DUANE MORRIS LLP
Gregory P. Gulia
Vanessa C. Hew
R. Terry Parker
1540 Broadway
New York, NY 10036
(212) 692-1000

Counsel for Defendants
MP3tunes, Inc. and Michael Robertson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC; 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., EMI AL GALLICO MUSIC CORP., EMI ALGEE MUSIC CORP., EMI FEIST CATALOG, INC., EMI GOLD HORIZON CORP., EMI GROVE PARK MUSIC, INC., EMI HASTINGS CATALOG, INC., EMI MILLS MUSIC, INC., EMI MILLER CATALOG, INC., EMI ROBBINS CATALOG, INC., EMI U CATALOG, INC., EMI UNART CATALOG, INC., JOBETE MUSIC CO., INC., SCREEN GEMS-EMI MUSIC, INC., STONE AGATE MUSIC, and STONE DIAMOND MUSIC, Plaintiffs, v. MP3TUNES, INC., and MICHAEL ROBERTSON, Defendants.	CIVIL ACTION NO. 07 Civ. 9931 (WHP) ECF Case **DEFENDANT MICHAEL ROBERTSON'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF PERSONAL JURISDICTION**

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant Michael Robertson respectfully submits this memorandum of law in support of his motion for summary judgment on the issue of personal jurisdiction and for dismissal of all claims against him in EMI's[1] Second Amended Complaint.

PRELIMINARY STATEMENT

In its letter to the Court, EMI grossly misrepresents the holding of *Penguin Grp. (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295 (N.Y. 2011) ("*American Buddha III*"), inaccurately claiming that it allows a New York court to exercise jurisdiction over out-of-state individuals who commit copyright infringement over the Internet. *See* Dkt.# 283 (emphasis added). It does no such thing. In *American Buddha III*, the Second Circuit Court of Appeals certified a question to the New York State Court of Appeals with respect to one prong of New York's C.P.L.R. 302(a)(3)(ii):

> In copyright infringement cases, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302(a)(3)(ii), the location of the infringing action or the residence or location of the principal place of business of the copyright holder?

American Buddha III, 16 N.Y.3d at 301.

The New York Court of Appeals declined to address this question. Instead, the New York Court of Appeals narrowed and reformulated the certified question to the following:

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1 The term "EMI" refers to Capitol Records, Inc., Caroline Records, Inc, EMI Christian Music Group Inc., Priority Records LLC, Virgin Records America, Inc. (these five plaintiffs collectively are referred to herein as the "Labels"), Beechwood Music Corporation, Colgems-EMI Music Inc., EMI Al Gallico Music Corp., EMI Algee Music Corp., EMI April Music Inc., EMI Blackwood Music, EMI Full Keel Music, EMI Feist Catalog, Inc., EMI Gold Horizon Corp., EMI Golden Torch Music Corp., EMI Grove Park Music, Inc., EMI Hastings Catalog, Inc., EMI Longitude Music, EMI Miller Catalog, Inc., EMI Mills Music, Inc., EMI Robbins Catalog, Inc., EMI Virgin Music, Inc., EMI Virgin Songs, Inc., EMI U Catalog, Inc., EMI Unart Catalog, Inc., Jobete Music Co., Inc., Screen Gems-EMI Music, Inc., Stone Agate Music, and Stone Diamond Music (these twenty-four plaintiffs collectively are referred to herein as the "Publishers").

> In copyright infringement cases involving the uploading of a copyrighted printed literary work onto the Internet, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302 (a) (3) (ii) the location of the infringing action or the residence or location of the principal place of business of the copyright holder?

Id. at 301-02 (emphasis added).

The reformulated question addressed by the New York Court of Appeals in *American Buddha III* is inapposite to the issue of whether this Court can exercise jurisdiction over Mr. Robertson. As an initial matter, Mr. Robertson is not accused of uploading copyrighted works. Rather, he is accused of sideloading, an act that is totally different from uploading. Uploading refers to the act of moving a digital file from a computer up to the Internet, where it is made publicly available to all users of the Internet. In contrast, "sideloading" refers to the act of moving a digital file that is already publicly available on the Internet to another, private, password-protected storage locker. Indeed, Sideloading has none of the same intended consequences as uploading. Sideloading does not make a previously unavailable work available to the public. Sideloading does not create or allow more access to a copyrighted work. It does not involve the act of copying or distributing a copyrighted work in a manner that renders it available to the millions of users of the Internet. Thus, "the distribution over the Internet" which was such a key factor in *American Buddha III* is wholly absent in the instant case. *See id.* at 301.

The Second Circuit gave the New York Court of Appeals the opportunity to make its holding much broader so that it would apply to all copyright infringement claims, but the New York Court of Appeals expressly declined to do so, limiting their holding to uploading. Accordingly, EMI's attempt to broaden *American Buddha III*'s holding to apply to other types of copyright infringement is contrary to the express language of *American Buddha III* and is insupportable. It is also worth noting that, in addition to specifically narrowing the type of

activity to uploading as opposed to downloading or sideloading, the New York Court of Appeals narrowed its holding to a specific type of copyrighted work—printed literary works—not sound recordings. *See id.*

Indeed, even assuming that the express intentions of the New York Court of Appeals could be ignored, Judge Graffeo made clear that: "our decision today does not open a Pandora's box allowing any nondomiciliary accused of digital copyright infringement to be haled into a New York court when the plaintiff is a New York copyright owner of a printed literary work." *Id.* at 307. Judge Graffeo instructed that the situs of injury is merely one element in the test for personal jurisdiction under § 302(a)(3)(ii):

> CPLR 302(a)(3)(ii) incorporates built-in safeguards against such exposure by requiring a plaintiff to show that the nondomiciliary both "expects or should reasonably expect the act to have consequences in the state" and, importantly, "derives substantial revenue from interstate or international commerce." There must also be proof that the out-of-state defendant has the requisite "minimum contacts" with the forum state and that the prospect of defending a suit here comports with "traditional notions of fair play and substantial justice," as required by the Federal Due Process Clause (*International Shoe Co. v Washington*, 326 US 310, 316, 66 S Ct 154, 90 L Ed 95 [1945] [internal quotation marks and citation omitted]; *see also World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 291-292, 100 S Ct 559, 62 L Ed 2d 490 [1980]).

Id. at 307.[2]

[2] Indeed, the Second Circuit, upon adopting Judge Graffeo's decision, remanded the case for a determination of the remainder of the prongs listed by Judge Graffeo. See *Penguin Grp. (USA) Inc. v. Am. Buddha*, 640 F.3d 497, 501 (2d Cir. 2011) ("We therefore vacate the judgment of the district court and remand this case to that court for its consideration in the first instance of whether Penguin has established the four remaining jurisdictional requisites, and the extent to which the assertion of personal jurisdiction over American Buddha would be consistent with the requirements of Due Process."). Plaintiffs have grossly misrepresented the Second Circuit's holding by claiming "[t]he Second Circuit held that pursuant to [Judge Graffeo's] decision, an out of state website operator who posted material online and operated an online 'library' of infringing content could be subject to personal jurisdiction in New York." That was clearly not the Second Circuit's holding.

Jurisdiction is further improper because the remaining prongs of § 302(a)(3)(ii) are unsupported by the facts. Mr. Robertson is a resident of California with virtually no contacts with New York. EMI alleges that he is liable for direct infringement of its copyrighted works by sideloading certain songs from websites on the Internet, many of which EMI itself has authorized to distribute free downloads for promotional purposes. EMI also alleges that Mr. Robertson is liable for indirect infringement of its copyrighted works because he serves as an officer of MP3tunes, Inc. ("MP3tunes"), which operates a website at which customers sideload songs. However, this Court has already held that Mr. Robertson has insufficient contacts with New York because "[t]here is no evidence that Robertson's only activities in New York—a trip for a meeting with vTunes and a trip to speak at an industry forum—relate to [EMI's] claims." *See* Dkt. # 48 at 9. Accordingly, there is no jurisdiction under *American Buddha III*.

Nor is there long-arm jurisdiction through agency. In order for jurisdiction through agency to be proper, EMI must demonstrate with evidence, not with speculative allegations that: (1) that Mr. Robertson knew and consented to MP3tunes' alleged infringement; (2) that he benefited from that alleged infringement; and (3) that he exercized substantial control over that alleged infringement.

However, in its Memorandum and Order on summary judgment dated October 25, 2011 (the "2011 SJ Order"), this Court held that MP3tunes neither controlled, nor benefited from infringement. *See* Dkt.#276 at 24. If MP3tunes did not control or benefit from any infringing activities at its websites, there is no disputing the fact that Mr. Robertson could not control nor benefit from MP3tunes' alleged infringement. Accordingly, the claims against Mr. Robertson as an individual defendant should be dismissed for lack of personal jurisdiction.

STATEMENT OF FACTS

Mr. Robertson is the Chief Executive Officer of MP3tunes, an Internet company that operates two user-directed websites—MP3tunes.com and Sideload.com. *See* Defendant's Statement of Uncontested Facts ("DSUF" ¶ 1; Declaration of Michael Robertson in Support of His Motion for Summary Judgment on the Issue of Personal Jurisdiction ("Robertson Decl.") ¶ 1. MP3tunes.com allows users to store and play songs at MP3tunes.com. *See* DSUF ¶ 2. All the songs stored at MP3tunes.com are directed by users. *See* DSUF ¶ 3; Robertson Decl.") ¶ 5. MP3tunes does not control which songs users choose to store or play at MP3tunes.com. *See* DSUF ¶ 4; Robertson Decl. ¶ 5. Similarly, Sideload.com is a user-directed service in that it merely allows users to search for free songs on the Internet. *See id*. As with the search engines Google and Yahoo!, users of Sideload.com can enter the name of a song or artist and Sideload.com will return lists of links to other sites on the Internet with potential matches. *See* DSUF ¶ 6-7; Robertson Decl. ¶ 5. The process is fully automated and at no point does MP3tunes, or any employee at MP3tunes, decide which song a user should search for at Sideload.com or store at MP3tunes.com. *See* DSUF ¶ 6; Robertson Decl. ¶ 5.

Nor does Mr. Robertson decide which songs MP3tunes' users store and play in their lockers. Rather, as Chief Executive Officer at MP3tunes, Mr. Robertson develops and implements high-level strategies, making major corporate decisions and managing the overall operations and resources of the company. *See* DSUF ¶ 9; Robertson Decl. ¶ 5).

MP3tunes does not derive a financial benefit, direct or otherwise, from any alleged infringement. *See* DSUF ¶ 10, 11, 12, 13; Robertson Decl. ¶ 7. MP3tunes' revenue comes from the fees it charges consumers for providing them with storage services. *See id.* MP3tunes.com offers a storage plan with two gigabytes of storage free of charge. *See id.* This two-gigabyte

storage limit for free accounts applies only to files that are uploaded from users' local hard drives. *See id.* Users who seek to upload more than two gigabytes of data may upgrade to premium accounts, which cost up to $12.95 per month. *See id.* Sideload.com's search services are free of charge and the files stored at MP3tunes.com from sideloading do not count towards the two gigabytes storage limit. *See* DSUF ¶ 15; Robertson ¶ 7.

Moreover, Mr. Robertson does not personally benefit, nor stand to benefit, from any infringing activities at MP3tunes. Mr. Robertson does not receive a pecuniary benefit from MP3tunes, does not have an ownership interest in MP3tunes, nor has he ever had one. *See* DSUF ¶ 19; Robertson ¶ 7. Since March 31, 2005, Mr. Robertson has not had a membership interest in MP3tunes' corporate predecessor, MP3tunes LLC, more than three years prior to EMI's filing its Second Amended Complaint. *See* DSUF ¶ 18, 19; Robertson ¶ 2. Nor has Mr. Robertson ever been paid a salary or received a bonus or dividends from MP3tunes. *See* DSUF ¶ 18, 19; Robertson ¶ 7.

On November 9, 2007, this action was initiated against Mr. Robertson. *See* Complaint (Dkt. #1). On September 29, 2008, this Court dismissed all claims against Mr. Robertson for lack of personal jurisdiction, holding that Mr. Robertson as an individual did not have the requisite minimum contacts for jurisdiction: "[t]here is no evidence that Robertson's only activities in New York—a trip for a meeting with vTunes and a trip to speak at an industry forum—relate to [EMI's] claims." The Court also held that jurisdiction through agency was improper because: "Robertson has not benefited from that revenue since he has not received a salary, bonus, or dividends from MP3tunes." *See* DSUF ¶ 21.

On October 16, 2009, this Court granted EMI's motion to amend their complaint and re-add Mr. Robertson as a defendant, finding this Court had jurisdiction over Mr. Robertson under

the theory that MP3tunes acted as an agent of Mr. Robertson with respect to its allegedly infringing activities in New York (the "2009 Order"). *See* DSUF ¶ 22. EMI alleged that Mr. Robertson was once a shareholder of MP3tunes as supposed evidence that Mr. Robertson benefited from alleged infringement and that he controlled the design and implementation of MP3tunes' supposedly infringing "single master storage" technology. *See id*. This Court granted EMI's motion to add Mr. Robertson but warned:

> In making this ruling, this Court notes that while Plaintiffs may have provided evidence sufficient for this Court to grant Plaintiffs' motion, "[e]ventually personal jurisdiction must be established by a preponderance of the evidence . . . . Thus, Robertson will be free to argue at trial that the evidence does not establish personal jurisdiction by a preponderance of the evidence.

See id.

However, the 2011 SJ Order has resolved the issue of whether or not Mr. Robertson benefited, or stood to benefit, from infringement when it found that: "there is no genuine dispute that MP3tunes neither received a direct financial benefit nor controlled the infringing activity." *See* DSUF ¶ 25. Specifically, the Court rejected EMI's argument that "Defendants directly benefit from and have the right and ability to control their users' infringing activity" when it held that "the financial benefit must be attributable to the infringing activity." *See id.* As this Court explained:

> While Sideload.com may be used to draw users to MP3tunes.com and drive sales of pay lockers, it has non-infringing uses. . . . In addition, any link between infringing activity and a direct benefit to MP3tunes is attenuated because sideloaded songs were stored free of charge and infringing and non-infringing users of Sideload.com paid precisely the same or nothing at all, for locker services.

See id.

In addition, with respect to the issue of control, the Court held that:

> MP3tunes users alone choose the websites they link to Sideload.com and the songs they sideload and store in their lockers. MP3tunes does not participate in those decisions. At worst, MP3tunes set up a fully automated system where users choose to download infringing content.

See id.

Accordingly, having resolved any dispute as to whether or not Mr. Robertson stood to benefit from MP3tunes' alleged infringement or controlled that alleged infringement, EMI's claims of personal jurisdiction over Mr. Robertson are unfounded.

ARGUMENT

I. PERSONAL JURISDICTION OVER ROBERTSON IS NOT ESTABLISHED UNDER *AMERICAN BUDDHA III*

A. *American Buddha III* Is Inapposite To the Facts in This Case

Under C.P.L.R. § 302(a)(3)(ii), a plaintiff can establish jurisdiction over a nondomiciliary defendant only if the plaintiff demonstrates that: "(1) the defendant's tortious act was committed outside New York, (2) the cause of action arose from that act, (3) the tortious act caused an injury to a person or property in New York, (4) the defendant expected or should reasonably have expected that his or her action would have consequences in New York, and (5) the defendant derives substantial revenue from interstate or international commerce." *Penguin Grp (USA) Inc. v. Am. Buddha*, 640 F.3d 497, 499 (2d Cir. 2011) (*citing* C.P.L.R. § 302(a)(3)(ii) (citation omitted) (*American Buddha IV*).

The New York Court of Appeals in *American Buddha III* held that "the role of the Internet in cases alleging the uploading of copyrighted books distinguishes them from traditional commercial tort cases where courts have generally linked the injury to the place where sales or customers are lost." *Am. Buddha III*, 16 N.Y.3d at 306. The court explained that the crucial issue with uploading copyrighted books is "the intended consequence of those activities—the

instantaneous availability of those copyrighted works on American Buddha's Web sites for anyone, in New York or elsewhere, with an Internet connection to read and download the books free of charge." *Id.* at 304. The court further explained that the location of the infringement in cases of uploading is of little importance in as much "as the primary aim of the infringer is to make the works available to anyone with access to an Internet connection, including computer users in New York." *Id.* at 306. Accordingly, the court held that the location of the principal place of business of the copyright holder is the situs of the injury "when [the copyright owner's] printed literary work is uploaded without permission onto the Internet for public access." *American Buddha III*, 16 N.Y.3d at 304.

American Buddha III is wholly inapposite to the instant case. First, unlike the defendant in *American Buddha III*, Mr. Robertson is not accused of "uploading" copyrighted literary works to the Internet. The tort at issue in the instant case is Mr. Robertson's alleged infringement with respect to the sideloading of EMI songs. Unlike in *American Buddha III*, sideloading does not make works publicly available to anyone with access to an Internet connection—it merely transfers the work to an individual's private, password-protected site. Moreover, the direct injury identified by the court in *American Buddha III* is absent here. What injury, if any, Mr. Robertson has caused EMI by sideloading songs to his own private storage locker, is certainly not the type of irreversible, direct injury that was critical to the court's decision in *American Buddha III.*

In addition, the situs of injury is but one prong in the jurisdictional analysis under 302(a)(3)(ii). As Judge Graffeo made clear, plaintiffs in cases involving copyright infringement on the Internet must also demonstrate that the nondomiciliary: (1) "expects or should reasonably expect the act to have consequences in the state"; (2) "derives substantial revenue from interstate

or international commerce"; (3) "has the requisite 'minimum contacts' with the forum state"; and (4) that "the prospect of defending a suit here comports with 'traditional notions of fair play and substantial justice,' as required by the Federal Due Process Clause . . . ." *Id.* at 307.

In addition, "[b]ecause this is a matter of specific jurisdiction, each cause of action must be analyzed separately." *Ainbinder v. Potter*, 282 F. Supp. 2d 180, 184 (S.D.N.Y. 2003); *Ortiz v. Guitian Bros. Music Inc.*, No. 07 Civ. 3897, 2008 U.S. Dist. LEXIS 75455, at *23 (S.D.N.Y. Sept. 24, 2008) ("The [c]ourt must 'determine the issue of personal jurisdiction separately for each cause of action [and for each defendant].'").

B. Mr. Robertson Did Not Purposefully Avail Himself of the Laws of New York

"The test of whether a defendant expects or should reasonably expect his act to have consequences within the State is an objective rather than subjective one." *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 241 (2d Cir. 1999). However, "New York courts have asserted that the simple likelihood or foreseeability that a defendant's product will find its way into New York does not satisfy this element, and that purposeful availment of the benefits of the laws of New York such that the defendant may reasonably anticipate being haled into a New York court is required." *Id.* (emphasis added).

Furthermore, "[i]t is not enough that a defendant foresaw the possibility that its product would find its way here; foreseeability must be coupled with evidence of a purposeful New York affiliation, for example, a discernible effort to directly or indirectly serve the New York market." *Schaadt v. T.W. Kutter, Inc.*, 169 A.D.2d 969, 564 N.Y.S.2d 865, 866 (N.Y. App. Div. 3d Dep't 1991) (emphasis added); *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988) (holding that the jurisdiction under § 302(a)(3)(ii) required that "the defendant's activities here were purposeful") (emphasis added); *Tri-Coastal Design Group, Inc. v. Merestone Merch., Inc.*, No.

05 Civ. 10633, 2006 U.S. Dist. LEXIS 25307, at *11 (S.D.N.Y. 2006) (holding plaintiff must have demonstrated on-line retailer's "discernible effort to directly or indirectly serve the New York market" and knowledge that "goods would find their way to New York" was insufficient) (emphasis added).

Accordingly, "New York courts thus look for 'tangible manifestations' of a defendant's intent to target New York" as opposed to "sheer speculation that defendants intended, or even knew of, a harm suffered within the state of New York, which, alone, is insufficient to establish reasonable foreseeability and thus jurisdiction pursuant to section 302(a)(3)." *Royalty Network, Inc. v. Dishant.com, LLC*, 638 F. Supp. 2d 410, 425 (S.D.N.Y. 2009) (emphasis added) (finding no jurisdiction over website operator whose infringement did not purposefully target New York residents); *Forties B LLC v. Am. W. Satellite, Inc.*, 725 F. Supp. 2d 428, 434 (S.D.N.Y. 2010) (finding no jurisdiction and rejecting plaintiff's argument that defendants, distributors of infringing Indian language film, intended to target New York because "roughly 15 percent of the Indian population residing in the United States lives in New York").

Unlike the cases where a nondomiciliary specifically targeted New York consumers, Mr. Robertson, in his individual capacity, has made no similar discernible effort to serve the New York market. Rather, Mr. Robertson's sideloading, in his individual capacity was in no way related to MP3tunes business or targeted at New York consumers.

As for the claim that Mr. Robertson is liable for contributory infringement of MP3tunes' users, there is no evidence that Mr. Robertson purposefully directed his activities at consumers in New York in a manner that demonstrates he personally availed himself of the laws of New York. Indeed, EMI has not demonstrated that Mr. Robertson engaged in any activities purposefully targeting New York consumers. Rather EMI's entire argument is premised on the fact that

MP3tunes' services, as opposed to Mr. Robertson's services, were offered on the Internet and thus there was a likelihood that the services would be offered to New York consumers. However, such an attenuated likelihood or foreseeability does not demonstrate the purposeful availment of New York laws such that Mr. Robertson should have reasonably expected to be subject to jurisdiction in New York and haled into a New York court. As in *Schaadt*, *Royalty Network*, and *Forties B*, Mr. Robertson's personal sideloads in California was not intended to target New York consumers. Thus, § 302(a)(3)(ii) is wholly inapplicable.

C. Mr. Robertson Has Not Derived Any Revenue from MP3tunes' Sale of Services

The substantial revenue prong of the test is not met where revenue is derived from investments of the defendant; rather, the law requires that revenue come from the sales of goods or services in interstate or international commerce. Jurisdiction has been routinely denied where the source of revenue is derived from the defendant's investments as opposed to the interstate or international sale of goods or services. *See Pincione v. D'Alfonso*, No. 10 Civ. 3618, 2011 U.S. Dist. LEXIS 103944, at *32 (S.D.N.Y. Sept. 13, 2011) (citations omitted) (denying jurisdiction where the nondomiciliary defendant "received revenue from an investor, not from sales of goods or services in interstate or international commerce"); *Ziegler, Ziegler & Assocs. LLP v. China Digital Media Corp.*, No. 05 CV 4960, 2010 U.S. Dist. LEXIS 84506, at *19 (S.D.N.Y. July 13, 2010) ("There is no cognizable authority or other persuasive argument to indicate that investment capital should constitute 'revenue' from interstate [or international] commerce within the plain meaning of § 302(a)(3)(ii)." (quotations omitted)).

Here the facts are indisputable. Mr. Robertson does not personally place goods or services in the stream of interstate or international commerce. Thus, he personally cannot derive

any revenue—much less substantial revenue—from such activity. Nor has EMI alleged—much less demonstrated—that he has. Like defendants in *Ziegler* and *Pincione*, while Mr. Robertson may have derived revenue as an investor, such revenue is insufficient to meet the jurisdictional requirements under § 302(a)(3)(ii).

D. Mr. Robertson Lacks the Requisite Minimum Contacts with New York

To find minimum contacts, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "Thus, the court must determine that 'the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to those activities.'" *Houbigant, Inc. v. Dev. Specialists, Inc.*, 229 F. Supp. 2d 208, 225 (S.D.N.Y. 2002) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The cases on the minimum contacts consistently require that the defendant has "expressly aimed" his actions at the forum state. *Calder v. Jones*, 465 U.S. 783, 789 (1984) (surveying case law and holding minimum contacts established when defendants "expressly aimed" their "intentional, and allegedly tortious, actions" at the forum state).

However, this Court has already resolved the issue of whether or not Mr. Robertson has minimun contacts when it held that Mr. Robertson has insufficient contacts with New York because "[t]here is no evidence that Robertson's only activities in New York—a trip for a meeting with vTunes and a trip to speak at an industry forum—relate to [EMI's] claims." *See* Dkt. # 48 at 9. There has been no change of fact since this Court's holding which would alter this analysis—nor has EMI alleged that there has been.

E. Exercising Personal Jurisdiction over Mr. Robertson Would Violate Traditional Notions of Fair Play and Substantial Justice

Turning to the final prong of the *American Buddha III* analysis, even assuming that EMI could provide evidence that Mr. Robertson has minimum contacts with New York—which they cannot—EMI must show that the assertion of personal jurisdiction would "comport with fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (*citing Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). In determining whether the exercize of jurisdiction comports with "fair play and substantial justice," the courts weigh the following factors: (1) "the burden on the defendant;" (2) "the forum State's interest in adjudicating the dispute;" (3) "the plaintiff's interest in obtaining convenient and effective relief;" (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 477; *see also Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir. 2002) (holding same).

Even where the exercise of jurisdiction meets these criteria, the exercise of long-arm jurisdiction must still comport with the fundamental rights of due process:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294). The Supreme Court of the United States has held that "the Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no

meaningful contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

While Mr. Robertson is an individual with virtually no contacts with New York, EMI is an international company with offices in California and sufficient resources to litigate in that state. Furthermore, in light of the few, sporadic contacts that Mr. Robertson has had with New York, New York's interest in EMI's claims against Mr. Robertson as an individual is limited, if any.[3] Finally, the fundamental right to due process would be offended where a defendant is forced to litigate in a forum state in which he had no fair warning and in which he has no contacts. In sum, the *Burger King* factors demonstrate that this Court's jurisdiction over Mr. Robertson would not comport with traditional notions of fair play and substantial justice.

II. THERE IS NO LONG ARM JURISDICTION OVER MR. ROBERTSON UNDER AN AGENCY THEORY

Under New York law, "an individual defendant may be subject to specific personal jurisdiction (but not general jurisdiction) based on his actions in his corporate capacity only where the plaintiff can show that the corporation was acting as the agent of the officer (rather than vice versa, as would usually be the case)." *Duravest, Inc. v. Viscardi, A.G.*, 581 F. Supp. 2d 628, 634 (S.D.N.Y. 2008) (citations omitted). To assert long arm jurisdiction under an agency theory, a plaintiff must show each of the following:

> (1) that the corporation engaged in purposeful activities in New York in relation to the transaction; (2) that the corporation's activities were performed for the benefit of the individual defendant; (3) that the corporation's activities were performed with

[3] Moreover, EMI cannot, with a straight face, claim that adjudication of their claims against Mr. Robertson in New York is in the interest of obtaining convenient and efficient relief. EMI has already indicated that no matter the outcome at trial, resolution of this case will be postponed by EMI's appeal of this Court's summary judgment decision if EMI appeal is granted, it would lead to yet another trial in New York.

> the knowledge and consent of the individual defendant; and (4) that the individual defendant exercized control over the corporation.

Beatie & Osborn LLP v. Patriot Scientific Corp., 431 F. Supp. 2d 367, 389 (S.D.N.Y. 2006) (*citing Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 470, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988)).

"If jurisdiction is proper as a result of [the analysis under the long arm statute], a court must then determine whether the exercise of such jurisdiction would offend federal standards of due process." *Indiana Black Expo, Inc.*, 81 F. Supp. 2d at 499 (S.D.N.Y. 2000) (citations omitted). However, as demonstrated above, "[t]he Court must determine the issue of personal jurisdiction separately for each cause of action and for each defendant." *Ortiz*, 2008 U.S. Dist. LEXIS 75455, at *23.

A. Mr. Robertson Did Not Benefit from Any Allegedly Infringing Activity

An essential element of a plaintiff's claim of personal jurisdiction is a discernable benefit resulting in favor of the non-domiciliary defendant. *See Beatie & Osborn LLP*, 431 F. Supp. 2d at 390 (no personal jurisdiction where facts showed individual defendant did not benefit from the activities giving rise to the litigation). "[T]he mere fact that a nonresident defendant is a shareholder, or even a controlling shareholder, of a corporation which is amendable to personal jurisdiction in New York does not, without more, subject him or her individually to personal jurisdiction under CPLR § 301." *Craig v. First Web Bill, Inc.*, No. 04 Civ. 1012, 2004 U.S. Dist. Lexis 27432, at *37 (E.D.N.Y. Nov. 29, 2004) (finding no personal jurisdiction under *Kreutter*'s agency theory where there was no "discernable benefit" because "there was no pecuniary benefit flowing to [the corporate officer], or even to the corporation"); *see also Ontel Prods, v. Project Strategies Corp.*, 899 F. Supp. 1144, 1148 (S.D.N.Y. 1995) (no jurisdiction

over defendant who was CEO, President, and 100% shareholder of corporation).

This Court's holding that "there is no genuine dispute that MP3tunes neither received a direct financial benefit nor controlled the infringing activity" means that Mr. Robertson could not have stood to benefit from infringing activity at MP3tunes. *See* Dkt. # 276 at 22, 24. It is simply not possible for Mr. Robertson to have stood to benefit from the infringing activity at MP3tunes because, as this Court explicitly held, "any link between infringing activity and direct benefit to MP3tunes is attenuated because sideloaded songs were stored free of charge and infringing and non-infringing users of Sideload.com paid precisely the same or nothing at all, for locker services." *See id.* "The financial benefit must be attributed to the infringing activity." *See id.* Accordingly, Mr. Robertson could not possibly have stood to have benefited from infringing activity because MP3tunes has not benefited, nor stood to have benefited from any such activity.

While this Court analyzed MP3tunes' benefit within the context of its compliance with the Digital Millennium Copyright Act ("DMCA"), the Court's finding that MP3tunes did not benefit from infringing activity is not limited to the discreet analysis of whether or not MP3tunes "benefited" pursuant to DMCA case law. *See UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1116 (C.D. Cal. 2009) ("As to the phrase 'direct financial benefit,' the DMCA does not dictate a departure from the common law standard."); *see also Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007) (holding the DMCA merely incorporates the established meaning of common law terms). Indeed EMI itself has conceded this point by arguing "courts uniformly have concluded that the DMCA and common law tests for 'financial benefit' are the same", *see* Dkt. # 209 at 34, and "a key issue on personal jurisdiction based on agency is whether a corporate officer stood to benefit from a corporation's illegal activity." *See* Dkt. # 129 at 12) (emphasis added).

In addition, there is no disputing the fact that Mr. Robertson has obtained no pecuniary benefit from any activities of MP3tunes. Mr. Robertson is not a shareholder of MP3tunes, much less a controlling shareholder, nor has he been one during the relevant period of infringement. *See* Dkt. # 127 at 2. He has not been paid a salary, nor received a bonus or dividend from MP3tunes. *See* Dkt.# 21. Thus, Mr. Robertson's situation is totally different from the cases where jurisdiction through agency was found because the corporate officers derived a direct, pecuniary benefit from their corporation's infringement. Because there is no pecuniary benefit, either direct or indirect, from the infringing activities to MP3tunes or Mr. Robertson, there can be no jurisdiction through agency.

B. Mr. Robertson Did Not Know that the Songs His Users Sideloaded or MP3tunes' Executives Sideloaded Were Infringing

Mr. Robertson's personal sideloads which were at issue in EMI's motion for summary judgment are irrelevant for the purposes of determining personal jurisdiction through agency. Because this Court has found that Mr. Robertson has insufficient contacts with the state of New York, under any prong of the New York long-arm statute, *see* Dkt. # 48 at 8 ("two visits to New York are insufficient to show regular solicitation of business"), the only manner in which jurisdiction may extend to Mr. Robertson is if MP3tunes operates as Mr. Robertson's agent with respect to that specific cause of action. *Id.* (Dkt # 9-10 (citing cases)). Moreover, Mr. Robertson's personal sideloads were not directed at New York. There is no nexus, much less a substantial one, between Mr. Robertson's personal sideloads and the forum state. Mr. Robertson's personal sideloading of songs in California has nothing to do with New York. Accordingly, there can be no personal jurisdiction through agency over Mr. Robertson with respect to his personal sideloads as an individual defendant.

With respect to the alleged sideloads of MP3tunes executives, the facts are undisputed: Mr. Robertson did not know of and did not consent to the infringing activity of MP3tunes' executives. This Court has held: "EMI's executives concede that internet users, including MP3tunes' users and executives, have no way of knowing for sure whether free songs on the internet are unauthorized." *See* Dkt. # 276 at 21 (emphasis added). Accordingly, Mr. Robertson had no knowledge that MP3tunes executives were infringing copyrights.

To establish the control prong of the agency theory for personal jurisdiction, EMI must "persuade a court that the defendant was a 'primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation." *Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319, 324 (S.D.N.Y 1998). However, the Court has held that "there is no genuine dispute that MP3tunes neither received a direct financial benefit nor controlled the infringing activity." *See* Dkt. # 276 at 24. As this Court explained:

> MP3tunes users alone choose the websites they link to Sideload.com and the songs they sideload and store in their lockers. MP3tunes does not participate in those decisions. At worst, MP3tunes set up a fully automated system where users can choose to download infringing content.

See Dkt.# 276 at 2.

If MP3tunes did not participate in the infringing activity of MP3tunes' users, Mr. Robertson could not possibly have participated in users' decisions as to which songs to sideload and store in their lockers.

Moreover, EMI must not only show that Mr. Robertson personally participated in MP3tunes' infringing activity, they must also show that Mr. Robertson personally participated in infringing activity that targeted New York. *See Arma v. Buyseasons, Inc.*, 591 F. Supp. 2d 637, 648 (S.D.N.Y. 2008). In *Arma*, the court held it was not enough that the corporate officer "was

actively engaged in the day to day decisions with respect to the use of intellectual property during the term of the contract" and "personally participated in the day to day decisions relating to the use of the marks and images in various forms of advertising and media during the term of the contract" because "Plaintiffs have failed to persuade the court that [corporate officer] was a primary actor in any conduct targeting New York." Id. (emphasis added); *see also Karabu Corp. v. Gitner et al.*, 16 F. Supp. 2d 319, 323 (S.D.N.Y. 1988) (instructing that "the heart of this query is whether the out-of-state corporate officers were primary actors in the transaction in New York that gave rise to the litigation") (emphasis added).

With respect to MP3tunes' contributory infringement, EMI cannot meet the control prong of the test because Mr. Robertson did not participate in the infringement committed by MP3tunes' users. He merely served as the Chief Executive Officer of the company that provided the service. As this Court has held, "MP3tunes users alone choose the websites they link to Sideload.com and the songs they sideload and store in their lockers. MP3tunes does not participate in those decisions." Dkt. # 276 at 23. Accordingly, Mr. Robertson does not, and cannot, control the allegedly infringing activity of MP3tunes' users. Indeed, exercising jurisdiction over him would be like haling the out-of-state officer of an out-of-state manufacturer of photocopying machines based on the copyright infringement that occurs on that company's copiers in New York. Accordingly, finding personal jurisdiction over Mr. Robertson, based on MP3tunes' contributory liability, goes well beyond the boundaries of copyright law and would subject countless executives to liability for the infringement committed by their corporation's customers.

Even accepting *arguendo* that jurisdiction could somehow be based on such an attenuated relationship, EMI must demonstrate with evidence, not with speculative accusations, that Mr.

Robertson personally participated in MP3tunes' indirect infringement. There is no such evidence. The only basis upon which EMI alleges that Mr. Robertson personally participated in MP3tunes' contributory infringement is that he contributed to the design and development of MP3tunes' storage system and business model. This is insufficient as this Court has expressly rejected EMI's claim that MP3tunes' storage system and business model was infringing:

> EMI's argument, however, mischaracterized MP3tunes' storage system. The record demonstrates that MP3tunes does not use a "master copy" to store or play back songs stored in its lockers. Instead, MP3tunes uses a standard data compression algorithm that eliminates redundant digital data.

Dkt. # 276 at 31.

Even if this Court accepts EMI's implausible claim that Mr. Robertson, as Chief Executive Officer of MP3tunes, must have personally controlled MP3tunes' contributory infringement, there is no evidence that Mr. Robertson's participation in that action was targeted at New York consumers. As in *Karabu* and *Arma*, jurisdiction over Mr. Robertson is improper without evidence that his participation in the alleged illegal activity targeted New York consumers.

With respect to the alleged sideloads of MP3tunes' executives, there is no evidence that Mr. Robertson personally participated in these activities. EMI must submit evidence, not unsubstantiated allegations, to support their claim that Mr. Robertson personally participated in the sideloading undertaken by MP3tunes' executives. The relationship between Mr. Robertson and the infringement in this instance differs greatly from the cases in which agency was used to establish jurisdiction.

Finding agency based on the participation of others does not satisfy the control prong of the agency test. Without evidence that Mr. Robertson participated in the sideloads of executives

at MP3tunes, jurisdiction over Mr. Robertson is improper with respect to MP3tunes' liability for executive sideloads.

In addition, with respect to EMI's unfair competition claim, there is simply no evidence that Mr. Robertson personally participated in any action that amounts to unfair competition with EMI. Indeed, EMI's use of the term "Defendants" with reference to this claim is sloppy as none of the alleged facts can be attributed to Mr. Robertson as an individual. To establish jurisdiction over Mr. Robertson for their claim of unfair competition with respect to EMI's Pre-1972 Sound Recordings[4], EMI must present facts that Mr. Robertson: (1) personally participated in MP3tunes' purported use of Pre-1972 Sound Recordings; (2) personally participated in MP3tunes' acts of competition with EMI; and (3) that he did so for "commercial benefit" or that he personally participated in MP3tunes' commission of a bad faith action that deceived the public with respect to MP3tunes' services and EMI's goods. *See Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 563-564 (2005). At summary judgment, EMI must demonstrate evidence of Mr. Robertson's personal participation in each of these acts. They have not and they cannot. Without factual support, jurisdiction over Mr. Robertson is improper with respect to this claim.

III. EXERCISING JURISDICTION OVER MR. ROBERTSON WOULD VIOLATE THE FUNDAMENTAL RIGHT TO DUE PROCESS

It is clear that EMI cannot demonstrate that Mr. Robertson had sufficient knowledge of, sufficient benefit from, and sufficient personal participation in MP3tunes' alleged infringement to extend New York's long-arm jurisdiction through agency over Mr. Robertson. However, even in a case where these elements could be established, a plaintiff must also demonstrate that the

[4] "Pre-1972 Sound Recordings" refers to sound recordings fixed before February 15, 1972 and listed among the Identified Songs.

exercise of New York's long-arm jurisdiction would not be prohibited by the Fourteenth Amendment of the Constitution of the United States. *See Indiana Black Expo, Inc.*, 81 F. Supp. 2d at 499 (S.D.N.Y. 2000) (citations omitted) ("If jurisdiction is proper as a result of [the analysis under the long arm statute], a court must then determine whether the exercise of such jurisdiction would offend federal standards of due process."). However, as explained above, Mr. Robertson does not have the minimum contacts necessary to comply with the Fourteenth Amendment's due process requirements. Nor would exercising jurisdiction over Mr. Robertson comport with fair play and substantial justice.

CONCLUSION

For all of the foregoing reasons, Defendant's motion should be granted.

Dated: New York, NY
March 2, 2012

DUANE MORRIS LLP

By: /s /
Gregory P. Gulia
Vanessa C. Hew
R. Terry Parker
1540 Broadway
New York, NY 10036
(212) 692-1000

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2012 I caused a copy of the foregoing to be filed with this Court's Electronic Case Filing system, by which copies will be provided to the following:

Andrew H. Bart
Jenner & Block LLP
919 Third Avenue, 37th Floor
New York, NY 10022
abart@jenner.com

Frank P. Scibilia
Pryor Cashman LLP
410 Park Ave.
New York, NY 10022
fscibilia@pryorcashman.com

/s/ R. Terry Parker

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