Exhibit W

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UMG RECORDINGS, INC., *et al.*,

Plaintiffs,

REPORT AND
RECOMMENDATION

-against-

05 CV 1095 (DGT)(RML)

MARIE LINDOR,

Defendant.

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LEVY, United States Magistrate Judge:

By order dated November 22, 2006, the Honorable David G. Trager, United States District Judge, referred defendant's motion for preclusion to me for a report and recommendation. For the reasons stated below, I respectfully recommend that defendant's motion be granted in part and denied in part.

BACKGROUND AND FACTS

Plaintiffs UMG Recordings, Inc., Warner Bros. Records Inc., Arista Records LLC, Interscope Records, Motown Record Company, L.P., and Sony B.M.G. Music Entertainment ("plaintiffs") brought this copyright infringement suit against defendant Marie Lindor ("defendant") on February 22, 2005. (See Complaint, dated Feb. 22, 2005 ("Compl.").) Plaintiffs assert that defendant unlawfully used an internet media program to distribute plaintiffs' copyrighted songs to other internet users. (Compl. ¶¶ 12-14.) In so doing, plaintiffs allege, defendant "violated Plaintiffs' exclusive rights of reproduction and distribution" and

infringed plaintiffs' copyrights. (Compl. ¶ 14.)

In the complaint, plaintiffs specified nine sound recordings that defendant allegedly shared on the internet. (Compl., Ex. A.) During discovery, defendant requested all copyrighted sound recording files in plaintiffs' possession concerning this case. (Affidavit of Morlan Ty Rogers, Esq., dated Aug. 22, 2006 ("Rogers Aff."), ¶ 3.) As a result, plaintiffs turned over eleven sound files of copyrighted recordings to defendant. (Rogers Aff., Ex. D.) Plaintiffs allege that, even though they were only able to turn over eleven sound files, defendant actually shared a total of thirty-eight files. (Id.) At oral argument on November 30, 2006, counsel for plaintiffs advised the court that plaintiffs only turned over eleven sound files because those were the only files that plaintiffs downloaded from defendant's computer.[1] However, plaintiffs continue to assert that defendant shared a total of thirty-eight sound files, and are prepared to attempt to prove this by alternative methods.[2] Defendant contends that it is impossible to determine whether a given file that is allegedly being shared is a copyrighted sound file, and thus moves to preclude plaintiffs from "asserting or introducing evidence that defendant

[1] Plaintiffs' counsel revealed that MediaSentry, the company that plaintiffs employ to capture copyright infringers who share files on the internet, operates by attempting to download copyrighted material from users who share that material. If MediaSentry finds an individual sharing copyrighted material, MediaSentry will download a "sample" of the material being shared by that individual. That, plaintiffs assert, is why MediaSentry only downloaded eleven of the thirty-eight copyrighted sound recordings that defendant was allegedly sharing.

[2] Plaintiffs' counsel briefly described methods it would use, such as comparing the number of bytes making up the copyrighted recording to the number of bytes making up the shared recording and examining the "metadata" on the shared recording.

infringed any sound recordings of plaintiffs other than the eleven (11) recordings identified in plaintiffs' April 21, 2006 document production." (Rogers Aff. ¶ 13.)

DISCUSSION

The issue before the court is whether plaintiffs may proceed against defendant on a copyright infringement claim for sharing sound recordings if they cannot produce the allegedly shared recordings themselves. Plaintiffs contend that copyright infringement is analogous to theft, and a victim of theft is not obligated to produce the stolen property as evidence in order to prove that the defendant stole it. (Plaintiffs' Memorandum of Law, dated Sept. 15, 2006 ("Pls.' Mem."), at 1.) Furthermore, plaintiffs assert that in order to prevail on a copyright claim, a plaintiff need only (1) identify the infringing recording, (2) establish that the plaintiff owns the copyright for that recording, and (3) prove that the defendant is the infringer. (Id.)

Plaintiffs, therefore, rest their claim on the assertion that they can accomplish the third step, proving that defendant is the infringer, without providing the infringed recording at issue. In support of this argument, plaintiffs cite several cases in which flea market vendors were found to have distributed compact discs containing copyrighted music, thereby infringing copyrights, even though the plaintiffs were not able to produce the compact discs themselves. (Id. at 5-6 (citing Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996); Arista Records, Inc. v. Flea World, Inc., No. 03-2670, 2006 WL 842883 (D.N.J. Mar. 31, 2006); UMG Recordings, Inc. v. Sinnott, 300 F. Supp. 2d 993 (E.D. Cal. 2004)). However, plaintiffs cite no case law concerning internet file sharing.

Defendant, on the other hand, maintains that plaintiffs cannot prevail on their claims unless they produce the sound recordings that defendant allegedly infringed. Specifically, defendant relies on the deposition testimony of MediaSentry's president, Gary Millin, from BMG Canada Inc. v. Doe. There, Mr. Millin testified that "dummy files" and "fake files" exist on internet sharing programs. (Defendant's Reply Memorandum of Law, dated Sept. 22, 2006 ("Def.'s Mem."), at 3; Reply Affidavit of Morlan Ty Rogers, Esq., dated Sept. 22, 2006, Ex. C.) Mr. Millin further stated that one cannot distinguish a "dummy file" or "fake file" from a genuine sound recording until one opens it and attempts to listen. (Id.) Furthermore, defendant asserted at oral argument that in addition to "dummy files" and "fake files," internet sharing programs often contain corrupt files which once might have been working sound recording files, but are now broken and will not play any sound when one tries to open them.[3] Therefore, defendant argues, plaintiffs cannot prevail on infringement claims of the recordings that plaintiffs did not download.

This is an issue of first impression. This court's independent research uncovered no case law stating whether a plaintiff recording company must produce a sound file in order to prevail on a copyright infringement claim. However, after giving this matter careful consideration, it seems clear that the question of whether defendant infringed plaintiffs'

[3] Some discussion ensued as to whether one is an infringer if one shares a corrupt file that can be proved to once have been a copyrighted sound file. While interesting, this issue is not presently before the court.

copyrights by sharing plaintiffs' sound recording files is one to be determined by a finder of fact.

It is well-settled that in order "[t]o 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." Feist Publications, Inc. v. Rural Tel. Serv., 499 U.S. 340, 361 (1991). See also CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 549 (4th Cir. 2004); Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1174 (9th Cir. 2003). Specific to file sharing, courts have recently held that distributing copyrighted sound files on an internet file sharing program constitutes copyright infringement. BMG Music v. Gonzalez, 430 F.3d 888, 889 (7th Cir. 2005). See also Cable/Home Comm. Corp. v. Network Prods., Inc., 902 F.2d 829, 843 (11th Cir. 1990) ("Public distribution of a copyrighted work is a right reserved to the copyright owner, and usurpation of that right constitutes infringement."). At trial, plaintiffs will have the burden of proving by a preponderance of the evidence that defendant did indeed infringe plaintiff's copyrights by convincing the fact-finder, based on the evidence plaintiffs have gathered, that defendant actually shared sound files belonging to plaintiffs. See Medforms, Inc. v. Healthcare Management Solutions, 290 F.3d 98, 106 (2d Cir. 2002) (stating that in order for the plaintiff to succeed on a copyright infringement claim, the jury must find infringement by a preponderance of the evidence).

Although defendant moves under Fed. R. Civ. P. 37, defendant's motion presents elements of a motion for summary judgment. Not only does defendant move to preclude plaintiffs from introducing evidence at trial that they have not disclosed during discovery, but

she also moves to preclude plaintiffs from asserting that defendant infringed any copyrights with regard to sound recordings that plaintiffs did not download. (Rogers Aff. ¶ 13.) Because defendant is asking the court to rule, as a matter of law, that plaintiffs are not entitled to proceed or prevail on any claims regarding the allegedly shared recordings that plaintiffs did not download, defendant is, de facto, moving for summary judgment on those claims.

Fed. R. Civ. P. 56 provides that a moving party is entitled to summary judgment if it can establish that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Here, defendant has not met her burden of demonstrating that there is no disputed issue of material fact. Defendant has not presented any case law, and this court is aware of none, stating that a plaintiff in a copyright infringement case cannot prevail unless it can produce the copyrighted material that the defendant allegedly distributed. Defendant relies heavily on the deposition testimony of MediaSentry's president that listening to a sound file is the only way one can be certain of its contents. However, as plaintiffs point out, MediaSentry's president is not a party to this case and his testimony in an unrelated matter is not binding on plaintiffs. Plaintiffs state that they can present competent evidence to prove that defendant actually shared copyrighted sound files, even without the sound files themselves. This presents a genuine issue of material fact.

CONCLUSION

For the reasons stated above, I respectfully recommend that defendant's motion be granted in the sense that plaintiffs should not be permitted to introduce at trial evidence that

was not disclosed during discovery, but denied insofar as it seeks to prohibit plaintiffs from asserting that defendant infringed copyrighted sound files that plaintiffs cannot produce and play. Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with courtesy copies to Judge Trager and to my chambers, within ten (10) business days. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Respectfully submitted,

/s/
ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
December 12, 2006