

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MOTOWN RECORD COMPANY, L.P., a	:	
California limited partnership; UMG	:	
RECORDINGS, INC., a Delaware	:	
corporation; SONY BMG MUSIC	:	CIVIL ACTION NO. 2:07-cv-04702
ENTERTAINMENT, a Delaware general	:	
partnership; ZOMBA RECORDING LLC, a	:	
Delaware limited liability company; and	:	
ELEKTRA ENTERTAINMENT GROUP	:	
INC., a Delaware corporation,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
John C. Kovalcik,	:	
	:	
Defendant.	:	

**MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR JUDGMENT  
ON THE PLEADINGS PURSUANT TO FED. R. CIV. PROC. 12(C)**

Plaintiffs respectfully submit this response in opposition to Defendant’s Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. Proc. 12(c) and request that the Court deny Defendant’s Motion. In support of this request, Plaintiffs state as follows:

**NATURE OF THE CASE**

Plaintiffs are recording companies who filed suit against Defendant alleging online copyright infringement. Defendant has filed a Motion for Judgment on the Pleadings arguing that he is entitled to dismissal of Plaintiffs’ claims *with prejudice* because (1) Plaintiffs’ have not adequately plead a claim of copyright infringement under Rule 8 of the Federal Rules of Civil Procedure and the Supreme Court’s holding in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007); and (2) because the “statutory damages provision of the Copyright Act, 17 U.S.C. §

504(c), will invariably result in a damages verdict that violates the due process protection of the United States Constitution.” (Def.’s Mot., p.1). Subsumed within Defendant’s argument that Plaintiffs have failed to plead a claim of copyright infringement, Defendant also argues that making copyrighted works available for distribution over a peer-to-peer (“P2P”) network is not an act of infringement in violation of the Copyright Act. Defendant’s arguments are without merit, and, in any event, premature.

Despite Defendant’s argument to the contrary, Plaintiffs have adequately alleged a claim of copyright infringement. This Court and many others throughout the country have rejected similar attacks on the adequacy of the pleadings contained in Plaintiffs’ Complaint. This is because not only does Plaintiffs’ Complaint properly allege that Plaintiffs own the copyrighted sound recordings at issue in the Complaint and that Defendant has infringed Plaintiffs copyright, but Plaintiffs’ Complaint also identifies the date, time, and methods of infringement alleged and provides a list of copyrighted recordings that Defendant has, without the permission or consent of the copyright owners, downloaded and distributed to the public.

Defendant’s two remaining contentions, concerning “making works available” for distribution and the constitutionality of the statutory damages provision of the Copyright Act, need not be addressed on the merits by this Court because they are irrelevant to its determination of Defendant’s Rule 12(c) Motion. Specifically, Plaintiffs allege that Defendant both “downloaded and/or distributed” copyrighted works without authorization. (Complt. ¶ 15.) Thus, whether or not “making works available” is distribution under the Copyright Act, Defendant is not entitled to a dismissal of Plaintiffs’ claims because Plaintiffs have alleged downloading (reproduction) as a method of infringement. Moreover, Plaintiffs have evidence of actual distribution of each of the copyrighted sound recordings identified on Exhibit A to the

Complaint. Similarly, statutory damages under 17 U.S.C. § 504(a) are only one possible measure of damages available to Plaintiffs, and, indeed, only one of the forms of relief that Plaintiffs have claimed in this case. (Complt. ¶¶ 19-20.) Plaintiffs have asserted a claim for damages, attorneys' fees and injunctive relief. (*Id.*) Thus, even if Defendant's unprecedented view of the damages provision had merit, he would not be entitled to a dismissal with prejudice of the pleadings, as he requests.

Should the Court choose to reach Defendant's arguments that "making works available" is not a "distribution" under the Copyright Act and that statutory damages are unconstitutional, Defendant's arguments should be rejected. Indeed, Defendant's arguments have been considered, and rejected, by numerous courts across the country, as set forth below. For these and other reasons explained in more detail in the following arguments, Defendant's Motion should be denied.

### ARGUMENT

#### **I. LEGAL STANDARD FOR A MOTION FOR JUDGMENT ON THE PLEADINGS.**

"The court may only grant a motion under Federal Rule of Civil Procedure 12(c) if 'the movant clearly establishes that no material issues of fact remains to be resolved and that he is entitled to judgment as a matter of law.'" *Robbins v. Metropolitan Life Ins. Co. of Connecticut*, No. 08-0191, 2008 U.S. Dist. LEXIS 104902, 7-8 (E.D. Pa. Dec. 29, 2008.) The standard of review governing dismissal under Rule 12(c) is the same as Rule 12(b)(6). *Mele v. Federal Reserve Bank of New York*, 359 F.3d 251, 253 (3d Cir. 2004); *Robbins*, 2008 U.S. Dist. LEXIS 104902, 8; *Albright v. Viacom, Inc.*, No. 4-609, 2009 U.S. Dist. LEXIS 6444, 2 (W.D. PA Jan. 29, 2009); Wright & Miller, 5C Federal Practice and Procedure: Civil 3d § 1368 (2004). When considering a motion under 12(c), "[t]he Court must also accept as true all well-pleaded

allegations in the complaint and view them in the light most favorable to the nonmoving party.” See *Robbins*, 2008 U.S. Dist. LEXIS 104902, 8. Which means for purposes of this motion, all allegations must be construed in a the light most favorable to Plaintiffs. Furthermore, “[j]udgment on the pleadings shall only be granted if the moving party clearly establishes that there are no material issues of fact and that the moving party is entitled to judgment as a matter of law.” *Alea London Ltd. v. Woodlake Mgmt.*, No. 08-4093, 2009 U.S. Dist. LEXIS 2409, 6 (E.D. Pa. Jan. 14, 2009). Ultimately, a court should not grant a motion under Rule 12(c) or dismiss a complaint for failure to state a claim unless the complaint fails to include “plausible grounds” for relief. *Twombly*, 127 S. Ct. at 1965.

## **II. PLAINTIFFS HAVE ADEQUATELY PLED A CLAIM OF COPYRIGHT INFRINGEMENT CLAIM.**

Defendant contends that he is entitled to judgment on the pleadings because Plaintiffs’ failed to plead their claim of copyright infringement with specificity. In particular, Defendant contends that Plaintiffs failed to allege an act of distribution, that they failed to allege the time when the alleged infringement occurred, that they failed to alleged that copyrighted sound recordings at issue were registered, and that they failed to identify Defendant. Defendant’s arguments are simply wrong on two fronts. First, despite Defendant’s arguments to the contrary, Plaintiffs are not required to plead a claim of copyright infringement with specificity. Second, the very factual allegations that Defendant contends are missing from Plaintiffs’ Complaint have, in fact, been pled by Plaintiffs.

### **A. Plaintiffs Are Not Required To Plead Copyright Infringement With Specificity.**

In order to adequately allege a claim of copyright infringement, Plaintiffs’ need only satisfy the pleading standards of Rule 8 of the Federal Rules of Civil Procedure as clarified by

the Supreme Court in *Twombly*. See *Sony BMG Music Entm't v. Cloud*, No. 08-1200, slip. op. 3 (E.D. Pa. Aug. 22, 2008) (“Indeed, the Supreme Court expressly stated that Twombly does not impose any new requirement of heightened detail or specificity in pleading, relative to preexisting pleading standards under Rule 8. Rather, Twombly clarifies that plaintiff’s Rule 8 obligation to make a “showing” of entitlement to relief is satisfied not by mere “blanket assertion” or “formulaic recitation of the elements of a cause of action,” but by “factual allegations [sufficient] to raise the right to relief above the speculative level” and provide a defendant both fair notice of the claim and the “grounds upon which it rests.”) (attached as Exhibit A). Contrary to Defendant’s allegations, Plaintiffs’ Complaint more than satisfies both Fed. R. Civ. P. 8 and *Twombly*.

To state a claim for copyright infringement, Plaintiffs need only allege: (1) that they own valid copyrights, and (2) that Defendant violated one or more of the exclusive rights in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs’ copyrighted works. See *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 203 (3d Cir. 2005) (citing *Dunn & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002)); see also *Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”); 4 Melville Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2002) (“Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant.”).

Plaintiffs specifically pled these two elements of a claim of copyright infringement in their Complaint in accordance with Fed. R. Civ. P. 8 and *Twombly*. First, Plaintiffs allege that they own or control the exclusive rights to copyrights in the nine sound recordings identified in Exhibit A to the Complaint, all of which have been properly registered with the United States Copyright Office (the “Copyrighted Sound Recordings”). (Complt. at ¶ 11 and Ex. A thereto.) Second, Plaintiffs also allege that Defendant violated Plaintiffs’ copyrights by using an online media distribution system to download (i.e., copy) and distribute the Copyrighted Sound Recordings over the Internet, that Defendant’s conduct “violated Plaintiffs’ exclusive rights of reproduction and distribution,” and that these infringements were continuous. (Complt. at ¶ 15.) Specifically, Plaintiffs’ Complaint states:

Plaintiffs identified an individual using LimeWire on the P2P network Gnutella at IP address 165.123.196.206 on June 21, 2007 at 14:46:46 EDT distributing 286 audio files over the Internet. The Defendant was identified as the individual responsible for that IP address at that date and time. Plaintiffs are informed and believe that as of June 21, 2007, Defendant, without the permission or consent of Plaintiffs, had continuously used, and continued to use, a P2P network to download and/or distribute to the public the Copyrighted Recordings. ***Exhibit A identifies the date and time of capture and a list of Copyrighted Recordings that Defendant has, without the permission or consent of Plaintiffs, downloaded and/or distributed to the public. Through Defendant’s continuous and ongoing acts of downloading and/or distributing to the public the Copyrighted Recordings, which acts Plaintiffs believe to have been ongoing for some time, Defendant has violated Plaintiffs’ exclusive rights of reproduction and distribution.*** Defendant’s actions constitute infringement of Plaintiffs’ copyrights and exclusive rights under copyright.

(Complt. at ¶ 15) (emphasis added). Thus, Plaintiffs have adequately alleged the requisite elements of a claim for copyright infringement.

Moreover, nearly every court, including this one, to have ruled on the sufficiency of similar complaints brought by the record companies in other cases has found Plaintiffs’ complaint to be sufficient. *See e.g., Sony BMG Music Entm’t v. Cloud*, No. 2:08 CV 01200 WY,

at. 4 (this Court found Plaintiffs' Complaint "to be well [pled] and to contain sufficient factual allegations to raise Plaintiffs' right to relief above the speculative level, such that Defendant's Motion for More Definite Statement will be denied.")(Exhibit A); *Atlantic Recording Corp. v. Serrano*, No. 07-CV-01824-W-JMA, 2007 U.S. Dist. LEXIS 95203, 8 (S.D. Cal. Dec. 28, 2007) (denying motion to dismiss under *Twombly*, finding "Plaintiffs supply more than enough information to give Defendant fair notice of who owns the copyrights and how and when Defendant allegedly infringed them."); *LaFace Records, LLC v. Does 1-5*, No. 07-CV-187, slip op. at 12 (W.D. Mich. Feb. 22, 2008) (denying defendant's motion to dismiss, finding "Under the standard recently established by the United States Supreme Court, the complaint alleges sufficient facts to raise the right to relief above the speculative level.")(attached as Exhibit B); *LaFace Records, LLC v. Does 1-38*, No. 07-CV-00298-BR, slip op. at 3 (E.D.N.C. Feb. 27, 2008) ("Plaintiffs have . . . sufficiently stated a claim and supplied a factual basis for copyright infringement.")(attached as Exhibit C); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 971-972 (N.D. Tex. 2006) ("Plaintiffs' pleading provides a short and plain statement that alleges both their copyright ownership and violation of one or more of the exclusive rights identified in 17 U.S.C. § 106"); *Warner Bros. Records Inc. v. Duarte*, No. No. SA-06-CV-615, slip op. at 4 (W.D. Tex. May 2, 2007) (plaintiffs' evidence confirms that "plaintiffs are the owners of the copyrighted material, the infringement originated from [defendant's] Internet account . . . and infringement occurred within three years of the filing of this lawsuit")(attached as Exhibit D); *Interscope Records, v. Duty*, No. 05-CV-3746-PHX-FJM, 2006 U.S. Dist. LEXIS 20214, 6 (D. Ariz. Apr. 14, 2006) (denying motion to dismiss and finding plaintiffs' complaint to be sufficient).<sup>1</sup>

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<sup>1</sup> Defendant does cite to two cases, *Atlantic Recording Corp. v. Brennan*, 534 F.Supp.2d 278, 283

Defendant, however, misrepresents to this Court that Plaintiffs have “the burden to allege with specificity the act by which defendant has infringed upon the plaintiffs copyright.” (Def.’s Mem. p.4.) Defendant cites no authority, nor are Plaintiffs aware of any authority, that either the Third Circuit or this particular Court requires a claim of copyright infringement to be pled with specificity. Each and every case that Defendant cites for this proposition is from the U.S. District Court for the Southern District of New York. Even courts in the Southern District of New York, however, have rejected a heightened pleading standard for claims of copyright infringement, particularly where, as here, plaintiffs have alleged continuous and ongoing acts of infringement. *See, e.g., Elektra Entm’t Group, Inc. v. Barker*, 551 F.Supp.2d 234, 8-11 (S.D.N.Y. Mar. 31, 2008); *see also Atlantic Recording Corp. v. Does 1-25*, No. 05-CV-9111, 2008 U.S. Dist. LEXIS 53654, 7-8 (S.D.N.Y. Jan. 3, 2006); *Elektra Entm’t Group, Inc. v. Santangelo*, 2005 U.S. Dist. LEXIS 30388, 4 (S.D.N.Y. Nov. 28, 2005); *Franklin Elec. Publishers v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991).

Indeed, it would defeat the purpose of the copyright laws to strictly require a plaintiff to allege with specificity when and how each infringement occurred, because such actions are not typically done in plain sight of the copyright holder. Piracy typically takes place “behind closed doors and beyond the watchful eyes of a copyright holder.” *See Warner Bros. Records, Inc. et al*

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(D.Conn. Feb. 13, 2008) and *Interscope v. Rodriguez*, No. 06cv2485-B (NLS) (S.D. CA Aug. 17, 2007), where complaints filed by these and other recording company plaintiffs were found to be insufficient under *Twombly*. In both *Rodriguez* and *Brennan* the courts were considering different complaints than that which was filed in this matter. Compare *Rodriguez* and *Brennan* complaints (attached as Exhibit E) with *Kovalcik* Complaint (attached as Exhibit F). Moreover, neither decision in *Rodriguez* and *Brennan* is binding on this Court and Plaintiffs respectfully submit that, as evidenced by the many courts, including this one, which have ruled differently on this matter, both *Rodriguez* and *Brennan* were wrongly decided.



*v. Payne*, No. 06-CA-051, 2006 U.S. Dist. LEXIS 65765, 10 (W.D. TX. 2006). Moreover, in cases like this one, Plaintiffs cannot be expected to allege each individual act of infringement, because the infringement has been taking place for as long as the sound recordings have been available on Defendant's computer, and this information is exclusively within Defendant's control.

**B. Plaintiffs Have Pled Specific Facts in Their Complaint.**

As noted above, Plaintiffs' claims of copyright infringement in this case clearly satisfy the pleading requirements of Fed. R. Civ. P. 8. Further, although there is no requirement that Plaintiffs plead a claim of copyright infringement with specificity, Plaintiffs have, in fact, alleged the very facts that Defendant contends are missing from Plaintiffs' Complaint. Despite Defendant's arguments to the contrary, Plaintiffs have alleged the specific acts by which copyright infringement took place, namely, (1) the reproduction and/or distribution of the 9 defined Copyrighted Recordings, (2) using the LimeWire file-sharing service on the Gnutella P2P network, (3) at a specifically defined IP address and (4) at a specific date and time. (Complt. at ¶ 15). Moreover, Plaintiffs have gone far beyond mere allegations by detailing evidence that Plaintiffs gathered concerning the hundreds of files being distributed by Defendant. (Complt. at ¶ 15). Specifically, Plaintiffs allege the P2P network used by Defendant to infringe Plaintiffs' copyrights, the manner by which Defendant infringed Plaintiffs' copyrights, the IP address through which the infringement occurred, and provided a detailed list of the works that Defendant has infringed. (*Id.* at ¶¶ 13-15 and Ex. A thereto.)

Despite these allegations in Plaintiffs' Complaint, Defendant contends that Plaintiffs' Complaint is insufficient because Plaintiffs' failed to allege a time when the alleged infringement took place. However, as set forth above, Plaintiffs need not specify the dates or times on which

the infringement occurred, particularly where, as here, plaintiffs have alleged continuous and ongoing acts of infringement. *See supra.*, p. 8. Notwithstanding this, and despite Defendant's arguments to the contrary, Plaintiffs *have* alleged a specific date and time that the alleged infringement occurred - June 21, 2007 at 14:46:46 EDT. (Complt. ¶ 15.)

**C. Plaintiffs Have Sufficiently Alleged Registration in the Copyrighted Works At Issue.**

Defendant also argues that Plaintiffs have failed to properly allege registration in the sound recordings at issue in the Complaint. (Def's Mem., p. 11.) Defendant argues that Plaintiffs did not attach copyright registrations to the Complaint nor identify the registration numbers for the copyrighted works at issue. (*Id.*) This is simply false. While Plaintiffs did not attach a copy of the copyright registrations to the Complaint, Plaintiffs did in fact identify the registration numbers for each of the copyrighted sound recordings at issue on Exhibit A of the Complaint. (Complt. ¶ 11 and Exhibit A.) Defendant, however, suggests that Plaintiffs should be required to physically attach the copyright registrations to the Complaint, and that by not doing so Plaintiffs have failed to adequately plead ownership of the copyrighted sound recordings at issue. (Def.'s Mem., p. 11.)

Defendant's argument is without merit. Contrary to Defendant's arguments, Plaintiffs' are not required to attach copies of the copyright registrations to the Complaint to establish ownership of the copyrighted sound recordings at issue. Even the cases Defendant cites in support of this proposition only require that Plaintiffs allege ownership and that the copyrighted sound recordings at issue are "suitably registered." *See Gee v. CBS, Inc.*, 471 F.Supp. 600, 644 (E.D. PA March 7, 1979)(stating that plaintiffs "would have had to allege that [t]hey presently own the copyright [and] . . . that each work is suitably registered . . . .") Moreover, Plaintiffs

provided Defendant with the Certificate of Copyright Registration number for each of the sound recordings at issue on Exhibit A to the Complaint. With that information, Defendant could have accessed the copyright registration for each of the sound recordings at issue at <http://www.copyright.gov/records>.

**D. Plaintiffs Have Sufficiently Identified Defendant For the Purposes Of Fed. R. Civ. P. 8.**

Finally, Defendant argues that Plaintiffs have failed to identify Defendant because IP addresses can be “spoofed.” (Def.’s Mem. p. 12.) However, as Plaintiffs alleged in their Complaint, Defendant has been “identified as the individual responsible for that IP address at that date and time.” (Complt. ¶ 15). Specifically, Defendant was identified as the individual responsible for the IP address referenced in the Complaint, 165.123.196.206, on June 21, 2007 at 14:46:46 EDT by his Internet Service Provider the University of Pennsylvania. The fact that Defendant may assert certain defenses, such as spoofing, challenging Plaintiffs’ allegations identifying Defendant as the individual responsible for the IP address in question is not an issue that can be resolved on a motion for judgment on the pleadings. At most, it merely establishes a potential issue of fact which precludes this Court from granting Defendant’s motion because, as previously stated, “[j]udgment on the pleadings shall only be granted if the moving party clearly establishes that there are *no material issues of fact* and that the moving party is entitled to judgment as a matter of law.” *Alea London Ltd.*, 2009 U.S. Dist. LEXIS 2409, 6 (emphasis added). While Defendant suggests that an IP address “can be ‘spoofed’” (Def.’s Mem. p. 12), Defendant’s bald assertion does not in any way establish “as a matter of law” that Defendant is not the individual responsible for the IP address identified in the Complaint. In fact, Defendant does not even actually suggest that Defendant’s IP address was spoofed or that Defendant has

evidence to suggest his IP address was spoofed. (Def.'s Mem. p. 11 - 13).

Accordingly, Plaintiffs' have adequately alleged a claim of copyright infringement against Defendant under Fed. R. Civ. P. 8(a) and *Twombly*, and, therefore, Defendant's Motion for Judgment on the Pleadings should be denied.

**III. DEFENDANT'S "MAKING AVAILABLE" ARGUMENT DOES NOT RENDER PLAINTIFFS' COMPLAINT INSUFFICIENT AND IS INCORRECT AS A MATTER OF LAW.**

Defendant argues, that Plaintiffs' Complaint fails because

the mere listing of copyrighted works in an index of files available to download constitutes the Defendant's "making available" or "authorization" of distribution, and therefore is an act of infringement, [is an argument that] has been squarely rejected by numerous jurisdictions.

(Def.'s Memo., p. 7). Defendant, however, fundamentally misconstrues Plaintiffs' Complaint and his "making available" argument is, at best, premature and does not render Plaintiffs' Complaint insufficient under Fed. R. Civ. Proc. 8.

Plaintiffs' Complaint alleges that Defendant used "a P2P network to download and/or distribute to the public the Copyrighted Recordings." (Complt., ¶ 15.) Contrary to Defendant's argument, this single allegation makes it clear that Plaintiffs' Complaint has alleged that Defendant violated both Plaintiffs' exclusive right of distribution *and* reproduction under the Copyright Act. Moreover, Defendant's "making available" argument is irrelevant because Plaintiffs have evidence of actual distribution of each of the Copyrighted Recordings identified in Exhibit A. These Copyrighted Recordings were actually distributed to MediaSentry. Moreover, Plaintiffs have directly alleged that Defendant has infringed on, among other things, their exclusive right of copying. In light of Plaintiffs' allegations of actual distribution and copying, this Court need not reach the question of whether the distribution right subsumes the

right of making copyrighted works available for distribution (the so-called right of “making available”). *See, e.g., Greubel*, 453 F. Supp. 2d 961; and *Duty*, 2006 U.S. Dist. LEXIS 20214.

Although premature, and unnecessary, if the Court were to consider the question of whether Plaintiffs can establish a violation of the exclusive right of distribution based solely on a “making available” theory, the law is clear that Defendant is wrong. This Court and many others have held that “[a] plaintiff . . . can establish infringement by . . . proof that the defendant ‘made available’ the copyrighted work.” *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 U.S. Dist. LEXIS 11626, 12-13 n.38. (E.D. Pa. 2007); *see also, e.g., Maverick Recording Co. v. Harper*, No. 5:07-CV-026-XR (W.D. Tex. Sept. 16, 2008)(attached as Exhibit G); *Atlantic Recording Corp. v. Anderson*, No. 06-CV-3578, 2008 U.S. Dist. LEXIS 53654, 18 (S.D. Tex. Mar. 12, 2008)(“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”(citations omitted)); *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9<sup>th</sup> Cir. 2001).

Section 106(3) of the Copyright Act grants a copyright owner the exclusive right to “distribute” copies of copyrighted works to the public by any means of transfer of ownership or by rental, lease or lending. 17 U.S.C. § 106(3). 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.

This is precisely what the Supreme Court held in *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 488 (2001). In *Tasini*, several authors sued both newspaper publishers and electronic publishers (including NEXIS) for making the authors’ copyrighted articles available for download on online databases like NEXIS. *See id.* at 487. The newspaper 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 in *Tasini*; 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 (emphasis added).

In addition to *Tasini*, courts, including this one, have routinely held that the unauthorized act of making copies available for download by others violates the copyright owner’s exclusive right to distribute its works.<sup>2</sup> *See DePietro*, 2007 U.S. Dist. LEXIS 11626, 12-13 n.38 (“[a] plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant ‘made available’ the copyrighted work.”) In fact, the United States District Court for the Western District of Texas in *Maverick Recording Co. v. Harper* recently held that while “the Fifth Circuit has not ruled on [“making available”], this Court will follow those other courts that have found a “make available” right in 17 U.S.C. Section 106(3).” *See Harper*, slip. op. at p.6 and n.4 (Exhibit G). The Ninth Circuit also concluded in *Napster*, *supra*, that “users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.” 239 F.3d

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<sup>2</sup> The United States Register of Copyrights has expressly determined 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, Sept. 25, 2002, *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 (2002) (attached hereto as Exhibit A.) The Register of Copyrights’ interpretation is entitled to particular respect. *De Sylva v. Ballentine*, 351 U.S. 570, 577-78 (1956).

1004, 1014 (9th Cir. 2001); *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 (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.”).<sup>3</sup>

This is nothing new - 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. As the Fourth Circuit explained in holding a library liable for offering copyrighted genealogical material:

When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public. At that point, members of the public can visit the library and use the work.

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<sup>3</sup> *Accord 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); *Payne*, 2006 U.S. Dist. LEXIS 65765, (holding that making copyrighted audio files available for distribution on a peer-to-peer network may violate the copyright owner’s distribution right); *Duty*, 2006 U.S. Dist. LEXIS 20214, 6 n.2 (D. Ariz. Apr. 14, 2006) (“The mere presence of copyrighted sound recordings in [the defendant’s] share file may constitute distribution and therefore infringement.”); *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 (emphasis original)); *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”).



*Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

Likewise, video rental stores that hold copyrighted videos out for sale also violate the copyright holders' distribution right, even where no actual sale is consummated. *See, e.g., Walt Disney Co. v. Video 47, Inc.*, 972 F. Supp. 595, 599 (S.D. Fla. 1996) (holding that a video rental store had 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. Wang*, 482 F. Supp. 2d 314, 317-18 (E.D.N.Y. 2007) (awarding statutory damages for offering to sell copies of the plaintiff's copyrighted television shows); *Columbia Pictures Indus., Inc. v. T&F Enters., Inc.*, 68 F. Supp. 2d 833, 835, 839 (E.D. Mich. 1999) (holding that the defendants violated the plaintiffs' distribution right by "[holding] these video cassettes out for distribution to the general public without authorization").<sup>4</sup>

The cases cited by Defendant, none of which are binding on this Court, do not outweigh the overwhelming authority referenced above, including binding precedent directly on point. Therefore, while reaching the question of whether Plaintiffs can establish a violation of the exclusive right of distribution based solely on a "making available" theory is premature and irrelevant to a determination of Defendant's Motion, the law is clear that making Plaintiffs' copyrighted sound recordings available to others for copying violates Plaintiffs' exclusive right of distribution.

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<sup>4</sup> In similar contexts, courts routinely hold that the plain meaning of the statutory term "distribution" includes making an item available to others. *See, e.g., United States v. Shaffer*, 472 F.3d 1219, 1223 (10th Cir. 2007) (holding that the defendant "distributed" child pornography by placing it in his KaZaA shared folder and making it available for other users); *United States v. Carani*, 492 F.3d 867, 876 (7th Cir. 2007) ("The notion that Carani could knowingly make his child pornography available for others to access and download without this qualifying as 'distribution' does not square with the plain meaning of the word.").



**IV. DEFENDANT’S ARGUMENT THAT STATUTORY DAMAGES ARE UNCONSTITUTIONAL IS NOT A BASIS TO DISMISS PLAINTIFFS’ CLAIM OF COPYRIGHT INFRINGEMENT.**

As a preliminary matter, whether some amount of statutory damages can be unconstitutionally excessive is not a basis to grant Defendant’s Motion for Judgment on the Pleadings. In fact, whether statutory damages are constitutional has no bearing at all on the only issue before the court - whether Plaintiffs' Complaint adequately states a claim for relief. Even if Defendant could convince this Court that statutory damages were relevant to his Motion, the relief sought in Plaintiffs’ Complaint is not limited to statutory damages as Plaintiffs also seek injunctive relief and attorneys’ fees. Accordingly, Defendant is not entitled to judgment on the pleadings. However, to the extent the Court chooses to address Defendant' assertion that statutory damages are, or may be, unconstitutionally excessive, Defendant's argument fails and has been rejected repeatedly by courts around the country.<sup>5</sup> Moreover, Defendant's unsupported argument that statutory damages are subject to the same limitations as punitive damages completely ignores the very purpose for which Congress authorized statutory damages under the Copyright Act.

**A. The Copyright Act Demonstrates Congress’ Intent to Allow a Plaintiff To Recover Statutory Damages.**

Under the Copyright Act, the plaintiff copyright owner in a civil case may recover “the copyright owner’s actual damages and any additional profit of the infringer” or “instead . . . statutory damages.” 17 U.S.C. § 504(a). “Because awards of statutory damages serve both

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<sup>5</sup> Defendant cites *UMG Recordings, Inc. v. Lindor*, No. 05-1095, 2006 WL 3335048, 3 (E.D.N.Y. Nov. 9, 2006) for the proposition that statutory damages are 1,071 times the actual damages incurred by the plaintiffs. What Defendant fails to point out is that the court did not adopt the affidavit’s conclusions but rather considered the affidavit in determining whether defendant’s requested amendment was frivolous.

compensatory and punitive purposes, a plaintiff may recover statutory damages *whether or not* there is adequate evidence of the actual damages suffered by plaintiffs or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement.” *Los Angeles News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 996 (9<sup>th</sup> Cir. 1998) (emphasis added). 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) (emphasis added).

Congress has carefully tailored the remedy of statutory damages and has revised section 504(c) several times since 1976 to *increase* the ranges of damages. A Report of the Committee on the Judiciary explained that increases were needed to achieve “more stringent deterrent to copyright infringement and stronger enforcement of the laws.” H.R. Rep. No. 106-216, at 2 (1999). The House Report elaborated in a way that resonates strikingly with the facts of 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. See *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001); *N.A.S. Import, Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252 (2d Cir. 1992). The wisdom of Congress' regime and the amounts set forth therein is not within the province of this Court to second guess. See *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (“[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the [Copyright] Clause . . . [and] [t]he wisdom of Congress’ action . . . is not within [the Supreme Court’s] province to second guess.”); *ABC, Inc. v. PrimeTime 24, J.V.*, 17 F. Supp. 2d 478, 489 (D.N.C. 1998) (“Congress passed the Copyright Act . . . . If Congress can create the right, it follows that it can also create the remedy”).

**B. Defendant’s Argument That Statutory Damages Must Be Proportionate to Actual Damages Has Been Considered, And Rejected, by Numerous Courts.**

Defendant’s claims that the statutory damages are unconstitutionally excessive has been routinely rejected. As the Supreme Court has made clear, there is no requirement that statutory damages be related to actual damages. See *FW Woolworth*, 344 U.S. at 233. *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001), demonstrates this very point. In that case, after the jury returned a verdict of \$31.68 million for 440 infringements, the defendant moved for a new trial, arguing that the damages were “excessive.” *Columbia Pictures Television, Inc. v. Feltner*, Case No. CV 91-6847 ER (CTx), Order at 2 (C.D. Cal. June 10, 1999) (Exhibit D). Denying the motion, the district court held that a defendant cannot argue that the award was overly punitive, since the award amount fell squarely within the statutory range provided by the statutory damages provision of section

504(c). *Id.* (affirmed at *Krypton Broadcasting*, 259 F.3d at 1195). The court further held that “[t]o receive statutory damages, the Plaintiff did not need to prove the damages actually suffered.” *Id.*

The Second Circuit reached the same conclusion in *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001). In that case, 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 of \$100,000 per work. *Id.* at 113. Significantly, while 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,” the district court rejected defendant’s argument that *statutory damages* under the Copyright Act must be “reasonably related to the harm.” *Id.* at 462-63. 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.* (emphasis added). The Second Circuit affirmed, noting that the award was “within the statutory range” and thus within the jury’s “discretion.” *Yurman*, 262 F.3d at 113-14. See *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 458 (D. Md. 2004) (rejecting defendant argument that an award of copyright statutory damages should be limited to four times actual damages and subject to due process review, holding that “there has never been a requirement that statutory damages be strictly related to actual injury.”).

In *SESAC, Inc. v. WPNY*, 327 F. Supp. 2d 531 (W.D. Pa. 2003), the district court sustained a \$1.26 million verdict where actual damages (the cost of a license) were \$6,000. Specifically rejecting the defendant’s argument, also made by Defendant here, that statutory

damages should be proportionate to damages sustained by Plaintiffs, the court concluded its opinion with an observation that applies equally here:

[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. The Court should not interfere lightly with a carefully crafted statutory scheme by substituting its judgment for that of the legislature. In essence, that is what the defendants ask us to do.

*Id.* at 532.

Plaintiffs are aware of no case in which a court has reduced or set aside as excessive an award that fell within the range permitted by the Copyright Act. Moreover, Plaintiffs are aware of no case in which a Court has dismissed a claim of copyright infringement based on a finding that statutory damages under the Copyright Act are unconstitutional. As established above, statutory damages are constitutional. Defendant's argument to the contrary not only is incorrect but does not constitute a basis to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6).

### **CONCLUSION**

Based on the foregoing, Plaintiffs request that Defendant's Motion for Judgment on the Pleadings be denied.

Dated: February 20, 2009

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 20, 2009, a copy of the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. PROC. 12(C)** was served upon the Defendant via United States Mail as follows:

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Dated: February 20, 2009

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