the letter expresses any view on whether actual dissemination must be proven in order to establish direct infringement of the distribution right. In fact, if anything, the Register of Copyrights, Marybeth Peters, expresses the opposite view:

> Making a work available in this context [i.e., uploading to a peer-to-peer network] constitutes an infringement of the exclusive distribution right, as well as the reproduction right (*where the work is uploaded* without the authorization of the copyright holder.)

[9] Opinion letters from the Copyright Office to Congress on matters of statutory interpretation are non-binding and "entitled to respect only insofar as they are persuasive," *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 778 (6th Cir. 2005).

See Plfs. Supp. Br., Exh. D (emphasis added). In other words, contrary to Plaintiffs' contention, the Register does not endorse the notion that the distribution right is infringed where a file is merely offered via a P2P network, but never actually uploaded or transmitted to another user.

C. The Judicial Authorities Cited by Plaintiffs Are Either Inapposite or Unpersuasive.

Plaintiffs' citations to judicial precedents fare no better. Plaintiffs begin by citing the Ninth Circuit's recent ruling in *Perfect 10 v. Amazon.com*. But rather than buttressing Plaintiffs' position, that case fatally undermines it. In that case, the copyright owner sought a preliminary injunction against Google, arguing (among other things) that Google directly infringed its distribution rights by indexing and linking to infringing photographs posted by third parties on the Internet. The district court disagreed, holding that:

> A distribution of a copyrighted work requires an "actual dissemination" of copies. *See In re Napster, Inc. Copyright Litig.*, 377 F.Supp.2d 796, 802-04 (N.D. Cal. 2005); *accord* Nimmer § 8.11[A]. In the Internet context, an actual dissemination means the transfer of a file from one computer to another.

Perfect 10 v. Google, 416 F.Supp.2d at 844. On appeal, the Ninth Circuit affirmed the district court:

> The district court reasoned that distribution requires an "actual dissemination" of a copy. Because Google did not communicate the full-sized images to the user's computer, Google did not distribute these images. *Again, the district court's conclusion on this point is consistent with the language of the Copyright Act*.

Perfect 10 v. Amazon.com, 2007 WL 4225819, slip op. at 15463 (emphasis added, internal citations omitted). Accordingly, far from approving Plaintiffs' argument that a mere "making available" infringes the distribution right, *Perfect 10 v. Amazon.com* forecloses it.

Faced with *Perfect 10 v. Amazon.com*, Plaintiffs cling to one line of *obiter dicta* in the Ninth Circuit's earlier ruling in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."). Plaintiffs contend that this statement establishes a "deemed distribution" theory that spares a copyright owner from having to prove that any actual distributions of copyrighted materials ever took place. Plfs. Supp. Br. at 8.

This view misreads *A&M Records v. Napster*. In that appeal, the defendant did not dispute

evidence that millions of Napster users were actively trading copyrighted materials. *See Napster,* 239 F.3d at 1013. Moreover, because the appeal turned on application of secondary liability principles, there was no need for the court in inquire into the circumstances of any particular Napster user—it was enough that millions were actively swapping files, thus providing direct infringements for which Napster could be held secondarily liable. In this context, it was unnecessary for the court to opine on whether a Napster user who merely offered, but never actually disseminated, any copyrighted material was infringing the distribution right. In other words, in *Napster*, the court and parties alike assumed the existence of an avalanche of actual disseminations, making it unnecessary to express any view on whether *merely* "making available," without more, could infringe the § 106(3) distribution right. In subsequent rulings that have squarely faced that issue, as explained above, the Ninth Circuit and lower courts in this circuit have repeatedly rejected the broad "making available" theory pressed by Plaintiffs. *See Perfect 10 v. Amazon.com*, 2007 WL 4225819, slip op. at 15463; *In re Napster*, 377 F.Supp.2d at 802-04.

Plaintiffs' remaining out-of-circuit citations are either inapposite or unpersuasive. For example, Plaintiffs' reliance on *United States v. Shaffer,* 472 F.3d 1219 (10th Cir. 2007), is entirely misplaced. That case involved a criminal statute unrelated to copyright prohibiting the distribution of child pornography. The court there was not called on to construe "distribution" as defined and delimited in 17 U.S.C. § 106(3). In *Sony Pictures Home Entertainment, Inc. v. Lott,* 471 F.Supp.2d 716 (N.D. Tex. 2007), the *pro se* defendant appears not to have raised any arguments relating to the proper scope of the distribution right, relying instead on a "mistaken identity" defense. *See id.* at 721. Plaintiffs' citation to a jury instruction obtained in *Capitol Records, Inc. v. Thomas,* No. 06-CV-1497 (MJD/RLE) (D. Minn. 2007), sheds no light on the reasoning employed by the court, the evidence presented at trial, nor the arguments raised by the defendant. Plfs. Supp. Br. at 7-8 & Exh. E.

Plaintiffs finally fall back on the Fourth Circuit ruling in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997). In that case, a copyright owner sued a number of libraries that had made infringing copies of a microfiche work. Because the plaintiff's reproduction claims were time-barred, she was left with only a distribution claim. Because the

libraries had no records of loans to patrons, the plaintiff was also unable to prove any actual loans to the public. The Fourth Circuit nevertheless found that the plaintiff could proceed with her distribution claim, reasoning that "a library distributes a published work, … when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public." *Id.* at 201. This outcome, perhaps motivated by sympathy for the plaintiff, *see id.* at 205 (Hall, J., dissenting), simply cannot be squared with the statutory language of § 106(3) or with the Ninth Circuit authorities discussed above. The opinion has also drawn the criticism of commentators. *See* 4 PATRY ON COPYRIGHT § 13:9.[10]

II. Expansion of the Distribution Right would have Disruptive Consequences in Other Contexts.

Plaintiffs' expansive re-imagining of the § 106(3) distribution right would have disruptive consequences far beyond this case, jeopardizing the legitimate interests of consumers and technology innovators. For example, many broadcasters rely on compulsory or negotiated licenses that entitle them to publicly perform copyrighted works over the air. Plaintiffs' "making available" conception of the distribution right would call into question whether these broadcasters could now be forced to seek additional distribution licenses. This concern is not merely hypothetical—several Plaintiffs here have already brought suit against XM Satellite Radio, alleging that XM is "distributing Plaintiffs' copyrighted sound recordings to the public by making available and automatically disseminating to [its] subscribers copies of sound recordings contained in its satellite

[10] In other cases where their expansive notion of § 106(3) has been challenged, Plaintiffs have invoked the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The invocation, however, is unavailing. As an initial matter, international copyright treaties are not self-executing and thus lack any binding legal authority separate from their implementation through the Copyright Act. *See* 17 U.S.C. § 104(c) & (d). In addition, these treaties are solely concerned with ensuring minimum protections for *foreign* copyright holders, and Plaintiffs have not shown that any of the works at issue here is a foreign work. *See* Jane C. Ginsburg, *International Copyright: From a Bundle of National Copyright Laws to a Supranational Code?*, 47 J. COPYR. SOC'Y U.S.A. 265, 270 (2000) ("[T]he Berne *minima* apply to a Union member's protection of works from other Berne members; no Berne member is obliged to accord its own authors treaty-level protection."). Finally, as explained by the Copyright Office in the letter cited by Plaintiffs, the WIPO treaties do not require a radical expansion of the distribution right; other U.S. copyright law doctrines (including the exclusive rights of reproduction and public performance, along with secondary liability doctrines), taken together, satisfy the WIPO treaty requirements. Plfs. Supp. Br., Exh. D.

radio transmissions." Complaint ¶ 42, *Atlantic Recording Corp. v. XM Satellite Radio,* No. 1:06-cv-03733-DAB (S.D.N.Y. filed May 16, 2006) (complaint available at <http://eff.org/IP/digitalradio/XM_complaint.pdf>). In this way, a conception of distribution that encompasses mere "making available" threatens to blur the distinction between public performance and distribution, potentially exposing broadcasters and webcasters to massive infringement liability. *See Agee v. Paramount Comm., Inc.,* 59 F.3d 317, 325 (2d Cir. 1995) (in rejecting a distribution claim against a broadcaster, holding that "[i]t is clear that merely transmitting a sound recording to the public does not constitute a 'distribution….").

Similarly, some copyright owners have attempted to use expansive interpretations of distribution to transform secondary liability claims into direct infringement claims (in order to take advantage of the strict liability nature of direct infringement claims). In *Perfect 10 v. Amazon.com*, for example, the plaintiffs argued that Google's operation of a search engine infringed their distribution rights by making it possible for users to find infringing photographs posted to the Internet by third parties, even in the absence of any evidence that users actually copied the photos. *See Perfect 10 v. Amazon.com*, 2007 WL 4225819, slip op. at 15463. Direct infringement claims of this kind could also be imagined against other businesses that make tools that help users find copyrighted works on the Internet, an arena that has, until now, been the realm of secondary liability. *See A&M v. Napster,* 239 F.3d at 1019-24.

III. In Order to Prevail, Plaintiffs Must Present Evidence That Defendants Actually Disseminated the Works in Question to Third Parties

As discussed above, the controlling authorities establish that an infringement of the distribution right requires that a copyright owner demonstrate *an actual dissemination* of the copyrighted work at issue. Although *amicus* EFF does not have access to the complete factual record in this case, it does not appear from Plaintiffs' submissions on summary judgment that they have shouldered their evidentiary burden.

The only evidence of "actual dissemination" of copyrighted works owned by Plaintiffs consists of a hearsay account supplied by Plaintiffs' expert, Doug Jacobsen, relating information gleaned from materials prepared by Plaintiffs' retained investigator, MediaSentry. Plfs. Supp. Br.

Exh. A (decl. of Doug Jacobsen); Statement of Facts in Support of Plaintiffs' Motion for Summary Judgment (hereinafter "SOF"), Doc. # 31, Exh. 12. According to this hearsay evidence, on January 30, 2007, MediaSentry downloaded 12 digital files containing sound recordings (only 11 of which are the subject of this motion) from a computer with the Internet Protocol (IP) address 68.110.64.47. SOF, Exh. 12, ¶18. Responding to a subpoena issued by Plaintiffs, Cox Communications identified the IP address as one assigned to the Howell residence at the time. SOF, Exh. 12, ¶ 20.

The trouble with this "evidence" of actual distribution is that it derives entirely from the activities of Plaintiffs' own investigators. It is axiomatic that a copyright owner cannot infringe her own copyright. *See Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994). By the same token, an authorized agent acting on behalf of a copyright owner also cannot infringe any rights held by that owner. *See Higgins v. Detroit Educ. Television Found.*, 4 F.Supp.2d 701, 705 (E.D. Mich.1998). Accordingly, where the only evidence of infringing distribution consists of distributions to authorized agents of the copyright owner, that evidence cannot, by itself, establish that other, *unauthorized* distributions have taken place. If § 106(3) requires that a copyright owner establish that actual unauthorized disseminations took place, Plaintiffs should not be able to bootstrap their way to that conclusion simply by hiring an investigator.

Of course, evidence gathered by an investigator may be relevant, in appropriate cases, to prove whether actual infringing distributions may have occurred. For example, it is well-established that agents of a copyright owner may testify to observed infringements involving third parties. *See, e.g., Polygram Int'l Publishing v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1319 (D Mass 1994) (investigators observed unauthorized public performances by trade show exhibitors). In some cases, courts have been willing to accept evidence from investigators who invite defendants to engage in activity that constitutes direct infringement. *See, e.g., RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.,* 845 F.2d 773, 777 (8th Cir. 1988) (defendant's employees actively participated in infringement). Similarly, in appropriate cases, an investigator's purchase of infringing material may provide circumstantial evidence that supports the inference that similar sales have occurred to third parties. *See, e.g., RCA Records v. All-Fast Systems, Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y.

1984) (experience of investigators created sufficient inference of similar activities with third parties to support preliminary injunction).

Plaintiffs' hearsay evidence here, however, does not fit any of these descriptions. Plaintiffs' investigator, MediaSentry, did not observe Defendant's disseminating any materials to third parties. Nor do Plaintiffs contend that MediaSentry invited Defendants to make any unauthorized reproductions. Nor have Plaintiffs established that MediaSentry's downloads constitute circumstantial evidence that the Howell's computer disseminated copies of the 11 songs in question to any other KaZaA user. In fact, Plaintiffs' own evidence makes this seem particularly unlikely. According to Plaintiffs' expert, during the period that MediaSentry performed its investigation, there were 2,282,954 KaZaA users online, sharing 292,532,420 files. Plfs. Supp. Br. Exh. A, ¶ 8. Every one of the 11 songs at issue came from multi-platinum hit records. Complaint, Doc. # 1, Exh. A. Even accepting Plaintiffs' hearsay testimony as true, these facts together suggest that it is highly unlikely that, among the millions of KaZaA users who are likely to be sharing them at any time, these 11 songs would have been downloaded from Defendants' computer. At any instant, KaZaA users are likely to have thousands of sources for these particular songs to choose from and no reason to choose the Defendants' computer over any other. And while Plaintiffs may be correct that, in the aggregate, KaZaA users engage in a prodigious amount of infringing activity, that general statement tells us nothing about the crucial issue in this case: whether *these* Defendants transmitted (i.e., uploaded) any of *these* 11 songs[11] during the time period in question. Plaintiffs evidence simply cannot bridge the chasm between "making available" and "actual dissemination" to anyone other than Plaintiffs' authorized agents.

Nor will Plaintiffs' allegations of spoliation by Defendants fill the evidentiary void. Plaintiffs accuse Defendants of removing the KaZaA software from his computer. Plfs. Supp. Br. at 13. Yet Plaintiffs simultaneously admit that the KaZaA software was unlikely to have yielded any probative evidence regarding any actual disseminations to third parties: "unless the individual KaZaA user makes a log of the files that he or she has actually distributed to other KaZaA users, it

[11] Plaintiffs appear to lack any evidence, circumstantial or otherwise, to suggest that Defendants disseminated any of the other 43 sound recordings on which they are seeking summary judgment.

is difficult for any third party to determine exactly what files were actually distributed or when." Plfs. Supp. Br. at 13 & Exh. A, ¶ 9. In light of this concession, it is difficult to make sense of Plaintiffs' assertion that "Defendants' intentional destruction of [the KaZaA software] severely and irreparably prejudices Plaintiffs' ability to prove their claim." Plfs. Br. at 14. Plaintiffs' evidentiary problem is the lack of any evidence regarding actual dissemination of any of the 54 sound recordings at issue to anyone other than Plaintiffs' own investigators. Based on Plaintiffs' own submissions, neither the KaZaA software nor anything else on Defendants' computer would have provided such evidence.[12]

In short, the evidentiary difficulties that face Plaintiffs do not appear to be the fault of Defendants. Rather, they appear to be the result of the design of the KaZaA software (insofar as it does not log uploads to other users), and Plaintiffs' choice to bring a summary judgment motion based solely on their distribution claim. Moreover, while the KaZaA software may not amass and disgorge evidence as conveniently as Plaintiffs might prefer, the software is no different in this regard than other personal-use duplication technologies. After all, consider VCRs, cassette decks, and photocopiers: none keep "logs" of what was copied or to whom copies might have been distributed.

To reiterate, it is not Defendants' fault that Plaintiffs are unable to produce evidence of actual distributions beyond the 11 authorized downloads performed by MediaSentry, nor is it their burden to prove Plaintiffs' case. Plaintiffs include some of the largest companies in the recording industry, with nearly limitless resources when compared to Defendants. It is Plaintiffs who have opted to file more than 20,000 lawsuits against individuals, many whom are unprepared for the unfamiliar (to a layperson) demands of discovery. It is Plaintiffs who have chosen to target noncommercial activities that occur in the privacy of the home, thereby injecting themselves "behind closed doors" where factual investigation can be difficult. Having put themselves in this

[12] Plaintiffs' expert speculates that "[a] forensic examination [of Defendants' computer] *might* also provide indications of particular instances of distribution from the user's shared folder." Plfs. Supp. Br., Exh. A, ¶ 10 (emphasis added). This assertion is entirely unexplained. Moreover, it sheds no light on what influence, if any, Defendants' deletion of the KaZaA software might have on the possibility that a forensic examination of Defendants' computer might establish any particular instances of actual dissemination to parties other than MediaSentry.

position, Plaintiffs ought not be heard to complain that proving their distribution claims poses evidentiary challenges.

CONCLUSION

For the reasons stated above, this Court should reject Plaintiffs' effort to radically expand the § 106(3) distribution right and should deny Plaintiffs' motion for summary judgment.

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By /s/

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