UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; UMG RECORDINGS, INC., a Delaware corporation; and VIRGIN RECORDS AMERICA, INC., a California corporation,

Plaintiffs,

-against-

DENISE BARKER,

Defendant.

Case No. 05CV7340(KMK)(THK)

PLAINTIFFS' BRIEF IN RESPONSE TO THE AMICUS CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION

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Plaintiffs Elektra Entertainment Group Inc., UMG Recordings, Inc., and Virgin Records America, Inc. ("plaintiffs") respectfully submit this response to the amicus curiae brief of the Electronic Frontier Foundation ("EFF").[1]

INTRODUCTION

The EFF's amicus brief seeks to have this court rule that one of the fundamental rights of a copyright owner, the exclusive right of distribution, does not apply on the Internet. Needless to say, the consequences of such a decision would be dramatic. It would literally unwind the basic structure of copyright laws as applied to a medium that has become fundamental in this nation's economy.

The EFF's argument is that the language of the Copyright Act covers distribution of copyrighted works only if tangible materials are transferred. The EFF has misinterpreted the statute and the legislative history. Indeed, its argument fails to acknowledge that the vast majority of courts, if not every court, that has addressed this issue has rejected it and found, either directly or implicitly, that the transmission of electronic files from one person to another does implicate the exclusive right of distribution set forth in the Copyright Act. Moreover, the EFF has failed to explain how the remainder of the copyright statute can be interpreted to make sense if it is correct about the limitations of the right of distribution. Finally, the EFF has overlooked its own 2003 analysis of the issue, in which it concluded that "the transmission of a file from one person to another results in a reproduction, a distribution, and possibly a public performance . . . ." under the Copyright law. See Fred von Lohmann, Peer-to-Peer File Sharing

[1] Plaintiffs note that, this morning, defendant filed a pleading commenting on the EFF's amicus brief. This pleading was filed without authorization and should be stricken. In any event, defendant's statement that plaintiffs failed to allege improper reproduction or distribution is false. See, e.g., Complt. ¶ 12.

and Copyright Law after Napster, <http://www.mp3offshore.com\copyrightlaw.html> (Jan. 2003) (hereafter "von Lohmann") (a copy of this article is attached as Appendix A).

ARGUMENT

I. BECAUSE THE ISSUES RAISED BY THE EFF WERE NOT RAISED BY ANY OF THE PARTIES IN THIS CASE, THIS COURT SHOULD NOT CONSIDER THOSE ISSUES.

It is well-settled that new issues raised by an amicus and that were not raised by any of the parties generally are not properly before the court. See Bano v. Union Carbide Corp., 273 F.3d 120, 127 n. 5 (2d Cir. 2001) (refusing to consider issues raised only by amici but not by the parties themselves); A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 266 (3d Cir. 2001), cert. denied, 534 U.S. 1081 (2002); Eldred v. Ashcroft, 255 F.3d 849, 851 (D.C. Cir. 2001); General Engineering Corp. v. Virgin Islands Water & Power Authority, 805 F.2d 88, 92 n. 5 (3d Cir. 1986) (collecting cases); In re Verizon Internet Services, Inc., 240 F. Supp. 2d 24, 42 (D.D.C.), rev'd on other grounds, 351 F.3d 1229 (D.C.C. 2003), cert. denied, 543 U.S. 924 (2004); 4 Am. Jur. 2d Amicus Curiae §§ 6 ("An amicus curiae is not a party and generally cannot assume the functions of a party, or an attorney for a party."), 7 ("In general, an amicus curiae must accept the case before the court with the issues made by the parties. Accordingly, an amicus curiae ordinarily cannot inject new issues into a case which have not been presented by the parties.") (2004) (footnotes omitted).

Here, the EFF seeks to have the Court rule that the exclusive right of distribution does not cover digital transmissions. This argument cannot be found in any form or function in the defendant's motion to dismiss. It was not raised by any party in this case and is only now before the Court by virtue of the EFF's amicus brief. Because it is improper for an amicus to introduce

new issues that have not been raised by any party, this Court should not consider the issues raised in the EFF's brief.

II. SHOULD THE COURT CONSIDER THE ISSUE RAISED BY THE EFF, THE COURT SHOULD FOLLOW THE VAST MAJORITY OF COURTS AND COMMENTATORS AND FIND THAT THE UNAUTHORIZED DISTRIBUTION OF COPYRIGHTED SOUND RECORDINGS OVER P2P NETWORKS VIOLATES THE EXCLUSIVE RIGHT OF DISTRIBUTION

A. The Language of the Copyright Act Subsumes the Unauthorized Distribution of Electronic Files Over P2P Networks

17 U.S.C. § 106(3) grants to a copyright owner the exclusive right to distribute copies or phonorecords of a copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. As such, the Copyright Act calls for some form of transfer, but it does not require that such transfer involve the movement of any particular material object from one computer to another. Rather, the Act requires only that a material object embodying a copyright owner's work be delivered into someone else's hands or computer hard drive, as the case may be. In other words, the statute requires only that, at the end of the transaction, a work is transferred from one location to another, not whether a material object has been transferred. This distinguishes the distribution right from the public display and performance rights set forth elsewhere in § 106. Simply stated, as long as the recipient of the work being transmitted has a material object embedded with the work after a transfer has taken place, a distribution has occurred. See Keith Kupferschmid, Lost in Space: The Digital Demise of the First-Sale Doctrine, 16 J. Marshall J. Computer & Info. L. 825, 849-50 (Summer 1998) (hereafter "Kupferschmid"); accord Niels Schaumann, Copyright Infringement and Peer-to-Peer Technology, 28 Wm. Mitchell L. Rev. 1001, 1037 (2002) (hereafter "Schaumann").

To argue that a distribution must involve the transfer of tangible objects simply ignores the reality of electronic transmissions, which, when they result in identifiable fixations on a

recipient's computer, are the functional equivalent of receiving a tangible copy. Arguing that such a transmission does not amount to a distribution needlessly, and inconsistent with the Copyright Act, anchors the concept to distribution to the long past, when the only way copies could be distributed was through the dissemination of tangible objects. See Schaumann, at 1037.

This analysis is fully consistent with the well-established view that the unlawful downloading of a copyrighted work to one's computer violates the exclusive right of reproduction set forth in 17 U.S.C. § 106(1). The EFF apparently concedes, as it must, that an MP3 file residing on a downloader's computer constitutes a copy or phonorecord and, thus, by definition, is a "material object" under § 101 of the Copyright Act. See von Lohmann, at 3 (App. A); see also Stenograph L.L.C. v. Bossard Associates, Inc., 144 F.3d 96, 101-02 (D.C. Cir. 1998) (reproduction of program in random access memory creates a "copy"); MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993), cert. dismissed, 510 U.S. 1033 (1994) (same); Final Report of the National Commission on New Technological Uses of Copyrighted Works, H.R. Rep. No. 1307, 96th Cong., 1st Sess., at 22, reprinted in 1980 U.S.C.C.A.N. 6460 (1980) ("Because works in computer storage may be repeatedly reproduced, they are fixed and, therefore, are copies."); Kupferschmid, at 842-43. For the same reasons that an MP3 file residing on a downloader's computer is a copy of a phonorecord for purposes of the Act, the unauthorized transmittal of such a file over P2P networks satisfies the requirements of distribution under the Act.

B. Adopting the EFF's Position Would Improperly Render Various Provisions of the Copyright Act Meaningless

It is a settled principle of statutory construction that courts must construe statutory schemes so as to give effect to all provisions of a statute. See, e.g., Reiter v. Sonotone Corp.,

442 U.S. 330, 339 (1979). Here, adopting the position that the EFF espouses would improperly render several clauses of the Copyright Act meaningless.

For example, section 512 of the Digital Millennium Copyright Act limits the liability of, among others, Internet service providers for copyright infringement resulting from the use of their networks to infringe copyrights by transmitting copyrighted works without authorization. See 17 U.S.C. § 512(a). This provision necessarily assumes that distribution of electronic files over a network implicates the exclusive right of distribution. If the distribution of electronic files over a network could not violate the exclusive right of distribution, as the EFF claims, then there would be no reason for § 512(a).

Similarly, 17 U.S.C. § 114(b) provides, in relevant part, "The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 [including the distribution right] do not apply to sound recordings included in educational television and radio programs . . . distributed or transmitted by or through public broadcasting entities . . . ." Again, if, as the EFF contends, the right of distribution does not protect electronic transmissions, then there would be no need for this sentence, because the distribution right could never apply to transmissions by or through public broadcasting entities.

For all of the foregoing reasons, the EFF's interpretation of the distribution right would render meaningless several provisions of the Copyright Act. Because a court must always construe a statutory scheme to give meaning to all of its provisions, the EFF's interpretation should be rejected.

C. Every Court That Has Addressed the Issue, Including the United States Supreme Court and This Court, As Well As Most Commentators, Has Found That the Unauthorized Transmission of Electronic Files Containing Copyrighted Works Violates the Exclusive Right of Distribution

Consistent with the interpretation of the Copyright Act set forth above, every court of which plaintiffs are aware, including the Supreme Court and this Court, have concluded that the unauthorized transmission of electronic files over the Internet and over P2P networks implicates the exclusive right of distribution. In New York Times Co. v. Tasini, 533 U.S. 483, 498 (2001), the United States Supreme Court found a violation of the exclusive right of distribution where copyrighted news articles were uploaded to electronic and CD-ROM databases and publicly distributed through the NEXIS database. A fundamental presumption in the Supreme Court's analysis is that the § 106(3) right encompasses digital transmissions.

Similarly, last year, in Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005), the Supreme Court considered the issue of whether propagators of P2P file-sharing software could be secondarily liable for the direct infringements of their users. The Court found that they could. See id. at 2782. Fundamental to the Court's conclusion was that the underlying electronic transmissions violated the distribution right. See id. ("MGM's evidence in this case most obviously addresses a different basis of liability for distributing a product open to alternative uses. Here, evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement. If liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was."); accord In re Aimster Copyright Litigation, 334 F.3d 643, 645 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004) (holding that file-swapping, which involves the making and transmitting of a digital copy of music, infringes copyrights); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights.").

Every other court of which plaintiffs are aware is in accord. For example, in Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993), the court found that the operator of a subscription computer billboard whose service was used by subscribers to transmit unauthorized copies of the plaintiff's copyrighted work violated the exclusive right of distribution. Although the EFF seeks to ignore this decision because it lacks detailed analysis, the fact is that numerous courts, including this Court and the U.S. Copyright Office, have reached the same conclusion. See, e.g., Getaped.com, Inc. v. Cangemi, 188 F. Supp. 2d 398, 402 (S.D.N.Y. 2002); Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823, 830-31 (C.D. Cal. 1998); Marobie-FL, Inc. v. National Association of Fire & Equipment Distributors & Northwest Nexus, Inc., 983 F. Supp. 1167, 1180 (N.D. Ill. 1997); Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997); Playboy Enterprises, Inc. v. Webbworld, Inc., 991 F. Supp. 543, 554 (N.D. Tex. 1997), aff'd, 168 F.3d 486 (5th Cir. 1999); Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996); Religious Technology Center, Inc. v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995); DMCA Section 104 Report, at 79, available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf (setting forth position of Copyright Office) (a copy of the relevant pages is attached as Appendix B). Indeed, as noted above, until now, the EFF itself had subscribed to this view. See von Lohmann, at 3 (App. A). The EFF should not now be heard to argue otherwise.

The Second Circuit's decision in Agee v. Paramount Communications, Inc., 59 F.3d 317 (2nd Cir. 1995), on which the EFF relies, is inapposite. Agee involved a television station's transmission of a program for broadcast. On the facts before it, the court found that this transmission implicated the exclusive right of performance, as opposed to the exclusive right of

distribution. See id. at 326. The Agee court expressly distinguished its facts from those at issue in Frena, and, as the EFF concedes, the Agee court did not even address the question of whether disseminations must always be in a physical form to constitute distribution under the Copyright Act. See Agee, 59 F.3d, at 325-26. In short, Agee did not address the issue that the EFF wishes to place before this Court and is irrelevant here.

Nor does the article by Professor Reese, on which the EFF's brief appears to be exclusively based, compel a different result. The fact is that, to plaintiff's knowledge, no court has ever adopted Professor Reese's analysis. To the contrary, as more fully set forth above, all courts that have addressed this issue have reached a contrary result.

For all of the foregoing reasons, because the vast majority of courts (if not all courts) that have addressed the issue before this Court have held that the unauthorized transmission of electronic files containing copyrighted works do, indeed, implicate the exclusive right of distribution, the EFF's contention that this Court should adopt a contrary position should be rejected.[2]

D. The Legislative History on Which the EFF Relies Does Not Support the EFF's Position

The EFF makes much of the legislative history underlying the 1976 Copyright Act, and the Digital Performance Right in Sound Recordings Act of 1995 (the "1995 Act"). The EFF also focuses on the so-called NII White Paper, in which the Clinton administration suggested that 17 U.S.C. § 106(3) should be amended to clarify that a transmission can constitute a distribution

[2] Plaintiffs note that the Department of Justice's well-publicized enforcement efforts against software piracy, which efforts have relied heavily on the distribution right, further support plaintiffs' position here.

of copies or phonorecords of a work, which amendment was never adopted. The EFF's assertions are misplaced.

1. The Legislative History Underlying the Copyright Act of 1976 Does Not Address The Issue Before This Court

First, notwithstanding the EFF's assertions to the contrary, the legislative history underlying the Copyright Act of 1976 did not address the present issue, which involves a technology that did not then exist. The legislature did, however, attempt to distinguish the distribution right from the performance right, noting that, when a work is distributed, something must change hands. This is in contrast to transmissions of performances or displays (e.g., on television), in which nothing changes hands. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 138, reprinted in 1976 U.S.C.C.A.N. 5659, 5754. This view is entirely consistent with plaintiffs' position in this case. As noted above, transmissions of MP3 files over P2P networks result in the recipient's having a complete embodiment of the copyrighted sound recordings at issue. As such, something has changed hands, and pursuant to the 94th Congress's understanding of a distribution, the type of electronic transfer at issue here clearly satisfies that definition.

2. The NII White Paper And The Legislative History Of The 1995 Act Support Plaintiffs' Position Here

The EFF's effort to rely on the NII White Paper and the legislative history underlying the 1995 Act is equally unavailing. Indeed, both fully support plaintiffs' position here.

Although the EFF makes much of the fact that, in the NII White Paper, the Clinton administration encouraged Congress to amend 17 U.S.C. § 106(3) to clarify that electronic transmissions could implicate the distribution right, which Congress then failed to do, the EFF ignores the fact that the NII White Paper also stated that the proposed amendment was not

necessary, because the "existing right of distribution encompasses transmissions of copies." NII White Paper, at 214.

Likewise, although the EFF notes that § 106(3) was not amended in connection with the 1995 Act, this fact is meaningless. The 1995 Act focused on performance rights, only. It did not address the distribution right. Notwithstanding that, the legislative history of the 1995 Act does state, "[T]he digital transmission of a sound recording that results in the reproduction by or for the transmission recipient of a phonorecord of that sound recording implicates the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein." S. 128, 104th Cong., 1st Sess. 27 (1995), reprinted in 1995 U.S.C.C.A.N. 356, 374. As such, the 104th Congress well recognized that electronic transmissions implicate the distribution right in cases like this one.

CONCLUSION

For all of the foregoing reasons, unauthorized electronic transmissions of plaintiffs' copyrighted sound recordings violate the exclusive right of distribution under the Copyright Act, and plaintiffs have properly stated a claim for violations of that right.

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