

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

<b>MOTOWN RECORD COMPANY,</b>	:	
<b>L.P., <i>et al</i></b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION NO. 2:07-cv-04702-AB</b>
	:	
<b>v.</b>	:	
	:	
<b>JOHN C. KOVALCIK,</b>	:	<b>JUDGE CYNTHIA M. RUFÉ</b>
	:	
<b>Defendant.</b>	:	<b>DOCUMENT FILED ELECTRONICALLY</b>

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT  
ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12(C)**

AND NOW comes the Defendant, John C. Kovalcik, by and through his counsel, Richard J. Bove, and file the within Motion for Judgment on the Pleadings, averring as follows:

**I. INTRODUCTION AND PROCEDURAL HISTORY**

This case was initiated with Plaintiffs' filing of a Complaint on or about February 20, 2008, in the Federal District Court, Eastern District of Pennsylvania. Plaintiffs, in their Complaint, allege upon information and belief that Defendant has downloaded and/or distributed to the public copyrighted sound recordings owned by or exclusively licensed to Plaintiffs. Plaintiffs further allege that they have suffered damages as a result of Defendant's alleged actions. As set forth more fully below, Plaintiffs' Complaint irreparably fails to set

forth a claim for copyright infringement or any other theory of liability, and must be dismissed with prejudice.

## **II. STATEMENT OF FACTS**

As this is a motion for judgment on the pleadings, the court is to look at the allegations found in the four corners of the Plaintiffs' complaint for copyright infringement, to the extent said complaint contains any facts.

## **III. STANDARD REVIEW: FED R. CIV. P. 12(C)**

After the pleadings are closed but within such time as not to delay trial, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c); *S&S Constr., Inc. v. Reliance Ins. Co.*, 42 F. Supp.2d (D.S.C. 1998). When considering a Rule 12(c) motion, the court must construe the allegations in the complaint in the light most favorable to the non-moving party. *See Turbe v. Government of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991) (holding that when a Rule 12(c) motion alleges plaintiff's failure to state a claim upon which relief can be granted, we analyze the motion under the same standard as a Rule 12(b)(6) motion to dismiss). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)). A court may grant a motion for judgment on the pleadings when no genuine issues of material fact remain and the case can be decided as a matter of law. *Id.* The court may, however, take judicial notice of facts not contained in the complaint without

converting the motion into that for summary judgment. *Cf. In re FAC Realty Secs. Litigation*, 990 F.Supp. 416 (E.D.N.C. 1997) (in 12(b)(6) motion, written materials not attached to complaint or incorporated by reference but integral to allegations of complaint and known to nonmoving party), *In re Criimi Mae, Inc. Secs. Litigation*, 94 F.Supp.2d 652 (D.Md. 2000) (in securities fraud case, court may consider relevant press releases and public disclosure documents referenced and relied upon by plaintiffs without converting 12(b)(6) motion into one for summary judgment). Wright & Miller, 5B Federal Practice and Procedure: Civil 3d § 1357 at n.1 (Supp. 2007).

“Although a moving party, for the purposes of the Rule 12(c) motion, concedes the accuracy of the factual allegation in his adversary’s pleading, he does not admit other assertions in the other party’s pleading that constitute conclusions of law, legally impossible facts, or matters that would not be admissible in evidence in trial.” Wright & Miller, 5C Federal Practice and Procedure: Civil 2d § 1368 (2d ed. 1995) (citing, *inter alia*, *Grindstaff v. Green*, 133 F.3d 416 (6th Cir. 1998); *Duhamel v. U.S.*, 119 F.Supp. 192 (Ct. Cl. 1954)). However, all reasonable inferences and intendments from the pleading’s factual allegations are drawn in favor of the nonmoving party. *E.g. King v. Gemini Food Services, Inc.*, 438 F.Supp. 964 (E.D.Va. 1976).

A dismissal pursuant to Rule 12(c) is *with prejudice*. *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570 (4th Cir. 2006); *U.S. ex rel Bledsoe v. Community Health Systems, Inc.*, 501 F.3d 493, 2007 WL 2492439 (6th Cir. 2007); *Jung v. Association of American Medical Colleges*, 184 Fed.Appx. 9 (D.C. Cir. 2006); *Bull v. U.S.*, 63 Fed.Cl. 580

(Fed.Cl. 2005); J. Moore, *et al.*, 11-56 Moore's Federal Practice - Civil § 56.30 (Rule 12(c) motions for judgment on the pleadings result in final adjudication of a case or claim.).

Rule 12(b)(6) requires that a claim be dismissed if the plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face." *Tegg Corp. v. Beckstrom Electric Co.*, 2008 U.S. Dist. LEXIS 52184 \*12 (W.D. Pa. July 1, 2008) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007)). *See also: Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d. Cir. 2008). Although the Court accepts all well-pled material allegations as true and draws all reasonable inferences therefrom in favor of the non-moving party, the Court cannot accept bald assertions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. *See: In re Rockefeller Ctr. Props., Inc. Secs. Litig.*, 311 F.3d 198, 215 (3d. Cir. 2002; *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 n.8 (3d. Cir. 1997); *Twombly*, 127 S. Ct. at 1964.

#### **IV. ARGUMENT**

In order to sufficiently state a claim for copyright infringement, the plaintiff has the burden to allege with specificity the *acts* by which defendant has infringed upon the plaintiffs copyright. *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000); *DiMaggio v. International Sports Ltd.* 1998 U.S. Dist. LEXIS 13468 at \*4-5 (S.D.N.Y. Aug. 31, 1998); *Brought to Life Music, Inc. v. MCA Records, Inc.*, 2003 U.S. Dist. LEXIS 1967 at \*3 (S.D.N.Y. Feb. 11, 2003), *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, 1999 U.S. Dist. LEXIS 15837 at \*8, 12 (S.D.N.Y. Oct. 13, 1999), *Stampone v. Stahl*, 2005

WL 1694073 at \*2 (D.N.J. July 19, 2005). This pleading requirement demands the plaintiff allege with specificity all facts supporting each element of its claim, including the time of the alleged infringement and by what manner or mechanism the defendant committed the alleged infringement. *Marvullo*, supra; *DiMaggio*, supra; *Brought to Life*, supra; *Lindsay*, supra; *Stampono*, supra.

Although pleading upon "information and belief" is appropriate for claims which may be generally pled, claims for copyright infringement must be pled with specificity, and include a statement of facts upon which the plaintiffs allegations are based. *Fountain v. Talley*, 104 F. Supp. 2d 1345, 1355 (M.D. Ala. 2000) (granting motion to dismiss when mere information and belief was pled as factual basis for claim that was to be pled with specificity). Here, Plaintiffs use a boilerplate complaint used by RIAA-Affiliated Plaintiffs across the country in litigation identical to this case. This complaint, and its brethren, fail to state their claim sounding in copyright infringement as they have failed to allege any actual act of infringing distribution, failed to plead a time in which the alleged distribution took place, and failed to identify the Defendant as the alleged infringing entity. As set forth more fully hereinafter, these defects are fatal, and Plaintiffs' Complaint must be dismissed.

**1. Plaintiffs fail to state a claim for copyright infringement insofar as Plaintiffs fail to allege, and are incapable of alleging, any act of distribution**

To state a claim for copyright infringement, Plaintiffs must demonstrate two elements: (1) plaintiff's ownership of a valid copyright to the material in dispute, and (2) unauthorized copying of original elements of the plaintiff's work. *Feist Publ'ns, Inc. v. Rual*

*Tel. Serv. Co.*, 499 U.S. 340, 362 (1991); *Broadcast Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd.*, 555 F. Supp. 2d 537, 540 (E.D. Pa. 2008); *Dun & Bradstreet Software Servs., Inc., v. Grace Consulting, Inc.*, 307 F.2d 197, 206 (3d Cir. 2002). "Copying" is the act of infringing any exclusive rights held by the copyright holder, as enumerated at 17 U.S.C. §106, including the rights to distribute and reproduce copyrighted material. *Id.*; *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 207 (3d Cir. 2005).

A plaintiff's burden to allege an actual *incident* of infringement, via distribution or otherwise, in order to make out a claim for copyright infringement has been well established by the federal courts. In *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, 1999 U.S. Dist. LEXIS 15837 (S.D. N. Y. October 13, 1999), the court dismissed plaintiff's copyright infringement claim pursuant to Rule 12(b)(6), and determined that conclusory allegations of infringement pleaded using "and/or" statements did not satisfy plaintiff's requirement of pleading particular infringing acts with specificity. Similarly, in *Stampono v. Stahl*, 2005 WL 1694073 (D. N.J. July 19, 2005), the court dismissed plaintiff's copyright infringement claim under Rule 12(b)(6) because plaintiff's complaint failed to "set out *particular infringing acts* with some specificity." (emphasis added). Further, in *Brought to Life Music, Inc. v. MCA Records, Inc.*, 2003 U.S. Dist. LEXIS 1967 at \*3 (S.D.N.Y. Feb. 11, 2003), the court dismissed plaintiff's copyright infringement claim pursuant to Rule 12(b)(6) because the "[p]laintiff ha[d] not attempted to describe 'by what *acts* and during *what time*' [the defendant] infringed the copyright." (emphasis added). *See also: Broadcast Music Inc., v. Miller Assoc., Inc.*, 2006 WL 3064107 (W.D. Pa. Oct. 25, 2006) (denying summary judgment

to defendant in copyright infringement claim because plaintiff demonstrated actual incidents of infringement with a list of specific dates and times of when the infringing performances took place); *Atalntic v. Brennan*, 534 F.Supp.2d 278, 2008 WL 445819 (D.Conn. February 13, 2008) (denying plaintiff's motion for default judgment finding that plaintiffs' allegations of infringement lacked factual grounding relying instead on their "information and belief" finding "This is the type of 'speculative' pleading which is insufficient under *Twombly*, and Plaintiffs' complaint is therefore inadequate."); and *Interscope Records v. Rodriguez*, No. 06-2485, 2007 WL 2408484, at \*1 (S.D. Cal. Aug. 17, 2007) (denying plaintiffs' motion for default judgment finding "the complaint is simply a boilerplate listing of the elements of copyright infringement without any facts pertaining specifically to the instant Defendant").

Plaintiffs argue that the mere listing of copyrighted works in an index of files available to download constitutes the Defendant's "making available" or "authorization" of distribution, and therefore is an act of infringement, this argument has been squarely rejected by numerous jurisdictions. It is well established that an actual *act* of unauthorized dissemination *to the public* must occur to give rise to liability for copyright infringement. *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 434 (8<sup>th</sup> Cir. 1993) ("[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords"); *Arista Records, Inc. v. MP3Board, Inc.*, 2002 WL 1997918 at \*4 (S.D.N.Y. Aug. 29, 2002) (holding: "[i]nfringement of the distribution right requires an actual dissemination of copies"); *In re Napster, Inc.*, 2005 WL 1688374 at \*8 (N.D. Cal. May 31, 2005) (copyright owner must prove the defendant "actually disseminated" the copyrighted

work to prove infringement). *See also: Obolensky v. G.P. Putnam's Sons*, 628 F. Supp. 1552, 1555-56 (S.D.N.Y.), *affd.* 795 F. 2d 1005 (2d Cir. 1986) (holding "there is no violation of the right to vend copyrighted works...where the defendant offers to sell copyrighted materials but does not consummate a sale"); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9<sup>th</sup> Cir. 2007) (affirming the district court's finding "that distribution requires an 'actual dissemination' of a copy"); *SBK Catalogue Partnership v. Orion Pictures Corp.*, 723 F. Supp. 1053, 1064 (D. N.J. 1989) (no copyright infringement when third party "authorized" distribution of copyrighted works, but no actual distribution was made); *CACI Intern., Inc. v. Pentagon Technologies Intern.*, 1994 W L 1752376 at \*4 (E.D. Va. 1994) (offering distribution of software package but not actually distributing it is not infringement); *Capitol v. Thomas*, No. cv 06-1497 (D.Minn.. September 24, 2008) (acknowledging manifest error of law and ordering new trial when trial court failed to instruct jury that actual *act* of dissemination must occur for liability for copyright infringement to attach); *Atlantic v. Howell*, No, CV 06-02076-PHX N V B , (D. Ariz. April 29, 2008) (denying record industry plaintiffs' motion for summary judgment and holding "An offer to distribute does not constitute distribution.").

Plaintiffs' burden, as demonstrated by the cases above is to allege facts showing Defendant did engage in a specific act infringing behavior, not that he could have engaged in infringement at some unspecified time. Here, Plaintiffs sole allegation of the infringement element-that Defendant "continuously used, and continued to use, a P2P network to download and/or distribute to the public the Copyrighted Recordings" (Complaint at ¶15)---is a



conclusion unsupported by any allegations of a specific act of infringement. The Complaint does not allege any actual instances of downloading or distribution. Plaintiffs tellingly phrase their conclusory allegations with the terms "and/or", thereby admitting that they do not know of any specific instance in which Defendant actually downloaded, distributed, or committed any other infringing behavior. Because Plaintiff is unable to allege any instance of downloading or distribution, the Complaint must be dismissed.

Plaintiffs' exhibit to the Complaint listing nine files that are allegedly the basis for Plaintiffs' claims contribute nothing toward meeting Plaintiffs' burden of alleging an actual infringement. Neither the Complaint nor Exhibit A to the Complaint attempt to describe the specific acts, or the dates and times, of the alleged infringement. Exhibit A is nothing more than an enumerated list of files allegedly present on an individual's computer on a date. Notably, nothing is alleged concerning any distribution or other infringing act.

The mere presence of music or other such files on an individual's computer does not *per se* violate any of the copyright holder's enumerated rights under statute. Indeed, the Audio Home Recording Act of 1992 explicitly acknowledges as legal the copying of music from a compact disc to a computer<sup>1</sup>, which could equally explain the presence of music files on an individual's computer, and which Plaintiffs here attempt to contort into a basis for liability. Should mere possession constitute infringement, any individual's possession of any

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<sup>1</sup> "No action may be brought under [Title 17, U.S.C.] alleging infringement of copyright based on the ...noncommercial use by a consumer of a [digital audio recording device or a digital audio recording medium] for making digital musical recordings or analog musical recordings." 17 U.S.C. §1008 (1992).

copyrighted material in any form would be fair game for speculative lawsuits by copyright holders alleging that since the individual has a copy of the material, he clearly at some time must have been engaged in some form of infringement. Plaintiffs' unfounded speculation does not pass muster under Rule 8(a)'s pleading standard, and must not be accepted here.

**2. Plaintiffs fail to plead their claim with specificity insofar as they fail to allege a time when the alleged infringement took place**

Hand-in-hand with Plaintiffs' failure to allege an act of infringement is Plaintiffs' failure to allege a specific time of infringement, as Plaintiff is obligated to do pursuant to the specific pleading requirements applicable to copyright infringement claims. Plaintiffs' allegation that Defendant has committed "continuing infringement" is conclusory and unsubstantiated. Plaintiffs' allegation of "continuing infringement" suffers from the same pleading deficiencies discussed above, and fails to set forth with specificity those facts supporting Plaintiffs' claims for relief. Plaintiffs' investigator, MediaSentry, did not observe Defendant disseminating any materials to third parties. Nor do Plaintiffs contend that MediaSentry sought Defendant's assistance in making unauthorized reproductions. Nor have Plaintiffs established that MediaSentry's downloads constitute even circumstantial evidence that the Defendant's computer disseminated copies of the 9 songs in question to any other P2P user. At any instant, P2P users are likely to have thousands of sources for these particular songs to choose from and no reason to choose one computer over any other. Plaintiffs have not been able to provide any direct evidence showing that Defendant transmitted any of these 9 songs

during the relevant time period. The fact that MediaSentry allegedly downloaded a song, from a certain IP address that might or might not be associated with Defendant, simply cannot bridge the chasm between “making available” and “actual dissemination” to anyone other than Plaintiffs’ authorized agents.

### **3. Plaintiffs' Fail to Properly Allege Registration in Sound Recordings.**

“Registration or the application for copyright registration is a jurisdictional prerequisite to a suit for [copyright] infringement.” *Starr v. Daimler Chrysler Corporation*, 2006 WL 2175394 \*2 (S.D. Miss. June 14, 2006) (civil action was dismissed because of the failure to fully allege copyright registration). *See also, Hung Tang v. Ho Yong Hwang*, 799 F.Supp. 499, 503 (E.D. Pa. 1992). Because “the possession of a registration certificate creates a rebuttable presumption that the work in question is copyrightable,” *Hung Tang*, 799 F.Supp 503 n. 8, the Plaintiffs should be required to attach the certificates of registration, or at the minimum, identify the registration numbers for the copyrighted works in question. *See, Gee v. CBS, Inc.*, 471 F. Supp. 600, 643-644 (E.D. Pa. 1979), *aff’d*, 612 F.2d 572 (3d Cir. 1979). As the Plaintiffs have failed to do so, their Complaint should be dismissed for failure to plead with sufficient specificity as to the registration of the sound recordings. *Id.*, *Hung Tang*, 799 F.Supp at 503.

### **4. Plaintiffs' Complaint is mere boilerplate which fails to identify Defendant**

Plaintiffs' identify Defendant using only an IP address. IP addresses are dynamic, regularly reassigned, and may encompass more than one computer. The court in *London-*

*Sire*, in considering a record company's subpoena to an internet service provider ("ISP") demanding the ISP disclose the users associated with certain IP addresses, explains:

An IP number is sometimes called an IP address because it is just that: an address. It serves as a locator declaring the place of a particular piece of electronic equipment so that electronic data may be sent to it, and is usually represented as a series of four numbers between 0 and 255. [...]

But relatively few personal computers have a specific, set IP address, called a "static" address. Instead, many use their computers to connect to a network provided by their ISP, which uses a certain range of IP addresses-say, all of the numbers between 168.122.1.x to 168.122.100.x. The ISP assigns an address within its range to the user's computer for the user's session, allocating the numbers within its range on an as-needed basis. This process is known as "dynamic" addressing. [...]

Generally speaking, according to the [recording industry] plaintiffs, the combination of IP address and date and time of access is sufficient to allow identification of the defendant.[...] That claim may not always be true. More than one computer may be placed under a single IP number. Thus, it is possible that the ISP may not be able to identify with any specificity which of numerous users is the one in question. *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 160-161, 178 (Mass. 2008) (internal citations omitted)

The same court further recognizes that IP addresses and even Media Access Control numbers (identifying number unique to each individual piece of hardware) can be "spoofed", i.e. appear otherwise than they actually are. Plaintiffs' here allege that infringement in an unknown manner and at an unknown time was allegedly committed by an individual using a particular IP address, which could represent one or more computers, but which Plaintiff's

summarily attributes to Defendant. Plaintiffs fail to set forth any facts upon which their allegations are purportedly based, and their Complaint must be dismissed.

**5. The Copyright Act's statutory damage provision, measured against the actual damages suffered, is unconstitutionally excessive.**

Plaintiffs are requesting statutory damages well in excess of one thousand times the harm done to them. In *UMG Recordings, Inc. v. Lindor*, No. 05-1095. 2006 WL 3335048, at \*3 (E.D.N.Y. 2006) the court referenced a “sworn affidavit asserting that plaintiffs’ actual damages are 70 cents per recording and that plaintiffs seek statutory damages under the Copyright Act that are 1,071 times the actual damages suffered.” 2006 WL 3335048, at \*3. *See generally* Blaine Evanson, *Due Process in Statutory Damages*, 3 Geo.J.L. & Pub. Pol’y 601, 737 (2005). As the U.S. Supreme Court has shown in cases like *State Farm v. Campbell*, 538 U.S. 408 (2003) and *BMW v. Gore*, 517 U.S. 559 (1996), there is a due process limit on the amount of damages that might be sought. More than one thousand times the actual damages should be presumptively unconstitutional.

V. **CONCLUSIONS**

For the reasons set forth more fully above, Defendant respectfully requests this Honorable Court grant Defendant's Motion pursuant to Fed. R. Civ. Proc. 12(c), and dismiss Plaintiffs' Complaint with prejudice.

Dated: February 3, 2009

Respectfully Submitted:

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#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 3, 2009, I electronically filed the foregoing Memorandum with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Geoffrey L. Beauchamp, Counsel for Plaintiffs

All parties are registered as CM/ECF participants for electronic notification.

Dated February 3, 2009

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