

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LAVA RECORDS LLC et al.,

Plaintiffs,

7:08-CV-03462-CS-MDF

-against-

AUDREY AMURAO,

Defendant.

-----x

**REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF DEFENDANT'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

August 14, 2009

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Defendant's attorney, Richard A. Altman, submits this memorandum of law in response to plaintiffs' opposition, and in further support of defendant's cross-motion for summary judgment in her favor.

Plaintiffs argue in opposition to the cross-motion essentially as follows:

1. Defendant distributed ten sound recordings to MediaSentry on June 1, 2005, and thus the distribution claim is timely.

2. Defendant downloaded all 25 sound recordings on their Schedule 1 after June 6, 2005 and thus the infringement claim is timely.

3. Defendant's declaration is a sham, and contradicts her prior deposition testimony.

4. The statute of limitations accrues upon discovery, not upon copying.

5. Defendant should be equitably estopped from asserting the statute of limitations.

6. Defendant is an infringer anyway, because she distributed the songs to MediaSentry.

7. Defendant violated the distribution right even though there is no direct evidence of actual distribution to anyone.

8. The Kempe declaration is admissible, is not hearsay, and the failure of MediaSentry to have a license is not a bar. Moreover, the Jacobson declaration¹ is admissible despite the Court's ruling that expert witness disclosure (and presumably their testimony) would await determination of the summary judgment motions.

9. Defendant has not properly raised the issue of unconstitutionality of statutory damages.

¹ Apparently there was a date error in the Jacobson Report, which he has corrected by a Supplemental Declaration, so that the report should be dated March 4, 2009. Defendant's arguments arising from the erroneous date should be deemed withdrawn.

Some of these arguments have been adequately briefed in defendant's cross-motion, and need not be responded to at length here. Responses to the remaining arguments follow.

POINT I

THE STATUTE OF LIMITATIONS RUNS FROM THE DATE OF THE ALLEGED INFRINGEMENT, AND THERE IS NO BASIS FOR EQUITABLE ESTOPPEL.

Plaintiffs argue that the principal case relied upon by defendant for this point, *Auscape Int'l v. Nat'l Geographic Soc.*, 409 F.Supp.2d 235 (S.D.N.Y.2004), is not the majority rule, and that it should not be followed, in favor of the discovery rule. But although *Auscape* itself acknowledges that the majority of prior cases applied the discovery rule, cases since then (as well as Prof. Nimmer) have approved of its thorough scholarly reasoning and historical analysis, and have cited it with approval. See Def. Mem. at 7 and cases cited therein. See also *Medical Educ. Dev. Servs. v. Reed Elsevier Group, PLC*, 2008 U.S. Dist. LEXIS 76899 (S.D.N.Y. Sept. 30, 2008); *CA, Inc. v. Rocket Software, Inc.*, 579 F.Supp.2d 355, 360 (E.D.N.Y.2008) (“The courts in this Circuit have widely held that a claim for infringement accrues on the date of the alleged infringement rather than on the date infringement is discovered by the plaintiff, and the Court adopts that view.” [citing *Auscape*]).

Thus, in the absence of contrary authority on point from the Second Circuit, *Auscape* should be considered to state the correct rule regarding accrual of the statute of limitations in copyright infringement cases. There is no exception to this rule for the recording industry and its unprecedented and flawed methods for determining whom it wishes to sue. The latest date on which plaintiffs alleged claims accrued was February 2005, when defendant stopped copying song files, and the claims should be dismissed as time-barred.

Plaintiffs' argument that defendant should be barred from asserting the statute of limitations by the doctrine of equitable estoppel is baseless. "A defendant may be equitably estopped to assert the statute of limitations as a defense 'in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused the plaintiff to delay in bringing his lawsuit.'" *Tomas v. Gillespie*, 385 F. Supp.2d 240, 247 (S.D.N.Y. 2005)(quoting *Buttry v. Gen. Signal Corp.*, 68 F.3d 1488, 1493 [2d Cir.1995]). Moreover, the plaintiff must demonstrate its own diligence, see *Price v. Fox Entertainment Group, Inc.*, 473 F. Supp.2d 446, 455 (S.D.N.Y.2007).

Here, the plaintiffs knew of her father's complete innocence, and defendant's copying, as early as her first deposition in 2007. She concealed nothing, testified truthfully and accurately (as did her father, mother and brother), and there was nothing in her conduct which caused plaintiffs any delay. They could have sued her immediately were they so inclined, instead of choosing first to voluntarily dismiss the case against her father and then waiting another six months. So in addition to the sanctionable conduct of plaintiffs having sued defendant's father on the baseless assumption of his guilt, harassed him and his family for a year, and then simply walking away when they realized their error², we now have the unseemly, if not outrageous, accusation that the daughter should be liable, just because she did not immediately come forward in 2006 and confess her guilt over the monstrous crime of downloading some music which she thought was available for free.

The statute of limitations was asserted in the answer as an affirmative defense, defendant was entitled to move for summary judgment based upon it, and there is no basis for an equitable estoppel.

² The District Court's refusal to award attorney's fees to Mr. Amurao following plaintiffs' dismissal with prejudice, thus rendering him the prevailing party, is on appeal to the Second Circuit, and will be argued on September 23, 2009.

POINT II

DEFENDANT'S TESTIMONY IS COMPLETELY CONSISTENT.

Plaintiffs claim that defendant's deposition testimony contradicts her declaration in support of her cross-motion, in that she supposedly admitted in her depositions that she continued to download music after the date in her declaration. The claim is erroneous; she said no such thing. She said in her declaration that "all of the copies were made by late January or early February 2005, and I made no copies of any song files after then, until the present day." ¶ 2. Plaintiffs cite two places in which defendant supposedly contradicted herself. In her deposition on November 8, 2007, she testified as follows:

Q. Just so I understand how Limewire was used, walk me through what you would do to get onto the program.

A. Once my computer was on, I click on the program under my program files and if there was a song that I wanted or that I thought of that would be cool to have on my computer, I would see if they had it. If they had it, click there, it is on my computer now.

...

Q. You said you stopped downloading?

A. Yes.

Q. Do you know when?

A. Once we got this letter for this, I didn't know what to do so I stopped in my tracks.

Q. When you say "this letter," which letter are you referring to?

A. The letter from -- I don't remember the name of the company. The letter that -- I got a letter -- not me, my dad got a letter, it was under my dad's name, a year ago or so, saying copyright infringement for downloading music.

(Nov. 8, 2007 Deposition, 43:7-17, 44:14-45:5, Plaintiffs' Exhibit A.).

In her second deposition on February 16, 2009, defendant said the following:

Q. You testified at your first deposition that you stopped using Limewire on your computer in the fall of 2006 --

A. Correct.

Q. -- in conjunction with a letter that you received regarding the lawsuit with your father?

A. Correct.

(Feb. 16, 2009 Deposition, 51:25--52:7, Plaintiffs' Exhibit B).

This testimony is perfectly consistent. Whatever MediaSentry may or may not have detected in June 2005, it does not necessarily follow from that detection that defendant did any downloading or when she may have done so. And she did not actually answer the question as to when she stopped downloading by providing a date. Her answer was in fact not responsive to the question, and plaintiffs' counsel did not follow up and demand a precise date. "I stopped in my tracks" is, standing alone, a meaningless answer, and cannot fairly be deemed to be an admission of continuous downloading until then. It is far more reasonable to assume that the letter had its intended effect of frightening its recipient and his family, and that defendant was responding in that way.

Furthermore, as she makes clear in her reply declaration, there is a difference between merely *using Limewire* and using it to *download song files*. Thus it is entirely consistent to say that she stopped using Limewire altogether once her father received the plaintiffs' demand letter (which, as she says, she initially believed was fraudulent until she heard more about the RIAA litigation campaign), and her initial downloading shortly after purchasing the computer.

Thus there are no inconsistencies in her testimony.

POINT III

**PLAINTIFFS DO NOT DISPUTE THAT BOTH KEMPE AND JACOBSON
ARE TESTIFYING AS EXPERT WITNESSES, YET PROVIDE NO
FOUNDATION EVIDENCE TO SUPPORT THEIR RELIABILITY.
THEIR DECLARATIONS SHOULD BE STRICKEN.**

In her cross-motion, defendant argued that Mr. Kempe and Dr. Jacobson were expert witnesses, and that their testimony should be excluded because of the plaintiffs' failure to provide a sufficient foundation for their admissibility. Plaintiffs do not dispute that both are testifying as experts, but argue only that their testimony is admissible and is not hearsay. But this is not enough.

District courts “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In particular, Mr. Kempe does not disclose any of the proprietary methods and processes by which MediaSentry does its investigations, but merely asks the Court to accept his report of what some unnamed investigator did and told him. Dr. Jacobson’s methods and conclusions have been questioned by others, see Def. Mem. at 18 n. 10, and, moreover, by sandbagging the defendant and submitting the report without defendant’s having had an opportunity to question him, prevented those methods and conclusions from being scrutinized. The Court has broad discretion to exclude their testimony, both under *Daubert* and because of plaintiffs’ violation of the Court’s scheduling order, postponing expert witness disclosure until after the disposition of summary judgment motions, and it should do so.

POINT IV

AN AWARD OF STATUTORY DAMAGES AS DEMANDED BY PLAINTIFFS WOULD BE AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS.

These downloading and file-sharing cases have raised significant due process concerns among many courts and commentators. Because of the provision for statutory damages in 17 U.S.C. § 504(c), the RIAA has been able to assert an *in terrorem* effect, and has sought, and received, damage awards which any reasonable observer would have to characterize as grossly excessive, and which bear no reasonable relation to any actual damages. In addition to the *Capitol Records, Inc. v. Thomas* case (see Def. Mem. at 13), there is the recent jury award of an astonishing \$675,000 against a Harvard University student. See *Student Must Pay \$675,000 in Downloading Case*, N.Y. Times, July 31, 2009, *available at* [6](http://www.nytimes.com/aponline/2009/07/31/business/AP-US-</p></div><div data-bbox=)

TEC-MusicDownload.html. While motions for new trials have been made in both cases, and so the verdicts should not be deemed the last word, clearly something is very wrong here. When juries are permitted to make awards which are many thousands of times actual damages, against people who have not profited in the least from their actions, there must be due process concerns. No one condones copyright infringement, but there is a significant difference between a student who downloads music for personal use and a commercial pirate who profits from stealing the works of others.

Damage awards which ignore that difference cannot be upheld consistent with the Supreme Court's due process jurisprudence, beginning with *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and its progeny. The correct approach is shown by the concurring opinion of Judge Newman in *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 26 (2d Cir.2003), see Def. Mem. at 19-20 ("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"), and it should be followed here.

The statutory damage provisions in U.S. copyright law were originally intended to provide some reasonable level of compensation to copyright owners when it was difficult to prove actual damages or a defendant's profits. But statutory damages are not established, and should not be imposed, so as to deter infringers who are not before the Court, and such excessive awards are contrary to the holding of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), which held it a violation of due process to punish a defendant for harms done to others. In other words, the issue is not—and must not be—whether file sharing is damaging the recording industry, but only the damages caused (if any) by the defendant who is before the Court. It is a violation of due process

to give a copyright plaintiff such a windfall, and it would be a violation here to give the plaintiffs what they demand.

Many courts have expressed such concerns. *See, e.g., Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 486-90 (6th Cir.2007)(striking down high ratio punitive damage award in common law copyright case as inconsistent with *Gore*); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1017 (7th Cir.1991)(“[C]oncerns of due process and the opportunity for meaningful, if limited, appellate review contemplate that the district court would provide *some* explanation of the factual findings that underlie this exercise of discretion to award greater than minimum statutory damages.”)(emphasis in original); *Atlantic Recording Corp. v. Brennan*, 534 F. Supp.2d 278, 282 (D.Conn.2008)(denying motion for default judgment in file-sharing case because of possible unconstitutionality of statutory damage award); *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095 (DGT), 2006 WL 3335048, at *5 (E.D.N.Y.2006)(granting leave to amend answer to plead unconstitutionality of statutory damage award in file-sharing case; finding due process defense not frivolous); *In re Napster, Inc.*, No. C04-1617 MHP, 2005 U.S. Dist. LEXIS 11498, at **37-38 (N.D.Cal.2005).

It must be kept in mind that although plaintiffs always claim that anyone who uses file-sharing software is potentially sharing music with millions of users, there is not a shred of evidence in any of these cases that that is so. That is why the plaintiffs’ theory of “making available” and attempted distribution is so flawed. Whatever the technological problems plaintiffs may have in demonstrating actual distribution, there must be real evidence of such distribution before plaintiffs can be heard to make such otherwise unsupported claims

In a final stretch to justify its punitive and overreaching position, plaintiffs claim that defendant has forfeited the defense for failing to provide notice to the Attorney General pursuant to F.R.Civ.P. 5.1. Plaintiffs, however, have ignored Rule 5.1(d), which says that “[a] party’s failure to file and serve the notice, or the court’s failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.” The defense is thus properly interposed, but it is respectfully submitted that the Court, if it deems the defense meritorious, may so advise the Attorney General and seek his views on the matter prior to rendering final judgment, in accordance with Rule 5.1(c).³

CONCLUSION

The Court should grant summary judgment to the defendant on her cross-motion and dismiss the complaint with prejudice. It should also award a reasonable attorney’s fee to defendant as a prevailing party.

Dated: New York, New York
August 14, 2009

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³ To defendant’s counsel’s knowledge, in none of the cases in which the Attorney General has intervened on the question of constitutionality (see Pls. Mem. at 20 n. 7) have there been any rulings. One can assume that plaintiffs’ counsel would have advised us if there were.