

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LAVA RECORDS LLC *et al.*,

Plaintiffs,

08 CV 3462 (CS)

-against-

AUDREY AMURAO,

Defendant.

-----x

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Dated: New York, New York
June 23, 2009

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Introduction

Defendant’s attorney, Richard A. Altman, submits this memorandum of law in opposition to plaintiffs’ motion for summary judgment and in support of her cross- motion for the same relief.

This is one of an estimated 30,000 cases brought since 2003 in federal district courts around the nation by members of the Recording Industry Association of America (“RIAA”), alleging copyright infringement by the downloading and file-sharing of recorded music over the internet. Although the cases are always brought in the names of record company plaintiffs who allege that they are the owners or proprietors of the copyrights involved, it is undisputed that the RIAA is the real party in interest, and that it controls and determines the course and strategy of the litigation.

This flood of litigation has been brought supposedly to stem the detrimental effect on sales of compact disks caused by the availability of recorded music on the internet, although the extent of that effect has been vigorously disputed by disinterested scholars, and in any event, the campaign has

been a failure. District Judges and commentators have harshly criticized the RIAA's tactics and the legal theories behind them¹, but the litigation continues, with seemingly little effect on the public's unflagging desire and intention to download music from the internet.²

¹ "The concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants." *Elektra v. O'Brien* (C.D.Calif., March 2, 2007).

See Arista v. Does 1-27, 2008 U.S. Dist. LEXIS 6241 at *21 (D.Me. Jan. 25, 2008) (magistrate judge's ruling):

Rule 11(b)(3) requires that a representation in a pleading have evidentiary support and one wonders if the Plaintiffs are intentionally flouting that requirement in order to make their discovery efforts more convenient or to avoid paying the proper filing fees. In my view, the Court would be well within its power to direct the Plaintiffs to show cause why they have not violated Rule 11(b) with their allegations respecting joinder. [I]t is difficult to ignore the kind of gamesmanship that is going on here.... These plaintiffs have devised a clever scheme... to obtain court-authorized discovery prior to the service of complaints, but it troubles me that they do so with impunity and at the expense of the requirements of Rule 11(b)(3) because they have no good faith evidentiary basis to believe the cases should be joined.

See Patry, Atlantic Recording Corp. v. Howell, available at <http://williampatry.blogspot.com/2008/04/atlantic-recording-corp-v-howell.html> (April 30, 2008) (accessed on July 29, 2008):

From the beginning of copyright law, copyright owners have had the burden of proving their case, and rightly so. What we are seeing now in the making available cases and in other areas is not only an attempted reversal of centuries of copyright law, but of civil procedure as well... I do not condone infringement of copyright whether by P2P or any other means, and believe that copyright owners have every right to bring litigation against those who have infringed their rights (and here I mean infringed an actual section 106 right, not fabricated rights like attempted distribution). But I do believe that copyright owners must prove their case the old fashioned way.

² *See Fisher, Download Uproar: Record Industry Goes After Personal Use*, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html> (December 30, 2007) (accessed July 29, 2008) ("Despite more than 20,000 lawsuits filed against music fans in the years since they started finding free tunes online rather than buying CDs from record companies, the recording industry has utterly failed to halt the decline of the record album or the rise of digital music sharing." *See also Holt, The Effect of Recording Industry Lawsuits on the Market for Recorded Music*, 1 *Vanderbilt Undergraduate Research Journal* 1 (2005) (available at ejournals.library.vanderbilt.edu/vurj/include/getdoc.php?id=112&article=14&mode=pdf) (accessed

This nationwide litigation campaign has been seriously detrimental to the fair administration of justice and the public policy importance of establishing clear boundaries to copyright law, and has imposed enormous burdens on the federal courts. The RIAA has used questionable investigations, unsupported and erroneous legal theories, *ex parte* applications and communications with court personnel, violations of the rules against joinder of unrelated defendants, and abusive litigation tactics against individuals, many of whom are completely innocent, and none of whom should reasonably expect to find themselves in federal courts defending their personal use of computers.

These RIAA cases are replete with bad faith, unclean hands and sharp practices by their counsel. The RIAA readily admits that the purpose of this flood of litigation is not to recover damages for copyright infringement, but to send a message: “the RIAA—the lobbying group for the world’s big four music companies, Sony BMG, Universal Music, EMI and Warner Music—admits that the lawsuits are largely a public relations effort, aimed at striking fear into the hearts of would-be downloaders.”³ Moreover, moneys recovered from this campaign do not seem to have made their way to creative artists, but are instead being used to continue it.⁴ And, as the present case demonstrates, they are brought without regard to economic realities: plaintiffs have surely spent more on attorney’s

July 29, 2008)(“the recording industry ought to place more confidence in the findings of the academic community and acknowledge that file sharing, although an interesting phenomenon that may have important future consequences throughout all sectors of business, does not appear to be directly related to serendipitous decline in sales that marked the early twenty-first century...it would seem prudential for the recording industry to adapt to and discover the benefits intrinsic to this new technology, not attack it”).

³ Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (accessed September 12, 2008).

⁴ See Chasick, *RIAA Pockets Filesharing Settlement Money, Doesn’t Pay Artists Whose Copyrights Were Infringed*, <http://consumerist.com/368663/riaa-pockets-filesharing-settlement-money-doesnt-pay-artists-whose-copyrights-were-infringed> (accessed October 17, 2008).

fees than any possible recovery here, but they obviously prefer to punish defendant and send a message.

The RIAA's theory in these cases is that anyone who downloads song files from the internet and makes them available to anyone by way of so-called peer-to-peer software (which enables users to exchange files directly between their computers without intermediate servers) has violated both the copyright owner's right to make copies, contained in 17 U.S.C. § 106(1), and the distribution right of § 106(3). Its position, moreover, is that the distribution right is violated whether or not any copies have actually been distributed, and that merely making song files available to others is an infringement of that right. Both of these contentions are legally erroneous, and, as will be shown, defendant is entitled to summary judgment in her favor and to an award of attorney's fees as a prevailing party.

This case is the second case brought against defendant and her family, and is a continuation of the vindictiveness and vexatious overlawyering which has characterized this dispute from the beginning. In 2006, these plaintiffs sued defendant's father, Rolando Amurao, a diabetic who speaks little English and does not know how to operate a computer, on exactly the same claims as are being pressed here. *See Lava Records, LLC v Amurao*, 07-CV-321 (CLB).

The sole basis for seeking to hold him liable demonstrates the deeply flawed nature of the RIAA's strategy, namely that he was the subscriber to the internet service, and that that status was alone sufficient. In other words, the underlying assumption is that the putative defendant infringer and the subscriber are one and the same. But parents have children who use their internet connection, or people have friends and visitors who might use their computers, or they have wireless routers which can permit anyone to access their internet service from a distance. It is thus objectively

unreasonable to assume that the subscriber is always a proper defendant without further investigation, and yet that is the sole basis upon which the RIAA plaintiffs proceed in general, and proceeded in this case.

After extensive discovery, including document demands, notices to admit and depositions of Mr. Amurao, and his wife, son and daughter Audrey, a New York City school special education teacher in her twenties, plaintiffs finally realized that he had nothing to do with any downloading. Indeed he had testified that he had no idea how to use a computer, and that only his daughter and son had used the internet service.

Following their realization of this sanctionable error (which had been brought to their attention from the beginning), plaintiffs moved to dismiss their own case against Mr. Amurao with prejudice, and he cross-moved for an award of attorney's fees, inasmuch as the dismissal with prejudice would render him a prevailing party and entitle him to a fee pursuant to 17 U.S.C. § 505. The district court dismissed the action, but denied a fee. Mr. Amurao has appealed that denial to the Second Circuit Court of Appeals. The appeal has been fully briefed (Case No. 08-2376), and is awaiting the setting of a date for oral argument.

In the meantime, plaintiffs continued their vindictive campaign against Mr. Amurao by commencing this action against his daughter on April 9, 2008, a few months after the dismissal against the father. Defendant answered, asserting denials and affirmative defenses. Discovery in this case consisted of a deposition of defendant and a forensic examination of her computer hard drive. Plaintiffs now seek summary judgment for the alleged infringement of 79 songs, and demand statutory damages of \$750 for each of 34 of their allegedly copyrighted recordings, for a total of \$25,500.

But as will be shown, their motion must be denied, and defendants' cross-motion granted, for the following reasons:

1. The statute of limitations has run on plaintiffs' claims.
2. Plaintiffs' claims are legally insufficient as a matter of law, in that "making available" copyrighted song files in the absence of actual distribution is not infringement.
3. Their motion violates F.R.Civ.P. 56(e), which provides that affidavits in support of a summary judgment motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Plaintiffs' entire submission consists of inadmissible hearsay and incompetent evidence not based upon personal knowledge.
4. Plaintiffs' submission of an expert witness declaration now violated this Court's directive that such witnesses would only be used if and after summary judgment was denied, and in any event that witness's testimony is insufficient to satisfy the *Daubert* standard.
5. An award of the full amount of statutory damages in this case would be an unconstitutional violation of defendant's due process rights.

POINT I

PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The statute of limitations for copyright infringement claims is three years, and the claim must be "commenced within three years after the claim accrued." 17 U.S.C. § 507(b). The majority of District Courts in the Second Circuit have held that the claim accrues and the three years begins to run when the infringement occurs, not when it is discovered. The leading case in this district is

Auscapes Int'l v. Nat'l Geographic Soc., 409 F. Supp. 2d 235 (S.D.N.Y.2004), *aff'd on other grds.* 282 Fed.Appx. 890 (2d Cir.2008); *Med. Educ. Dev. Servs. v. Reed Elsevier Group, PLC*, 2008 U.S. Dist. LEXIS 76899, 2008 WL 4449412, at *10 (S.D.N.Y. Sep. 30, 2008).

Most of the subsequent cases have found the reasoning in *Auscapes* persuasive, as recently as last month. *See Broadvision v. General Electric Co.*, 2009 U.S. Dist. LEXIS 45862 at *14-15 (S.D.N.Y. May 5, 2009); *Vasquez v. Torres-Negron*, 2007 U.S. Dist. LEXIS 57872, 2007 WL 2244784 (S.D.N.Y. July 11, 2007); *Roberts v. Keith*, 2006 U.S. Dist. LEXIS 8959, 2006 WL 547252 (S.D.N.Y. Mar. 7, 2006); *Chivalry Film Prods. v. NBC Universal, Inc.*, 2006 U.S. Dist. LEXIS 1177, 2006 WL 89944, at *1 (S.D.N.Y. Jan. 11, 2006). *But see Kwan v. Schlein*, 441 F.Supp.2d 491, 499 (S.D.N.Y.2006); *Tomas v. Gillespie*, 385 F.Supp.2d 240, 243 (S.D.N.Y.2005); *Newsome v. Brown*, 2005 U.S. Dist. LEXIS 4088, 2005 WL 627639, at *5 (S.D.N.Y. Mar. 16, 2005). Thus the majority and better-reasoned view is that the claim accrues when the acts constituting infringement occur. “Although only a district court opinion, *Auscapes* is the best articulation to date of how to compute the Copyright Act’s statute of limitations.” 3 Nimmer on Copyright § 12.05[B][2][b] (2004).

Moreover, the copying, even assuming it was an infringement, took place when the song files were first copied onto defendant’s computer hard drive. The fact that they were still there later does not constitute a continuing infringement, regardless of when MediaSentry may have accessed the files. The continuing infringement doctrine is unavailable in the Second Circuit. “The continuing-infringement doctrine elaborated in *Woods* [*Hole Oceanographic Institute v. Goldman*, 228 U.S.P.Q. 874 (S.D.N.Y. 1985)] and *Taylor* [*v. Meirick*, 712 F.2d 1112 (7th Cir. 1983)] is both inapplicable on these facts and unavailable in this circuit.” *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d

Cir.1993). “Recovery is allowed only for those acts occurring within three years of suit, and is disallowed for earlier infringing acts...Application of the continuous wrong doctrine generally has been rejected in the infringement context.” *Stone v. Williams*, 970 F.2d 1043, 1049-50 (2d Cir.1992), *cert.den.* 508 U.S. 906 (1993). Thus, to the extent that defendant made unauthorized copies of song files, and to the extent that the copies were infringements, any claims arising therefrom arose on the first date that the copies were made, and not thereafter.

In this case, defendant states, in both her declaration and her deposition testimony, that she purchased the computer around November 2004, that she immediately installed the Limewire software on it, and that she copied song files beginning around then onto the computer over the next few months. She also states that she no longer copied any files after the beginning of 2005, and definitely none after March 2005. This action was commenced on April 9, 2008. Thus any and all claims for infringement based upon copying song files are time-barred, because they all took place before April 9, 2005. The fact that plaintiffs’ MediaSentry evidence is dated as of June 1, 2005 does not affect this result, because the statute of limitations runs from the date of copying (assuming *arguendo* that mere copying is infringement under these circumstances), and not from the date of discovery. Thus the action is time-barred to the extent it is based upon violation of the right to make copies and defendant is entitled to summary judgment dismissing the complaint.

Moreover, there would be no basis for any equitable tolling of the statute. Defendant is not responsible for the fact that plaintiffs spent two years suing her father. If anything, plaintiffs’ actions prove nothing so much as the inherently flawed technology by which they justify bringing these cases in the first place. The claims are time-barred and defendant is entitled to summary judgment.

Second, to the extent that plaintiffs seek to recover on the grounds that the distribution right has been violated, they have not made out a prima facie case, because attempted distribution of copyrighted material, the so-called “making available” theory, is not infringement and is not actionable. Without admissible evidence of actual distribution of copyrighted materials after April 9, 2005, satisfying each and every requirement of 17 U.S.C. § 106(3), the claims of infringement based upon the distribution right are similarly time-barred. There is no such evidence, Point II, *infra*.

POINT II

DEFENDANT IS NOT LIABLE FOR VIOLATING THE PLAINTIFFS’ DISTRIBUTION RIGHT. “MAKING AVAILABLE” COPYRIGHTED MATERIAL IS NOT INFRINGEMENT WITHOUT EVIDENCE OF ACTUAL DISTRIBUTION TO THE PUBLIC BY SALE, TRANSFER OF OWNERSHIP, RENTAL, LEASE OR LENDING.

The distribution right is defined in 17 U.S.C. §106(3), as follows: “Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” Plaintiffs’ motion is fatally defective because it fails to provide any evidence of *actual distribution* of copies “*to the public*” by “*sale or other transfer of ownership, or by rental, lease or lending.*” Without such evidence, plaintiffs have no claim for violation of the distribution right, and defendant is entitled to summary judgment in her favor.

Plaintiffs’ argument is essentially that solely because song files reside on a defendant’s computer hard drive, in a shared folder, theoretically available to other computers on the network, the distribution right has been violated. That is, “making available” alone is actionable, and plaintiffs need not show any evidence of actual distribution. This is an erroneous conclusion, and represents

an unwarranted expansion of the distribution right, opening the possibility of limitless liability, even where there was no harm to the copyright owner. Copyright infringement, being a strict liability tort, should not be extended to cover attempts to infringe, let alone passively allowing someone else to make copies. In essence, plaintiffs are arguing that defendant is a contributory infringer, but they cannot make that argument, because it is impossible for them to identify a primary infringer.

It has been frequently held that merely “making available” copyrighted material does not violate the distribution right, absent proof of actual distribution of copies. The issue is the subject of a recent exhaustive law review article, Note: “Making Available” as Distribution: File-Sharing and the Copyright Act, 22 Harv. J. Law & Tech. 273 (2008), which argues that the ““making available”” doctrine has no basis in the text of the Copyright Act, the Act’s legislative history, or appellate jurisprudence, and thus should be abolished.” Because of its scope, and its collection of the relevant cases, the Court is respectfully referred thereto for a full analysis.

There is ample authority to support this proposition in any event. We begin with the language of the statute, which is unambiguous, and requires the conclusion that an offer to distribute is not a violation of the distribution right.

1. The distribution right encompasses distribution to the public. But song files which reside on a computer hard drive are only accessible to someone else who has the same file-sharing software. Without such software, files cannot be copied by anyone else, and cannot therefore be distributed to the public. Rather, they can only be accessed and copies made by persons who already have the Limewire software on their computers. The general public is not being asked to buy, or receive, or solicit, or copy files, even assuming that defendant intended that they do so. Only persons on the network with the software installed can access the files, by definition.

2. There must be a “sale or other transfer of ownership, or by rental, lease or lending.” But by definition, files on a computer cannot be the subject of sale as if they were physical personal property, but only copied. Once copied, the original remains. This is, of course, the entire basis of the RIAA’s litigation campaign, but the remedy, if any there be, is with Congress, not the district courts, which have historically been unwilling to expand the scope of copyright beyond the statutory language.⁵ The 1976 Copyright Act represents a careful balancing of competing interests, and provides precise remedies for precise conduct deemed to be actionable. There is no basis for extending it to any other conduct by judicial interpretation. The distribution right is intended to protect copyright proprietors against piracy, or the large-scale distribution of material. It does not, by its own terms, cover attempted but unsuccessful distribution. Since plaintiffs have presented no admissible evidence that the song files on defendant’s computer hard drive were actually distributed

⁵ Congress is the only proper place for the resolution of these problems. The RIAA’s litigation campaign has improperly demanded that District Courts expand the scope of the copyright monopoly far beyond the language of the statute and Congressional intent, and this Court should reject the demand. *See Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, 464 U.S. 417 at 430-31 (footnotes, citations and quotation marks omitted; emphasis supplied):

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment--the printing press--that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary...*The remedies for infringement are only those prescribed by Congress.* The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

to anyone other than MediaSentry, there is no actual completed transfer, and hence no violation of the distribution right.

3. Plaintiffs' only "evidence" of actual distribution derives entirely from the activities of its own investigator, who presumably acts as their agent. But a copyright owner cannot infringe his own copyright, *see Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir.1994); *Weissmann v. Freeman*, 868 F.2d 1313 (2d Cir.1988), and an authorized agent cannot infringe the owner's copyright either. *See Higgins v. Detroit Educ. Television Found.*, 4 F.Supp.2d 701, 705 (E.D. Mich.1998). Thus, where the only evidence of illegal distribution consists of obviously *authorized* distributions to an *authorized* agent of a copyright owner, that cannot prove anything about *unauthorized* distributions. Otherwise, copyright owners could always bootstrap their way to a claim simply by hiring an investigator to infringe, and then blame the victim. An infringement claim requires proof by direct observation, not entrapment.

Of course, an investigator can always provide testimony regarding violation of the distribution right, by testifying about direct observation of distributions to or infringements by others, *see, e.g., Polygram Int'l Publishing v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1319 (D Mass.1994) (investigators observed unauthorized public performances by trade show exhibitors). Investigators can also invite potential defendants to engage in direct infringement, and such evidence is also admissible. *See, e.g., RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 777 (8th Cir. 1988). Or an investigator's purchase of infringing material may provide circumstantial evidence that supports the inference that similar sales have occurred to third parties, just as an investigator can purchase counterfeit goods being offered for sale to prove trademark infringement. *See, e.g., RCA Records v. All-Fast Systems, Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y.1984).

But here, where the only evidence of distribution is to plaintiffs' agent itself, and not to any direct observations by plaintiffs, there is not a shred of admissible proof. MediaSentry did not observe the defendant distributing anything to the general public, nor can their own copying be used to prove distributions to anyone else.

4. Many cases have held that "making available" copyrighted material is not a violation of the distribution right. In the only one of these file-sharing cases to go to trial, *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1210 (D.Minn.2008), the District Judge *sua sponte* vacated a jury verdict and judgment of \$222,000 against the defendant, and ordered a new trial⁶. In a thorough and scholarly opinion, with the aid of many submissions by *amici curiae*, the Court said that merely making available files for distribution, without evidence of *actual* distribution, is *not* copyright infringement, and that its jury instruction to the contrary had been erroneous:

[T]he plain meaning of the term 'distribution' does not including [sic] making available and, instead, requires actual dissemination... Plaintiffs' interpretation of the distribution right is simply not reasonable... Liability for violation of the exclusive distribution right found in § 106(3) requires actual dissemination. Jury Instruction No. 15 was erroneous and that error substantially prejudiced Thomas's rights. 579 F.Supp.2d at 1218-19, 1226-27.

The District Court then cited as controlling *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir.1993), which held that "[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords," 991 F.2d at 434 (citation and quotation marks omitted), and noted that it had been "relied upon by numerous district

⁶ It should be noted that the case was recently retried. On June 19, 2009, the jury found the defendant liable and awarded damages in the astounding sum of \$1,920,000, or \$80,000 for each of 24 song files. See <http://recordingindustryvspeople.blogspot.com/2009/06/jury-awards-plaintiffs-19200000-in.html> (accessed June 23, 2009). If any further proof of the ludicrousness of these file-sharing cases, and the distortion which they impose on a principled copyright regime is necessary, this verdict, which is surely not the end of the matter, should be Exhibit A.

courts in the peer-to-peer network downloading context.” 579 F.Supp.2d at 1223 (citing cases). There are other cases which have reached the same conclusion⁷ and the two most prominent copyright scholars are in complete accord.⁸

Plaintiffs are some of the largest companies in the recording industry, with limitless resources compared to the defendants whom they pursue. Plaintiffs have filed more than 30,000 lawsuits against individuals, and chosen to proceed by going after noncommercial activities that occur in the privacy of the home, making factual investigation difficult. But having put themselves in this position by their own Rule 11-worthy and sanctionable litigation strategy, they must bear the consequences.

Plaintiffs have failed to satisfy their burden of proof. Defendant did not violate the distribution right, and she is entitled to summary judgment dismissing the complaint.

⁷ See *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 169 (D.Mass.2008)(quashing subpoenas; “the defendants cannot be liable for violating the plaintiffs’ distribution right unless a ‘distribution’ actually occurred.”); *Atlantic v. Brennan*, 534 F.Supp.2d 278 (D.Conn.2008)(refusing to enter a default judgment because allegations of complaint insufficient under *Bell Atlantic*; “[W]ithout actual distribution of copies...there is no violation [of] the distribution right.”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir.2007); *Atlantic Recording Corp. v. Howell*, 554 F.Supp.2d 976 at 981 (D.Ariz.2008)(collecting cases; denying summary judgment) (“The general rule, supported by the great weight of authority, is that infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords....The court agrees with the great weight of authority that § 106(3) is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public.”). 554 F. Supp.2d at 981(quotation marks omitted).

⁸ See Nimmer on Copyright, § 8.11[A] (2008); 4 William F. Patry, Patry on Copyright, § 13.11.50 (2008). It should be noted that the issue is presently before the Second Circuit in *Arista v. Doe 3*, No. 09-0905, which raises a host of issues surrounding these cases, including the validity of the “making available” argument (defendant’s counsel in this action represents Doe 3 in the Second Circuit).

POINT III

PLAINTIFFS' TWO MAIN DECLARATIONS ARE NOT ON PERSONAL KNOWLEDGE IN ADMISSIBLE FORM. THE JACOBSON DECLARATION IS INCOMPETENT AND CONTRADICTORY, AND INSUFFICIENT UNDER *DAUBERT*. BOTH THE KEMPE AND JACOBSON DECLARATIONS SHOULD BE STRICKEN.

On a motion for summary judgment, the movant must submit affidavits which are on personal knowledge, containing facts which are admissible in evidence and show that the affiant is competent to testify. F.R.Civ.P. 56(e); Fed. R. Evid. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter”). Plaintiffs submit two principal declarations in support of their motion. Neither is competent and both should be stricken and disregarded. Without the declarations, plaintiffs have no case and defendant is entitled to summary judgment.

1. The Andrew Kempe Declaration

Mr. Kempe states that he is “the Manager of Technical Account Services for the MediaSentry Business Unit of Safenet, Inc, formerly MediaSentry.” He states that MediaSentry “detected an individual” on June 1, 2005 at approximately 11:57 pm. at Internet Protocol (“IP”) address 162.83.166.67.” He does not state, however, who at MediaSentry did this detection, whether it was done by an individual or by some automatic software program. Nor does he state that he personally did the detecting, nor what investigation, if any, he did to guarantee the reliability of the facts which he sets forth. Therefore, the facts in his declaration are inadmissible hearsay. Nor does he testify as to any facts which would support the admissibility of his testimony as a business record, Fed. R. Evid. 803(6). “[H]earsay testimony...that would not be admissible if testified to at the trial may not properly be set forth in [the Rule 56 (e)] affidavit.” *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir.2008)(quotation marks omitted). In *Salvino*, there was

sufficient foundation testimony to admit the challenged affidavits as business records, but here there is nothing to make Mr. Kempe's testimony admissible.

He states that "MediaSentry's process for identifying potential infringers and gathering evidence of infringement has multiple fail-safes to ensure that the information gathered is accurate." But he does not tell us what they are. In fact, MediaSentry uses proprietary software and methods, and has refused to disclose them in other cases, <http://www.p2pnet.net/story/22042> (accessed June 23, 2009). Because of that, the MediaSentry report is actually an expert witness report, and no expert witness would be permitted to testify based upon proprietary methods, without disclosing them so that the Court can evaluate their compliance with the standards for admissibility of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993).

Finally, MediaSentry's activities are illegal. In New York, a private investigator must have a license, and operating without one is a misdemeanor, Gen. Bus. L. §§ 70 subds. 2 & 4, 71 subd. 1. MediaSentry has none, and its actions have been challenged in many states. Thus the collection of evidence is arguably illegal, and the Court should not countenance the admission of such evidence in any event.

2. The Doug Jacobson Declaration.

The declaration of plaintiffs' expert, Dr. Doug Jacobson, is dated March 4, 2008, Pl. SOMF, Exh. 2 at 10. This is more than one month before this action was even commenced on April 8, 2008. He makes reference to a computer inspection but does not state that the actual computer inspection of defendant's computer took place on February 10, 2009, shortly after the Court ordered it to be produced. He further states that "I will testify that based on the hard drive supplied that the Amurao

computer contains evidence showing that sound recordings continued to be downloaded through the Gnutella computer after June 1st 2005 through at least September 13, 2008.” Id., ¶ 33 at 9.

First, there is no Gnutella computer. Defendant’s software was Limewire. Second, how can he possibly in good faith state under oath that sound recordings continued to be downloaded for 7 months after his declaration? And how can he base his testimony on an inspection which took place nearly one year after his declaration? Finally, he states, “[m]y investigation and forensics analysis of the hard drive is not complete and I reserve the right supplement [sic] my report based upon further forensic examination and investigation.” Id., ¶ 34 at 9. But there is no supplement.

Finally, where is the report following the inspection of the defendant’s hard drive, which was delivered to plaintiffs’ attorneys on February 9 and copied the next day? These are not issues of fact, but go to the very competence and admissibility of his testimony. Moreover, his repeated locution that “I will testify” as prefatory words to his factual assertions is not the same as a simple straightforward recitation of what he actually and personally observed.

Even if we assume that the date is a mistake, and that it was signed on March 4, 2009,⁹ it is still inadmissible because (1) it violates this Court’s prior order that expert testimony would be addressed only after the summary judgment motions were decided, and only if the motions were denied; and (2) it fails in any event to comply with the requirements for expert witness disclosures in F.R.Civ.P. 26(a)(2)(C), which requires that his report be made at least 90 days before the trial date.

In any event, regardless of what the report says, the Court’s scheduling order of December 22, 2008 specifically excluded the use of expert witness reports on the parties’ summary judgment

⁹ This is plausible inasmuch as defendant’s counsel received the report by email on March 4, 2009. However, neither the Court nor the defendant should assume that there was an error in the absence of evidence to the contrary, and the document must be deemed to speak for itself.

motions. Its order, issued after the parties appeared in court for a conference, set a date of February 27, 2009 for the close of discovery, ordered defendant to produce her computer hard drive for inspection, and required the plaintiffs to file their summary judgment motion by March 31, 2009. The order states “[e]xpert discovery to be determined after motions, if motion not granted.” (Dkt. Entry 12/22/08).

Therefore, the parties proceeded on the assumption that the summary judgment motions would be supported and opposed without any expert testimony in the first place. Defendant was therefore entitled to assume that she would not be required to challenge an expert witness in opposing summary judgment (or to obtain her own expert), but would only have to do so if the motions were denied and the case proceeded to trial. Defendant saw the report for the first time after the close of discovery, which date, said the Court, would have “no further extensions,” thus making it pointless for defendant to have then requested an examination of Jacobson, and only three weeks before receiving plaintiffs’ voluminous summary judgment motion.

Thus defendant has had no opportunity to challenge or examine the expert witness¹⁰ and his testimony should be excluded. *See Ebewo v. Martinez*, 309 F. Supp.2d 600 (S.D.N.Y.2004)(“The purpose of the rule is to prevent the practice of ‘sandbagging’ an opposing party with new evidence.”). Moreover, such a sanction is available for violation of a Rule 16(f) scheduling order, which is what this is. “Preclusion of a proposed expert’s testimony and report, disclosed in violation of a scheduling order, entered pursuant to Rule 16(b), is a proper sanction where the tardy expert report is offered in opposition to summary judgment.” *Arnold v. Krause, Inc.*, 232 F.R.D. 58, 67

¹⁰ This witness’s qualifications have been challenged in other RIAA cases, including this month. See <http://arstechnica.com/tech-policy/news/2009/06/riaa-lawyers-toss-a-skunk-in-the-jury-box-apologize.ars> (accessed June 21, 2009).

(W.D.N.Y.2004). It would seem just as logical to apply the sanction where no expert witnesses were permitted to submit any reports at all on the parties' summary judgment motions.

Moreover, even on its own terms, the declaration is insufficient to satisfy the rigorous standards for admission of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993) and F.R.Evid. 702. "A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." F.R.E. 702, Advisory Committee Notes (2000). There is insufficient evidence to conclude that Dr. Jacobson's methodology and conclusions are reliable enough to be admissible, especially where defendant has not had a meaningful opportunity to challenge it. This court has broad discretion to reject any expert witness testimony, *Zaremba v. GMC*, 360 F.3d 355 (2d Cir.2004), and it should do so here.

Accordingly, the Kempe and Jacobson declarations should be stricken, pursuant to F.R.Civ.P. 16 (f) and 37(c)(1), and F.R.E. 702.

POINT IV

AN AWARD OF STATUTORY DAMAGES IN THIS CASE WOULD BE UNCONSTITUTIONAL AS VIOLATIVE OF DUE PROCESS.

These RIAA cases raise the issue of whether statutory damages may in a particular case be so large when compared to any actual loss caused by infringement as to violate due process. "Although statutory damages amounts might be calculated in part to compensate for actual losses that are difficult to quantify, they are often also motivated in part by a pseudo-punitive intention to address and deter overall public harm...A statutory penalty may violate due process where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously

unreasonable.” *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 26 (2d Cir.2003) (Newman, J., concurring)(quotation marks omitted), and see cases cited therein at 26-27.

“[L]arge awards of statutory damages can raise due process concerns. Extending the reasoning of [*BMW of North America, Inc. v.] Gore*[, 517 U.S. 559, (1996)], and its progeny, a number of courts have recognized that an award of statutory damages may violate due process if the amount of the award is out of all reasonable proportion to the actual harm caused by a defendant’s conduct. [T]hese cases are doubtlessly correct to note that a punitive and grossly excessive statutory damages award violates the Due Process Clause.” *In re Napster*, 2005 US DIST Lexis 11498, 2005 WL 1287611 (N.D.Calif., June 1, 2005).

In these file-sharing cases, there is evidence, and judicial acceptance, of an estimate that plaintiff’s actual damages are approximately 70 cents per song, in that that is the sum which is paid by a retailer to a record label. See *UMG v. Lindor*, 2006 U.S. Dist. LEXIS 83486, 2006 WL 3335048 (E.D.N.Y.November 9, 2006):

[P]laintiffs can cite to no case foreclosing the applicability of the due process clause to the aggregation of minimum statutory damages proscribed under the Copyright Act. On the other hand, Lindor cites to case law and to law review articles suggesting that, in a proper case, a court may extend its current due process jurisprudence prohibiting grossly excessive punitive jury awards to prohibit the award of statutory damages mandated under the Copyright Act if they are grossly in excess of the actual damages suffered....Furthermore, Lindor provides a sworn affidavit asserting that plaintiffs’ actual damages are 70 cents per recording and that plaintiffs seek statutory damages under the Copyright Act that are 1,071 times the actual damages suffered....As FRCP Rule 12(b)(6) requires that this figure be taken as true for purposes of the motion, Lindor has alleged a factual basis supporting her affirmative defense.

In this case, defendant has stated that she used Limewire in the belief that it was a place to find free, but entirely legal, music: “I thought, honestly, I thought it was just free music, because why

else would it be operating for people to use, if – you know, and not be shut down, if it wasn't free music? Because I had other friends use Limewire as well, and I heard of it from friends. Then I heard of it from my boyfriend and said, well, if my friends are using it, and you are using it, it must be free music." She also said, "I kind of treated it like Google, where I would type an inquiry of a song or name or artist name; and if it showed up, I clicked, kind of like Google. I approached Limewire as a music search engine." Amurao deposition, Plaintiffs' Exhibit 3, p. 45, lines 18-25, p. 46, lines 2-3, 47, line 8-12.

This is evidence that defendant is at worst an innocent infringer. Yet plaintiffs seek damages of \$750 per song against her. Such an award of more than 1000 times their actual damages would be a gross violation of defendant's constitutional rights and cannot be an acceptable outcome in a principled legal system. As noted in the discussion of the Thomas case, *supra* n. 6 at 13, something is seriously wrong with a legal system which assesses damages of \$80,000 for copying a piece of music; \$750 is only slightly less absurd.

Accordingly, plaintiffs cannot be entitled to the statutory damages they request consistent with due process.

CONCLUSION

Based upon the foregoing, the Court should deny plaintiffs' summary judgment motion in its entirety and grant defendant's cross-motion, dismissing the complaint and awarding costs and disbursements, including a reasonable attorney's fee.

Dated: New York, New York
June 23, 2009

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