

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

ATLANTIC RECORDING CORPORATION,
a Delaware Corporation; UMG RECORDINGS,
INC., a Delaware corporation; ELEKTRA
ENTERTAINMENT GROUP, INC., a
Delaware corporation; and SONY BMG
MUSIC ENTERTAINMENT, a Delaware
General partnership,

Plaintiffs,

v.

JEROME WILLIAMS,

Defendant.

Civil Action: **2:08-cv-01710-DSC**

Judge David S. Cercone

Electronically Filed

**BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. PROC.
12(b)(6)**

AND NOW comes the Defendant, JEROME WILLIAMS, by and through his counsel, Elizabeth A. Farina, Esquire, George M. Kontos, Esquire, and Swensen Perer and Kontos, and file the within Motion to Dismiss, averring as follows:

I. INTRODUCTION AND PROCEDURAL HISTORY

This case was initiated with Plaintiffs' filing of a Complaint on or about December 15, 2008, in the Federal District Court, Western 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

The Plaintiffs herein are member companies of the Recording Industry Association of America (“RIAA”) and claim to own the copyrights in a number of sound recordings created by artists they represent. Over the last several years, in a number of actions throughout the country, Plaintiffs, other record companies, and the RIAA, have sued tens of thousands of individuals alleging that those defendants “uploaded,” “downloaded,” and “made available” various sound recordings. See e.g. *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (Ma. 2008), *Elektra Entertainment Group, Inc. v. Barker*, No. 05 cv 7340 (S.D.N.Y.); *Interscope Records v. Rodriguez*, No. 06-cv-2485-B (S.D. Ca.); *Elektra Entertainment Group, Inc. v. Dennis*, No. 3:07-cv-39 (S.D. MS.). Said actions have been notoriously uninvestigated heavy-handed attempts by recording industry giants to extort settlements from individual Plaintiffs with limited resources, and these recording industry has been admonished by numerous courts for this approach. See e.g. *Elektra v. O’Brien*, No. cv 06-5289-SJO (C. D. Cal. March 2, 2007) (“The Concern of this Court is that in these lawsuits, potentially meritorious legal and factual 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.”); *UMG v. Del Cid*, No. 8:07-cv-368-T-26TGW, (M.D. Fla. Sept. 19, 2007) (“[N]either Florida’s litigation privilege nor the Noerr-Pennington Doctrine serves as a shield for sham litigation.”).

In complaints nearly identical in each of such cases, the recording industry Plaintiffs allege that they have suffered damages due the unauthorized distribution of music, to which they own the copyrights, via “peer-to-peer” (“P2P”) online file distribution software. In a P2P network, the P2P software allows individual computer users to communicate directly with one another over the internet (as opposed to communication through a central server), and permits

P2P network users to transfer files directly from one user's computer to another. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764, 2770-71 (2005). Many such file transfers are entirely legitimate, and their legitimacy and utility has been acknowledged by several Federal Courts. *Id.* at 2764; *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 159 (Mass. 2008).

Plaintiffs here claim that they have suffered copyright infringement via vague references to Defendant's alleged use or participation in a P2P network. Indistinct references to use of a P2P network without identifying any actual act of infringement and without identifying Defendant as a user of such network fall well short of the requirements for pleading Plaintiff's claim.

III. STANDARD OF REVIEW

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 sufficiently stating a claim for copyright infringement, the plaintiff has the burden to allege with specificity the *acts* by which defendant has infringed upon the plaintiff's 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), *Stampono 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 plaintiff's 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 have failed 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 dispute¹, and (2) unauthorized copying of original elements of the plaintiff's work. *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 *Stampone 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

¹ Insofar as the Court must accept all allegations pled as true for purposes of determining a motion to dismiss, Defendant at this juncture has little basis to contest Plaintiffs' allegations that they hold valid copyrights to the works listed on Plaintiffs' Exhibit A to the Complaint. To the extent that Plaintiffs allege that the sound recordings are "owned by or exclusively licensed to Plaintiffs or *Plaintiffs' affiliate record labels*", Defendant submits that Plaintiffs' fail to state a claim in that a claimant alleging copyright infringement must personally hold the copyright to the allegedly infringed upon work. Insofar as Plaintiffs' affiliates, not Plaintiffs, may actually be the copyright holders, Plaintiffs lack standing and fail to state a claim upon which relief may be granted.

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).

To the extent that Plaintiffs may argue that the 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 (8th 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.), *aff'd*, 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"); *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. Pentagen*

Technologies Intern., 1994 WL 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., May 15, 2008) (acknowledging possible manifest error of law 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 NVW (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 ¶14)—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 eight 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 computer², 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. Would mere possession constitute infringement, any individual's possession of any copyrighted material in any form would be fair game for speculative lawsuits by copyright holders nebulously 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' unbounded speculation does not pass muster under Rule 8(a)'s pleading standard, and must not be tolerated 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.

² "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).

Defendant expects that Plaintiffs here, as they have done in many similar lawsuits, will attest that an act of infringement occurred on February 6, 2007, when Plaintiffs, using MediaSentry or a similar program, harvested the song titles listed in Exhibit A to Plaintiffs' Complaint from the computer at the listed IP address. MediaSentry is a program used by numerous recording industry copyright holders that poses as a P2P user, downloads material from other users on the P2P network, and reports to the recording industry copyright holder what files it was capable of downloading, and the IP address from whence they were downloaded. *London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153, 159-160 (D. Mass. 2008). MediaSentry's work is done as an agent of the copyright holder, and it is well established that a copyright holder cannot infringe their own rights. *U.S. Naval Institute v. Charter Communications, Inc.*, 936 F.2d 692, 695 (2d. Cir. 1991); *RSO Records v. Peri*, 1980 WL 1164 (S.D.N.Y. Sep. 5, 1980); *Higgins v. Detroit Education Television Foundation*, 4 F. Supp. 2d 701, 705 (E.D. Mich. 1998).

3. 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 I*, 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.

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(b)(6), and dismiss Plaintiffs’ Complaint with prejudice.

Dated: January 8, 2009

Respectfully Submitted:

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