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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

CAPITOL RECORDS, INC.; CAROLINE  
RECORDS, INC.; EMI CHRISTIAN MUSIC  
GROUP INC.; PRIORITY RECORDS LLC;  
VIRGIN RECORDS AMERICA, INC.;  
BEECHWOOD MUSIC CORP.; COLGEMS-EMI  
MUSIC INC; EMI APRIL MUSIC INC.; EMI  
BLACKWOOD MUSIC; EMI FULL KEEL  
MUSIC; EMI GOLDEN TORCH MUSIC CORP.;  
EMI LONGITUDE MUSIC; EMI VIRGIN MUSIC,  
INC.; EMI VIRGIN SONGS, INC.,

Plaintiffs,

v.

MP3TUNES, LLC

Defendant.

MP3TUNES, INC.

Counter-Claimant

v.

EMI GROUP, LTD; EMI GROUP NORTH  
AMERICA, INC.; EMI GROUP NORTH  
AMERICA HOLDINGS, INC.; and EMI MUSIC  
NORTH AMERICA, LLC

Counter-Defendants.

CIVIL ACTION NO. 07-Civ. 9931 (WHP)

**DEFENDANT'S ANSWER, AFFIRMATIVE DEFENSES, AND  
COUNTERCLAIMS WITH JURY DEMAND**

Defendant MP3tunes, Inc. ("MP3tunes"), hereby submits its Answer to Plaintiffs'

Complaint as follows:

**NATURE OF THE CASE**

1. Defendant denies each and every allegation in paragraph 1 of the Complaint.
2. Defendant denies each and every allegation in paragraph 2 of the Complaint.
3. Defendant denies as to Defendant, and lacks sufficient information to respond to all other allegations in paragraph 3 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.
4. Defendant denies each and every allegation in paragraph 4 of the Complaint.
5. Defendant denies each and every allegation in paragraph 5 of the Complaint.

**THE PARTIES**

6. Defendant lacks sufficient information to respond to the allegations in paragraph 6 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.
7. Defendant lacks sufficient information to respond to the allegations in paragraph 7 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.
8. Defendant lacks sufficient information to respond to the allegations in paragraph 8 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

9. Defendant lacks sufficient information to respond to the allegations in paragraph 9 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

10. Defendant lacks sufficient information to respond to the allegations in paragraph 10 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

11. Defendant lacks sufficient information to respond to the allegations in paragraph 11 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

12. Defendant lacks sufficient information to respond to the allegations in paragraph 12 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

13. Defendant lacks sufficient information to respond to the allegations in paragraph 13 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

14. Defendant lacks sufficient information to respond to the allegations in paragraph 14 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

15. Defendant lacks sufficient information to respond to the allegations in paragraph 15 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

16. Defendant lacks sufficient information to respond to the allegations in paragraph 16 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

17. Defendant lacks sufficient information to respond to the allegations in paragraph 17 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

18. Defendant lacks sufficient information to respond to the allegations in paragraph 18 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

19. Defendant lacks sufficient information to respond to the allegations in paragraph 19 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

20. Defendant lacks sufficient information to respond to the allegations in paragraph 20 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

21. Defendant lacks sufficient information to respond to the allegations in paragraph 21 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

22. Defendant lacks sufficient information to respond to the allegations in paragraph 22 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

23. Defendant admits that it is a limited liability company incorporated in Delaware that owns and operates the [www.sideload.com](http://www.sideload.com) ("Sideload.com") and [www.mp3tunes.com](http://www.mp3tunes.com) ("MP3tunes.com") websites.

24. Defendant admits that Michael Robertson is Chief Executive Officer of MP3tunes. Defendant admits that the MP3tunes.com website was subject to a copyright infringement lawsuit before the Southern District of New York. Defendant admits that Judge Rakoff found the unrelated MP3.com website to willfully infringe copyrights. Defendant denies both generally and specifically all other allegations in paragraph 24 of the Complaint.

#### **DEFENDANT'S MUSIC SERVICE**

25. Defendant denies each and every allegation in paragraph 25 of the Complaint.

26. Defendant admits that no music files are hosted or stored on Sideload.com but instead are hosted on third-party websites and servers. Defendant lacks sufficient information to respond to the allegation in paragraph 26 regarding the content of third-party websites, and, therefore, denies both generally and specifically this allegation. Defendant denies both generally and specifically all other allegations in paragraph 26 of the Complaint.

27. Defendant denies both generally and specifically each and every allegations in paragraph 27 of the Complaint.

28. Defendant denies both generally and specifically each and every allegations in paragraph 28 of the Complaint.

29. Defendant admits that it provides the Oboe Sideload Plugin software, which allows users to sideload music made available for download on third-party websites to the user's locker on MP3tunes.com. Defendant denies both generally and specifically all other allegations in paragraph 29 of the Complaint.

30. Defendant denies both generally and specifically each and every allegation in paragraph 30 of the Complaint.

31. Defendant denies each and every allegation in paragraph 31 of the Complaint.

32. Defendants admits that no one can access a user's locker without entering a secured email address and password, which allows the user to access and download music files contained in the locker. Defendant denies both generally and specifically all other allegations in paragraph 32 of the Complaint.

33. Defendant denies both generally and specifically each and every allegation in paragraph 33 of the Complaint.

34. Defendant admits that a user can download a song from their locker to the user's computer or iPod. Defendant lacks sufficient information to respond to the allegations in paragraph 34 of the Complaint regarding the availability of songs on third-party websites, and, therefore, denies both generally and specifically each and every allegation contained therein. Defendant denies both generally and specifically all other allegations in paragraph 34 of the Complaint.

35. Defendant admits that it received a letter from EMI with a list of links to allegedly infringing musical works. However, Defendant lacks sufficient information to respond to the allegations in paragraph 35 of the Complaint regarding whether the letter was sent from each and every Plaintiff, and, therefore, denies both generally and specifically each and every allegation contained therein. Defendant denies both generally and specifically all other allegations in paragraph 35 of the Complaint.

36. Defendant denies each and every allegation in paragraph 36 of the Complaint.

37. Defendant denies each and every allegation in paragraph 37 of the Complaint.

## **JURISDICTION AND VENUE**

38. Paragraph 38 states legal conclusions, which require no response from Defendant. Defendant admits that Plaintiff has styled this action as described.

39. Defendant denies each and every allegation in paragraph 39 of the Complaint.

40. Defendant denies each and every allegation in paragraph 40 of the Complaint.

## **FIRST CLAIM FOR RELIEF**

### **Infringement of Plaintiffs' Reproduction Rights**

41. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 40 above as if fully set forth herein.

42. Defendant denies each and every allegation in paragraph 42 of the Complaint.

43. Defendant denies each and every allegation in paragraph 43 of the Complaint.

44. Defendant denies each and every allegation in paragraph 44 of the Complaint.

45. Defendant denies each and every allegation in paragraph 45 of the Complaint.

46. Defendant denies each and every allegation in paragraph 46 of the Complaint.

47. Defendant denies each and every allegation in paragraph 47 of the Complaint.

## **SECOND CLAIM FOR RELIEF**

### **Infringement of Plaintiffs' Distribution Rights**

48. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 47 above as if fully set forth herein.

49. Defendant denies each and every allegation in paragraph 49 of the Complaint.

50. Defendant denies each and every allegation in paragraph 50 of the Complaint.

51. Defendant denies each and every allegation in paragraph 51 of the Complaint.

52. Defendant denies each and every allegation in paragraph 52 of the Complaint.

53. Defendant denies each and every allegation in paragraph 53 of the Complaint.

54. Defendant denies each and every allegation in paragraph 54 of the Complaint.

### **THIRD CLAIM FOR RELIEF**

#### **Infringement of Plaintiffs' Public Performance Rights**

55. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 54 above as if fully set forth herein.

56. Defendant denies each and every allegation in paragraph 56 of the Complaint.

57. Defendant denies each and every allegation in paragraph 57 of the Complaint.

58. Defendant denies each and every allegation in paragraph 58 of the Complaint.

59. Defendant denies each and every allegation in paragraph 59 of the Complaint.

60. Defendant denies each and every allegation in paragraph 60 of the Complaint.

61. Defendant denies each and every allegation in paragraph 61 of the Complaint.

62. Defendant denies each and every allegation in paragraph 62 of the Complaint.

### **FOURTH CLAIM FOR RELIEF**

#### **Inducement of Copyright Infringement**

63. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 62 above as if fully set forth herein.

64. Defendant denies each and every allegation in paragraph 64 of the Complaint.

65. Defendant denies each and every allegation in paragraph 65 of the Complaint.

66. Defendant denies each and every allegation in paragraph 66 of the Complaint.

67. Defendant denies each and every allegation in paragraph 67 of the Complaint.

68. Defendant denies each and every allegation in paragraph 68 of the Complaint.

69. Defendant denies each and every allegation in paragraph 69 of the Complaint.



## **FIFTH CLAIM FOR RELIEF**

### **Contributory of Copyright Infringement**

70. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 69 above as if fully set forth herein.

71. Defendant denies each and every allegation in paragraph 71 of the Complaint.

72. Defendant denies each and every allegation in paragraph 72 of the Complaint.

73. Defendant denies each and every allegation in paragraph 73 of the Complaint.

74. Defendant denies each and every allegation in paragraph 74 of the Complaint.

75. Defendant denies each and every allegation in paragraph 75 of the Complaint.

76. Defendant denies each and every allegation in paragraph 76 of the Complaint.

## **SIXTH CLAIM FOR RELIEF**

### **Vicarious Copyright Infringement**

77. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 76 above as if fully set forth herein.

78. Defendant denies each and every allegation in paragraph 78 of the Complaint.

79. Defendant denies each and every allegation in paragraph 79 of the Complaint.

80. Defendant denies each and every allegation in paragraph 80 of the Complaint.

81. Defendant denies each and every allegation in paragraph 81 of the Complaint.

82. Defendant denies each and every allegation in paragraph 82 of the Complaint.

83. Defendant denies each and every allegation in paragraph 83 of the Complaint.

**SEVENTH CLAIM FOR RELIEF**

**Common-Law Copyright Infringement of Pre-1972 Works**

84. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 83 above as if fully set forth herein.

85. Defendant denies each and every allegation in paragraph 85 of the Complaint.

86. Defendant denies each and every allegation in paragraph 86 of the Complaint.

87. Defendant denies each and every allegation in paragraph 87 of the Complaint.

88. Defendant denies each and every allegation in paragraph 88 of the Complaint.

**EIGHTH CLAIM FOR RELIEF**

**Unfair Competition as to Pre-1972 Works**

89. Defendant incorporates every response to every allegation set forth in paragraphs 1 through 88 above as if fully set forth herein.

90. Defendant lacks sufficient information to respond to the allegations in paragraph 90 of the Complaint, and, therefore, denies both generally and specifically each and every allegation contained therein.

91. Defendant denies each and every allegation in paragraph 91 of the Complaint.

92. Defendant denies each and every allegation in paragraph 92 of the Complaint.

93. Defendant denies each and every allegation in paragraph 93 of the Complaint.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

As and for a First Affirmative Defense to the Complaint, Defendant alleges that the Complaint and each and every claim for relief therein fails to state a claim upon which relief can be granted as against Defendant.

**SECOND AFFIRMATIVE DEFENSE**

As and for a Second Affirmative Defense to the Complaint, Defendant alleges that some or all of the claims in the Complaint are barred by each and every applicable statute of limitations.

**THIRD AFFIRMATIVE DEFENSE**

As and for a Third Affirmative Defense to the Complaint and each and every claim for relief therein, Defendant alleges that Plaintiffs are barred from any affirmative recovery by reason of laches, waiver and/or its own unclean hands.

**FOURTH AFFIRMATIVE DEFENSE**

As and for a Fourth Affirmative Defense to the Complaint, Defendant alleges that some or all of the claims for damages under New York law and/or New York common law in the Complaint are barred as being preempted by federal law.

**FIFTH AFFIRMATIVE DEFENSE**

As and for a Fifth Affirmative Defense to the Complaint, Defendant alleges that some or all of the claims for damages for copyright infringement are barred because Plaintiffs failed to comply with the copyright registration requirements of 17 U.S.C. § 412.

**SIXTH AFFIRMATIVE DEFENSE**

As and for a Sixth Affirmative Defense to the Complaint, Defendant alleges that some or all of the claims for statutory damages and attorneys' fees are barred because Plaintiffs failed to comply with the copyright registration requirements of 17 U.S.C. § 412.

**SEVENTH AFFIRMATIVE DEFENSE**

As and for a Seventh Affirmative Defense to the Complaint, Defendant alleges that some or all of the claims for damages for copyright infringement are barred because Plaintiffs failed to comply with the copyright notice provisions.

**EIGHTH AFFIRMATIVE DEFENSE**

As and for a Eighth Affirmative Defense to the Complaint, Defendant alleges each and every claim for copyright infringement is barred because of Plaintiffs' misuse of their alleged copyrights.

**NINTH AFFIRMATIVE DEFENSE**

As and for a Ninth Affirmative Defense to the Complaint, and each and every claim for relief therein, Defendant alleges that Plaintiffs are barred from any affirmative recovery by under the doctrine of fair use.

**TENTH AFFIRMATIVE DEFENSE**

As and for a Tenth Affirmative Defense to the Complaint, Defendant alleges that some or all of the claims for damages are barred from any affirmative recovery under the safe harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512.

**ELEVENTH AFFIRMATIVE DEFENSE**

As and for a Eleventh Affirmative Defense to the Complaint, Defendant alleges that some or all of the claims for damages are barred from any affirmative recovery under the safe harbor provisions of the Communications Decency Act, 47 U.S.C. § 230.

**TWELFTH AFFIRMATIVE DEFENSE**

As and for a Twelfth Affirmative Defense to the Complaint, and each and every claim for relief therein, Defendant alleges that Plaintiffs authorized Defendant's allegedly infringing conduct in its use of the copyrights at issue herein.

**THIRTEENTH AFFIRMATIVE DEFENSE**

As and for a Thirteenth Affirmative Defense to the Complaint and to each and every claim for relief therein, Defendant alleges that Defendant's discovery and investigation in this matter is ongoing. Accordingly, Defendant expressly reserves the right to modify or supplement its affirmative defenses as appropriate. Defendant's assertion of any affirmative defense shall not be construed as a concession as to whether or not it bears the burden of proof on any particular issue.

### **COUNTERCLAIM**

Defendant/Counter-claimant MP3tunes, LLC (“MP3tunes” or “Counter-Claimant”) brings the following Counterclaim against plaintiffs/Counter-defendants Capitol Records, Inc.; Caroline Records, Inc.; EMI Christian Music Group Inc.; Priority Records LLC; Virgin Records America, Inc.; Beechwood Music Corp.; Colgems-EMI Music Inc; EMI April Music Inc.; EMI Blackwood Music; EMI Full Keel Music; Emi Golden Torch Music Corp.; EMI Longitude Music; EMI Virgin Music, Inc.; EMI Virgin Songs, Inc. and Counter-defendants EMI Group, Ltd; EMI Group North America, Inc.; EMI Group North America Holdings, Inc.; and EMI Music North America, LLC (collectively, “EMI” or “Counter-Defendants”) and hereby avers as follows:

### **NATURE OF THE ACTION**

1. As set forth in more detail below, MP3tunes owns and operates MP3tunes.com and Sideload.com (collectively, the “Sites”) and offers online storage lockers and Oboe software to users of the Sites.
2. MP3tunes.com is a music service provider and offers registered users a personal music locker offering online storage. MP3tunes.com users can sync their personal music collections to enjoy their music through any web browser, as well as through a growing number of home entertainment and mobile devices.
3. MP3tunes.com users can use the Oboe software to sideload music files from the MP3tunes music store or third party websites, to the user’s personal storage locker.
4. Sideload.com is a website owned and operated by MP3tunes that aggregates links to free music tracks on the Internet chosen and posted by users of Sideload.com and/or the Oboe software.

5. MP3tunes has been sued by EMI as a result of the foregoing websites and software after receiving three threatening – albeit deficient – cease-and-desist letters from EMI’s counsel, dated September 4, 2007, September 18, 2007, and October 25, 2007 (collectively, the “Notice”).

6. By this action, MP3tunes seeks a declaration that (i) MP3tunes.com and Sideload.com are service providers as defined in the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(k); (ii) the conduct by MP3tunes.com and Sideload.com challenged by EMI in the Notice falls within the protections of §§ 512(a), (b), (c) and/or (d); (iii) the Notice served on MP3tunes was deficient under 17 U.S.C. §§ 512(c) and/or (d); (iv) to the extent the Notice was not deficient, MP3tunes complied with its obligations under 17 U.S.C. §§ 512(c) and/or (d); and (v) the activities of Sideload.com, MP3tunes.com and Oboe complained of by EMI in the Notice do not constitute direct copyright infringement, contributory copyright infringement and/or inducement of copyright infringement.

7. MP3tunes further seeks: (i) an order from the Court enjoining EMI from engaging in their unfair, unlawful, and deceptive business act or practice of intentionally sending defective Notice under the DMCA in order to further their business interests; (ii) an order from the Court requiring EMI to disgorge any profits that they have made as a result of their wrongful conduct; (iii) an Order from the Court holding that EMI violated 17 U.S.C. § 512(f) (“Section 512 (f)”); (iv) an award of damages as a result of EMI’s Section 512(f) violation; and an award of attorney’s fees and costs.

#### **PARTIES**

8. Counter-claimant MP3tunes is a Delaware corporation with its principal place of business in San Diego, California.

9. Upon information and belief, Counter-defendant Capitol Records, Inc. is a

Delaware corporation, with its principal place of business in New York, New York.

10. Upon information and belief, Counter-defendant Caroline Records, Inc. is a New York corporation, with its principal place of business in New York, New York.

11. Upon information and belief, Counter-defendant EMI Christian Music Group, Inc. is a California corporation, with its principal place of business in Brentwood, Tennessee.

12. Upon information and belief, Counter-defendant Priority Records LLC is a Delaware limited liability company with its principal place of business in New York, New York.

13. Upon information and belief, Counter-defendant Virgin Records America, Inc. is a California corporation, with its principal place of business in New York, New York.

14. Upon information and belief, Counter-defendant Beechwood Music Corporation is a California corporation, with its principal place of business in New York, New York.

15. Upon information and belief, Counter-defendant Colgems-EMI Music Inc. is a Delaware corporation, with its principal place of business in New York, New York.

16. Upon information and belief, Counter-defendant EMI April Music Inc. is a Connecticut corporation, with its principal place of business in New York, New York.

17. Upon information and belief, Counter-defendant EMI Blackwood Music is a Connecticut corporation, with its principal place of business in New York, New York.

18. Upon information and belief, Counter-defendant EMI Full Keel Music is a duly organized corporation, with its principal place of business in New York, New York.

19. Upon information and belief, Counter-defendant Golden Torch Music Corp. is a New York corporation, with its principal place of business in New York, New York.

20. Upon information and belief, Counter-defendant EMI Longitude Music is a duly organized corporation, with its principal place of business in New York, New York.



21. Upon information and belief, Counter-defendant EMI Virgin Music, Inc. is a New York corporation, with its principal place of business in New York, New York.

22. Upon information and belief, Counter-defendant EMI Virgin Songs, Inc. is a New York corporation, with its principal place of business in New York, New York.

23. Upon information and belief, Counter-defendant EMI Group, LTD is headquartered in London, England. EMI operates in the United States through its division, EMI Music Group North America, as well as subsidiaries EMI Group North America, Inc., EMI Group North America Holdings Inc. and EMI Music North America, LLC, among others. The record labels EMI purports to represent in the United States include the Counter-defendants listed in paragraphs 9 through 22 above.

24. Upon information and belief, Counter-defendant EMI Group North America, Inc. is a Delaware corporation with its principal place of business in New York, New York.

25. Upon information and belief, Counter-defendant EMI Group North America Holdings Inc. is a Delaware corporation with its principal place of business in New York, New York.

26. Upon information and belief, Counter-defendant EMI Music North America, LLC is a Delaware limited liability company with its principal place of business in New York, New York.

27. Upon information and belief, Counter-defendants are collectively referred to herein as "EMI" or "Counter-Defendants."

#### **JURISDICTION AND VENUE**

28. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure seeking a declaration of rights and/or other legal relations of the parties to this litigation with respect to a substantial controversy arising under the

copyright laws of the United States, 17 U.S.C. § 101 *et seq.* This action also seeks relief according under Section 512(f). This action further seeks injunctive relief prohibiting defendants from engaging in unfair, illegal, and deceptive business acts and practices.

29. This Court has jurisdiction over the subject matter of this action pursuant to the Copyright Act (17 U.S.C. § 101 *et seq.*); 28 U.S.C. §§ 1331, 1338; the Declaratory Judgment Act (28 U.S.C. § 2201); and 28 U.S.C. §1367.

30. This Court has personal jurisdiction over plaintiffs/Counter-defendants Capitol Records, Inc.; Caroline Records, Inc.; EMI Christian Music Group Inc.; Priority Records LLC; Virgin Records America, Inc.; Beechwood Music Corp.; Colgems-EMI Music Inc; EMI April Music Inc.; EMI Blackwood Music; EMI Full Keel Music; Emi Golden Torch Music Corp.; EMI Longitude Music; EMI Virgin Music, Inc.; EMI Virgin Songs, Inc., who have waived any right to challenge jurisdiction by filing the above-captioned lawsuit before this Court.

31. This Court has personal jurisdiction over Counter-defendants EMI Group, Ltd; EMI Group North America, Inc.; EMI Group North America Holdings, Inc.; and EMI Music North America, LLC, all of whom are believed to have a principal place of business and/or are transacting business in this District.

32. Although disputed by MP3tunes, this Court has held that Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400(a).

#### **JOINDER OF PARTIES**

33. Joinder of parties not previously party to this action is proper pursuant to Federal Rules of Civil Procedure Rules 13(h) and Rule 19 and/or Rule 20.

34. EMI Group, Ltd; EMI Group North America, Inc.; EMI Group North America Holdings, Inc.; and EMI Music North America, LLC are subject to service of process, do not deprive the Court of subject-matter jurisdiction and are necessary and proper parties to the claim

for relief, which is asserted jointly and severally against all parties. Further, claims against these parties arise out of the same series of transactions and occurrences and involve common questions of fact and law.

### **THE BUSINESS OF MP3TUNES**

35. MP3tunes owns and operates MP3tunes.com and Sideload.com.

36. MP3tunes.com is a music service provider and offers registered users the Oboe software, and a personal music locker offering online storage. MP3tunes.com users can sync their personal music collections to enjoy them through any web browser, as well as through a growing number of home entertainment and mobile devices.

37. MP3tunes.com does not control or select the songs in an individual consumer's locker and instead merely provides online storage space for such music. Consumers can organize, add and delete songs as they choose. While MP3tunes.com can identify the songs in a consumer's locker, it has no means of determining where the track came from (*i.e.* from another website, from a CD that the user owns or elsewhere). Only the individual consumer can access his or her own particular songs from the consumer's locker.

38. Sideload.com is a website owned and operated by MP3tunes that aggregates links to free music on the Internet. The links listed on Sideload.com are designated and posted by users of the Sites. Consumers can listen to songs on third-party websites using the Sideload.com media player and "sideload" those tracks into their personal lockers at MP3tunes.com. MP3tunes plays no role in which songs are designated for Sideload.com by users of the Sites. None of the songs designated by users for sideloading or listening are physically available on Sideload.com. Rather, what is provided is a hyperlink to a third-party website.

39. Until MP3tunes' recent receipt of the Notice (discussed below), MP3tunes believed that **all** of the songs on Sideload.com and in the consumer's personal lockers were non-

infringing songs. Before using Sideload.com and MP3tunes.com, consumers must agree to the Terms of Use set forth on both websites, which states that the user “acknowledge[s] that by uploading music or any other content to the Site, or requesting that music or any content be uploaded to [the user’s] account maintained on the Site, that [the user is] directing [MP3tunes] to store the file in the format in which it is uploaded and to convert and store it in the MP3 format, or such other format in which it may be converted by [MP3tunes]. [The user] agree[s] that [he/she] will not upload music and content, and will not request that any music or content be uploaded to [her/her] account maintained on the Site, that infringes the copyright or other intellectual property rights of any third party.”

40. The Terms of Use states further that “[u]nder the appropriate circumstances, it is MP3tunes’ policy to remove and/or to disable access from MP3tunes to web pages of repeat infringers, to terminate subscribers and account holders who are repeat infringers, and to remove and/or to disable access from MP3tunes to web pages as to which there have been steps taken for the purpose of affecting MP3tunes’s search results such as adding inappropriate ‘meta-tags.’”

41. Thus, until recently, MP3tunes believed that all of the songs on Sideload.com and in the consumer’s personal lockers were non-infringing songs. Indeed, MP3tunes still believes that the songs currently in the consumer’s personal lockers are non-infringing and MP3tunes has no basis to believe, and no means of determining, otherwise.

42. For the reasons set forth below, MP3tunes cannot continue to operate MP3tunes.com, Sideload.com and the Oboe lockers without fear of crippling litigation until this action is resolved.

#### **EMI’S ACTIONS**

43. On September 4, 2007, September 18, 2007, and October 25, 2007, EMI, through its counsel, sent Notice, which was deficient under the DMCA, to MP3tunes alleging that

MP3tunes, through its websites MP3tunes.com and Sideload.com and its “Oboe Software Suite” “is copying and storing to its servers, indexing, publicly performing, and making available for download hundreds (if not thousands) of [EMI’s] copyrighted recordings in violation of the Copyright Act.” A true and correct copy of the Notice is attached hereto as Exhibit A.

44. The Notice is deficient for a number of reasons. First, it fails to identify the party represented by Jenner & Block LLP sending the Notice. To the contrary, the Notice identifies only divisions of EMI Group Limited, but not legal entities. To date, the EMI entity that served the deficient Notice is unknown. On information and belief, the parties the Notice purported to represent include some or all of Counter-Defendants.

45. Second, the Notice falsely states that “[f]or a variety of reasons, MP3[t]unes is not protected by any of the ‘safe-harbors’ of the Digital Millennium Copyright Act (‘DMCA’).” To the contrary, MP3tunes.com and Sideload.com are service providers as defined in 17 U.S.C. § 512(k) and their conduct falls within the enumerated categories of §§ 512(a), (b), (c) and/or (d).

46. Third, with the exception of approximately 350 songs about which EMI properly notified MP3tunes pursuant to 17 U.S.C. § 512(c)(3)(A)(ii) by enclosing a CD-ROM listing the songs and website locations which EMI’s alleged infringed the copyrights of EMI and/or parties it allegedly represents, the remainder of the Notice was deficient. As to the songs that EMI properly identified on the list enclosed with the Notice, those songs were immediately removed from Sideload.com and EMI was promptly notified of this.

47. However, the Notice stated further that the “enclosed representative list reflects only a small portion of the total number of infringing EMI works contained on MP3[t]unes, with more being copied and made available daily. Accordingly, pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), based on EMI’s representative list, MP3[t]unes is obligated to remove all of

EMI's copyrighted works, even those not specifically identified on the attached. A non-exhaustive further listing of EMI's recording artists can be found at <http://www.emigroup.com/About/Music/Default.htm>."

48. This notification was inadequate under the DMCA. The Notice did not specifically identify the material that is to be removed or access to which is to be disabled as required by 17 U.S.C. § 512(c)(3)(A)(iii).

49. Moreover, EMI failed to conduct any investigation to confirm whether the links listed in the Notice were associated with infringing works. Even a cursory review of the links listed in the Notice reveals that numerous links are not associated with infringing works. For example, some of the artists on EMI's list and/or on the EMI Group's website are no longer represented by EMI, and numerous songs listed on the enclosure to the Notice are freely available for authorized digital download from music stores, music magazines, music festivals, promotional sites, TV sites, and even directly from the artist's own web site. For example, the first band that is listed in EMI's spreadsheet is "Air." MP3tunes features an "Air" track – "Once Upon A Time" – on the first page of Sideload.com. That track is from the popular online music magazine, *Filter*, and is accessed by the URL <http://filter-mag.com/index.php?id=13977&c=6>. Thus, MP3tunes has no reason to believe that the *Filter* track is anything but lawful. Nevertheless, MP3tunes removed this track from availability for sideloading as per EMI's demand. Another example is the promotional track that appears to be associated with Amazon.com: <http://anon.amazon.speedera.net/anon.amazon/mp3/The%20Concretes-Sugar.mp3>. Amazon is clearly a reputable, authorized retailer of digital music. Other links included in the Notice that appear to be authorized by EMI for free download include links from the MTV2 website, which offers numerous authorized free music downloads:

[http://a1926.g.akamai.net/downloadstor.download.akamai.com/mtv2.com/downloads/mp3/u/underoath/underoath-its\\_dangerous\\_business\\_walking\\_out\\_your\\_front\\_door.mp3](http://a1926.g.akamai.net/downloadstor.download.akamai.com/mtv2.com/downloads/mp3/u/underoath/underoath-its_dangerous_business_walking_out_your_front_door.mp3).

50. Similarly, EMI's list also includes the track "Nobody Move, Nobody Get Hurt" by the band "We Are Scientists" from the URL [http://media.spin.com/features/band\\_of\\_the\\_day/audio/2005/11/nobody\\_move\\_nobody\\_get\\_hurt\\_hi.mp3](http://media.spin.com/features/band_of_the_day/audio/2005/11/nobody_move_nobody_get_hurt_hi.mp3). *Spin* is a popular online music magazine. All the labels distribute MP3s promotionally. MP3tunes believes that it is likely that this track is such a promotional distribution and is lawfully available. The same is true for the tracks that EMI lists from the *Paste Store*:

<http://www.pastestore.com/radio/OverTheRhine-IRadioHeaven.mp3>;

<http://www.pastestore.com/radio/OverTheRhine-Suitcase.mp3>

<http://www.pastestore.com/radio/OverTheRhine-Born.mp3>; and,

<http://www.pastestore.com/radio/OverTheRhine-NobodyNumberOne.mp3>. Paste Store is a store which often distributes promotional tracks provided to them.

51. Still additional links to *Artist Direct*, an online music retailer and promoter, were wrongfully listed in the Notice: <http://assets.artistdirect.com/Downloads/artd/listen/cracker-low.mp3>.

52. There were also several songs listed from the SXSW (South by Southwest) website. The SXSW MUSIC AND MEDIA CONFERENCE features a legendary festival showcasing more than 1,800 musical acts of all genres from around the globe on over eighty stages in downtown Austin and offers free promotional downloads for artists featured at the festival. For example, [http://audio.sxsw.com/2006/mp3/Morningwood-Nth\\_Degree.mp3](http://audio.sxsw.com/2006/mp3/Morningwood-Nth_Degree.mp3), [http://audio.sxsw.com/2006/mp3/Gemma\\_Hayes-Hanging\\_Around.mp3](http://audio.sxsw.com/2006/mp3/Gemma_Hayes-Hanging_Around.mp3), and [http://audio.sxsw.com/2006/mp3/KT\\_Tunstall-Black\\_Horse\\_and\\_the\\_Cherry\\_Tree.mp3](http://audio.sxsw.com/2006/mp3/KT_Tunstall-Black_Horse_and_the_Cherry_Tree.mp3).



53. Links were also included from promotional companies such as ToolShed, which is billed as an online promotion for independent records: <http://www.toolshed-media.com/ts/cracker-low.mp3>.

54. The links referenced herein are not exhaustive, but merely examples of the many links that EMI represented as being associated with infringing copies of their alleged copyrighted works, which were not, in fact, infringing.

55. Nevertheless, MP3tunes removed these tracks from availability for sideloading as per EMI's demand.

56. EMI knowingly materially misrepresented that certain material on the Sites - such as the aforementioned material - was infringing in violation of 17 U.S.C. § 512(f)(1) when it was not.

57. By sending the Notice, EMI engaged in an unfair, deceptive, or illegal business act or practice in that they were aware that their conduct violated 17 U.S.C. § 512(f). EMI routinely illegally engage in such practices to illegally and unfairly further their business interests. EMI will not stop these illegal practices unless and until they are enjoined by the Court.

58. EMI's Notice was only directed towards tracks on Sideload.com, although it sought relief with respect to Oboe and consumers' lockers on MP3tunes.com. The list enclosed with the Notice only specified allegedly infringing tracks that could be removed from Sideload.com and did not specify any possible infringements within individual consumers' lockers.

59. The Sites are fully protected by the DMCA.

60. In connection with the transmitting, routing, or providing connections for,



material through the Sites controlled by MP3tunes, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections, the transmission of the material found on the Sites is not initiated by or at the direction of MP3tunes and instead is initiated at the direction of the user.

61. In connection with the transmitting, routing, or providing connections for, material through the Sites controlled by MP3tunes, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections, the transmission, routing, provision of connections, or storage of the material found on the Sites is carried out through an automatic technical process without selection of the material by MP3tunes.

62. In connection with the transmitting, routing, or providing connections for, material through the Sites controlled by MP3tunes, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections, MP3tunes does not select the recipients of the material on its Sites, except as an automatic response to the request of another person.

63. In connection with the transmitting, routing, or providing connections for, material through the Sites controlled by MP3tunes, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections, no copy of the material made by MP3tunes in the course of its intermediate and transient storage of the material on its Sites is maintained on the system or network in a manner ordinarily accessible to anyone other than the anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections.

64. In connection with the transmitting, routing, or providing connections for, material through the Sites controlled by MP3tunes, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections, the material on the Sites is transmitted through the system or network without modification of its content.

65. In connection with the transmitting, routing, or providing connections for, material through the Sites controlled by MP3tunes, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections, the material on the Sites is made available online by a person or website other than MP3tunes' Sites.

66. The intermediate and temporary storage of the material on the Sites is transmitted from a person or website other than MP3tunes through the system or network to a user at the direction of the user.

67. The intermediate and temporary storage of the material on the Sites is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described above, request access to the material from the person described above.

68. The intermediate and temporary storage of the material on the Sites is transmitted to the subsequent users without modification to its content from the manner in which the material was transmitted from the person or website described above.

69. When MP3tunes learns the person or website set forth above has made material available online without the authorization of the copyright owner of the material, MP3tunes responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement.

70. Before receiving the Notice, MP3tunes did not have actual knowledge that the material posted and/or stored on the Sites at the direction of users was infringing.

71. MP3tunes does not now have actual knowledge that the material posted and/or stored on the Sites at the direction of users was infringing.

72. Before receiving the Notice, MP3tunes was not aware of facts or circumstances relating to the material posted and/or stored on the Sites at the direction of users from which infringing activity is apparent.

73. MP3tunes is not now aware of facts or circumstances relating to the material posted and/or stored on the Sites at the direction of users from which infringing activity is apparent.

74. Upon obtaining knowledge or awareness that the material posted and/or stored on the Sites at the direction of users is infringing, MP3tunes acts expeditiously to remove, or disable access to, the allegedly infringing material and did so in this instance.

75. MP3tunes does not receive a financial benefit directly attributable to the material posted and/or stored on the Sites at the direction of users and MP3tunes does not have the right and ability to control such activity, other than to terminate the user's ability to use the Sites.

76. Upon notification of claimed infringement as described in 17 U.S.C. § 512(c)(3) as to the material posted and/or stored on the Sites at the direction of users, MP3tunes responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity and has done so in this instance.

77. MP3tunes has designated an agent to receive notifications of claimed infringement described in 17 U.S.C. § 512(c)(3).

78. When MP3tunes receives a notification that includes substantially the following it

expeditiously complies with its obligations under the DMCA: (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (ii) identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site; (iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; (iv) information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted; (v) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (vi) a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

79. MP3tunes does not now have actual knowledge that the Sideload.com website links users to online locations containing infringing material or activity and did not have such knowledge before receiving the Notice. When MP3tunes has such knowledge, MP3tunes acts expeditiously to remove, or disable access to, the material and did so in this instance.

80. MP3tunes is not now aware of facts or circumstances from which it is apparent that the Sites link users to online locations containing infringing material or activity and was not aware of such facts or circumstances before receiving the Notice. When MP3tunes becomes aware of such facts or circumstances, MP3tunes acts expeditiously to remove, or disable access to, the material and did so in this instance.

81. MP3tunes does not receive a financial benefit directly attributable to any link to online locations containing infringing material and MP3tunes does not have the right and ability to control such activity absent the overbroad termination of the user's ability to use the Sites.

82. Upon notification of claimed infringement as described in 17 U.S.C. § 512(c)(3) as to any links the Sites have to online locations containing infringing material, MP3tunes responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity and has done so in this instance.

83. MP3tunes is an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received and/or a provider of online services or network access, or the operator of facilities therefor.

84. MP3tunes did not and does not (1) directly infringe EMI's alleged copyrights; (2) have knowledge of any infringement of EMI's alleged copyrights; or (3) make a material contribution to any infringement of EMI's alleged copyrights.

85. MP3tunes did not and does not set up its Sites with the intent to encourage copyright infringement.

86. After receiving the Notice, despite its deficiencies, MP3tunes contacted EMI's counsel and was informed that the matter was unlikely to be settled absent a substantial monetary payment.

87. In response to the Notice, on September 13, 2007, MP3tunes' counsel responded by: (i) notifying EMI that its Notice was deficient (ii) notifying EMI that the approximately 350 songs about which EMI properly notified MP3tunes about had been removed from

Sideload.com; and (iii) requesting that EMI send a list of additional tracks to which EMI (and the labels it purports to represent) own the copyrights, provide information reasonably sufficient to permit MP3tunes to locate the material, and accurately represent that the listed tracks are not legally digitally available for copying (along with the remaining required elements of 17 U.S.C. § 512(c)(3)(A)), so that MP3tunes could disable those songs from sideloading as well. A true and correct copy of this letter is attached hereto as Exhibit B.

88. On September 18, 2007, in response to the aforementioned letter, EMI's counsel responded by claiming that MP3tunes' interpretation of the DMCA was wrong and that if "MP3tunes has made an informed decision to litigate the issue of its copyright liability, so be it." *See* Exhibit A.

89. As a result, there exists a substantial controversy between MP3tunes and MP3tunes as to whether MP3tunes's activities on MP3tunes.com, Sideload.com and Oboe will subject it to liability to EMI for copyright infringement.

**FIRST CLAIM FOR RELIEF**  
**(DECLARATORY JUDGMENT)**

90. MP3tunes repeats and realleges paragraphs 1 through 89 above, as if fully set forth herein.

91. Declaratory relief is warranted because the facts herein show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant relief. Specifically, there exists a substantial controversy between MP3tunes and EMI as to whether MP3tunes activities constitute direct or indirect copyright infringement.

92. Accordingly, MP3tunes seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure that: (i) MP3tunes.com and

Sideload.com are service providers as defined in the DMCA, 17 U.S.C. § 512(k); (ii) the conduct by MP3tunes.com and Sideload.com challenged by EMI in the Notice falls within the protections of §§ 512(a), (b), (c) and/or (d); (iii) the Notice served on MP3tunes was deficient under 17 U.S.C. §§ 512(c) and/or (d); (iv) to the extent the Notice was not deficient, MP3tunes complied with its obligations under 17 U.S.C. §§ 512(c) and/or (d); and (v) the activities of Sideload.com, MP3tunes.com and Oboe complained of by EMI in the Notice do not constitute direct copyright infringement, contributory copyright infringement and/or inducement of copyright infringement.

### **SECOND CLAIM FOR RELIEF**

#### **(VIOLATION OF THE DMCA, 17 U.S.C. § 512(f))**

93. MP3tunes repeats and realleges paragraphs 1 through 92 above, as if fully set forth herein.

94. In its Notice, EMI knowingly materially misrepresented that certain material on the Sites was infringing in violation of 17 U.S.C. § 512(f)(1) when it was not.

95. MP3tunes has been injured by EMI's misrepresentations because (1) it relied upon such misrepresentations and removed or disabled access to the allegedly infringing material; and (2) MP3tunes was forced to bring this action as a result of the inaccuracies and deficiencies in EMI's Notice.

96. Pursuant to 17 U.S.C. § 512(f), as a result of such knowing material misrepresentations, EMI shall be liable for any damages, including costs and attorneys' fees, incurred by MP3tunes.

### **THIRD CLAIM FOR RELIEF**

#### **(DECEPTIVE BUSINESS PRACTICES)**

97. MP3tunes repeats and realleges paragraphs 1 through 96 above, as if fully set



forth herein.

98. EMI's acts hereinabove alleged are acts of unfair or unlawful deceptive business acts or practices within the meaning of New York General Business Law Section 349.

99. On information and belief, EMI's deceptive acts or practices were willful and/or in knowing violation of New York General Business Law Section 349.

100. MP3tunes has suffered damages as a result of EMI's unfair or unlawful deceptive acts or practices and MP3tunes will continue to be harmed unless the Court orders EMI to cease and desist.

**FOURTH CLAIM FOR RELIEF**

**(COMMON LAW UNFAIR COMPETITION)**

101. MP3tunes repeats and realleges paragraphs 1 through 100 above, as if fully set forth herein.

102. EMI's acts hereinabove alleged are acts deceptive business acts or practices under New York common law.

103. MP3tunes has suffered damages as a result of EMI's deceptive business acts or practices.

104. MP3tunes is informed and believes that the EMI will continue to do those acts unless the Court orders them to cease and desist.

**FIFTH CLAIM FOR RELIEF**

**(VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200, ET SEQ)**

105. MP3tunes repeats and realleges paragraphs 1 through 104 above, as if fully set forth herein.

106. EMI's acts hereinabove alleged are acts of unfair, unlawful, or deceptive business acts or practices within the meaning of California Business and Professions Code Section 17200,



et seq.

107. MP3tunes is informed and believes that the EMI will continue to do those acts unless the Court orders them to cease and desist.

WHEREFORE, MP3tunes respectfully requests that this Court enter judgment in its favor and against EMI, as follows:

A. On the First Claim for Relief, a declaratory judgment that:

1. MP3tunes.com and Sideload.com are service providers as defined in the DMCA, 17 U.S.C. § 512(k);

2. the conduct by MP3tunes.com and Sideload.com challenged by EMI in the Notice falls within the protections of §§ 512(a), (b), (c) and/or (d);

3. the Notice served on MP3tunes was deficient under 17 U.S.C. §§ 512(c) and/or (d);

4. to the extent the Notice was not deficient, MP3tunes complied with its obligations under 17 U.S.C. §§ 512(c) and/or (d); and

5. the activities of Sideload.com, MP3tunes.com and Oboe complained of by EMI in the Notice do not constitute direct copyright infringement, contributory copyright infringement and/or inducement of copyright infringement; and

B. On the Second Claim for Relief:

1. awarding MP3tunes its actual damages;

2. an additional award to MP3tunes of treble damages according to statute;

and

3. awarding MP3tunes its costs and attorneys' fees.

C. On the Third Claim for Relief:

1. awarding MP3tunes its actual damages and/or statutory damages;
2. awarding treble damages;
3. attorney's fees; and
4. entering a temporary and permanent injunction prohibiting EMI and the EMI's agents, servants, and employees, and all persons acting under or in concert with them, to cease and desist from engaging in unfair or unlawful deceptive business acts or practices as herein alleged;

D. On the Fourth Claim for Relief:

1. awarding MP3tunes its actual damages; and
2. entering a temporary and permanent injunction prohibiting EMI and the EMI's agents, servants, and employees, and all persons acting under or in concert with them, to cease and desist from engaging in unfair or unlawful deceptive business acts or practices as herein alleged;

E. On the Fifth Claim for Relief:

1. entering a temporary and permanent injunction prohibiting EMI and the EMI's agents, servants, and employees, and all persons acting under or in concert with them, to cease and desist from engaging in unfair, unlawful, or deceptive business acts or practices as herein alleged;

2. ordering EMI to disgorge any profits that they have earned as a result of their illegal activities;

F. Granting MP3tunes such other, further and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

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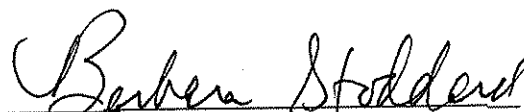
Dated: October 14, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of Defendant's Answer, Affirmative Defenses, and Counterclaims with Jury Demand to be served by electronic service via ECF this 14<sup>th</sup> day of October, 2008:

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