

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

LAVA RECORDS LLC, a Delaware limited liability company; WARNER BROS. RECORDS INC., a Delaware corporation; CAPITOL RECORDS, LLC, a Delaware limited liability company; UMG RECORDINGS, INC., a Delaware corporation; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; ARISTA RECORDS LLC, a Delaware limited liability company; BMG MUSIC, a New York general partnership; ATLANTIC RECORDING CORPORATION, a Delaware corporation; MAVERICK RECORDING COMPANY, a California joint venture; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; VIRGIN RECORDS AMERICA, INC., a California corporation; and MOTOWN RECORD COMPANY, L.P., a California limited partnership,

Plaintiffs,

-against-

AUDREY AMURAO,

Defendant.

Civil Action No.: 7:08-CV-03462-CLB

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

Dated: July 17, 2009

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## INTRODUCTION

Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment ("Pls' Mem.") and Plaintiffs' Statement of Material Facts ("SOF") demonstrated that Defendant downloaded and installed the LimeWire peer-to-peer ("P2P") file sharing program ("LimeWire") on her computer and used LimeWire to download (copy) and upload (distribute) Plaintiffs' copyrighted sound recordings to other peer-to-peer users over the Internet. Plaintiffs demonstrated that they own or control the exclusive rights in the copyrights and that Defendant violated Plaintiffs' exclusive reproduction and distribution rights in 54 of Plaintiffs' sound recordings listed on Exhibit A to the Complaint (the "Exhibit A Recordings") and an additional 25 of Plaintiffs' copyrighted sound recordings listed on Schedule 1 (the "Schedule 1 Recordings").

In her Memorandum of Law in Opposition ("Opp."), Defendant does not dispute any of the material facts regarding Plaintiffs' ownership or control of the copyrights at issue. Nor does Defendant offer any evidence to dispute any of the material facts regarding her infringement. Instead, in an effort to avoid summary judgment based on a statute of limitations argument, Defendant submits a Declaration ("Amurao Decl.") concerning a single fact, *i.e.*, claiming that she stopped downloading by late January or early February 2005. On this single fact, however, Defendant's Declaration directly contradicts her previous sworn deposition testimony in two different depositions that she continued to use LimeWire to download music until October 2006. As demonstrated below, Defendant's Declaration is a sham declaration under Second Circuit law and cannot be used to defeat summary judgment.

Aside from her sham declaration, Defendant seeks to escape summary judgment based on legal arguments that: (1) Defendant cannot be held responsible for her infringements based on the Copyright Act's statute of limitations; (2) Plaintiffs' claims fail solely on the basis that

making copyrighted works available over a P2P network does not constitute distribution; (3) Plaintiffs have not put forth competent summary judgment evidence; and (4) an award of statutory damages would be unconstitutional as violating due process. As demonstrated below, none of these arguments has any merit and none of them defeat Plaintiffs' motion.

### **STATEMENT OF FACTS**

Pursuant to Local Civil Rule 56.1(a), Plaintiffs previously filed a Statement of Material Facts on Motion for Summary Judgment ("SOF"). Pursuant to Local Civil Rule 56.1(b), Plaintiffs are contemporaneously filing a Response to Defendant's Statement of Undisputed Material Facts in order to respond to the statement of material facts filed by Defendant in support of her Cross-Motion for Summary Judgment ("Cross-Motion").

### **ARGUMENT**

#### **I. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.**

Defendant argues that Plaintiffs' infringement claims are barred by the Copyright Act's statute of limitations. Defendant is wrong on the facts and the law.

##### **A. All Of Plaintiffs' Claims For Damages Fall Within The Statute Of Limitations.**

First, Plaintiffs are seeking damages on only 34 of the 79 sound recordings at issue. (Pls' Mem. at 21, 25.) Plaintiffs' undisputed evidence shows that Defendant distributed ten sound recordings to MediaSentry on June 1, 2005. (SOF ¶ 4.) Plaintiffs filed this lawsuit on April 9, 2008, seeking recovery on certain copyrighted sound recordings, including nine of the ten sound recordings distributed to MediaSentry on June 1, 2005 (which are listed on Exhibit A to Plaintiffs' Complaint.) (Compl. and Ex. A thereto.) Thus, there is no dispute that Plaintiffs' claims for these nine sound recordings on Exhibit A fall within the Copyright Act's three-year statute of limitations. Additionally, the undisputed evidence shows that Defendant downloaded



all 25 sound recordings listed on Schedule 1 after June 6, 2005. (SOF ¶ 21, regarding Defendant's testimony that she continued downloading through October 11, 2005 and Plaintiffs' forensic evidence showing the Schedule 1 Recordings were all downloaded on or after June 6, 2005.) Thus, Defendant's downloading of these 25 sound recordings also falls within the statute of limitations. Therefore, the undisputed evidence shows that Defendant infringed all 34 of these sound recordings well within the limitations period even as Defendant would seek to define the limitations period.

Recognizing this, Defendant offers a sham declaration, claiming without any corroborating detail that she somehow stopped infringing by late January or early February 2005 (Amurao Decl. at ¶ 2), miraculously just before Defendant argues the statute of limitations had run on Plaintiffs' claims. Under the "sham affidavit" rule, "a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Raskin v. Wyatt Co.*, 125 F.3d 55, 63 (2d Cir. 1997). "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting [her] own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). The rule does not apply in two narrowly proscribed circumstances, neither of which is relevant to this case. *See Butler v. Raytel Med. Corp.*, 2004 U.S. Dist. LEXIS 26023, \*9 n.11 (E.D.N.Y. Aug 24, 2004, *aff'd* 2005 U.S. App. LEXIS 20987 (2d Cir. Sept. 27, 2005).

Here, Defendant gave testimony in two depositions and never sought to change that testimony until after Plaintiffs filed their motion for summary judgment, despite the fact that she was represented at her depositions by counsel and had the opportunity to correct her testimony

after the depositions. Defendant admitted in her depositions that she continued to use LimeWire to download sound recordings through the fall of 2006, up until the time her father received a letter regarding infringement over his Internet account. Plaintiffs' evidence demonstrates that Defendant continued to download sound recordings on LimeWire to her computer *through at least October 11, 2006*. (SOF ¶ 21.) In her deposition on November 8, 2007, Defendant explained the date on which she stopped downloading sound recordings on LimeWire:

- 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.

(First Deposition of Audrey Amurao, dated November 8, 2007 ("Amurao Dep. I") 43:7-17, 44:14-45:5, attached hereto as Exhibit A.) The letter that Defendant references in her November 2007 deposition that her father received "a year ago or so" is Plaintiffs' letter to her father dated October 11, 2006, shown to Defendant as deposition exhibit 3. (*Id.* 52:8-53:9, testifying that she learned of this letter in "Fall of '06.") In her second deposition on February 16, 2009, Defendant corroborated her testimony that she stopped using LimeWire to download music in fall 2006:

- 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.

(Second Deposition of Audrey Amurao, dated February 16, 2009 (“Amurao Dep. II”) 51:25-52:7, attached hereto as Exhibit B.) Thus, Defendant’s Declaration alleging that she made no copies after late January or early February 2005 (Amurao Decl. at ¶ 2) has no merit as she *twice testified* that she continued to download (copy) sound recordings through the fall of 2006, which Plaintiffs have demonstrated is on or around October 11, 2006.<sup>1</sup>

**B. The Majority Of District Courts In The Second Circuit Apply The Discovery Rule To Accrual Under The Copyright Act’s Statute Of Limitations.**

Second, as to the legal standard, Defendant contends that the majority of the district courts in the Second Circuit have held that an infringement claim accrues when the infringement occurs (the “injury rule”), not when a copyright holder discovers the infringement (the “discovery rule”). (Opp. at 6-7.) Defendant has misstated the law in the Second Circuit. As the Southern District of New York stated in *Auscape Int’l v. Nat’l Geographic Soc’y*, the main case relied upon by Defendant:

The Supreme Court has not determined whether the injury or discovery rule governs accrual of copyright infringement claims. Nor has the Second Circuit ruled on the issue. Those district courts within this Circuit to have considered the issue are divided, *with the majority holding that accrual is governed by a discovery rule.*

409 F. Supp. 2d 235, 242-243 (S.D.N.Y. 2004) (emphasis provided). Because the Second Circuit has not decided the accrual standard, the Court should consider any statute of limitations

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<sup>1</sup> Notably, Defendant’s other statement in her Declaration – that she witnessed her brother and her boyfriend on occasion downloading music files using LimeWire until late January or early February 2004 (Amurao Decl. at ¶ 3) – has no bearing on Plaintiffs’ infringement claims for any of the 34 sound recordings for which Plaintiffs seek damages. Also, this testimony is also sham testimony because Defendant directly contradicts her deposition testimony that she does not “have any information at all about [her] brother using Limewire on [her] computer” (Amurao Dep. II 38:12-20, Ex. B) and that her boyfriend only used LimeWire on her computer after October 2006 when Defendant was given an iPod (*id.*, 38:21-39:17, 52:16-21).

question under the discovery rule in line with the majority of district courts in the Second Circuit.

Here, Defendant admits that she downloaded all of the sound recordings on Exhibit A and Schedule 1. (SOF ¶¶ 11, 17, regarding Exhibit A Recordings; *id.* ¶¶ 18-21, regarding Schedule 1 Recordings.) Plaintiffs discovered infringement of the Exhibit A Recordings on June 1, 2005 when MediaSentry detected infringement over LimeWire (*id.* ¶¶ 1-4), and then brought their claims for infringement against Defendant on April 9, 2008, which is within the statute of limitations. Plaintiffs discovered infringement of the Schedule 1 Recordings during the forensic examination of Defendant's computer hard drive in February 2009. (*Id.* ¶¶ 12, 19.) Thus, according to the discovery rule, Plaintiffs are within the statute of limitations.

**C. Defendant Is Equitably Estopped From Raising The Statute Of Limitations Because She Knew About Plaintiffs' Claims But Withheld This Information For Over A Year.**

Finally, Defendant is equitably estopped from asserting a statute of limitations bar to Plaintiffs' claims in this case. Equitable estoppel tolls the limitations period where the plaintiff knew of the existence of the cause of action, but the defendant's misconduct caused the plaintiff to delay in filing suit. *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001) (invoking equitable tolling to prevent a defendant from raising a statute of limitations defense); *Barbour v. Head*, 178 F. Supp. 2d 758, 765 (S.D. Tex. 2001) (stating that general equitable tolling doctrines apply to copyright infringement claims).

Here, Defendant has known about the existence of Plaintiffs' infringement claims since October 2006. (*See* Amurao Dep. I 52:8-53:9, Ex. A; Amurao Dep. II 51:25-52:7, Ex. B). Notwithstanding such knowledge, she intentionally withheld from Plaintiffs for over a year information that she was directly responsible for the infringement. (*See* Pls' Mem. at 2-3.) She knew about Plaintiffs' October 2006 letter and discussed it with her father. (Amurao Dep. I

44:21-45:24, Ex. A.) Defendant's father then sent a letter to Plaintiffs stating that "We downloaded the songs through a program called Lime Wire [sic]," and the songs were being "shared" over the Internet. (See Exhibit A to Plaintiffs' Letter Motion to Compel dated November 24, 2008, Ex. A to Pls' Mem.) Defendant knew this information was false, and specifically knew that her father had not engaged in any infringement. (Amurao Dep. I 56:17-59:11, Ex. A.) It was not until Plaintiffs took the depositions of Defendant and her father in November 2007, that Plaintiffs learned for the first time what Defendant knew all along, *i.e.*, that Defendant, and not her father, was the individual responsible for the infringement. Instead of directly taking responsibility for her actions in October 2006, Defendant withheld this information from Plaintiffs for over a year. As a result, Defendant should not now be permitted to use a statute of limitations defense as a shield against Plaintiffs' infringement claims. Indeed, it is Defendant's misconduct that caused any delay in Plaintiffs' filing suit against her for infringement. See *Kosakow*, 274 F.3d at 725.

## **II. DEFENDANT'S "MAKING AVAILABLE" ARGUMENT CANNOT DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.**

Defendant next seeks to avoid summary judgment based on her argument that making copyrighted works available for download by others on a P2P network does not violate Plaintiffs' distribution right. (Opp. at 9-15.) This argument fails for several reasons.

First, Plaintiffs' evidence shows that Defendant violated Plaintiffs' reproduction right under Section 106(1) by downloading all 79 Copyrighted Recordings at issue. (SOF ¶¶ 11, 17, regarding 54 Exhibit A Recordings; *id.* ¶¶ 18-21, regarding 25 Schedule 1 Recordings.) Defendant's violation of Plaintiffs' reproduction right, by itself, requires entry of summary judgment in Plaintiffs' favor. *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005).

Therefore, the Court need not even entertain Defendant's arguments regarding the scope of Plaintiffs' distribution right.

Second, Plaintiffs have also demonstrated that Defendant distributed actual copies of nine of the sound recordings listed on Exhibit A directly to MediaSentry. (Pls' Mem. at 15; SOF ¶¶ 1-4, 9-11, 15, 17.) Such distributions constitute violations of Plaintiffs' distribution right. *See Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008) (holding that "distribution to MediaSentry can form the basis of an infringement claim"); *see also Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994) ("the copies made by [the defendant] at the request of the investigator were copyright violations"); *Atlantic Recording Corp. v. Howell*, 554 F. Supp 2d 976, 985 (D. Ariz. 2008) (quoting *Olan Mills* and holding that "[T]he investigator's assignment was part of [the recording companies'] attempt to stop [the defendant's] infringement,' and therefore the 12 copies obtained by MediaSentry are unauthorized."). Plaintiffs have also proven distribution of all 79 Copyrighted Recordings through circumstantial evidence. (Pls' Mem. at 16, citing case law regarding use of circumstantial evidence to prove violation of distribution right.) For these reasons, too, the Court need not address Defendant's making available argument.

Third, contrary to Defendant's arguments, the overwhelming weight of authority holds that one who makes copyrighted works available for download by others on a P2P network without authorization from the copyright holder violates the copyright holder's distribution right under 17 U.S.C. § 106(3). Section 106(3) provides that "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." 17 U.S.C. § 106(3) (emphasis added). This section grants a copyright

owner the exclusive right to “distribute” copies of copyrighted works to the public. By definition, a person who possesses the exclusive right to distribute works also possesses the exclusive right to make works available for copying by others.<sup>2</sup>

This is precisely what the Supreme Court held in *New York Times Co. v. Tasini*, 533 U.S. 483, 488 (2001). In *Tasini*, several “Authors” sued a number of “Print Publishers” (newspapers) and “Electronic Publishers” (including NEXIS) for making the Authors’ copyrighted articles available for download on online databases like NEXIS. *Id.* at 487. The Print Publishers had a license to “reproduce or distribute” the articles only as part of a compilation. *Id.* at 498. There was no allegation or proof of any actual transfer of files to the public; rather, the Authors alleged only that the Publishers had “placed copies of the [articles] . . . into three databases” where they were “retrievable” by the public, and that the Authors’ distribution right had been infringed “by the inclusion of their articles in the databases.” *Id.* at 487. The Supreme Court agreed, and held that “the Electronic Publishers infringed the Authors’ copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors . . . [and] that the Print Publishers infringed the Authors’ copyrights by authorizing the Electronic Publishers to place the Articles in the Databases . . . .” *Id.* at 506. The Court specifically rejected the publishers’ argument that they were not liable for direct infringement of the right to “distribute” because their subscribers were responsible for actually downloading the articles. *Id.* at 504. That ruling leaves no doubt

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<sup>2</sup> Indeed, Congress itself has acknowledged that section 106 encompasses a right of making available; in the Digital Millennium Copyright Act, Congress specifically authorized copyright owners to issue takedown notices for copyrighted works made available online—and then directs copyright owners to bring suit for infringement if Internet service providers do not take the infringing work down or put the work back up, regardless of whether there has been an actual transfer. 17 U.S.C. § 512(c) and (g).

that making copyrighted works available for copying by others on the Internet constitutes infringement of the distribution right.<sup>3</sup>

Courts for decades have found book stores, music stores, and video rental stores who made copies of copyrighted works available without authorization liable for infringement, without requiring additional monitoring to catch a member of the public accepting the defendant's offer. *See Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (finding that a public library completes all steps necessary for public distribution when it adds a work to its collection, lists the work in a catalog system, and makes the work available to the borrowing or browsing public); *Walt Disney Co. v. Video 47, Inc.*, 972 F. Supp. 595, 599 (S.D. Fla. 1996) (finding that video rental store infringed distribution rights based on the seizure of videos "from the portion of the store where the videocassettes were available for rental"); *U2 Home Entm't, Inc. v. Fu Shun Wang*, 482 F. Supp. 2d 314, 317-18 (E.D.N.Y. 2007) (distribution liability based on offers for sale or rental of unauthorized copies of copyrighted works).

This common-sense understanding of "distribution" applies fully to the online context. In addition to the Supreme Court's decision in *Tasini*, courts have routinely held that the unauthorized act of making copies available for download by others violates the copyright owner's exclusive right to distribute. For example, the Ninth Circuit concluded in *A&M*

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<sup>3</sup> Given the Supreme Court's view, it is no surprise that the Register of Copyrights, citing *Tasini*, has also concluded that "making [a work] available for other users of a peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well as of the reproduction right." *See* Letter from Marybeth Peters to Rep. Howard L. Berman at 1, *reprinted in* Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 114-15 (Sept. 25, 2002) (attached hereto as Exhibit C). That interpretation is entitled to particular respect. *De Sylva v. Ballentine*, 351 U.S. 570, 577-78 (1956).



*Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), that “users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.” *Id.* at 1014; *see also Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701, 718-19 (9th Cir. 2007) (confirming that defendant who makes actual files available for distribution, not just links to files, “distributes” them). In *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 637-38 (D. Md. 2006), relying on *Tasini*, the court held that an online publisher violated a copyright owner’s distribution rights by posting the owner’s copyrighted publications online. *Id.* at 637-38 (“[B]y making available unauthorized copies of Plaintiff’s publications, he has infringed its right to distribution.”); *see also Sony Pictures Home Entm’t, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-22 (N.D. Tex. 2007) (granting summary judgment to plaintiff motion picture companies based on evidence that copyrighted motion pictures were made available for download); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 509 (N.D. Ohio. 1997) (finding distribution without actual transfer, and rejecting argument that defendants “never ‘distributed’ [plaintiffs’] photographs to their customers because it was the customers themselves who chose whether or not to download” the photographs from defendants’ server); *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distribs. & Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1173-74 (N.D. Ill. 1997) (finding infringement without transfers, and noting that “once the files were uploaded, they were available for downloading”).

In the face of this overwhelming authority, Defendant relies on several decisions to support her assertion that making copyrighted works available to others on a P2P network does not violate the copyright holder’s distribution right, most prominently: *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008), *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir. 1993), and *London-Sire Records, Inc. v.*

*Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008). (Opp. at 13-14.) Defendant's reliance on these cases is misplaced.

The *Thomas* court based its ruling on *National Car Rental*, which does not hold, or even imply, that a plaintiff must prove an actual completed transfer in order to prove infringement. Indeed, the *National Car Rental* decision has nothing to do with the issues presented here. In *National Car Rental*, the plaintiff licensed data-processing software to National Car Rental ("National") and its vendor for internal operations only. *Id.* at 427-28. After discovering that National had used the software to process transactions for third parties in violation of the license, the plaintiff brought a contract claim, alleging that National exceeded the scope of its license. *Id.* Copyright law was relevant only because National asserted that the Copyright Act preempted the plaintiff's common law claim. *Id.* at 430-31 (contending that using software for the benefit of third parties was a "distribution" under 17 U.S.C. § 106). The court concluded that such *use* was not a distribution, and that the contract suit was not preempted. *Id.* at 432-33. The court rejected the defendant's novel theory that *using* software to process third-party data should be treated as the equivalent of actually transferring that software to the third parties because the third parties could take advantage of the software's function. *Id.* at 434. The court emphasized that "copyright protection in computer software does not extend to the software's *function*," *id.* at 434 (emphasis added), but protects "only the right to distribute *copies*," *id.* (emphasis in original).

That holding is irrelevant to the question before this Court. The defendant in *National Car Rental* was not making a work available for copying by third parties; it was merely using copyrighted software beyond the scope of its license. The Eighth Circuit never considered whether the right to distribution is violated by the unauthorized "making available" of copies, or whether an actual transfer of a copy must occur. The Eighth Circuit's decision simply does not

address *what it means* to “distribute” under the Copyright Act.<sup>4</sup> The question in *National Car Rental* was only *what had to be distributed*: copies or functionality.

Finally, the decision in *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008), rests on two fundamental mistakes. First, *London-Sire* relied on a limited piece of the legislative history to override the plain meaning of the statute. Specifically, the court looked to legislative history indicating that the language in the Copyright Act granting the copyright holder the exclusive right “to authorize” a distribution refers to actions that constitute contributory infringement. *Id.* at 166. Nothing in the legislative history, however, suggests that the words “to authorize” refer *only* to contributory infringement; the committee report states only that “to authorize” *does* encompass contributory infringement. H.R. Rep. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 (attached as Exhibit D). Thus, *London-Sire* incorrectly went behind the plain meaning of the statute to look at this part of the legislative history, and then misinterpreted that legislative history as *excluding* a concept simply because it did not *mention* the concept. Legislative history should not be given this force. *See Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980) (stating the Court was “unwilling to ‘apply the canon of statutory interpretation [*expressio unius, exclusio alterius*] to the language employed in a committee report,” which “would permit an omission in the legislative history to nullify the plain meaning of a statute”). Second, after relying on this part of the legislative history to

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<sup>4</sup> The sentence quoted from Professor Nimmer’s treatise is similarly lifted out of context: In stating that the distribution right “requires an actual dissemination of either copies or phonorecords,” 2 *Nimmer on Copyright* § 8.11[A] at 8-149, Nimmer addresses not the distinction between actual transfers and making available, but between dissemination of copies and live, ephemeral performances that do not involve copies of any kind. Indeed, Nimmer himself cites only *National Car Rental*, which does not implicate making available in any way. Nimmer’s treatise is consistent with the decades of case law recognizing that the distribution right can be infringed without an actual transfer. *See* 3 *Nimmer on Copyright* § 10.02[A] at 10-21 (“[I]f another dealer were *to attempt to distribute* the same paper ... the first dealer could sue the second for infringement of his distribution right.”) (emphasis added).

override the statute's plain meaning, *London-Sire* refused even to look at legislative history showing that Congress used the terms "publication" and "distribution" interchangeably. 542 F. Supp. 2d at 169; *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985). Thus, the only way to reach the *London-Sire* court's conclusion was to use legislative history in exactly the wrong manner: to override the meaning of a clear statutory term (and only because the legislative history did not specifically enumerate a concept covered by the term), and then to ignore how that history explained a critical but undefined statutory term.

### III. PLAINTIFFS' SUMMARY JUDGMENT EVIDENCE IS COMPETENT AND UNDISPUTED BY DEFENDANT.

#### A. The Kempe Declaration Is Competent And Admissible Evidence And In No Way Violates New York State Law.

Defendant challenges the sufficiency of the Kempe Declaration on the grounds that Mr. Kempe lacks personal knowledge of the facts in his Declaration, that his Declaration contains inadmissible hearsay, and that MediaSentry's activities are illegal in New York. (Opp. at 15-16.)<sup>5</sup> For the reasons set forth below, Defendant's arguments are without merit.

For the personal knowledge requirement under Fed. R. Civ. P. 56(e), an affiant's testimony must be "based on personal knowledge, as opposed to information and belief." *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) (finding affidavit insufficient because affiant stated it was based on "personal knowledge or upon information and belief," thus preventing a court from distinguishing basis of testimony); *see also Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 581 (2d Cir. 1993) (affirming district court's denial of motion to strike summary judgment affidavits where the affidavits were based on personal knowledge). "The

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<sup>5</sup> Without explanation, Defendant also contends that the "MediaSentry report" is actually an expert witness report. (Opp. at 16.) Plaintiffs have not submitted any MediaSentry report in this case, nor have they identified any MediaSentry employee as an expert witness. Defendant's argument is therefore irrelevant and does not warrant any further response.

test for admissibility is whether a reasonable trier of fact could believe the witness had personal knowledge.” *Zakre v. Norddeutsche Landesbank Girozentrale*, 396 F. Supp. 2d 483, 503 (S.D.N.Y. 2005).

Here, Mr. Kempe’s Declaration constitutes competent and admissible testimony. Mr. Kempe satisfies the personal knowledge requirement of Rule 56(e). He states in his Declaration that he is the Manager of Technical Account Services for the MediaSentry Business Unit of Safenet, Inc., formerly MediaSentry, Inc. (“MediaSentry”), and that he “ha[s] personal knowledge of all of the matters discussed in this Declaration except as where stated on information and belief.” (Kempe Decl. at ¶ 1, Ex. 1 to SOF.) None of the testimony in the Kempe Declaration is based on information and belief. As a result, the Kempe Declaration satisfies the personal knowledge requirement of Rule 56(e). *See Sellers*, 842 F.2d at 643.

Furthermore, Defendant’s contention that the Kempe Declaration contains inadmissible hearsay is incorrect. As discussed above, Mr. Kempe testifies based on his personal knowledge. To the extent that any of his testimony is deemed hearsay evidence, Plaintiffs would lay the foundation for its admissibility at trial. Hearsay evidence is admissible at the summary judgment stage if the contents would otherwise be admissible at trial. *See Century Pac., Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 215 (S.D.N.Y. 2007). Plaintiffs note that documents from MediaSentry and testimony from its employees have twice been admitted as evidence at trials in a case with similar facts. *See Capitol Records, Inc. v. Thomas-Rasset*, Case No. 06-cv-1497 (D. Minn.).

Defendant’s contention (Opp. at 16) that MediaSentry’s collection of evidence in this case is illegal under New York state law regarding private investigators likewise fails for several reasons.

First, the investigations performed by MediaSentry do not fall under the umbrella of Article 7 of the New York General Business Law. *See* N.Y. Gen. Bus. Law § 70(3). The New York Attorney General has stated that one who devotes himself exclusively to making investigations for patent attorneys in connection with litigations for infringements does not require a license. *Op Atty Gen*, 21 St Dept Rep 495 (1919) (attached hereto as Exhibit E); *see also* N.Y. Gen. Bus. Law § 70 (annotated case notes No. 3). A direct parallel can be drawn from the patent infringement investigation described by the Attorney General and the copyright infringement investigation performed by MediaSentry, which, as described in the Kempe Declaration (Kempe Decl. at ¶¶ 3-4), uses various P2P networks to search for potential infringers in a manner that any other user of P2P networks could. Such conduct “in connection with litigations for infringements [do] not require a license.” *See Op Atty Gen*, 21 St Dept Rep 495 (1919) (Ex. E); *see also* N.Y. Gen. Bus. Law § 70 (annotated case notes No. 3). For this reason alone, Defendant’s argument that MediaSentry is somehow in violation of Article 7 fails as a matter of law.

Second, Article 7, Section 70, of the New York General Business Law is aimed at those entities that engage in intrusive investigations into private facts. *Op Atty Gen*, 21 St Dept Rep at 503 (the attorney general opined that Article 7 concerns “detection” and that “[d]etect, the act, is thus seen to mean the finding out and bringing to light that which is concealed and covered up”) (Ex. E). Here, as a matter of law, the information that MediaSentry gathered was placed out on the Internet from Defendant’s computer, through Defendant’s internet account, for any P2P user to see, and neither Defendant nor anyone else using the network has any expectation of privacy with respect to such information. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257, 267 (D.D.C. 2003) (when an ISP subscriber “opens his computer to permit others, through

peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world.”), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *Elektra Entm't Group, Inc. v. Does 1-9*, 2004 LEXIS 23560, \*13 (S.D.N.Y. Sept. 7, 2004) (holding Defendant has “minimal expectation of privacy in downloading and distributing copyrighted songs without permission”) (citations omitted). MediaSentry's actions, therefore, cannot be considered intrusive in any manner.

Third, Defendant does not have standing to assert claims under Article 7. Rather, such power resides exclusively with the New York Secretary of State. N.Y. Gen. Bus. Law § 73(1) (“[T]he secretary of state shall have the power to enforce the provisions of this article . . .”).

Finally, Defendant does not and could not cite any authority for the proposition that a violation of Article 7, even if one occurred, would provide a basis to exclude testimony or evidence in a civil litigation. To begin with, Article 7, Section 70 of the New York General Business Law is designed to protect consumers of private investigative services, not those who are themselves engaged in illegal activity. *Op Atty Gen*, 21 St Dept Rep at 499 (stating that the law “is enacted in the interest of the detective's clients and those with whom he has a relation of trust, rather than in the interest of detectives”) (Ex. E). Therefore, Article 7 does not serve the purpose for which Defendant would have the Court use it. *Cf. London-Sire Records, Inc. v. Doe 1*, Case No. 07CV10834-NG, slip op. at 3-4 (D. Mass. Jan. 9, 2009) (attached hereto as Exhibit F).

**B. Defendant's Arguments Attacking The Jacobson Report Are Without Merit.**

Defendant also raises several arguments to attack the sufficiency and admissibility of the Jacobson Report. The Court should disregard all of these arguments. First, Defendant attempts to make an issue out of the fact that Dr. Jacobson's declaration was dated March 4, 2008, when, in fact, the actual date of the declaration was a year off. (Opp. at 16-17.) The Supplemental

Declaration of Dr. Doug Jacobson (attached as Exhibit G hereto) makes clear that Dr. Jacobson signed his Declaration and Expert Report (“Jacobson Report”) on March 4, 2009, and that he simply misdated the report when he produced it. (*Id.* at ¶¶ 2-4.) Therefore, Defendant’s arguments based on this date error (Opp. at 16-17) have no merit.

Second, Defendant misreads and distorts Dr. Jacobson’s testimony in his report. Defendant questions why the report does not contain findings following the inspection of Defendant’s hard drive. (Opp. at 17.) In fact, Defendant simply ignores the testimony regarding the hard drive inspection in the Jacobson Report. Dr. Jacobson states that “[t]his case involved the examination of a hard drive” (Jacobson Report at 5, ¶ 16, Ex. 2 to SOF) and that he considered Defendant’s hard drive in his analysis for the report (*id.* at 7, ¶ 18(i)). Then, Defendant misquotes Dr. Jacobson by claiming he testified to a “Gnutella computer” to contrast with “Defendant’s software [which] was LimeWire.” (Opp. at 17.) Defendant’s quotation from the Jacobson Report which appears on page 17 of her Response is incomplete; in fact, Dr. Jacobson testifies in his report that the “Amurao computer contains evidence showing that sound recordings continued to be downloaded *through the Gnutella network to the Amurao computer* after June 1st 2005 through at least September 13, 2008.” (Jacobson Report at 9, ¶ 13 (emphasis provided), Ex. 2 to SOF.) Moreover, as Dr. Jacobson explains in his Report, the Gnutella network is the file sharing network on which LimeWire and other similar file sharing programs operate. (*Id.* at 4, ¶ 15.) Thus, Defendant’s argument has no factual basis.

Third, Defendant attacks the Jacobson Report on the grounds that Plaintiffs failed to comply with the timing requirement for disclosure under Fed. R. Civ. P. 26(a)(2)(C). This argument is baseless. Under Rule 26(a)(2)(C), a party must make expert disclosures at least 90



days before the trial date. The Court has not set a trial date in this case, so it is impossible that Plaintiffs could have violated the disclosure deadline for experts.

Finally, Plaintiffs have in no way violated this Court's December 22, 2008 Minute Order by designating Dr. Jacobson as an expert witness. Under the Court's Order, the Court delayed any discovery and motions practice on experts until after the determination of dispositive motions.<sup>6</sup> However, the Order in no way precluded Plaintiffs from designating an expert witness or utilizing an expert witness in discovery. In fact, the parties and the Court specifically contemplated the use of Plaintiffs' expert. The protective order signed by the Court on January 28, 2009 made clear that Plaintiffs' computer forensic expert could examine the forensically imaged copy of Defendant's hard drive. (Order, Doc. No. 21, at ¶ 4.) Plaintiffs have done just that. Thus, the Court should reject Defendant's argument.

**IV. THE COURT SHOULD REFUSE TO CONSIDER DEFENDANT'S CONSTITUTIONAL CHALLENGE TO CONGRESS' REGIME FOR STATUTORY DAMAGES UNDER THE COPYRIGHT ACT BECAUSE DEFENDANT HAS NOT PROPERLY RAISED THE ISSUE AND HER ARGUMENTS HAVE NO MERIT.**

Finally, Defendant challenges the constitutionality of the statutory damages regime set out in section 504 of the Copyright Act claiming that, as applied to Defendant, statutory damages violate the Due Process clause of the U.S. Constitution. (Opp. at 19-21.) Defendant, however, has consistently failed to raise this issue in accordance with the Federal Rules of Civil Procedure. Specifically, Defendant has failed to comply with Rule 5.1 requiring that Defendant promptly file a notice of constitutional question and serve notice on the Attorney General of the United

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<sup>6</sup> Plaintiffs dispute Defendant's contention that Dr. Jacobson could not satisfy the standards for admission of expert testimony set forth in *Daubert*. (Opp. at 19.) To the extent that Defendant contends this argument has merit, she can file a motion with the Court on that issue.

States. Fed. R. Civ. P. 5.1(a). As a result, the Court should not consider Defendant's argument until she has properly complied with the Federal Rules.<sup>7</sup>

Furthermore, Defendant's argument fails on the merits. The Copyright Clause of the U.S. Constitution gives Congress the power "to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause." *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003). Statutory damages are a fundamental part of the copyright laws established by Congress. They reflect Congress' rational decisions about how to achieve the goals of the Copyright Clause and Defendant has not and could not provide any factual or legal basis for challenging Congress' decisions.

The copyright remedy of statutory damages is a central element in modern copyright law, and an award of statutory damages serves several purposes—it compensates a plaintiff for the infringement of its copyrights, it punishes and deters unlawful conduct, and it encourages vigorous enforcement of the law by copyright holders. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113-14 (2d Cir. 2001); *Los Angeles News Serv. v. Reuters Tele Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1554 (9th Cir. 1989). "Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages whether or not there is adequate evidence of

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<sup>7</sup> Plaintiffs note that the U.S. Department of Justice has weighed in on this constitutional argument in similar copyright infringement cases, contending that the Copyright Act's statutory damages provision is constitutional. *See, e.g.*, United States of America's Memorandum in Defense of the Constitutionality of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504(c) dated December 3, 2007 in *Capitol Records, Inc. v. Thomas*, Case No. 06-cv-1497 (D. Minn.) (attached hereto as Exhibit H); United States of America's Memorandum in Response to Defendant's Motion to Dismiss and In Defense of the Constitutionality of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504(c) dated March 22, 2009 in *Sony BMG Music Entm't v. Tenenbaum*, Case No. 07-cv-11446 (D. Mass.) (attached hereto as Exhibit I).

the actual damages suffered by plaintiff or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement.” *Los Angeles News Serv.*, 149 F.3d at 996. Indeed, “[s]tatutory damages have been made available to plaintiffs in infringement actions precisely because of the difficulties inherent in proving actual damages and profits, as well as to encourage vigorous enforcement of the copyright laws.” *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000).

In 1999, Congress increased the minimum and maximum statutory awards. *See* Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (attached hereto as Exhibit J). The Report of the Committee on the Judiciary explained that increases were needed to achieve “more stringent deterrents to copyright infringement and stronger enforcement of the laws.” H.R. Rep. No. 106-216, at 2 (1999) (attached hereto as Exhibit K). The House Report elaborated in a way that resonates with Plaintiffs’ allegations in this case:

Many computer users are either *ignorant that copyright laws apply to Internet activity*, or they simply *believe that they will not be caught* or prosecuted for their conduct. Also, many infringers do not consider the current copyright penalties a real threat and continue infringing even after a copyright owner puts them on notice . . . . In light of this disturbing trend, it is manifest that Congress respond appropriately with *updated penalties to dissuade such conduct*. H.R. 1761 increases copyright penalties to have a *significant deterrent effect* on copyright infringement.

*Id.* at 3 (emphasis added).

In sum, the statutory damages provisions in the Copyright Act reflect a carefully considered and targeted legislative judgment intended not only to compensate the copyright owner, but also to punish the infringer, deter other potential infringers, and encourage vigorous enforcement of the copyright laws. Defendant offers no basis that would allow the courts to second-guess Congress’ considered judgment, and doing so would effectively nullify Congress’

carefully crafted remedial scheme. *Eldred*, 537 U.S. at 222 (“[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in the body’s judgment, will serve the ends of the Clause . . . [and] [the] wisdom of Congress’ action is not within our province to second-guess”).

To support his legal argument that *statutory* damages under the Copyright Act are unconstitutionally excessive, Defendant relies exclusively on the Supreme Court’s decisions of *punitive* damages in the *State Farm v. Campbell*, 538 U.S. 408 (2003) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) line of cases. (Opp. at 20.) The *Campbell* and *Gore* line of cases, however, has no application here.

First, the fundamental problem with Defendant’s suggested analogy to *Campbell* and *Gore* is that, unlike punitive damages, which are potentially unlimited and subject to the unbridled discretion of the jury, copyright statutory damages are strictly limited to specifically defined ranges that have been established by Congress in the Copyright Act. *See* 17 U.S.C. § 504(c). Because these ranges are prescribed by statute and tied to a defendant’s culpability, a jury has *no discretion* to award statutory damages in excess of these carefully circumscribed limits. This crucial difference renders wholly inapposite the constitutional case law cited by Defendant that governs the imposition of punitive damages.

The particular set of constitutional rules that the Supreme Court has articulated to govern *punitive damages* is based precisely on the concern that the award of such damages would otherwise rest on an “*unregulated and arbitrary use of judicial power*” that would violate due process. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 10 (1991) (emphasis added). These concerns are simply inapplicable in the context of a system of statutorily prescribed fixed damages ranges. In light of the “safeguards in the legislative process,” the Supreme Court has

explicitly stated that there is a “significant[] differen[ce]” - a constitutional difference - between “review of a jury’s award for arbitrariness and *the review of legislation.*” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456-57 (1993) (emphasis added).

Defendant’s argument that statutory damages must be proportionate to actual damages (Opp. at 21) has been considered, and rejected, by every court to consider the issue. In *Yurman Design*, for example, a jury found that the defendant had willfully infringed the plaintiff’s copyright in four pieces of jewelry and awarded statutory damages of “\$68,750 per work infringed,” two-thirds of the then-maximum amount of \$100,000 per work. *Yurman Design*, 262 F.3d at 113. The jury also found trade dress infringement and awarded traditional punitive damages under that claim. *Id.* at 107-08. Significantly, the district court vacated the punitive damages award because “the jury was not presented with any evidence concerning damages” and did not find “any . . . lost profits whatever.” *Yurman Design*, 93 F. Supp. 2d at 462-63. The district court, however, rejected defendant’s argument that statutory damages under the Copyright Act must be “reasonably related to the harm” and should not “give [plaintiff] an undeserved windfall.” The district court instead held that the lack of any evidence concerning actual damages did “not preclude [plaintiff’s] recovery of statutory damages.” *Id.* at 462. As the district court noted, “[s]tatutory damages have been made available to plaintiffs in infringement actions precisely because of the difficulties inherent in proving actual damages and profits, as well as to encourage vigorous enforcement of the copyright law.” *Id.* The Second Circuit affirmed, noting that the award was “within the statutory range” and thus within the jury’s “discretion.” *Yurman Design*, 262 F.3d at 113-14.

The Ninth Circuit’s decision in *Columbia Pictures Television, Inc. v. Feltner*, No. CV 91 6847 ER (CTx) (C.D. Cal.), is also instructive. After the Supreme Court in *Feltner v. Columbia*

*Pictures Television, Inc.*, 523 U.S. 340, 355 (1998), reversed the judge’s \$8.8 million award and held that the plaintiff was entitled to a jury determination of statutory damages, the case was retried, and the jury returned a verdict of \$31.68 million for 440 infringements. *See Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1190-91 (9th Cir. 2001). Feltner moved for a new trial, arguing that the damages were “excessive,” “shocked the conscience,” and “violated due process.” *Columbia Pictures Television, Inc. v. Feltner*, Case No. CV 91 6847 ER (CTx), slip op. at 2 (C.D. Cal. June 10, 1999) (attached hereto as Exhibit L). Denying the motion, the district court held that the defendant “cannot argue that the award was overly punitive, or violated due process, since the award amount fell squarely within the statutory range provided by the statutory damages provision of section 504(c).” *Id.* The court further held that, “[t]o receive statutory damages, the Plaintiff did not need to prove the damages actually suffered.” *Id.* On appeal, the Ninth Circuit affirmed the substantial discretion afforded to a jury’s determination of statutory damages. *Columbia Pictures*, 259 F.3d at 1195; *see also Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996) (rejecting argument that damages within statutory range were “excessive,” did not “bear some reasonable relationship to the amount of actual damages” and would give the plaintiff a “windfall”); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459 (D. Md. 2004) (holding that “[s]tatutory damages are ‘not fixed or readily calculable from a fixed formula,’” and that “there has never been a requirement that statutory damages be strictly related to actual injury.”) (citation omitted); *SESAC, Inc. v. WPNT, Inc.*, 327 F. Supp. 2d 531, 532 (W.D. Pa. 2003) (“[I]t is Congress’ prerogative to pass laws intended to protect copyrights and to prescribe the range of punishment Congress believes is appropriate to accomplish the statutory goal.”).


Finally, Defendant's proportionality argument also fails because it focuses exclusively on the harm to Plaintiffs caused by Defendant's downloading (Opp. at 20), while ignoring the harm caused by Defendant's distribution of hundreds of copyrighted sound recordings to potentially millions of other users on multiple file sharing networks. Defendant, for example, was distributing 528 digital audio files—including many of Plaintiffs' copyrighted sound recordings—to potentially millions of other users on the Gnutella network when MediaSentry detected her infringement on June 1, 2005. (SOF ¶ 1.) Under these circumstances, "the true cost of Defendant's harms in distributing Plaintiffs' Copyrighted Recordings for download by other users . . . is incalculable." *Atlantic Recording Corp. v. Anderson*, 2008 U.S. Dist LEXIS 53654, \*24 (S.D. Tex. Mar. 12, 2008).

For all of these reasons, the Court should reject Defendant's constitutional challenge to the statutory damages set by Congress.

### CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court: (1) grant Plaintiffs' Motion for Summary Judgment; (2) deny Defendant's Cross-Motion for Summary Judgment; (3) find Defendant liable for infringing the 79 Copyrighted Recordings; (4) award Plaintiffs minimum statutory damages for 34 of the Copyrighted Recordings in the total amount of \$25,500; (5) enter injunctive relief as prayed for in the Complaint; and (6) such further relief as the Court deems just and proper.

Dated: July 17, 2009

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on July 17, 2009, a copy of the foregoing

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY**

**JUDGMENT** was served upon Defendant via email and United States Mail as follows:

Richard Altman, Esq.  
285 West 4<sup>th</sup> Street  
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