

IN THE 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, )  
 )  
vs. )  
 )  
JEROME WILLIAMS, )  
 )  
Defendant. )

Civil Action No.: 2:08-cv-01710-DSC

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO  
DISMISS PURSUANT TO FED. R. CIV. PROC. 12(b)(6)**

Plaintiffs respectfully submit this memorandum in opposition to Defendant Jerome Williams' Motion to Dismiss Pursuant to Fed. R. Civ. Proc. 12(b)(6) and request that the Court deny Defendant's Motion. In support of this request, Plaintiffs state as follows:

**INTRODUCTION**

Defendant has moved to dismiss the Plaintiffs' Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that Plaintiffs failed to adequately allege a claim of copyright infringement. In support of this claim, Defendant argues that (1) Plaintiffs fail to allege an act of distribution; (2) Plaintiffs fail to allege a time when the alleged infringement occurred; and (3) Plaintiffs fail to identify Defendant as the alleged infringer. Defendant's arguments are without merit and, in any event, premature.

Despite Defendant's argument to the contrary, Plaintiffs have adequately alleged a claim of copyright infringement. This Court and many others throughout the country have rejected similar attacks on the adequacy of the pleadings contained in Plaintiffs' Complaint. This is because not only does Plaintiffs' Complaint properly allege that Plaintiffs own the copyrighted sound recordings at issue in the Complaint and that Defendant has infringed Plaintiffs' copyrights, but Plaintiffs' Complaint also identifies the date, time, and methods of infringement alleged and provides a list of copyrighted recordings that Defendant has, without the permission or consent of the copyright owners, downloaded and distributed to the public.

Defendant's argument that Plaintiffs failed to allege an act of distribution is based on the assumption that Defendant's claim of copyright infringement rests on a theory of "making available," a theory which Defendant contends has been rejected. (Def.'s Mem., p. 6.) First, Defendant fundamentally misconstrue Plaintiffs' Complaint and is simply wrong. Specifically, Plaintiffs allege that Defendant **both** "downloaded and/or distributed" copyrighted works without authorization. (Complt. ¶ 14.) Thus, whether or not "making works available" is distribution under the Copyright Act, Defendant is not entitled to a dismissal of Plaintiffs' claims because Plaintiffs have alleged downloading (reproduction) as a method of infringement. Moreover, Plaintiffs have evidence of actual distribution of each of the copyrighted sound recordings identified on Exhibit A to the Complaint. Second, Defendant is simply wrong that "making works available" on a peer-to-peer ("P2P") network is not a "distribution" under the Copyright Act. In fact, Defendant's argument's have been considered, and rejected, by numerous courts across the country, as set forth below. Accordingly, Defendant's "making available" argument is erroneous and does not render Plaintiffs' Complaint insufficient. For these and other reasons explained in more detail in the following arguments, Defendant's Motion should be denied.

## **BACKGROUND AND STATEMENT OF FACTS**

This action seeks redress for the infringement of Plaintiffs' copyrighted sound recordings pursuant to the Copyright Act, 17 U.S.C. § 101, *et seq.* Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet. Today, copyright infringers use a variety of peer-to-peer networks to download (reproduce) and unlawfully disseminate (distribute) to others billions of perfect digital copies of Plaintiffs' copyrighted sound recordings each month. Indeed, the Supreme Court of the United States has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2782 (2005).

Peer-to-peer networks are designed so that users can easily and anonymously connect with like-minded infringers. A new user first downloads the necessary software for one of the many peer-to-peer networks. Once the software is installed and launched, the user is connected to other users of the network – typically millions of people at a time – to search for, copy and distribute copyrighted works stored on other users' computers. The software creates a "share" folder on each user's computer in which to store the files that the user downloaded from the service, which are then further distributed to other users.<sup>1</sup>

The Department of Justice has concluded that online media distribution systems are "one of the greatest emerging threats to intellectual property ownership," estimated that "millions of users access P2P networks," and that "the vast majority" of those users "illegally distribute

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<sup>1</sup> For further information about how peer-to-peer networks are utilized to commit copyright infringement, see *In re Aimster Copyright Litigation*, 334 F.3d 643, 646-47 (7th Cir. 2003) and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1032-33 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *rev'd*, 125 S. Ct. 2764, 2005 WL 1499402 (June 27, 2005).

copyrighted materials through the networks.” Report of the Department of Justice’s Task Force on Intellectual Property (October 2004), available at <http://www.cybercrime.gov/IPTaskForceReport.pdf>, at 39. As the Seventh Circuit has held, “music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.” *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005). In addition, downloads from P2P networks compete with licensed broadcasts and undermine the income available to authors. *Id.* at 891. Plaintiffs’ losses from online music piracy have resulted in layoffs of thousands of employees in the music industry. Unfortunately, infringing users of P2P systems are often “disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement,” rendering this serious problem even more difficult for copyright owners to combat. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

P2P users who reproduce or copy (download) or distribute (upload) copyrighted material violate the Copyright Act. *See Grokster*, 545 U.S. at 919-22 (noting that users of P2P networks share copyrighted music and video files on an enormous scale, and, as such, even the providers of those networks “concede infringement” by the individual users); *Aimster*, 334 F.3d 643. A copy downloaded, played, and retained on one’s hard drive for future use is a direct substitute for a purchased copy — and without the benefit of the license fee paid to the broadcaster. *See Gonzalez*, 430 F.3d at 891.

On February 6, 2007, a third-party retained by Plaintiffs’, MediaSentry, detected an individual using the Limewire online media distribution system over a peer-to-peer file-sharing network. This individual had over 286 audio files on his computer and was distributing them to the millions of people who use peer-to-peer networks. Plaintiffs’ agent, MediaSentry, Inc.,

determined that the individual used Internet Protocol (“IP”) address 128.237.227.220 to connect to the Internet. In observing the infringement, MediaSentry uses the same functionalities that are built into P2P programs that any user of the software can utilize on the network.<sup>2</sup> In fact, MediaSentry does not do anything that other users of a P2P network cannot do; the only information it obtains is the information that is available to anyone who logs onto a P2P network.

In this case, after filing a “Doe” lawsuit against the individual using the IP address detected by MediaSentry, Plaintiffs served a court-ordered third-party subpoena on the Internet Service Provider (“ISP”) to determine the identity of the individual responsible for the IP address. The ISP, Carnegie Mellon University, identified Jerome Williams as the individual in question. The Parties were unable to resolve the matter and on December 15, 2008, Plaintiffs initiated this action against Defendant Jerome Williams for damages and injunctive relief against the Defendant. Plaintiffs’ Complaint lists a sample of the sound recordings that Defendant was distributing without authorization. (Complaint at Ex. A.) As alleged in the Complaint, Defendant, without the permission or consent of the Plaintiffs, used a P2P network to download and/or distribute to the public each of these specifically identified sound recordings. (Compl., ¶ 15.)

## ARGUMENT

### **I. LEGAL STANDARDS FOR MOTION TO DISMISS.**

In resolving a 12(b)(6) motion, the Court must “accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff . . . and determine

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<sup>2</sup> See *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n.4 (D. Kan. 2000) (explaining detection through file-sharing program); *Heslep*, 2007 U.S. Dist. LEXIS 35824 (Exhibit A).

whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Umland v. Planco Fin. Servs.*, 542 F.3d 59, 64 (3d Cir. 2008) (citations omitted). Furthermore, in light of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), Plaintiffs’ “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 234 (quoting *Twombly*, 127 S. Ct. at 1965).

## **II. PLAINTIFFS HAVE ADEQUATELY PLED A CLAIM OF COPYRIGHT INFRINGEMENT CLAIM.**

Defendant contends that he is entitled to a dismissal because Plaintiffs failed to plead their claim of copyright infringement with specificity. In particular, Defendant contends that Plaintiffs failed to allege an act of distribution, that they failed to allege the time when the alleged infringement occurred, that they failed to allege that copyrighted sound recordings at issue were registered, and that they failed to identify Defendant. Defendant’s arguments are simply wrong on two fronts. First, despite Defendant’s arguments to the contrary, Plaintiffs are not required to plead a claim of copyright infringement with specificity. Second, the very factual allegations that Defendant contends are missing from Plaintiffs’ Complaint have, in fact, been pled by Plaintiffs.

### **A. Plaintiffs Are Not Required To Plead Copyright Infringement With Specificity.**

In order to adequately allege a claim of copyright infringement, Plaintiffs need only satisfy the pleading standards of Rule 8 of the Federal Rules of Civil Procedure as clarified by the Supreme Court in *Twombly*. See *Sony BMG Music Entm’t v. Cloud*, No. 08-1200, slip. op. 3 (E.D. Pa. Aug. 22, 2008) (“Indeed, the Supreme Court expressly stated that Twombly does not impose any new requirement of heightened detail or specificity in pleading, relative to preexisting pleading standards under Rule 8. Rather, Twombly clarifies that plaintiff’s Rule 8 obligation to make a “showing” of entitlement to relief is satisfied not by mere “blanket

assertion” or “formulaic recitation of the elements of a cause of action,” but by “factual allegations [sufficient] to raise the right to relief above the speculative level” and provide a defendant both fair notice of the claim and the “grounds upon which it rests.”)(attached as Exhibit A). Contrary to Defendant’s allegations, Plaintiffs’ Complaint more than satisfies both Fed. R. Civ. P. 8 and *Twombly*.

To state a claim for copyright infringement, Plaintiffs need only allege: (1) that they own valid copyrights, and (2) that Defendant violated one or more of the exclusive rights in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs’ copyrighted works. *See Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 203 (3d Cir. 2005) (citing *Dunn & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002)); *see also Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”); 4 Melville Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2002) (“Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant.”).

Plaintiffs specifically pled these two elements of a claim of copyright infringement in their Complaint in accordance with Fed. R. Civ. P. 8 and *Twombly*. First, Plaintiffs state that they own or control the exclusive rights to copyrights in the eight sound recordings identified in Exhibit A to the Complaint, all of which have been properly registered with the United States Copyright Office (the “Copyrighted Sound Recordings”). (Complt. at ¶ 10 and Ex. A thereto.) Second, Plaintiffs also allege that Defendant violated Plaintiffs’ copyrights by using an online

media distribution system to download (i.e., copy) and distribute the Copyrighted Sound Recordings over the Internet, that Defendant's conduct "violated Plaintiffs' exclusive rights of reproduction and distribution," and that these infringements were continuous. (Complt. at ¶ 14.)

Specifically, Plaintiffs' Complaint states:

Plaintiffs identified an individual using LimeWire on the P2P network Gnutella at IP address 128.237.227.220 on February 6, 2007 at 16:16:07 EST distributing 286 audio files over the Internet. The Defendant was identified as the individual responsible for that IP address at that date and time. Plaintiffs are informed and believe that as of February 6, 2007, Defendant, without the permission or consent of Plaintiffs, had continuously used, and continued to use, a P2P network to download and/or distribute to the public the Copyrighted Recordings. ***Exhibit A identifies the date and time of capture and a list of Copyrighted Recordings that Defendant has, without the permission or consent of Plaintiffs, downloaded and/or distributed to the public. Through Defendant's continuous and ongoing acts of downloading and/or distributing to the public the Copyrighted Recordings, which acts Plaintiffs believe to have been ongoing for some time, Defendant has violated Plaintiffs' exclusive rights of reproduction and distribution.*** Defendant's actions constitute infringement of Plaintiffs' copyrights and exclusive rights under copyright.

(Complt. at ¶ 14) (emphasis added). Thus, Plaintiffs have adequately alleged the requisite elements of a claim of copyright infringement.

Moreover, nearly every court, including the United States District Court for the Eastern District of Pennsylvania, to have ruled on the sufficiency of similar complaints brought by the record companies in other cases has found Plaintiffs' complaint to be sufficient. *See e.g., Sony BMG Music Entm't v. Cloud*, No. 2:08 CV 01200 WY, at. 4 (this Court found Plaintiffs' Complaint "to be well [pled] and to contain sufficient factual allegations to raise Plaintiffs' right to relief above the speculative level, such that Defendant's Motion for More Definite Statement will be denied.")(Exhibit A); *Atlantic Recording Corp. v. Serrano*, No. 07-CV-01824-W-JMA, 2007 U.S. Dist. LEXIS 95203, 8 (S.D. Cal. Dec. 28, 2007) (denying motion to dismiss under *Twombly*, finding "Plaintiffs supply more than enough information to give Defendant fair notice of who owns the copyrights and how and when Defendant allegedly infringed them."); *LaFace*



*Records, LLC v. Does 1-5*, No. 07-CV-187, slip op. at 12 (W.D. Mich. Feb. 22, 2008) (denying defendant's motion to dismiss, finding "Under the standard recently established by the United States Supreme Court, the complaint alleges sufficient facts to raise the right to relief above the speculative level.")(attached as Exhibit B); *LaFace Records, LLC v. Does 1-38*, No. 07-CV-00298-BR, slip op. at 3 (E.D.N.C. Feb. 27, 2008) ("Plaintiffs have . . . sufficiently stated a claim and supplied a factual basis for copyright infringement.")(attached as Exhibit C); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 971-972 (N.D. Tex. 2006) ("Plaintiffs' pleading provides a short and plain statement that alleges both their copyright ownership and violation of one or more of the exclusive rights identified in 17 U.S.C. § 106"); *Warner Bros. Records Inc. v. Duarte*, No. No. SA-06-CV-615, slip op. at 4 (W.D. Tex. May 2, 2007) (plaintiffs' evidence confirms that "plaintiffs are the owners of the copyrighted material, the infringement originated from [defendant's] Internet account . . . and infringement occurred within three years of the filing of this lawsuit")(attached as Exhibit D); *Interscope Records, v. Duty*, No. 05-CV-3746-PHX-FJM, 2006 U.S. Dist. LEXIS 20214, 6 (D. Ariz. Apr. 14, 2006) (denying motion to dismiss and finding plaintiffs' complaint to be sufficient).

Defendant, however, misrepresents to this Court that Plaintiffs have "the burden to allege with specificity the act by which defendant has infringed upon the plaintiffs copyright." (Def.'s Mem. p.4.) Defendant cites no authority, nor are Plaintiffs aware of any authority, that either the Third Circuit or this particular Court requires a claim of copyright infringement to be pled with specificity. Each and every case that Defendant cites for this proposition is from the U.S. District Court for the Southern District of New York. Even courts in the Southern District of New York, however, have rejected a heightened pleading standard for claims of copyright infringement, particularly where, as here, plaintiffs have alleged continuous and ongoing acts of

infringement. *See, e.g., Elektra Entm't Group, Inc. v. Barker*, 551 F.Supp.2d 234, 8-11 (S.D.N.Y. Mar. 31, 2008); *see also Atlantic Recording Corp. v. Does 1-25*, No. 05-CV-9111, 2008 U.S. Dist. LEXIS 53654, 7-8 (S.D.N.Y. Jan. 3, 2006); *Elektra Entm't Group, Inc. v. Santangelo*, 2005 U.S. Dist. LEXIS 30388, 4 (S.D.N.Y. Nov. 28, 2005); *Franklin Elec. Publishers v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991).

Indeed, it would defeat the purpose of the copyright laws to strictly require a plaintiff to allege with specificity when and how each infringement occurred, because such actions are not typically done in plain sight of the copyright holder. Piracy typically takes place “behind closed doors and beyond the watchful eyes of a copyright holder.” *See Warner Bros. Records, Inc. et al v. Payne*, No. 06-CA-051, 2006 U.S. Dist. LEXIS 65765, 10 (W.D. TX. 2006). Moreover, in cases like this one, Plaintiffs cannot be expected to allege each individual act of infringement, because the infringement has been taking place for as long as the sound recordings have been available on Defendant's computer, and this information is exclusively within Defendant's control.

#### **B. Plaintiffs Have Pled Specific Facts in Their Complaint.**

As noted above, Plaintiffs' claims of copyright infringement in this case clearly satisfy the pleading requirements of Fed. R. Civ. P. 8. Further, although there is no requirement that Plaintiffs' plead a claim of copyright infringement with specificity, Plaintiffs have, in fact, alleged the very facts that Defendant contends are missing from Plaintiffs' Complaint. Despite Defendant's arguments to the contrary, Plaintiffs have alleged the specific acts by which copyright infringement took place, namely, (1) the reproduction and/or distribution of the 8 defined Copyrighted Recordings, (2) using the LimeWire file-sharing service on the Gnutella P2P network, (3) at a specifically defined IP address and (4) at a specific date and time. (Complt. at ¶ 14). Moreover, Plaintiffs have gone far beyond mere allegations by detailing

evidence that Plaintiffs gathered concerning the hundreds of files being distributed by Defendant. (Complt. at ¶ 14). Specifically, Plaintiffs allege the P2P network used by Defendant to infringe Plaintiffs' copyrights, the manner by which Defendant infringed Plaintiffs' copyrights, the IP address through which the infringement occurred, and provided a detailed list of the works that Defendant has infringed. (*Id.* at ¶¶ 12-14 and Ex. A thereto.)

Despite these allegations in Plaintiffs' Complaint, Defendant contends that Plaintiffs' Complaint is insufficient because Plaintiffs' failed to allege a time when the alleged infringement took place. However, as set forth above, Plaintiffs need not specify the dates or times on which the infringement occurred, particularly where, as here, plaintiffs have alleged continuous and ongoing acts of infringement. *See supra.*, p. 9-10. Notwithstanding this, and despite Defendant's arguments to the contrary, Plaintiffs *have* alleged a specific date and time that the alleged infringement occurred - February 6, 2007 at 16:16:07 EDT. (Complt. ¶ 14.)

**C. Plaintiffs Have Sufficiently Identified Defendant For the Purposes Of Fed. R. Civ. P. 8.**

Finally, Defendant argues that Plaintiffs' have failed to identify Defendant because IP addresses can be "spoofed." (Def.'s Mem. p. 9-10.) However, as Plaintiffs alleged in their Complaint, Defendant has been "identified as the individual responsible for that IP address at that date and time." (Complt. ¶ 14). Specifically, Defendant was identified as the individual responsible for the IP address referenced in the Complaint, 128.237.227.220, on February 6, 2007 at 16:16:07 EDT by his Internet Service Provider Carnegie Mellon University. The fact that Defendant may assert certain defenses, such as spoofing, challenging Plaintiffs' allegations identifying Defendant as the individual responsible for the IP address in question is not an issue that can be resolved on a motion to dismiss. At most, it merely establishes a potential issue of fact, it does not render Plaintiffs' claim of copyright infringement insufficient. While Defendant

suggests that an IP address “can be ‘spoofed’” (Def.’s Mem. p. 10), Defendant’s bald assertion does not in any way establish “as a matter of law” that Defendant is not the individual responsible for the IP address identified in the Complaint. In fact, Defendant does not even actually suggest that Defendant’s IP address was spoofed or that Defendant has evidence to suggest his IP address was spoofed. (Def.’s Mem. p. 9-10).

Accordingly, Plaintiffs’ have adequately alleged a claim of copyright infringement against Defendant under Fed. R. Civ. P. 8(a) and *Twombly*, and, therefore, Defendant’s Motion to Dismiss should be denied.

**III. DEFENDANT’S “MAKING AVAILABLE” ARGUMENT DOES NOT RENDER PLAINTIFFS’ COMPLAINT INSUFFICIENT AND IS INCORRECT AS A MATTER OF LAW.**

Defendant also argues that Plaintiffs’ Complaint fails because

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, [is an argument that] has been squarely rejected by numerous jurisdictions.

(Def.’s Memo., p. 6.) Defendant, however, fundamentally misconstrues Plaintiffs’ Complaint and his “making available” argument is wrong and premature. Accordingly, it does not render Plaintiffs’ Complaint insufficient under Fed. R. Civ. P. 8.

Plaintiffs’ Complaint alleges that Defendant used “a P2P network to download and/or distribute to the public the Copyrighted Recordings.” (Complt., ¶ 14.) Contrary to Defendant’s argument, this single allegation makes it clear that Plaintiffs’ Complaint has alleged that Defendant violated both Plaintiffs’ exclusive right of distribution *and* reproduction under the Copyright Act. Moreover, Defendant’s “making available” argument is irrelevant because Plaintiffs have evidence of actual distribution of each of the Copyrighted Recordings identified in Exhibit A. These Copyrighted Recordings were actually distributed to MediaSentry.

Moreover, Plaintiffs have directly alleged that Defendant has infringed on, among other things, their exclusive right of copying. In light of Plaintiffs' allegations of actual distribution and copying, this Court need not reach the question of whether the distribution right subsumes the right of making copyrighted works available for distribution (the so-called right of "making available"). See, e.g., *Greubel*, 453 F. Supp. 2d 961; and *Duty*, 2006 U.S. Dist. LEXIS 20214.

Although premature, and unnecessary, if the Court were to consider the question of whether Plaintiffs can establish a violation of the exclusive right of distribution based solely on a "making available" theory, the law is clear that Defendant is simply wrong. Many courts, including the United States District Court for the Eastern District of Pennsylvania, have held that "[a] plaintiff . . . can establish infringement by . . . proof that the defendant 'made available' the copyrighted work." *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 U.S. Dist. LEXIS 11626, 12-13 n.38. (E.D. Pa. 2007); see also, e.g., *Maverick Recording Co. v. Harper*, No. 5:07-CV-026-XR (W.D. Tex. Sept. 16, 2008)(attached as Exhibit E); *Atlantic Recording Corp. v. Anderson*, No. 06-CV-3578, 2008 U.S. Dist. LEXIS 53654, 18 (S.D. Tex. Mar. 12, 2008)("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."(citations omitted)); *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9<sup>th</sup> Cir. 2001).

Section 106(3) of the Copyright Act grants a copyright owner the exclusive right to "distribute" copies of copyrighted works to the public by any means of transfer of ownership or by rental, lease or lending. 17 U.S.C. § 106(3). By definition, a person who possesses the exclusive right to distribute works also possesses the exclusive right to make works available for copying by others.

This is precisely what the Supreme Court held in *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 488 (2001). In *Tasini*, several authors sued both newspaper publishers and electronic publishers (including NEXIS) for making the authors' copyrighted articles available for download on online databases like NEXIS. *See id.* at 487. The newspaper publishers had a license to "reproduce or distribute" the articles only as part of a compilation. *Id.* at 498. There was no allegation or proof of any actual transfer of files to the public in *Tasini*; rather, the authors alleged only that the publishers had "placed copies of the [articles] . . . into three databases" where they were "retrievable" by the public, and that the authors' distribution right had been infringed "by the inclusion of their articles in the databases." *Id.* at 487. The Supreme Court agreed and held that "the Electronic Publishers infringed the Authors' copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors . . . [and] that the Print Publishers infringed the Authors' copyrights by authorizing the Electronic Publishers *to place the Articles in the Databases . . .*" *Id.* at 506 (emphasis added).

In addition to *Tasini*, courts have routinely held that the unauthorized act of making copies available for download by others violates the copyright owner's exclusive right to distribute its works.<sup>3</sup> *See DePietro*, 2007 U.S. Dist. LEXIS 11626, 12-13 n.38 ("[a] plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant 'made available' the copyrighted work."). In fact, the United States District Court for the Western District of Texas in *Maverick Recording Co. v. Harper* recently held that while "the Fifth Circuit

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<sup>3</sup> The United States Register of Copyrights has expressly determined that "making [a work] available for other users of a peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well as of the reproduction right." *See* Letter from Marybeth Peters to Rep. Howard L. Berman at 1, Sept. 25, 2002, *reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks*, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 114-15 (2002) (attached hereto as Exhibit A.) The Register of Copyrights' interpretation is entitled to particular respect. *De Sylva v. Ballentine*, 351 U.S. 570, 577-78 (1956).

has not ruled on [“making available”], this Court will follow those other courts that have found a “make available” right in 17 U.S.C. Section 106(3).” See Harper, slip. op. at p.6 and n.4 (Exhibit E). The Ninth Circuit also concluded in *A&M Records, Inc. v. Napster, Inc.* that “users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.” 239 F.3d 1004, 1014 (9th Cir. 2001); see also *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701, 718-19 (9th Cir. 2007) (confirming that defendant who makes actual files available for distribution, not just links to files, “distributes” them). In *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628 (D. Md. 2006), relying on *Tasini*, the court held that an online publisher violated a copyright owner’s distribution rights by posting the owner’s copyrighted publications online. *Id.* at 637-38 (“[B]y making available unauthorized copies of Plaintiff’s publications, he has infringed its right to distribution.”).<sup>4</sup>

This is nothing new - courts for decades have found book stores, music stores, and video rental stores who made copies of copyrighted works available without authorization liable for infringement. As the Fourth Circuit explained in holding a library liable for offering copyrighted genealogical material:

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<sup>4</sup> *Accord Sony Pictures Home Entm’t, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-22 (N.D. Tex. 2007) (granting summary judgment to plaintiff motion picture companies based on evidence that copyrighted motion pictures were made available for download); *Payne*, 2006 U.S. Dist. LEXIS 65765, (holding that making copyrighted audio files available for distribution on a peer-to-peer network may violate the copyright owner’s distribution right); *Duty*, 2006 U.S. Dist. LEXIS 20214, 6 n.2 (D. Ariz. Apr. 14, 2006) (“The mere presence of copyrighted sound recordings in [the defendant’s] share file may constitute distribution and therefore infringement.”); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 509 (N.D. Ohio. 1997) (finding distribution without actual transfer, and rejecting argument that defendants “never ‘distributed’ [plaintiffs’] photographs to their customers because it was the customers themselves who chose whether or not to download” the photographs from defendants’ server (emphasis original)); *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distribs. & Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1173-74 (N.D. Ill. 1997) (finding infringement without transfers, and noting that “once the files were uploaded, they were available for downloading”).

When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public. At that point, members of the public can visit the library and use the work.

*Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

Likewise, video rental stores that hold copyrighted videos out for sale also violate the copyright holders' distribution right, even where no actual sale is consummated. *See, e.g., Walt Disney Co. v. Video 47, Inc.*, 972 F. Supp. 595, 599 (S.D. Fla. 1996) (holding that a video rental store had infringed distribution rights, based on the seizure of videos "from the portion of the store where the videocassettes were available for rental"); *U2 Home Entm't, Inc. v. Wang*, 482 F. Supp. 2d 314, 317-18 (E.D.N.Y. 2007) (awarding statutory damages for offering to sell copies of the plaintiff's copyrighted television shows); *Columbia Pictures Indus., Inc. v. T&F Enters., Inc.*, 68 F. Supp. 2d 833, 835, 839 (E.D. Mich. 1999) (holding that the defendants violated the plaintiffs' distribution right by "[holding] these video cassettes out for distribution to the general public without authorization").<sup>5</sup>

The cases cited by Defendant, none of which are binding on this Court, do not outweigh the overwhelming authority referenced above, including binding precedent directly on point. Therefore, while reaching the question of whether Plaintiffs can establish a violation of the exclusive right of distribution based solely on a "making available" theory is premature and irrelevant to a determination of Defendant's Motion, the law is clear that making Plaintiffs'

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<sup>5</sup> In similar contexts, courts routinely hold that the plain meaning of the statutory term "distribution" includes making an item available to others. *See, e.g., United States v. Shaffer*, 472 F.3d 1219, 1223 (10th Cir. 2007) (holding that the defendant "distributed" child pornography by placing it in his KaZaA shared folder and making it available for other users); *United States v. Carani*, 492 F.3d 867, 876 (7th Cir. 2007) ("The notion that Carani could knowingly make his child pornography available for others to access and download without this qualifying as 'distribution' does not square with the plain meaning of the word.").



copyrighted sound recordings available to others for copying violates Plaintiffs' exclusive right of distribution.

### **CONCLUSION**

Based on the foregoing, Plaintiffs request that Defendant's Motion to Dismiss should be denied.

Dated: 2/23/09

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 23, 2009, a copy of the foregoing  
**MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**  
**PURSUANT TO FED. R. CIV. PROC. 12(b)(6)** was served upon the Defendant as follows:

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- U.S. Mail, postage prepaid
- Hand Delivery
- Fax ( # )
- Overnight courier
- Electronically via CM/ECF

Dated: 2/23/09

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