

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SONY BMG MUSIC ENTERTAINMENT, :  
a Delaware general partnership; ARISTA :  
RECORDS LLC, a Delaware limited liability :  
company; UMG RECORDINGS, :  
INC., a Delaware corporation; and BMG :  
MUSIC, a New York general partnership, :

Case No. 2:08 CV 01200

Plaintiffs

v.

DENISE CLOUD,

Defendant

**DEFENDANT’S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION  
OR 28 U.S.C. 1292(b) CERTIFICATION**

Defendant, by and through her counsel undersigned below, hereby submits this Brief in Support of her Motion for Reconsideration of this Court’s Order entered August 22, 2008, denying Defendant’s Motion for a More Definite Statement Pursuant to Fed. Rule Civ. Pro 12 (e), or, in the alternative, for a certification by the Court that issues under consideration meet the requirements of interlocutory appeal under 28 U.S.C. 1292(b)<sup>1</sup> because they contain novel issues of law, and their adjudication will advance the ultimate disposition of the case.

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<sup>1</sup> While these questions, prior to *Twombly*, might have been part of a Rule 12(b) rather than Rule 12(e) motion, *Twombly* admonishes “that allowing a federal case to proceed to the discovery phase imposes enormous financial consequences upon the defendant, and is not a step to be taken lightly.” Beckerman, Ray, *Large Recording Companies vs. The Defenseless : Some Common Sense Solutions to the Challenges of the RIAA Litigations*, THE JUDGES JOURNAL, Summer 2008 Edition , p.5 (Submitted under separate

### DISCUSSION

“The purpose of a motion for reconsideration is to ‘correct manifest errors of law or fact or to present newly discovered evidence.’ “ *Marriott Senior Living Quarters, Inc. v. Springfield Twp.*, Civ. A. No. 97-3660, 2000 WL 1781937 (E.D. Pa. Nov. 20, 2000) (quoting *Slagan v. John Whitman & Assoc., Inc.*, 1997 WL 611587, at \*1 (E.D. Pa. Sept. 26, 1997) (internal citations omitted). In considering a motion for reconsideration, we must determine whether (1) a clear error of law or manifest injustice was committed; (2) there has been an intervening change in controlling law; or (3) new evidence has become available. *Harseco Corp. V. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985).

Defendant’s Motion for a More Definitive Statement must be reconsidered in the light of the following three issues which the Court did not address, or addressed erroneously; 1) the total absence of any facts in the Complaint supporting the elevation of the statutory damage limitations of 17 U.S.C. § 504, from the normal range of up to \$30,000.00 per infringement to the elevated “*willful*” range of up to \$150,000.00; 2) whether a Copyright Complaint can proceed *at all* without specifying the *Twombly* - required fact that a copy or phonorecord within the meaning of 17 U.S.C. § 101, (requiring materiality, fixation and tangibility) was ever made; and 3) whether merely alleging that Defendant made digital audio files available on a “P2P” network infringes one of the exclusive rights of the copyright holder under 17 U.S.C. § 106, and meets the *Twombly* standard.

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cover as Ex. “A”). This article was not available when defendant filed her Rule 12(e) motion.

In the alternative, if the Court does not reconsider Defendant's Rule 12(e) Motion, then Defendant asks that the Court certify the question for interlocutory appeal pursuant to Fed. R. App. P. 1292(b), which provides,

"when a District Judge, in making in a civil action an Order not otherwise appealable under this section, shall be of the opinion that such Order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation, he shall so state in writing in such Order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such Order, if application is made to it within ten days after the entry of the Order."

Fed. R. App. P. 1292(b).

#### A. WILLFULNESS

The Copyright Act provides for increased damages for willful infringement.

Willfulness has been defined in the Third Circuit when "the infringer has knowledge that his/her conduct is infringing another's copyright or if the infringer has acted in reckless disregard of the copyright owner's rights. *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1115 (2d Cir.1986)." Quoting *Yash Raj Films (USA) Inc. v. Sur Sangeet Video Elecs. Inc.*, 2008 U.S. Dist. LEXIS 14951 at 12 (D. N.J. 2008).

In Plaintiffs' Complaint, Plaintiffs did not state that the Defendant knew or should have known that her conduct constituted copyright infringement. Paragraph 17 of the Complaint simply states that the "Plaintiffs are informed and believed that the foregoing acts of infringement are willful and intentional." Plaintiffs do not describe the factual basis of this belief.

The only actions described by the Plaintiffs as being made by the Defendant is that files on Defendant's computer were available due to installing a Peer to Peer Network program. Plaintiffs made no distinctions about whether Defendant was a sophisticated or casual user of such programs, what other files beyond the claimed copyright protected works that the Plaintiffs claim were present that were also listed under the Peer to Peer Network program nor if any of Defendant's activity using the Peer to Peer Network even suggested downloading, such as recording downloading taking place.

As "making available" is a contested area of copyright law, as discussed below, saying that the Defendant known or should have known that Defendant's actions are willful is stretching possibility, and not plausible under *Twombly*.

#### B. MATERIAL OBJECT

The Copyright Act provides protection against the unauthorized production of copies of protected works, 17 U.S.C. § 106 (1) (2006). Copies – and phonorecords, a species of copy, have been defined in the statute *as material objects*, 17 U.S.C. § 101 (2006).

According to a recent Second Circuit case, a "material object" must be 'sufficiently permanent or stable to permit it to be . . . reproduced . . . for a period of more than transitory duration'. *Cartoon Network v. Cablevision*, No. 07-1480-cv & No. 07-1511-cv (2nd Cir. August 4, 2008), (Submitted under separate cover as Exhibit "B"). Thus, the court found that a digital copy in computer memory was not a "copy" under the Copyright Act. If there is no copy made, there is no infringement. As *Cartoon Network*,

points out, the question of what constitutes a “copy” for the purpose of copyright infringement in the context of computer networks, storage and memory is not at all settled, having been first addressed as recently as 1993 in the case *MAI Systems Corp. vs. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993), which only assumed it was copying without discussion, as a case of first impression. However, the statute is clear. Copies and phonorecords must be material objects under 17 U.S.C. § 101 (2006).

Here the Plaintiffs do not show that the Defendant created any “material objects”. Defendant did not create sound files to be distributed to others, much less have actual copies made. Under *Cartoon Network*, there is no infringement without some actual “material object - copies” being made.

Assuming arguendo, then, even if Defendant had an IP address that some unlicensed investigator claims was attached to a “P2P” network , if any infringement occurred, which Plaintiffs have not successfully alleged, then it occurred due to other people’s actions, not those of the Defendant. Yet Plaintiffs asks that “willful” damages be assessed, without even alleging that Defendant knew of any infringing activity, and without allegation that somebody, somewhere, made an actual copy. This cannot be under *Twombly*.

### C. “MAKING AVAILABLE”

Plaintiffs allege that by having sound recordings on the Defendant’s computer and the Defendant using a Peer to Peer Network, Defendant was making the recordings available, and therefore violating the copyright holder’s exclusive rights.

The “making available” argument is stating that by having a copyright protected work unprotected and accessible to means of copying, then the one who makes the work

available is engaging in direct copyright infringement. In this suit, the Plaintiffs are arguing that the Defendant is engaging in *direct* copyright infringement of their works when, even in the most well known file sharing litigation, *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)., “making available” was a form of *vicarious or contributory infringement*. (“One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it.” )

In a recent case in the District of Massachusetts, “making available” without showing actual copying, was not copyright infringement. *London-Sire v. Doe*, No. 04cv12434-NG (D. Mass. Filed March 31, 2008, Submitted under separate cover as Exhibit C.). “The First Circuit has squarely considered and rejected the proposition that copyright liability arises when the Defendant authorized an infringement, but no actual infringement occurred.” *Id.* at 21-22. An infringing act, such as copying or public performance, must come after the authorization in order to violate the exclusive rights of 17 U.S.C. §106. *Id.* at 22.

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Plaintiffs do not make plead such a case. They simply allege that on their information and belief that infringement occurred with out providing any facts of infringing acts, which is insufficient under *Twombly*. See Paragraph 15 of Plaintiffs’ Complaint, for example, submitted under separate cover as Exhibit “D”.

### **WHY THIS CASE OUGHT NOT TO PROCEED ON THESE FACTS**

Plaintiffs, four non-U.S. owned recording companies operating under the umbrella of the pseudonym “Recording Industry Association of America (RIAA)” sued

Defendant, Denise Cloud, under the theory (in the words of the Memorandum and Order filed August 22, 2008), that Defendant's "use of a peer to peer (P2P) file sharing network to illegally download, reproduce and distribute *copies* of eight identified music recordings" constituted direct, "willful" copyright infringement. Plaintiff's Complaint is a boilerplate Complaint for "willful" copyright infringement used in thousands of other similar suits on-going in all circuits, as part of an attempt to coerce small monetary settlements, usually in the range of \$5,000.00 administered by a "national settlement center", which solicits and accepts Master Card and Visa payments in installments. (An example of "settlement" materials included with many complaints against unidentified "John Doe" Defendants, or suspected "downloaders" is submitted under separate cover as Ex. "E".)

As one Federal Court recently put it, "in these lawsuits, potentially meritorious defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of Plaintiffs to pound settlements out of unrepresented Defendants" *Elekta v. O'Brien* No. cv 07-2434 (C.D..Cal. filed Aug 29, 2007.),  

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 (Submitted under separate cover as Ex. "F").

By allowing indiscriminate suits for "willful" rather than ordinary copyright infringement, without any supporting facts, the federal judiciary itself is supercharging this ongoing litigation wave, since the ordinary range of \$750.00 to \$30,000.00 per infringement is suddenly raised to \$150,000.00 pursuant to 17 U.S.C. 504. Moreover, "[many judges, perhaps caught off guard by this onslaught, have been lulled into a pattern of inadvertently waiving, for the Plaintiff's benefit, the normal requirements for federal litigation." Beckerman, *supra* at note 1, at page 2.

This is one such case. Proper application of *Twombly* requires that the case not proceed without a more definite statement, because the complaint on its face, while it may or may not make out a case for contributory or vicarious infringement, certainly does not contain *plausible facts*, a *Twombly* requirement, to support an allegation of willfulness or direct infringement.

WHEREFORE, Defendant requests that the Court reconsiders its order denying Defendant's Rule 12(e) Motion for a More Definite Statement or in the alternative, certify the matter for interlocutory appeal under 28 U.S.C. 1292(b).

Respectfully submitted,

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