

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

SONY BMG MUSIC ENTERTAINMENT,	:	
a Delaware general partnership; ARISTA	:	
RECORDS LLC, a Delaware limited liability	:	
company; UMG RECORDINGS,	:	
INC., a Delaware corporation; and BMG	:	Case No. 2:08 CV 01200
MUSIC, a New York general partnership	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
DENISE CLOUD,	:	
	:	
Defendant	:	

**DEFENDANT DENISE CLOUD’S BRIEF IN SUPPORT OF
HER RULE 12(b) (6) MOTION TO DISMISS**

Defendant, by and through her counsel undersigned below, hereby submit this brief in support of her motion dismissal of Plaintiffs’ complaint under Fed. R. Civ. P. 12(b).

INTRODUCTION

Plaintiffs, recording companies operating under the umbrella of the Recording Industry Association of America (RIAA) sued Defendant Denise Cloud under the theory that her use of a peer to peer network alone constituted copyright infringement. Plaintiff’s Complaint, attached as Exhibit A, is a boilerplate complaint used in various other suits on-going in other circuits. Defendant now makes a Rule 12(b) motion for failure to state a claim for which relief may be granted, since “making available” is the centerpiece of Plaintiffs’ case in chief, and plaintiffs fail to allege how Defendant created

“material objects”. Additionally, plaintiffs ask for unconstitutional damages, and fail to allege any facts supporting enhanced statutory damages for willfulness.

DISCUSSION

Fed. R.Civ. P. 12(b)(6) states that a” failure to state a claim upon which relief can be granted” is a defense that may be raised prior to any responsive pleading being filed.

The “making available” theory of copyright infringement is the theory that plaintiffs urge herein, where simply leaving a computer open for access by other users on the internet who may create digital copies of copyrighted material, constitutes copyright infringement. While the concept has no basis in statutory history or case law, the plaintiffs are prosecuting this case solely under that theory of liability.

Plaintiffs also allege that Defendant distributed copies to others. Plaintiffs however fail to allege how the Defendant made material objects that are copies to be distributed, as you can only distribute physical, material objects. 17 U.S.C. § 101.

Plaintiffs are also seeking unconstitutional levels of statutory damages far in excess of any potential damage which they allege.

I. “Making available” does not constitute infringement pursuant to 17 USC 504 , because it is not among the exclusive rights of a copyright holder enumerated in 17 USC 106

Plaintiffs allege that by having copyrighted sound recordings on the Defendant’s computer and the Defendant using a Peer to Peer Network, Defendant was making the recordings available and therefore violating the copyright holder’s exclusive rights under 17 U.S.C. § 106.

The “making available” argument is that by having a copyrighted work unprotected and accessible to means of copying, then the one who makes the work

available is engaging in direct copyright infringement. In this suit, the Plaintiffs are arguing that the defendant is engaging in direct copyright infringement of their works, (despite that the Supreme Court stated that “making available” was at most, a form of vicarious or contributory infringement, not direct. “One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it.”

MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)

This line of reasoning has been followed by many other courts. For example, In *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278 (D. Conn. 2008), in determining whether or not plaintiffs could move for summary judgment after the defendant failed to respond the court had this to say;

At least one aspect of Plaintiffs' distribution claim is problematic, however, namely the allegation of infringement based on "mak[ing] the Copyrighted Recordings available for distribution to others." (citation omitted) This amounts to a valid ground on which to mount a defense, for "without actual distribution of copies . . . there is no violation [of] the distribution right." 4 William F. Patry, *Patry on Copyright* § 13:9 (2007); see also *id.* n.10 (collecting cases); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (affirming the district court's finding "that distribution requires an 'actual dissemination' of a copy"). *Id.* at 281-2.

This line of reasoning is why *Capitol v. Thomas*, the only case of this nature that had gone to trial, and upon which plaintiffs placed great reliance, is being retried. Judge Michael J. Davis ordered a new trial based on the binding precedent that for distribution to happen physical copies must be exchanged. (Order attached as Exhibit B.)

Plaintiffs do not imply that Defendant disseminated the works in question. They only state that outside persons could make copies, not that copies were actually made.

See Paragraph 15 of Plaintiffs' Complaint. "Making available" is not enough in order to allege copying.

II. Plaintiffs Fail to Properly Plead willfulness

In order to grant relief on a claim, Plaintiffs must properly plead all causes of action. The Copyright Act provides for increased damages for willful infringement. 17 U.S.C. § 504. Willfulness has been defined in the Third Circuit when "the infringer has knowledge that his conduct is infringing another's copyright or if the infringer has acted in reckless disregard of the copyright owner's rights. *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1115 (2d Cir.1986)." Quoting *Yash Raj Films (USA) Inc. v. Sur Sangeet Video Elecs. Inc.*, 2008 U.S. Dist. LEXIS 14951 at 12 (D.NJ 2008).

In the complaint, plaintiffs did not state that defendant knew or should have known that their conduct constituted copyright infringement. Paragraph 17 of the Complaint simply states that the "Plaintiffs are informed and believed that the foregoing acts of infringement are willful and intentional." Plaintiffs do not describe the factual basis of this belief.

The only actions described as being made by the defendant is that files on her computer were available due to installing a Peer to Peer Network program. Plaintiffs made no distinctions about whether Defendant was a sophisticated or casual user of such programs, what other files beyond the claimed copyright protected works that the Plaintiffs claim were present that were also listed under the Peer to Peer Network program nor if any of her activity using the Peer to Peer Network even suggested downloading, such as recording downloading taking place.

As Defendant was not making copies, it is difficult to translate not doing something to being willful.

III. Plaintiffs do not claim that any “material object” was made or disseminated, a requirement of 17 USC 101

The Copyright Act provides protection against the unauthorized production of copies or phonorecords (a type of copy) of protected works. 17 U.S.C. § 106 (1) (2006). Copies and Phonorecords are specifically defined as material objects. 17 U.S.C. § 101 (2006). This is part of the 400 year old copyright tradition that for anything to be protected or protectable, it must be tangible and fixed. Otherwise, singing in the shower might be copyright infringement, which it is not.

In a recent decision, the Second Circuit found that a digital file in computer memory was not sufficiently fixed to constitute a copy, as a “material object” must be ‘sufficiently permanent or stable to permit it to be . . . reproduced . . .for a period of more than transitory duration’. *Cartoon Network v. Cablevision*, No. 07-1480-cv & No. 07-1511-cv (2nd Cir. August 4, 2008). (Attached as Exhibit C.)

If there is no tangible copy made, there is no infringement. The Defendant is not accused of making copies. She did not create any material object with the contested recordings. Any infringement would have come at the hands of others, if it happened at all.

IV. The statutory damages requested are unconstitutional

Plaintiffs in their complaint ask for extraordinary high amounts of statutory damages due to alleged “willfulness”, which raises the normal statutory range of \$250 - \$30,000, to \$150,000 per infringement. Statutory damages are similar to punitive damages as they are a means to punish. Punitive damages have been limited by the U.S.

Supreme Court most famously in *BMW v. Gore* and *State Farm v. Campbell*, which limited normal punitive damages to eight times the amount of compensatory damages; otherwise they might violate the Fifth Amendment (or Eighth Amendment, in the case of any government involvement) to the U.S. Constitution:

The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring in judgment), is implicated by civil penalties.

(*BMW v. Gore*, 517 U.S. 559, note 22 (1996))

The Court continued this line of reasoning in *State Farm v. Campbell*. 538 U.S. 408 (2003):

By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries*, supra, at 432; see also *Gore*, supra, at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

Such a civil penalty might also be a violation of the eighth amendment prohibition against excessive fines. As the U.S. Supreme Court stated in *Austin v. United States*, 509 U.S. 602, (1993),

"The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *United States v. Halper*, 490 U.S. 435, 447-448 (1989). "It is commonly understood that civil proceedings may advance punitive and remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id.*, at 447. See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring). Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.

Plaintiffs are asking for damages that are many times over any damage they would have sustained or any lost profits that they might have enjoyed. Digital audio files

are normally sold on the internet for 99 cents (Apple's iTunes.com is the industry leader). Here, the plaintiff asks for \$150,000 per infringement. Asking for this level of statutory damages is a relief that this court cannot grant as constrained by the U.S. Constitution.

WHEREFORE, Defendant requests that the Court dismiss Plaintiff's Complaint for failure to make a claim for which relief may be granted.

Respectfully submitted,

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