MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CAPITOL RECORDS, INC., et al.,

Plaintiffs,

v.

MP3TUNES, LLC.,

Defendant.

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New York, N.Y.

07 Civ. 9931 (WHP)

January 16, 2009
12:37 p.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

JENNER & BLOCK, LLP (NYC)
Attorneys for Plaintiffs
BY: ANDREW H. BART

DUANE MORRIS, LLP (NYC)
Attorneys for Defendant
BY: JOHN DELLAPORTAS
GREGORY P. GULIA

THE CLERK: The case on for argument, Capitol Records versus MP3tunes. Counsel for the plaintiff, please give your appearances.

MR. BART: Yes. Good afternoon, your Honor. Andrew Bart from Jenner & Block for the plaintiffs.

THE COURT: Good afternoon, Mr. Bart.

MR. BART: Good afternoon.

MR. DELLAPORTAS: Good afternoon, your Honor. John Dellaportas and Gregory Gulia from Duane Morris for the defendant.

THE COURT: Good afternoon, Mr. Dellaportas.

This is argument on the plaintiff's motion to dismiss the counterclaims. Do you want to be heard, Mr. Bart?

MR. BART: Yes, I would. Thank you, your Honor.

Your Honor, as this Court is aware, this case focuses on whether the operation of the MP3tunes Web sites, which were created for the stated purpose of allowing users to find free, and almost invariably infringing, copies of copyrighted materials, to make multiple copies of these illegal copies and store them constitutes a violation of copyright law.

THE COURT: Do you agree that if the plaintiffs distribute music for free on the Internet, your client distributes music for free on the Internet, the fact that those songs are somewhere on MP3tunes Web sites' is not infringement?

MR. BART: I think it still is infringement. I don't

think that is the subject matter of the counterclaims as they have been drafted or any of the allegations that are relevant to this motion. But what MP3tunes does is more than merely link to a site where there may be materials available on the Internet. For example, if EMI made a song available for stream, meaning that you can listen to it the way that you can listen to it on a radio, and they enabled a listener to make a permanent copy of that -- make multiple permanent copies of it to distribute it to all sorts of devices that the user has, that is absolutely an infringement.

The claims that exist in this case today, before the distractions that were put in in the opposition papers, do not address that at all. The opposition papers are a very transparent attempt to present to your Honor a very different claim than what is in the counterclaims themselves.

What the counterclaims present is what was presented to the California court. The counterclaims say, you know what, you gave us a take-down notice, that in the California case had 363 songs and now has 569 songs, and roughly 2 percent of those we allege were authorized, and, therefore, you have committed a knowing, material misrepresentation, we've been damaged. Those are the counterclaims.

Recognizing in part that there are all sorts of issues with those, which I'm prepared to address, but I'm trying to

circle back to your Honor's question, in the opposition papers,

the defendants ignore what's in the counterclaims and come back with a different story. They come back with a story that we have taken the position that any EMI song that's out on the Internet is infringing, which we've never said, and that, therefore, we're committing, you know, using a lot of hyperbole and a lot of terms that shouldn't be responsibly used, perjury, fraud, everything under the sun, to throw up a big smokescreen around what is really at issue in these counterclaims.

I am prepared to address what they say in the opposition papers because that is the focus of where they hope to go on a motion to amend, because as big a part of this pending application is the motion to amend, but I would like to start back with what's directly before the Court.

THE COURT: But didn't the take-down notice require that MP3tunes remove all EMI songs?

MR. BART: We demanded that they do that because we felt that their operations, by allowing them to copy and make copies, would continue to be a violation. They never complained with it, so there can't be a violation -- a counter claim based on taking down all of EMI's tracks either under Section 512(f) of the Digital Millennium Copyright Act or any state act, they refused to do that. So there was no reliance on our representation. There was no damage flowing from that.

They can argue all they want to, and we will argue in this case on the merits of the case, whether or not their Web

sites are infringing, but that's not what the counterclaim is about and that's not what's before your Honor at this point.

It's an attempt to get away from what is before your Honor at this time, which is a counterclaim saying we, MP3tunes, were damaged because we relied on the take-down notice and removed 300 or 500 tracks. That's what's before your Honor. They're saying they were damaged by doing that. All of the other allegations say you made allegations that we couldn't use any of your tracks can't be the basis for a counterclaim because they never listened to it. They dispute that. That's the basis for the underlying lawsuit.

The counterclaims are saying we relied on you, on your representations as to those specific tracks, we were damaged by that, and that's what we're suing on. And we're saying, in response to that, that they didn't allege any knowing violations. As the California Court said, even the ones that they alleged were authorized uses, they do by saying, as the Court said, "In identifying specific songs which defendants allegedly misrepresented as infringing, plaintiff alleges only

that plaintiff has no reason to believe that these tracks are anything but lawful and that plaintiffs believe it is likely that other tracks are promotional tracks. Therefore, plaintiff has not identified or alleged a single track as definitively lawful, noninfringing, and wrongfully included in the cease and desist letter."

They use the exact same language in the counterclaims that are presented to you.

The California Court went on to say that there are specific items that they complain about in their list which weren't even on the take-down list. Think weren't even clever enough to take those out of the counterclaims that are before your Honor. The very first allegation on a group called Air that they lead off with in their presentation to you was not even on the take-down list. So what the counterclaims are saying is you identified the certain number of claims -- of tracks that you said were infringing, we relied on your representation, we took them down, we were damaged.

We say that as a matter of law, that cannot constitute a counterclaim against us, because they haven't laid an adequate foundation for showing that there was a misrepresentation, that there was a knowing misrepresentation, that there was damage flowing from that misrepresentation, because it has to be as a result of taking it down they were damaged.

If you look at Section 512 of the Copyright Act, what it's trying do is to create a balance between the interests of the Internet service providers and the content owners. And it's saying that if you give us notice, we take it down, we rely on you, but in certain circumstances people can be hurt by taking it down. Let's say you're taking down content which was

somebody's business and that person no longer is able to sell their product because of a misrepresentation in the take-down notice, that's what Section 512(f) is talking about. If a business model or a business is damaged because content has been removed from the stream of commerce as a result of a knowing and material misrepresentation, it's actionable.

But what they're saying is anytime you make an allegation and provide a take-down notice, if we can make an allegation that, as far as we know, a couple of those tracks are lawful, you're liable to us and now we can sue you and we can make demands for your entire business operations and internal records and bombard you with discovery requests. And that's not what Section 512 was about and it would be a perversion of the intent of 512 to allow that to happen.

We provided a take-down notice in the hope that there would be an ability to resolve this before the litigation. Your Honor addressed that when we were fighting the battle over what court this was supposed to take place in, and they removed the specifically identified links but continued their business model of allowing and, indeed, encouraging and facilitating users to use the Web site to find infringing tracks.

THE COURT: Mr. Bart, just hold on for one moment.

MR. BART: Sure.

(Pause)

THE COURT: You can proceed. Let me say that I have a

criminal matter on very briefly, and when all the parties are ready on that matter, because it involves a lot of Marshal Service personnel, I am going to interrupt this matter, but it will be a brief interruption.

MR. BART: It is your Honor's courtroom; we are at your disposal.

THE COURT: OK. On this point, though, about damage, why isn't the cost of responding to a take-down notice itself a sufficient damage, as courts in the Northern District of California held?

MR. BART: Well, I believe that the damage itself, if you look at the statutory language, is damage resulting from the take-down -- not damage of the take-down, damage that is the cost of taking a link and dislinking it -- that's not proper English but that's --

THE COURT: Delinking it.

MR. BART: Delinking it, thank you.

As I said before, when you look at the statute, the statute talks about balancing the interests of the content provider as against the Internet service provider. And if there is somebody -- and it is not limited to the service provider, there could be another content provider outside. Let's say, I provided a take-down notice saying that certain material on a Web site is illegal, that that content belongs to a third party and by my take-down notice I basically put that

third party out of business. So as a result of the reliance on the take-down notice this party has been given a cause of action.

Similarly, if an Internet service provider's business is damaged as a result of taking something down, they are given a cause of action. But it's not -- it's easy enough to provide that the cost of take-down themselves, which are ministerial and not worthy of a separate claim, could have been put into the statute, that's not what the statute provides.

And, you know, obviously, in addition to the damages, you have the knowing violation and the materiality, neither of which are satisfied in this particular case.

THE COURT: All right.

MR. BART: Do you want to break here?

THE COURT: Yes. I am informed this is a good time.

You are going to have to step out of the well with your materials. This will be very short.

(Recess)

THE COURT: All right. Go ahead.

MR. BART: Thank you, your Honor.

The law is clear that complying with take-down notices is not a carte blanche for a commercial enterprise whose very operation is premised on infringement. These types of operations threaten the continued existence of the recording industry in this country.

Recognizing that this battle is not the one they want to fight, MP3tunes and its CEO, Michael Robertson, have attempted to redefine the focus of this dispute to an analysis of the technical accuracy of the take-down notices themselves, trying to make the victim the accused. As we discussed before the other argument, they started an action in California alleging that seven of the 364 tracks were in fact noninfringing. The Court determined specifically that that was not actionable, that they had not made specific allegations of knowing violations or material violations and, in fact, included materials, contained here as well, that weren't even on the take-down notice.

In the counterclaims before this Court, the defendant again alleges, on information and belief, or worse, the same sort of language, "we have no reason not to believe." It is sort of like your Honor's comment about making a nonspurious argument. The same percentage that the California court previously found to be nonmaterial and, again, including tracks that were not even on the take-down notice

And in opposition to the motion, MP3tunes essentially recognizes that the allegations in the counterclaim were insufficient, abandons them, and launches a defense based on allegations not contained in the counterclaims. Instead of a counterclaim based on 12 specific links, the claim made in the opposition papers is that because EMI allegedly authorized some

use of some of its copyrighted material on Web sites, it's not only precluded from seeking to protect its copyrighted material from unauthorized exploitation but is liable for damages if it has the temerity to do so.

The simple response is that this is not the counterclaim that they have asserted and it reflects a concession that the counterclaims as stated are deficient.

Factual allegations submitted by declaration in opposition to a motion to dismiss are simply not relevant to that motion. Moreover, the nearly hysterical charges made in the opposition papers, replete with the charges of perjury and fraud, are easily dismissed. They trumpet the charge that as many as 140 tracks on our list were, quote, expressly or implicitly authorized. But when you break through that language, those carefully chosen words, what they really are saying is they believe that there are 140 tracks on that list that came from music blogs or other Web sites, that is, other infringing copies, the very issue we're talking about, that they link to infringing copies on people's blogs, and that since we haven't gone after those blogs, since we haven't brought hundreds of other suits, that we have implicitly authorized. That's the basis of their new huge number stated not in a pleading and stated in a declaration without any factual background by Mr. Robertson.

To use an adage that is not as novel to me as the one

your Honor used, it's the example of when you have the facts, you bang the facts; when you have the law, you bang the law; and when you have neither, you bang the table. And the opposition papers from MP3tunes do an awful lot of table banging.

Even if they are granted leave to replead, that claim, too, will be dismissed simply because MP3tunes are not authorized to exploit infringing copies of our copyrighted works the way they do, the way that is integral to their business plan and operations. They are Web sites created to induce, facilitate and commit infringement, and nothing stated in a take-down notice provides a basis for changing the focus of the litigation.

They talk throughout their papers about how their Web sites allow users to upload copies of CDs that they own in their own private property. But when you go to the Web sites, what they advertise is this is the way to find free music on the Internet, to make copies of that free music, to distribute it to all of your devices. That is their business plan.

Finally, before getting to the specific counterclaims, which I'll address very quickly, I must expose a certain slight of hand they play with regard to our claims. In our take-down letters, we claim that, quote, we had not authorized any of our recordings to be copied, distributed or performed "in this manner" on or by MP3tunes. They try to recast those

allegations to say that each and every link to any EMI artist on Sideload was infringing, in other words, that the link itself was infringing. We've never said that. What we are saying is the use by MP3tunes of these links in their Web sites in this matter on or by MP3tunes was infringing.

And they go even further and take the position that we're contending that any free MP3 files on the Internet are infringing, which is simply absurd. It is not a position that we've ever taken. Our allegations focus on the operations of the defendants and never address whether all uses on the Internet are infringing, or whether or not we, as an owner of content, have a right to control and provide certain limited access as part of a promotional plan.

MP3tunes knows this. This is all smoke and mirrors, hoping to preserve some claims that Michael Robertson can trumpet weekly to the masses because this is public relations, not the law.

Very briefly, turning to the counterclaims themselves --

THE COURT: With respect to their counterclaim for a declaratory judgment, what's the harm to plaintiffs from allowing that declaratory judgment claim to stand at this stage if it raises issues that essentially are going to be in this case anyway? I mean, it is not going to have any impact on discovery.

MR. BART: Right. Clearly, as among the counterclaims, your Honor, that is the least offensive. We think it is duplicative and redundant, and we think that in many cases, including the Usenet case before Judge Baer recently, those claims were dismissed. But your Honor is right. I mean, it will not have a material impact on the scope of discovery or the processing of this claim. And if I walked out at the end of the day and your Honor maintained that and dismissed the other, I would be a happy counselor. So that's not really the issue.

The issues are the 512(f) counterclaim and the three state counterclaims.

With regard to the 512(f) counterclaims, we have addressed this a little bit before the break and I don't want to repeat myself too much, but what it requires is a knowing and material misrepresentation and that you are liable to a person injured by such misrepresentations as a result of the service provider relying on such misrepresentations and removing or disabling access.

Your Honor before the break asked me about a Northern District of California case which I believe is the Lenz case.

THE COURT: Right.

MR. BART: The Lenz case involves what I was talking about before. It involves somebody who was contending that her

interests -- she was not the Internet service provider. She

was somebody who uploaded a video and then because of the take-down notice her content was removed from the Internet. So there is nothing in that case suggesting that the cost of taking down something in a take-down notice is actionable under 512(f). What she's saying is I was damaged because you removed my content in response to somebody else's false 512 notice. So I think that's a distinguishable situation.

But I think what you have for the purposes of the instant motion, putting aside the allegations in Mr. Robertson's declaration that are not in the complaint, is you have 12 tracks that are not material, I believe, as a matter of law. And it really doesn't matter to me whether your Honor says it's law of the case or collateral estoppel or looks at it independently, I believe that your Honor will come to the same conclusion; the law is pretty clear on that. And, moreover, there is no factual allegation even supporting the notion that there were misrepresentations at all. All you have is a statement that we believe it is more likely than not or that we believe we are aware of no information suggesting that it's not authorized, language that's not sufficient to state a claim, certainly not a claim that it's a misrepresentation and certainly not a claims that it's a knowing violation by EMI.

So you don't have materiality. You don't have a misrepresentation. You don't have a knowing violation, and as I said in dealing --

THE COURT: On that point, why isn't -- and I may have asked you this before the break, but why isn't the demand that MP3 remove all EMI tunes a misrepresentation if in fact EMI knows that some of its tunes are available for free or offered for free on the Internet?

MR. BART: There are two answers to that. One is that -- the simple one is that they didn't rely on it, they didn't take it down, so there is no damage.

But the other one is that we can authorize free uses of our copyrighted material in certain specific ways. I gave you the streaming example beforehand. They can then make use of it and allow copies to be made of it, which is what we're contending in the take-down letter.

We're not contending that it is the mere fact that there is an EMI link up there that is the violation. We're saying that you do something with that link. You operate Web sites and operate them in a manner that we believe violates our rights to control our own copyrights. So about enabling people to click on a single link and go from that site, which may be

streaming it to make permanent copies, make 12 permanent copies for themselves and all their devices and who knows where else, is a violation of our rights. That's our allegation.

And the scope of that allegation is going to be decided by your Honor. It is a perfectly legitimate legal position for us to be taking.

But the simple fact is they never complied with it. They rejected it. They're fighting us on that point in this litigation. So clearly there is no damage resulting from that statement. That's something your Honor is going to determine as part of the litigation and can't be the basis for a 512 claim.

With regard to the New York -- I think the state claims are easily dismissible for a couple of reasons. One, they are trying to put a square peg in a round hole in each one of them and there are major flaws with trying to apply these statutes to these facts, but each one of them is based on the same notion. Each one of them, the factual predicate is the notion that 12 tracks out of 560-some-odd constitutes an unfair business practice or, you know, some sort of anticompetitive behavior. They haven't made adequate allegations. They haven't made an allegation of any one specific misrepresentation or of a knowing or of a material violation. They're just making the same allegations they made in the 512(f) case, which factually are not enough to state a claim.

You can go beyond that and say that under the New York Unfair Business Practices Statute, General Business Law 349, the Court of Appeals has made it very clear that it requires actions that are directed at consumers, materially misleading and damaging to the plaintiffs. That's the Oswego Laborers' case that requires broad impact on consumers at large. They

come back and try to suggest, well, there may be some impact on consumers -- not that there is but there may be -- if bloggers are shut down and that people, users are denied access to their MP3s.

First off, we have never asked for that to happen. Secondly, it never has happened. It never was a part of the take-down notice. It is purely fanciful and has nothing to do with what is actually taking place in this case.

Their other cause is that there is a public interest in having access and utilization of the Sideload search engine, which I would suggest is a form of legal grandiosity, that there is a public interest in their particular service. But, again, there has been no denial of access to that service, nor have we ever asked for there to be.

But again, it comes down to the factual predicate. Under New York common law, unfair competition, it is a misappropriation claim and the only party that's really had its product misappropriated is by us. We're not attempting to profit from their labors; they're profiting from our labors, which is why we are here in the first place.

The California Business and Professional Code requires unlawful, unfair, and that means either antitrust or anticompetitive or fraudulent behavior. And their own case that they cite there says that an unfair practice is sufficient to allege a violation of that section, require conduct that's

offensive to public policy or substantially injurious to consumers, which doesn't happen.

With regard to the stay, I think that, you know, we'll basically rest on our papers, that if this is decided promptly, either granting our motion and denying leave to amend or denying the motion, it's moot. If there is leave to amend, then I ask your Honor to reflect on just how different the scope of the discovery sought on these claims is from the claims relating to -- your Honor basically put your finger on it by drawing a distinction between the declaratory counterclaim and the other counterclaims. But at the end of the day, on a motion to dismiss, one of the factual allegations they are making, their factual allegations are insufficient to sustain any of their counterclaims and must be dismissed.

Thank you for your time.

THE COURT: Thank you, Mr. Bart.

Mr. Dellaportas.

MR. DELLAPORTAS: Good afternoon, your Honor. I will try to be brief and precise, knowing the time.

It's fairly extraordinary that in 2009, the record business is still trying to shut down a search engine, because that's all we are. You've heard a lot of this stuff in their pleadings and their arguments, that we distribute, that we download. We don't do any of that. We run two Web sites. One is side Sideload, that is the search engine. The other is

called MP3tunes, that's a locker. Mr. Bart just acknowledged that MP3tunes wasn't part of the take-down notice.

So all we're talking about here, to narrow the issue, is Sideload. Sideload dot-com is a search engine. It is like Google. You don't download anything using Sideload. You don't distribute music using Sideload. All it does is post links, the same way that Google does, in fact, the same way except where Google will give you one trillion results, Sideload will just give you the music results. It narrows it for the user.

It makes it more useable. But it's the same thing.
So that's what we're dealing with here is a search engine which posts links. And your Honor asked a very good question which I think cuts to the very heart of this, which is once they put something on the Internet for free, can we link to it? And if we're linking to it, can we be sued for infringement, can we be accused of infringement? The answer is absolutely no.
He says, well, you can limit the uses. That's right. If I take stuff off the Internet, print it out on CDs and open a store in the mall and start selling these CDs for ten dollars a pop, then they might have a claim. But here all we're doing is posting links. You've got to go to those other sites to get them. That's what we have been accused of here. It is very important to understand that that is it.
And then you have to look at their take-down

notices --
THE COURT: Let me ask you this. Why has it taken MP3tunes over a year to raise the issue regarding plaintiff's free distribution of certain tunes on the Internet?
MR. DELLAPORTAS: It hasn't, your Honor. We filed first. We filed in California. We hear how our briefs are different. It is not. If you look at our original pleading in California, we raised that. That's exactly what it was about. We didn't have as much detail as we do now, and the reason we didn't is because they are concealing it. They are concealing just how much they use the Internet and they are hiding it from discovery. But from our very first pleading in California, we have been alleging that they have put stuff on the Internet deliberately for promotional purposes. Now, we said we only had seven examples in the first pleading, and the judge in the first case, the court said that wasn't enough. We disagreed but we respect that. And now we have a lot more, and, you know, since then, just without the benefit of discovery, we have been able to get a lot more. We're up to 140 now. So that's about a third of the posts that they have given us.
But we have alleged from the very beginning, in our California pleading and in our initial -- in our pleading here --
THE COURT: The complaint only has 12, right?
MR. DELLAPORTAS: Yes, your Honor, it has 12 specific

ones because that's as much as we were able to find at that time without the benefit of discovery. We still haven't had the benefit of discovery but we've learned a few things since then. What we've learned since then is that EMI not only puts

stuff on the Internet for free download, they actually pay other companies, called content delivery networks -- they have a contract with the biggest one called Akamia -- to do that for them, because it is such a big task and it is such an important part of their promotional activities.

So we've been learning this on our own and that's without discovery, and without discovery we've already gotten 140. This is a bit of a burden shifting here. It is their obligation under the Digital Millennium Copyright Act to do a good faith investigation and to swear under penalty of perjury that everything they are saying in their notice is correct. It is not our obligation, it is their obligation. And they are taking shots that 140 out of 560 aren't enough and that we're not definitive enough in our statements, that is their obligation under the penalty of perjury.

I will go direct, your Honor, to the Perfect 10 case, which states this I think perfectly. This is the Ninth Circuit decision. It says, "The DMCA" -- Digital Millennium Copyright Act -- "requires the complainant to declare under penalty of perjury he is authorized to represent the copyright holder and that he has a good faith belief that the use is infringing.

This requirement is not superfluous. Accusations of alleged infringement have drastic consequences. We, therefore, do not require a service provider to start potentially invasive proceedings if the complaint is unwilling to state under penalty of perjury that he is an unauthorized representative of the copyright owner and that he has a good faith belief that the material is unlicensed."

That's the heart of it and --

THE COURT: What is the injury that you are claiming under 512(f)?

MR. DELLAPORTAS: I'm glad you asked that, your Honor, because I heard all this, well, our business has been damaged. Our business model is providing links to music on the Internet; that is the business we're in. So when they force us to take-down 540 songs, some or most or all of which they put on there and are free for anyone to use on the Internet, that harms our business. EMI has one of the biggest catalogs. It has some of the most popular songs, and if the user goes on there and can't find, for example, the song "I Kissed a Girl," which they put on the Internet because they sent us a knowingly false take-down notice that forced us to take it down, which is what happened here, then the user is going to be disappointed and we are going to be injured. That is part of the injury. The rest of the injury is they sent us letters saying they are going to sue us and so we had to hire counsel dealing with

that. The letters were extremely threatening and they said, well -- there is a line in their brief where they say, well, we chose to sue.

Well, when you get a letter from your business and you get a letter from one of the largest law firms in the country, you have to retain counsel, and the Lenz case says just dealing with that is injury. It is not our obligation at this early stage, at the pleading stage, to prove the amount of damages. What Lenz says, and it is absolutely right, is that we just have to plead any injury, and once we have pled any injury, then at trial we can prove our amount of damages. And we have pled our injury and we have pled the basis for the injury, so we think that is a total red herring.

It is not what the California court ruled, by the way. The California court never said that we didn't have injury, they just said we didn't prove enough examples from which one can properly draw an inference that there was a knowing misrepresentation.

Now, we are under 8(a), we are not under 9(b), so in our view we just have to allege it. And the statute says if it is a knowing misrepresentation, you can plead a cause of action. We have alleged a knowing misrepresentation. We don't think there is a numerosity requirement, but if there was and if seven isn't enough, we've got 12 now, and if we get one chance to replead, we are going to have 140. They said you

should disregard that. Of course they say it, but the affidavit is there to show that we have a good faith basis to replead if 12 is enough. But 12 should be enough --

THE COURT: How many times should a court let you replead?

MR. DELLAPORTAS: At least once, your Honor, and this would be our first substantive repleading. Now, they say, very disingenuously, we had four. Our current pleading is styled as an amended pleading, and the reason that it is is because a few months ago counsel called us up and said, hey, you inadvertently dropped some of the names on the caption. We thought that was very nice, that is professional courtesy, thank you very much, we'll add those names to the caption and we did; we filed an amended are pleading. That is not a substantive amendment. I don't think that they intended this to be a lure for the unwary to --

THE COURT: What about the two complaints in California?

MR. DELLAPORTAS: Well, there is a good answer to that. If they wanted to file those, they could have kept this case in California. They didn't. They purposely got this dismissed. So --

THE COURT: The judge dismissed it, right?

MR. DELLAPORTAS: On their motion, your Honor.

THE COURT: Right, but --

MR. DELLAPORTAS: So they could have done one of two things. They could have kept it in California or they could have transferred it here, but it was dismissed. Again, the problem is they had the evidence. So I think we're doing a pretty good job if we found that 140 of their 540 links are bogus just based on Internet research. But once we get discovery, I think we are going to open this wide open. I think, they know they are going to open it wide open. You never see them deny that. Now we see in their reply briefs that they claim that this activity is extremely rare. I don't see an affidavit for anyone. That is just a statement of counsel.

We don't think it is extremely rare. With a minimal bit of research, Internet research, we found that at least 140 of the 540 blogs are to things like content delivery networks, their own record Web sites, and respected music blogs, which they disparage but the music blogs now -- if you have a music blog these days, as our client explained, the record companies are falling all over themselves to give you tracks because these are opinion makers. So if we are allowed to have discovery, we are going to break it wide open. But, frankly, we don't even have a particularity requirement here, and we have loaded this up with particularity beyond appeals.

And then I want to address a few of the other issues. They say, well, it is restrictive. In their brief they say,

well, the access, you have to give it in exchange for giving personal information. And now they said, well, you can stream it but you can't download it. Your Honor, I assisted Mr. Robertson in the declaration and I went personally and tested every link that he put in his declaration. And your Honor can do the same or your Honor's staff can do the same, not using Sideload dot-com but using their own links. If you go to their own links, they don't ask you for any personal information. They don't restrict you from downloading them. They are the easiest things in the world to download. These are things that they put on to be downloaded. And now they are suing us for linking them.

I now know they are trying to spin what they said in their take-down notice, but their take-down notice was very unambiguous. "EMI has not authorized any of its recordings to be copied, distributed, or performed in this manner on or by MP3tunes or its users." Well, they said "not in this manner." All we're doing is linking to it.

We're allowed to link to it. Google links to it.

Everybody links to it. That is the whole point of the Internet.

So you can't put something on the web and say, well, it's for everybody except MP3tunes. Google links to a trillion Web sites; they don't have express authorization from a trillion different Web sites. That is what the Internet is

about. If you put it publicly there, others are allowed to link to it.

Then they said, "MP3tunes is obligated to remove all of EMI's copyrighted works, even those not specifically identified in the attached." Now, they say we didn't rely on them. Well, we relied on them to remove 540 links, which is a lot. But beyond this, this is pretty good evidence of bad faith, I would say. They say we haven't pled anything sufficient to show bad faith. Well, if they say we have to take down them all and they know that it's a standard part of their business model to distribute music on the Internet for free for anyone to use and anyone to download, which is what we've pled in great detail, then this is false. There is at least a sufficient inference that this is false that we can take discovery on this.

And as far as I can tell, they have not briefed any case where something gets knocked out on a pleading stage based on this; that is fairly extraordinary. The two cases they site, Arista and the Rossi case, were after they took discovery and the discovery revealed some crazy facts in those cases. And just to give one example, because we didn't have time to discuss it in our brief. In the Arista case, discovery showed that the guy who was suing for a bad faith take-down notice was advertising all over the Internet, that come to my Web site for free downloadable movies. Then he says, well, gotcha, I have

been defrauding people, I don't actually have free downloadable movies on my Web site. The court said, well, you know what, you are not going to allege their bad faith when they took you at your word rather than actually join the Web site; you are not going to allow -- either assert a claim for bad faith take-down notice when they took you at your word. That is the Arista case. That is a fairly extraordinary set of facts.

That is not what we have here. What we have here is a pleading, extremely detailed, which --

and we can make it even more detailed, if the Court deems it necessary. We don't believe it is, but if the Court deems it necessary, we are prepared to do it.

-- which shows that they said things under penalty of perjury which were untrue. The Ninth Circuit says that you

have to do it or you can have a cause of action, and we have a cause of action. It seems very straightforward to us.

Now, I would like to address just briefly the other cause of action in the complaint. The declaratory judgment is very basic, which is that we need to free ourselves of this. We are trying to run a business here. And if we have every record company coming around and saying what you're doing is illegal, this is now ripe, if they decide to drop this case or certain allegations in their complaint, which we sense they are going to do, we have the right to get some finality here so that we don't have this cloud over our head, and the case law

is very clear on that.

THE COURT: What about your state law claims, how are those claims at all consumer oriented?

MR. DELLAPORTAS: Let me go through them one by one, your Honor.

THE COURT: All right.

MR. DELLAPORTAS: First, generally --

THE COURT: I mean, they all arise from the take-down notice, don't they?

MR. DELLAPORTAS: Yes, and they are absolutely consumer oriented. By the way, they intend them to be consumer oriented.

THE COURT: What does that have to do with the public?

MR. DELLAPORTAS: Let me explain. Let's start with why is EMI doing this. EMI is doing this because although they put things on the Internet for free, they want the people in the know to get that but they want the unsuspecting public to still pay for the music, even though they put it on there free and have waived any rights. So what they are doing here is they basically forced us to take 540 songs, which we showed the public and the consumers where they could buy them for free, and they have now unlawfully concealed it, based on misrepresentations and untruths, sworn under penalty of perjury.

So now I'm the public and I'm a consumer and I want to

get the song "I kissed a Girl," which is one of the most popular songs this year, whereas before I could go to Sideload dot-com, find me a Web site where EMI had distributed it for free, because they were trying to promote the song when this was an unknown artist, now, instead, I have to go to I-tunes, or whoever, and pay $10 for a CD or pay a dollar to download it on the Internet. It absolutely hurts consumer purposes. They are basically trying to keep the consumers from getting free music that they themselves put for free.

This is exactly what the statute and the common law were designed to prevent. This is exactly consumer oriented. There is no other reason for them to do it other than to keep the consumers from knowing about this free music that they put for free.

Now, as to some of the other allegations, they say unfair competition, you have to have a misappropriation, you just can't have a misrepresentation. There is a split in the case law on that. Judge Holwell, in the NYC Management case, says, no, you need either/or. Magistrate Peoples, in the Sears Petroleum case -- that is the case they relied upon -- expressly declined to follow the New York City Management case, and said, no, I think you need -- I think Judge Holwell misread the Second Circuit case he was relying on and you need actual misappropriation, not misrepresentation. So that's going to be something for your Honor to decide. We respectfully submit

that Judge Holwell got it right and that Magistrate Peoples, up in the Northern District, made an error on that, but that is essentially the distinction and that is the only case they are relying on for that point.

And we would even take a step back and say, more generally, that the Second Circuit has said very clearly that unfair competition in common law is any form of commercial immorality. I don't know how they could have stated it more broadly than that. So if, as we allege, EMI is telling us we don't put things on the Internet for free, and they do put things on the Internet for free and they forced us to take-down things that were put on the Internet for free so that we could not run our business and make a profit of directing consumers to these free links, well, then, that is, in our view, a form of commercial immorality.

The California statute -- and we would cite to the People v. Casa Blanca case, essentially the same standard. They say it is only to antitrust, but that is not the case. It is antitrust or deceptive conduct. This, again, is deceptive conduct. They said we don't put anything on the Internet for free. They did. They lied.

So it's essentially the same standard under the California Business Code.

And, again, as I noted for the General Business Statute 349, it is consumer oriented. The only reason for them

to do this is to restrict consumer choices; that's why they are doing it.

I would like to talk just a little bit about the state of discovery, if I could. They attach some of our discovery

and they suggest that this is all about the counterclaims. Your Honor, it is the exact same discovery either way. They're suing us for copyright infringement. They can't sue us for copyright infringement if they put it on the Internet themselves and we're merely linking to it. That's a defense. Our discovery is extremely narrow. We cite, in all the requests, just tell us what are you putting on the Internet for free. That's it. We don't want to know anything else, at least in this first set of discovery requests, about what they're doing if it doesn't involve putting it on the Internet for free.

It is extremely narrow and it's extremely relevant, because they are alleging -- they are suing us, remember, not for the 540 songs, they are suing us for all their songs because we took down their 540 songs. So they are suing us for copyright infringement based on their claims, they are now trying to back off of, that every EMI song on the Internet that we link to is an infringement. That is their position. That is what they have sued us on. We have a right to take discovery on that regardless of whether it is denominated as an affirmative defense or a counterclaim. And obviously they

don't want us to know that. Because when we know that, there is a little bit of trouble because, as I said, they swore under penalty of perjury one thing which they now admit isn't true.

Thank you, your Honor.

THE COURT: All right.

MR. BART: Can I have two quick rejoinders, really quick?

THE COURT: One minute.

MR. BART: OK. Thank you.

The first thing is their entire presentation is premised on the notion, as he said, that we don't put things on the Internet for free. I read to your Honor in the beginning of my remarks what we did say, that the use of our materials in this manner by or on MP3tunes is a violation of our rights. They are trying to create a straw man based on an allegation that was never made. There is no issue in this court about us ever saying we don't put material on the Internet. We said you -- and this comes to my second point -- are misusing that and doing it in a way that violates the Copyright Act.

And the second point that I wanted to make was throughout their papers and in this presentation they do their damnedest to separate MP3tunes from Sideload. MP3tunes is irrelevant, it is just a locker service and Sideload is a search engine. These things work together. It is a business model based on both of them. And they must separate them to

have any chance of success in this case, because what they do is they use the search engine and they have a button where you can click so that the items you find through the search engine, copies are made and provided to you in the other site. These sites work together.

And so they are not Google. They are Google that makes a library of infringing uses that you can copy and they will copy for you for all of your devices. So it's very important to look at these as a tandem and not to allow them to separate them out as just two separate units. That's their spin on what is clear copyright infringement.

And at the end of the day we're still dealing, again, with 12 examples alleged without -- not even on information and belief, which is insufficient as a matter of law. 140 is not properly before you and it's also not based on information and belief, it is based on other infringing sites.

Thank you.

MR. DELLAPORTAS: Your Honor, with the Court's indulgence, I don't want to respond to anything but there was one very brief point I left out and dropped from my outline. I didn't address preemption.

So just very briefly, your Honor. We don't believe this is preempted. They have not pointed to any case law which has held that these kinds of claims are preempted under the Copyright Act. The Copyright Act is very specific as to what

is expressly preempted. They acknowledge that there is no express preemption here.

The elements are different as to each. There is no conflict as to any of the common law claims versus the take-down notice claim. There is no inclination that Congress intended one to give up its rights under unfair competition law or what have you if someone lied in the take-down notice, which is what happened here.

That's all, your Honor.

THE COURT: All right. Counsel, thank you for your arguments.

Decision reserved.

Have a good weekend.

MR. BART: Thank you. You, too. Thank you for your time.

THE COURT: Thank you very much.

MR. DELLAPORTAS: Thank you, your Honor.

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(212) 805-0300