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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.)

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

 MP3TUNES, INC.,)

Counterclaimant,)

v.)

CAPITOL RECORDS, INC.; *et al.*)

Counter-Defendants.)

**DECLARATION OF MICHAEL ROBERTSON IN OPPOSITION TO
 EMI'S MOTION TO DISMISS AND REQUEST FOR RECONSIDERATION
 OF THE DENIAL OF ITS MOTION TO STAY DISCOVERY**

I, MICHAEL ROBERTSON, hereby declare as follows:

1. I am the Chief Executive Officer of MP3tunes, Inc. (“MP3tunes”), the defendant and counterclaimant in this action. On behalf of MP3tunes, I respectfully submit this declaration in opposition to the motion of the counter-defendants (together, “EMI”) to dismiss MP3tunes’ Counterclaims. Specifically, MP3tunes wishes to provide the Court with additional information which MP3tunes only discovered subsequent to the filing of its Counterclaims.

BACKGROUND

2. On or around September 4, 2007, MP3tunes received a cease and desist letter from “EMI Music Group North America” with an enclosed CD-ROM which contained a spreadsheet listing approximately 350 song titles with artist names and a URL for websites that EMI claimed infringed its copyrights. Numerous URLs listed in the September 4, 2007 letter clearly were not infringing as they were links to well known and reputable music magazines such as *Filter*, *Spin*, and *Paste Store*. Nevertheless, relying upon EMI’s notice, MP3tunes promptly removed all of the URLs listed in the September 4, 2007 letter.

3. Thereafter, on or around October 25, 2007, MP3tunes received two further cease and desist letters from “EMI Music Group North America” and “EMI Entertainment World.” Despite the apparent deficiencies and misrepresentations in these letters, MP3tunes once again promptly disabled all the songs listed in both letters. MP3tunes did so because it was aware that under the Digital Millennium Copyright Act (DMCA), EMI was required to certify that it had a good faith belief that use of the material in the manner complained of was not authorized by EMI, and swear under penalty of perjury the complaining party was authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. Indeed, all of EMI’s letters had language to that effect. For example, EMI represented in its September 4, 2007 letter that: “EMI

has not authorized any of its recordings to be copied, distributed, or performed in this manner on or by MP3Tunes or its users.” (Emphasis in original.)

4. In order to be able to resolve any prospective disputes without resort to wasteful litigation, MP3tunes made a proposal to EMI that if EMI complied with its obligations under the DMCA by providing a list of tracks to which EMI owned the copyright, providing information reasonably sufficient to permit MP3tunes to locate the material, and accurately represent that the listed tracks are not legally available for downloading, then MP3tunes would disable the songs from its website. EMI declined the offer.

5. Even though MP3tunes promptly took down links to each and every song listed in EMI’s letters, and notified EMI that it had done so, EMI took the position that those lists were only “a small portion of the total number of infringing EMI works contained on MP3Tunes” and that, “pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), based on EMI’s representative list, MP3Tunes is obligated to remove all of EMI’s copyrighted works, even those not specifically identified on the attached.” (Emphasis added).

6. Because MP3tunes declined to remove all of the links to every EMI-copyrighted song known to exist, EMI sued MP3tunes, and me personally, although this Court has since dismissed the claims filed against me. EMI continues to takes the position that all EMI songs on the Internet are infringing, and thus MP3tunes must remove links to them all.

**NEWLY DISCOVERED INFORMATION #1 –
EMI’S USE OF CONTENT DELIVERY NETWORKS TO
DISTRIBUTE FREE MUSIC OVER THE INTERNET**

7. As MP3tunes learned more about EMI’s extensive use of the Internet to distribute free music, it came to realize that EMI had not been truthful when it claimed in its take-down notices, under penalty of perjury, that it had not authorized “any of its recordings” to be on the

Internet. Viewing this as an attempt to disrupt its business, MP3tunes filed Counterclaims with the facts it had at that time, without the benefit of discovery. Since then, MP3tunes has come to learn much more about EMI's business practice of deliberately placing non-copy-protected music on the Internet, which has only reconfirmed the belief that EMI's demand that MP3tunes remove all links to such songs was knowingly false and made in bad faith.

8. It has long been known, as a general matter, that the major labels employ free promotional MP3s as a marketing and sales tool for both new and established artists. What MP3tunes recently learned, however, is that EMI is probably one of the most aggressive labels when it comes to MP3 promotion. EMI distributes files from its own record label sites, from a wide range of music-related websites, and (because the demand is so high) they actually have contracts with CDN (content delivery networks) like Akamai to circulate music files for them. This year, EMI successfully gave away an MP3 for "I Kissed A Girl" by Katy Perry which helped propel that song to #1 on both iTunes and Billboard charts.

9. Last month, MP3tunes learned EMI has entered into commercial relationships with several Content Delivery Networks (CDNs). These are private, third-party companies that are paid to distribute materials such as MP3s over the Internet. The biggest and most prominent CDN is a company called Akamai, which uses the brand "edgeboss" to market its technology service. It is clear that EMI has one or more accounts with Akamai to distribute its music over the Internet for free. MP3tunes has discovered on the Internet several EMI-copyrighted songs available for download with Akamai URLs.

10. One prominent example is the song "U R So Gay" from the aforementioned Katy Perry, who is signed to Capitol Records, which in turn is owned by EMI. While this is one of the

thousands of songs EMI is suing MP3tunes for linking to on its Sideload.com web site, everyone else in the world is free to listen to and download the song from the following URL:

http://capi001.edgeboss.net/download/capi001/katyperry/audio/katyperry_usogay.mp3

11. In the above-referenced URL, “edgeboss.net” is the domain name. As explained above, it is the brand name for Akamai, the CDN that EMI pays to distribute its music, for free, over the Internet. Just before that, “capi001” reflects that EMI’s Capital Records has an account with Akamai for music distribution. Here are some other examples of EMI songs which Akamai currently distributes over the Internet, free to everyone (except, apparently, MP3tunes):

- Lil’ Ru, “Don’t I Look Good” (EMI’s Capitol Records)
http://capi001.edgeboss.net/download/capi001/lilru/dontilookgood/lil_ru_dont_i_look_good_cl.mp3
- Beastie Boys, “Car Thief A Capella” (EMI’s Capitol Records)
http://capi001.edgeboss.net/download/capi001/beastieboys/misc/acapella/Car_Thief_A_Cappella.mp3?ewk13=1
- Doves, “Sky Starts Falling” (EMI’s Capitol Records)
<http://capi001.edgeboss.net/download/capi001/doves/skystartsfalling/audio/skystartsfalling.mp3>
- Seth Lakeman, “King and Country” (EMI’s Relentless Records)
http://angel.edgeboss.net/download/angel/seth_lakeman_audio/digitalep/king_and_country_128k.mp3
- XX Teens, “Darlin Original” (EMI’s Mute Records)
http://mute.edgeboss.net/download/mute/xx_teens/darlin_original.mp3
- Moby, “Moby Last Night” (EMI’s Mute Records)
http://mute.edgeboss.net/download/mute/moby/mobylastnight_sampler.mp3

MP3tunes also has several examples of music that EMI has distributed for free over the Internet in the past, but has removed from the Internet since the start of this litigation.

12. In addition, MP3tunes has since found EMI-copyrighted songs on the Internet with URLs indicating that they were distributed by CoralCDN and Nine Systems, two other paid

services which, like Akamai, distribute free MP3s for download over the Internet. MP3tunes firmly believes that, once discovery proceeds, more such services will be found.

**NEWLY DISCOVERED INFORMATION #2 –
EMI’S USE OF WEB SITES UNDER ITS CONTROL TO
DISTRIBUTE FREE MUSIC OVER THE INTERNET**

13. Since MP3tunes filed its Counterclaims, and without the benefit of discovery, it has also come to learn that EMI makes extensive use of its own web sites to distribute free music downloads. This fact was mentioned briefly in the Counterclaims, but there is now additional, more specific information. Indeed, among the record label sites owned by EMI which distribute free MP3 files are EMI Chrysalis, Definitive Jux Records, Siren Records, Parlophone, Bec Recordings, and Mute Record. Here are examples of actual EMI-copyrighted songs currently available for free download to everyone (except, apparently, MP3tunes):

- Vincent Vincent and the Villains, “I’m Alive ” (EMI Chrysalis)
<http://www.emichrysalis.co.uk/vincentvincentandthevillains/music/track0.mp3>
- Hercules and Love Affair, “Hercules Theme” (EMI Chrysalis)
http://emichrysalis.co.uk/herculesandloveaffair/downloads/16_11_07/Hercules_Theme.mp3
- Aesop Rock “Ghosts of The Barbary Coast” (EMI’s Definitive Jux Records)
<http://www.definitivejux.net/store/catalog-product/US-A4T-04-173-00.html>
- Goldenhorse, “Don’t Wake Me Up” (EMI’s Siren Records)
<http://goldenhorse.co.nz/mp3s/Dont%20Wake%20Me%20Up.mp3>
- Goldenhorse, “Fish” (EMI’s Siren Records)
<http://goldenhorse.co.nz/mp3s/Fish.mp3>
- Sparklehorse, “Shade and Honey” (EMI’s Parlophone Records)
<http://www.parlophone.co.uk/sparklehorse/download.php?FILENAME=shadeandhoney.mp3&DOWNLOAD=1>
- Mailers, “Morning Runner” (EMI’s Parlophone Records)
http://www.parlophone.co.uk/mailers/morningrunner/Cant_Get_It_Right.mp3

- Baby Shambles, “Lost Art of Murder” (EMI’s Parlophone Records)
http://www.parlophone.co.uk/babyshambles/timesdownload/download.php?DOWLOAD=1&FILENAME=babyshambles-lost_art_of_murder.mp3
- Chris Taylor, “Take Me Anywhere” (EMI’s Bec Recordings)
<http://www.becrecordings.com/christaylor/1.mp3>
- Chris Taylor, “That’s How It Goes” (EMI’s Bec Recordings)
<http://www.becrecordings.com/christaylor/2.mp3>
- Michael Andrews and Gary Jules, “Mad World” (EMI’s Mute Records)
<http://www.radiomute.com/rmmusic/fieldrecordings-mad%20world.mp3>

Please note that these too are just examples. There are hundreds, if not thousands, of other EMI-copyrighted songs on such sites which fit this category.

**NEWLY DISCOVERED INFORMATION #3 –
EMI’S USE OF MUSIC BLOGS TO DISTRIBUTE
FREE MUSIC OVER THE INTERNET**

14. Lastly, since the filing of the Counterclaims, MP3tunes has examined the songs listed on EMI’s take-down notice in greater detail, and has discovered that over 140 of the links are to music blogs and related online sites. MP3tunes has further learned that record companies such as EMI are often well aware that such sites post downloads but either choose to ignore them or, in many cases, openly cooperate with and license them, because exposure of artists on such web sites can lead to increased sales. Here is a list of such sites which hosts songs EMI that now alleges Sideload was linking to improperly:

Acme Rock
Aekituesday
Amazon
Archive.org
ArtistDirect
AudioBlog
Beatles Mania
Beatles Number9
Beatle Collectors
Belly Bongo

Bubblegum-Machine
Can You See The Sunset
Carla Bozulich
Central Village
Combo Plates
Conch Design
Contradictator
Crispy Tomato
Daily Refill
DJBox
Duke of Straw
eSnips
Feed Me Good Tunes
Freshbread
Fule Friends
Fusion Think
Fuzzy Lion
Google
GriffinBodiKrause
Hipcast
I Guess I'm Floating
Indietastic
Juno Records
London Lee
Mark Vidler / Go Home Productions
Mars Needs Guitars
McSleazy
Merry Swankster
Minneapolis Fucking Rocks
More Bounce Oz
Music Glob
MTV/MTV2
Odeo
Paste Store
Pop Muse
Pinzessin
Press The Button
Radio 879
Radio Free Internet
Rock Insider
Saturn5
Silly Pipe Dreams
Spin
Squeaky Fingers
StereoGum
SXSW (South by Southwest)

The Canal
The Crutch Blog
The Prettiest Pony
The Selector
Times New Radio (TNradio)
Toolshed
Tripod
Twylyght
Typepad
Ulik
Underrated Magazine
What Would Satan Do
Yellow Stereo
You ain't no picasso

* * *

15. In short, EMI has engaged in active marketing of its music directly and through hundreds if not thousands of online music partners. As a consequence, thousands of EMI songs are available on the Internet for free download with its authorization. Yet EMI is seeking to impose liability upon MP3tunes because it runs a search engine that links to many of the same files. MP3tunes respectfully requests that EMI's motion to dismiss be denied.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of December, 2008 at San Diego, California.

/s/ Michael Robertson

Michael Robertson

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served by electronic service via ECF this 30th day of December, 2008:

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