

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELEKTRA ENTERTAINMENT GROUP INC., a Delaware :
corporation; UMG RECORDINGS, INC., a Delaware :
corporation; VIRGIN RECORDS AMERICA, INC., a :
California corporation; and SONY BMG MUSIC :
ENTERTAINMENT, a Delaware general partnership, : Case No. 05CV7340 (KMK)(THK)
:
Plaintiffs, :
:
-against- :
:
DENISE BARKER, :
:
Defendant. :
----- X

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BACKGROUND 4

ARGUMENT 7

I. LEGAL STANDARDS FOR MOTION TO DISMISS..... 7

II. PLAINTIFFS’ COMPLAINT IS LEGALLY SUFFICIENT 8

 A. Defendant’s argument that the Complaint fails to set forth the specific acts and the dates and times of the alleged copyright infringement does not provide a proper basis upon which to dismiss Plaintiffs’ Complaint. 8

 1. Defendant’s arguments regarding the sufficiency of Plaintiffs’ Complaint have been repeatedly rejected by other federal courts. 8

 2. Plaintiffs’ complaint complies with the liberal notice pleading policies of Rule 8. 10

 3. Defendant’s “Made Available for Download” argument is irrelevant. 15

CONCLUSION..... 24

APPENDIX.....25

TABLE OF AUTHORITIES

Cases

<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	5, 13, 18, 22, 25
<i>Aimster Copyright Litigation</i> , 334 F.3d 643 (7th Cir. 2003).....	6, 13
<i>Atlantic Recording Corp., et al., v. Does 1-25</i> , No. 05-CV-9111-LTS (S.D.N.Y. 2005).....	9
<i>BMG Music et al., v. Gonzalez</i> , 430 F.3d at 890 (7th Cir. 2005).	5
<i>BMG Music, et al. v. Jacob Conklin</i> , No. H-05-1482 (Sept. 16, 2005).....	10
<i>Brode v. Tax Management, Inc.</i> , 1990 WL 25691 (N.D. Ill. 1990).....	20
<i>Brought to Life Music, Inc. v. MCA Records, Inc.</i> , 2003 WL 296561 (S.D.N.Y. Feb. 11, 2003).....	15
<i>CACI Int'l, Inc. v. Pentagen Tech. Int'l, Ltd.</i> , 1994 WL 1752376 at *4 (E.D.Va. June 16, 1994).....	22
<i>Cahill v. Liberty Mut. Ins. Co.</i> , 80 F.3d 336, 337-338 (9th Cir. 1996).....	8
<i>Carell v. Shubert Organization, Inc.</i> , 104 F. Supp. 2d 236 (S.D.N.Y. 2000).....	12
<i>Conley v. Gibson</i> , 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).....	7
<i>cords, Inc. v. MP3Board, Inc.</i> ,.....	22
<i>Elektra Entertainment Group, Inc., et al., v. Santangelo</i> , No. 05-CV-2414-CM (S.D.N.Y. 2005).....	8
<i>Entertainment Inc., v. Does 1-40</i> , 326 F. Supp. 2d 556, at 565 (S.D.N.Y. 2004).....	13
<i>Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.</i> , 499 U.S. 340 (1991).....	10
<i>Ford Motor Co. v. Summit Motor Prods., Inc.</i> , 930 F.2d 277, 299 (3d Cir. 1991).....	18
<i>Franklin Electronic Publishers v. Unisonic Prod. Corp.</i> , 763 F. Supp. 1 (S.D.N.Y. 1991).....	16
<i>Franklin Electronic Publishers v. Unisonic Prod. Corp.</i> , 763 F. Supp. 1, 4 (S.D.N.Y. 1991).....	16
<i>Getaped.com v. Cangemi</i> , 188 F. Supp.2d 398, 401 (S.D.N.Y. 2002).....	20
<i>Higgins v. Detroit Ed. Television Foundation</i> , 4 F.Supp.2d 701 (E.D. Mich. 1998).....	26
<i>Hotaling v. Church Of Jesus Christ Of Latter-Day Saints</i> , 118 F.3d 199 (4th Cir. 1997).....	13

<i>Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic</i> , 1999 LEXIS 15837 at *8, 12 (S.D.N.Y. Oct. 13, 1999)	14
<i>Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distribs. & Northwest Nexus, Inc.</i> , 983 F.Supp. 1167, 1173 (N.D. Ill. 1997)	21
<i>Marvullo v. Gruner & Jahr</i> , 105 F. Supp. 2d 225 (S.D.N.Y. 2000).....	11, 12, 14
<i>Matlow v. Solomon</i> , No. Civ. 04-6109, 2005 WL 309976 (D. Or. Feb. 7, 2005).....	19
<i>Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster Ltd., et al.</i> , 125 S. Ct. 2764 (2005) 4, 5, 13	
<i>Obolensky v. G.P. Putnam's Sons</i> , 628 F.Supp. 1552, 1555 (S.D.N.Y. 1986).....	22
<i>Peer Int'l Corp. v. Latin American Music Corp.</i> , 161 F. Supp.2d 38, 55 (D.P.R. 2001)	19
<i>Playboy Enters., Inc. v. Russ Hardenburgh, Inc.</i> , 982 F.Supp. 503 (N.D. Ohio 1997).....	20
<i>Records, Inc. v. MP3Board, Inc.</i> ,.....	22
<i>RSO Records, Inc. v. Peri</i> , 1980 WL 1164 (S.D.N.Y. Sept. 5, 1980)	27
<i>Salahuddin v. Cuomo</i> , 861 F.2d 40 (2d Cir. 1988).....	8
<i>Scott, No. 03-Civ.-6886-BSJ</i>	13
<i>Sony Music Entertainment Inc. v. Scott</i> , No. 03-CV-6886 (BSJ) (S.D.N.Y. Jan. 3, 2006)	20
<i>State v. Perry</i> , 697 N.E. 2d 624, 628 (Ohio 1998).....	21
<i>Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries</i> , 272 F.3d 441 (7th Cir. 2001).....	10
<i>United States Naval Institute v. Charter Comm., Inc.</i> , 936 F.2d 692 (2d Cir. 1991)	27
<i>Wildlife Internationale, Inc. v. Clements</i> , 591 F.Supp. 1542, 1547 (S.D. Ohio 1984).....	19
Statutes	
17 U.S.C. § 106.....	7
Other Authorities	
4 M. & D. NIMMER, NIMMER ON COPYRIGHT § 13.01.....	7
Rules	
Fed. R. Civ. P. 8.....	8, 9, 10, 12
Rule 12(b)(6).....	7

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**PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT**

Plaintiffs Elektra Entertainment Group Inc.; UMG Recordings, Inc.; and Virgin Records America, Inc. (collectively “Plaintiffs”)¹ respectfully file this opposition to Defendant Denise Barker’s motion to dismiss the Complaint. This motion is essentially identical to motions previously filed by Defendant’s counsel that have been soundly rejected by Judges Swain, Sweet, and McMahon of the Southern District of New York.² Because Defendant’s arguments have been repeatedly rejected, and because they are without legal merit, Defendant’s motion should be denied.

BACKGROUND

Plaintiffs are major recording companies who own copyrights in sound recordings. Collectively, they face a massive problem of digital piracy over the Internet. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs’ copyrighted sound recordings over peer-to-peer (“P2P”) networks. See Lev Grossman, *It’s All Free*, Time, May 5, 2003. Indeed, the Supreme Court recently characterized the magnitude of online piracy as “infringement on a gigantic scale.” See *Metro-Goldwyn-Mayer Studios, Inc., et al., v. Grokster Ltd., et al.*, 125 S. Ct. 2764, 2782 (2005).

Peer-to-peer networks involve the use of online media distribution systems (otherwise known as file-sharing programs) that allow users to transform their computers into

¹ Concurrently with this Opposition to Defendant’s Motion to Dismiss, Plaintiff Sony BMG Music Entertainment, pursuant to Rule 41, voluntarily dismisses its claims, without prejudice, against Defendant Denise Barker.

² See, e.g., *Loud Records, LLC, et al., v. Does 1-74*, No. 04-CV-9881-RWS (S.D.N.Y. 2005) (See Appendix, Sec. A) (denying motion to quash subpoena filed by Defendant’s counsel of record and stating, “[t]he time of the identification of Doe is determined to be the date of filing the complaint and thereafter”), appeal dismissed, No. 05-5559 (2d Cir. Nov. 28, 2005), petition for en banc review pending; *Elektra Entertainment Group, Inc., et al. v. Santangelo*, No. 05-CV-2414-CM (S.D.N.Y. 2005) (See Appendix, Sec. B) (rejecting identical arguments by Defendant’s counsel of record that Plaintiffs’ complaint should be dismissed); *Atlantic Recording Corp., et al. v. Does 1-25*, No. 05-CV-9111-LTS (S.D.N.Y. 2005) (See Appendix, Sec. C) (rejecting in its entirety the argument that Plaintiffs’ complaint should be dismissed for failure to allege specific dates and times of infringement).

interactive Internet sites for swapping copyrighted sound recordings with other users. The most infamous P2P network was the Napster system, which was enjoined by a federal court. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other P2P networks, however, have arisen in Napster's wake, and the Supreme Court has held that these P2P networks are liable for the infringement of Plaintiffs' copyrighted works. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc., et al., v. Grokster Ltd., et al.*, 125 S. Ct. 2764 (2005).

As a direct result of piracy over the P2P networks, Plaintiffs have sustained and continue to sustain devastating financial losses. Indeed, in a recently issued report, the Department of Justice concluded that online media distribution systems are "one of the greatest emerging threats to intellectual property ownership," estimated that "millions of users access P2P networks," and determined that "the vast majority" of those users "illegally distribute copyrighted materials through the networks." Report of the Department of Justice's Task Force on Intellectual Property, available at <http://www.cybercrime.gov/IPTaskForceReport.pdf>, at 39 (October 2004). *See*. As the Seventh Circuit recently held, "[m]usic downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals." *BMG Music et al., v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005). In addition, downloads from P2P networks compete with licensed broadcasts and undermine the income available to authors. *Id.* at 891. Plaintiffs' losses from on-line music piracy have resulted in layoffs of thousands of employees in the music industry. Unfortunately, infringing users of peer-to-peer systems are often "disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement," rendering this serious problem even more difficult for copyright owners to combat. *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004).

P2P users who disseminate (upload) and copy (download) copyrighted material violate the Copyright Act. *See Grokster* at 2770-72 (noting that users of peer-to-peer networks share copyrighted music and video files on an enormous scale and as such even the providers of those networks “concede infringement” by the individual users); *Aimster*, 334 F.3d 643. A copy downloaded, played, and retained on one’s hard drive for future use is a direct substitute for a purchased copy – and without the benefit of the license fee paid to the broadcaster. *See Gonzalez*, 430 F.3d at 891. Copyright infringement over P2P networks is rampant and widespread largely because users can conceal their identities by means of an alias. Copyright owners are able to detect infringement occurring on P2P networks, but can only identify the true names and locations of the infringers with the court-ordered assistance of the infringer’s Internet Service Provider.

On November 12, 2004, Plaintiffs’ investigators located an individual with the screen name “Phoenyxx@KaZaA” using the Kazaa file sharing program to engage in copyright infringement on a massive scale. Plaintiffs detected the infringement by logging onto the P2P network, in the same fashion as any Internet user, and viewing the files that Defendant was distributing to other users. This individual had 611 music files on her computer and offered them freely for distribution to the millions of people who use similar peer-to-peer networks. On information and belief, this individual downloaded all or many of these 611 music files without the permission of the record company copyright owners. In short, as an active user of a P2P network, Defendant was distributing copyrighted sound recordings stored on her computer to others and downloading copyrighted sounds recordings from other users of the P2P network.

Plaintiffs’ investigators further ascertained that this individual used Internet Protocol (“IP”) address 162.84.147.209 to connect to the Internet. Accordingly, Plaintiffs filed a

“John Doe” Complaint against this individual and, after obtaining a court order, issued a subpoena to Verizon Internet Services, Inc. (“VIS”) in order to determine who used the above-referenced IP address. VIS identified “Denise” Barker. On August 19, 2005, Plaintiffs filed a Complaint against Denise Barker (“Defendant”) for copyright infringement.

In conjunction with the Complaint filed in this case, Plaintiffs listed a sample of the songs that Defendant has been disseminating without authorization (*see* Exhibit A to the Complaint). Further, as alleged in the Complaint upon information and belief, Defendant downloaded (reproduced) the sound recordings without the permission of the Plaintiffs. (*See* Complaint, ¶ 12.)

For the reasons discussed below, Defendant’s motion to dismiss the complaint should be denied.

ARGUMENT

I. LEGAL STANDARDS FOR MOTION TO DISMISS.

When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the Court must decide whether the facts alleged in the Complaint, if true, would entitle Plaintiffs to some form of legal remedy. Unless the answer is unequivocally “no,” the motion must be denied. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957) (“In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

In resolving a 12(b)(6) motion, the Court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded allegations as true; and (3) determine whether Plaintiffs can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Dismissal is reserved only

“for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.” *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988).

II. PLAINTIFFS’ COMPLAINT IS LEGALLY SUFFICIENT .

A. Defendant’s argument that the Complaint fails to set forth the specific acts and the dates and times of the alleged copyright infringement does not provide a proper basis upon which to dismiss Plaintiffs’ Complaint.

1. Defendant’s arguments regarding the sufficiency of Plaintiffs’ Complaint have been repeatedly rejected by other federal courts.

As an initial matter, the same arguments Defendant now advances to dismiss Plaintiffs’ Complaint have previously been rejected on three different occasions by judges in the Southern District of New York. *See Loud Records*, No. 04-CV-9881-RWS (Sweet, J.) (See Appendix, Sec. A), appeal dismissed, No. 05-5559 (2d Cir. Nov. 28, 2005), petition for en banc review pending; *Elektra Entertainment Group, Inc., et al., v. Santangelo*, No. 05-CV-2414-CM (S.D.N.Y. 2005) (McMahon, J.) (See Appendix, Sec. B); *Atlantic Recording Corp., et al., v. Does 1-25*, No. 05-CV-9111-LTS (S.D.N.Y. 2005) (See Appendix, Sec. C). In *Loud Records*, Defendant’s counsel of record made the very same arguments regarding the sufficiency of Plaintiffs’ Complaint. Judge Sweet flatly rejected those arguments, finding instead that Plaintiffs’ Complaint sufficiently identified the time of infringement. *See Loud Records* at 1, (“The time of the identification of Doe is determined to be the date of filing the complaint and thereafter.”).³

³ Indeed, Defendant’s counsel recognized the import of Judge Sweet’s holding on his “blog,” available at <http://recordingindustryvspeople.blogspot.com/2005/10/jane-doe-motion-to-quash-subpoena.html>: “The judge concluded that plaintiffs’ alleging ‘continuing infringement’ from the date of the complaint is sufficient.” *See id.* at October 14, 2005.

Similarly, in *Santangelo*, Defendant's counsel of record filed a motion to dismiss on identical grounds as those set forth in Defendant's current motion to dismiss. Judge McMahon summarily denied the motion to dismiss, finding that "Plaintiff's Complaint satisfies Rule 8's pleading requirements, as applied to copyright infringement claims." *Id.* at 3. Moreover, with respect to the time period of the alleged copyright infringement, Judge McMahon found that the "assertion of continuous and ongoing infringement satisfied the pleading requirements applicable to claims for copyright infringement." *Id.* at 5. And in *Atlantic Recording Corp.*, Judge Swain denied counsel's third swing at dismissal, finding: "Here, Plaintiffs have sufficiently pled a copyright claim. The Complaint, therefore, does not fail to state a claim because Plaintiffs allege downloading and distribution as well as making copyrighted material available for distribution." *Atlantic Recording Corp.* at 2. Inexplicably, counsel for Defendant again advances the very same arguments that have been rejected by three other federal judges in the Southern District of New York.

In addition, the District Court for the Southern District of Texas has rejected similar arguments in a parallel case. In that case, a defendant moved to dismiss a similar complaint on nearly identical grounds to those set forth by Defendant in the current case. (*See* Appendix, Sec. D, Motion to Dismiss, *BMG Music, et al. v. Jacob Conklin*, No. H-05-1482 (Sept. 16, 2005).) The plaintiffs in *Conklin* opposed the motion to dismiss on the same grounds as those set forth below. (*See* Appendix, Sec. E, Opposition to Motion to Dismiss, *Conklin*, No. H-05-1482.) The *Conklin* court found no merit in the defendant's arguments and denied the motion to dismiss. (*See* Appendix, Sec. F, Order, *Conklin*, No. H-05-1482.)

Plaintiffs ask the Court to follow these decisions interpreting nearly identical complaints and reject Defendant's motion to dismiss.

2. Plaintiffs' complaint complies with the liberal notice pleading policies of Rule 8.

To state a claim of copyright infringement, Plaintiffs must 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 Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441, 450 (7th Cir. 2001). *See also, e.g., Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) ("To establish copyright 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 M. & D. 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.").

Moreover, Rule 8 (a) requires, in pertinent part, that Plaintiffs' Complaint include "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a). Defendant suggests that the Complaint is deficient with respect to the acts by which the copyrighted works were infringed and/or the time frame during which the infringement took place. These arguments are without merit, and the Motion to Dismiss should be denied.

- a. Plaintiffs have adequately alleged the acts by which the defendant infringed the copyrighted works.

Defendant's assertion that "[t]he Complaint makes no attempt to describe the specific acts of infringement" is simply incorrect. (Mem. Supp. Mot. at 3.) In support of this

contention, Defendant cites to *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000), for the proposition that Plaintiffs must “set out the ‘particular infringing acts . . . with some specificity.’” (Mem. Supp. Mot. at 1.) The acts the *Marvullo* court instructed must be specifically pleaded are the acts “by which [the] defendant directly or contributorily violated plaintiff’s copyright.” *Marvullo*, 105 F. Supp. 2d at 230. Plaintiffs submit they have set forth the acts of infringement with far more than “some” specificity; their allegations are hardly the “[b]road, sweeping allegations of infringement” against which the *Marvullo* court warned. *Id.* at 230.

At its heart, Defendant’s argument ignores the plain language of Plaintiffs’ Complaint, which states:

Plaintiffs are informed and believe that Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others. In doing so, Defendant has violated Plaintiffs’ exclusive rights of reproduction and distribution. Defendant’s actions constitute infringement of Plaintiffs’ copyrights and exclusive rights under copyright.

(Complaint ¶ 12.) Plaintiffs have therefore alleged the specific acts by which copyright infringement took place: the reproduction and distribution of the Copyrighted Recordings using an online media distribution system. Moreover, Plaintiffs have gone beyond mere allegations by detailing evidence that Plaintiffs have gathered concerning the hundreds of files being shared by Defendant. Specifically, Exhibit B to the Complaint is a copy of the shared folder as it appears on Defendant’s computer. It provides significant information concerning the P2P network used by Defendant, the manner by which Defendant infringed Plaintiffs’ copyrights, the name of the alias that was used, and a comprehensive list of the works that Defendant has infringed. In so doing, Plaintiffs have more than satisfied the liberal notice pleading standard of the federal rules.

And, in any event, Plaintiffs are *not* required to allege each individual act of copyright infringement in their Complaint. *See Carell v. Shubert Organization, Inc.*, 104 F. Supp. 2d 236, 251 (S.D.N.Y. 2000) (“Plaintiff’s Complaint narrows the infringing acts to the publication of the [copyrights at issue], and their illegal use in certain commercial products These allegations are sufficiently specific for the purposes of Rule 8, despite the fact that each individual infringement was not specified.”).⁴

Courts have found that the actions described in Plaintiffs’ Complaint unquestionably qualify as actionable copyright infringement. *See Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556, at 565 (S.D.N.Y. 2004) (a file-sharing case, “Plaintiffs have made a concrete showing of a prima facie claim of copyright infringement”); *Scott*, No. 03-Civ.-6886-BSJ (finding “no genuine issue of material fact as to Defendant’s liability for infringing Plaintiffs’ copyrights”) (See Appendix, Sec. G); *See also Grokster*, 125 S. Ct. at 2770-72 (basing its secondary liability finding on the “massive” underlying infringement by users of the P2P network); *Gonzalez*, 430 F.3d at 890, (“Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.”) *Aimster*, 334 F.3d at 645 (“transmitting a digital copy of [copyrighted] music . . . infringes copyright”); *Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others to copy violate Plaintiffs’ distribution rights.”); *Hotaling v. Church Of Jesus Christ Of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (placing unauthorized copy of copyrighted work in library’s collection, listing work in library’s index or catalog system, and making work available to borrowing or browsing public was distribution of work within meaning of Copyright Act).

⁴ Indeed, Plaintiffs could hardly be expected to do so: the infringement has been taking place for as long as the sound recordings have been available on Defendant’s computer.

The authorities cited by Defendant are distinguishable and unavailing. In *Marvullo*, the plaintiff alleged that his photograph “was published by the Defendants beyond the scope and authority of the limited license” sold by the plaintiff to the defendants and “contributorily infringed said copyright by alternatively acquiring, publishing, using and placing upon the general market . . . a photographic image which was copied largely from plaintiff’s copyrighted photographic image.” See *Marvullo*, 105 F. Supp. 2d at 228-29. The *Marvullo* court found that the plaintiff’s allegations were far too “vague and conclusory” and held that, “[a]side from the specific allegation that defendant . . . violated plaintiff’s copyright by unauthorizedly cropping the . . . photograph, [the plaintiff] fails to allege with specificity any acts by which either defendant directly or contributorily violated plaintiff’s copyright.” *Id.* at 230-31. Here, however, Plaintiffs have pleaded the precise acts “by which [the] defendant directly . . . violated plaintiff’s copyright”: the reproduction and distribution of Plaintiffs’ copyrighted sound recordings using an online media distribution system.

Defendant’s citation to *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, 1999 LEXIS 15837 at *8, 12 (S.D.N.Y. Oct. 13, 1999), as authority for dismissal for want of specificity because of the use of “and/or” in Plaintiffs’ Complaint is equally unavailing. (Mem. Supp. Mot. at 1.) The *Lindsay* court dismissed the complaint in that case for a broad lack of specificity – not simply for the use of “and/or” in the complaint. See *id.* at 12, (“[T]hese vague and conclusory allegations are, as a matter of law, insufficient to withstand the instant motion.”). As previously stated, Plaintiffs have clearly met their burden by pleading by what acts and at what time Defendant was infringing Plaintiffs’ copyrights.

Defendant similarly cites *Brought to Life Music, Inc. v. MCA Records, Inc.*, 2003 WL 296561, *1 (S.D.N.Y. Feb. 11, 2003), for the proposition that “a complaint must therefore

allege . . . ‘by what acts during what time the defendant infringed the copyright.’” (Mem. Supp. Mot. at 2.) But in that case, the plaintiff literally included *no* allegation in its complaint that the defendant had “violated any of its alleged exclusive rights in its works.” Specifically, “[the defendant] is not alleged to have (i) reproduced plaintiff’s work; (ii) prepared derivative works based on plaintiff’s work; (iii) distributed copies of plaintiff’s work to the public for sale; or (iv) performed plaintiff’s work publicly by means of digital audio transmission.” *Brought to Life Music, Inc.*, 2003 WL 296561 at *1. Here, Plaintiffs have alleged that Defendant violated Plaintiffs’ exclusive rights of reproduction and distribution through her use of an online media distribution system – precisely the sort of allegations missing from the complaint in *Brought to Life*.

Defendant also suggests that Plaintiffs have not adequately specified the time frame during which the copyright infringement took place. (See Mem. Supp. Mot. at 3.) Courts in this district, however, have previously recognized on a number of occasions that an allegation of ongoing and continuous infringement satisfies the requirement that the complaint specify the time period during which the subject copyright infringement occurred. For example, in *Franklin Electronic Publishers v. Unisonic Prod. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991), the court considered a motion to dismiss a copyright infringement count for failure to state the time of infringement. The court held that by alleging continuous infringement, the plaintiff in that case had sufficiently pled the time of infringement and, therefore, denied the motion to dismiss. *See id.* at 4. (“[W]hile plaintiff has not alleged the date defendants allegedly commenced their infringing activities, plaintiff has alleged that defendant continues to infringe.”).

In parallel cases brought by recording company plaintiffs, this Court examined a nearly identical complaint and found “[t]he time of identification of Doe is determined to be the

date of filing the complaint and thereafter.” *Loud Records*, No. 04-CV-9881-RWS (See Appendix, Sec. A). *See also Santangelo*, No. 05-CV-2414-CM, at *4 (S.D.N.Y. 2005) (See Appendix, Sec. B) (“The Court finds that Plaintiffs have also satisfied the final requirement—that Plaintiffs identify by what acts and during what time defendant infringed the copyrights.”), *Atlantic Recording Corp.*, No. 05-CV-9111-LTS, at *2 (S.D.N.Y. 2005)(See Appendix, Sec. C) (“Here Plaintiffs have sufficiently pled a copyright claim. They have alleged that . . . Defendants have and continue to ‘download, distribute to the public, and/or make available for distribution to others’ their copyrighted titles.” Here, Plaintiffs have alleged an ongoing and continuous infringement by Defendant. Plaintiffs’ Complaint unquestionably satisfies the requirement that it show the dates and times of the infringing acts.

Because Plaintiffs have more than adequately described the acts and the time during which Defendant infringed Plaintiffs’ copyrights, Defendant’s Motion to Dismiss on this point should be denied.

III. DEFENDANT’S “MADE AVAILABLE FOR DOWNLOAD” ARGUMENT IS IRRELEVANT.

Defendant argues that “merely offering files or making them available for distribution to others does not constitute copyright infringement.” (Mem. Supp. Mot. at 4.). Defendant’s argument ignores the text of the copyright statute, case law and international treaties—all of which provide that making actual files available for distribution is a violation of the copyright owner’s exclusive right to distribution.

A. The Copyright Act and the Legislative History Establish that “Making Available” is an Exclusive Right of the Copyright Owner

Pursuant to 17 U.S.C. § 106(3), the owner of a copyright in a sound recording has the exclusive right to “distribute copies . . . to the public by sale or other transfer of ownership,

or by rental, lease or lending.” While the Copyright Act does not directly define “distribute” or “distribution,” it does define the terms within its definition of “publication”:

The distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership by rental, lease, or lending. **The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.**

17 U.S.C. § 101 (emphasis added).

Courts, including the Supreme Court, have cited the definition of “publication” in determining the scope of the distribution right. The legislative history of the 1976 revision to the Copyright Act indicates that “Clause (3) of section 106, established the exclusive right of publication Under this provision, the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (quoting H.R. Rep. No. 94-1476, at 62 (1976)). Subsequent courts have interpreted this reference in the legislative history to equate “distribution” with “publication.” *See Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 299 (3d Cir. 1991) (noting that “publication and the exclusive right protected by section 106(3) are for all practical purposes synonymous.”). As such, the plain text of the Copyright Act, its legislative history and subsequent case law clearly establish that the offer to distribute (or “making available”) is an exclusive right of the copyright owner.

B. Case Law Supports An Interpretation of the Copyright Act to Protect the Right of Making Available

Courts that have addressed facts nearly identical to those in the current case have conclusively held that “making available” constitutes copyright infringement. For example, in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), the defendant obtained unauthorized copies of a work, added a listing of the unauthorized copies to

its index, and made the unauthorized copies available for distribution to the public in its library. The court held that even in the absence of proof the work had actually been provided to the public and the work had been distributed within the meaning of 17 U.S.C. § 106(3). *See id.* at 203. It was enough that the title of the work had been included in an index and that the work could have been checked out by a member of the public. It was not necessary for the Plaintiffs to show that work had ever actually been checked out.

The Ninth Circuit in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) also found that “making available” constituted copyright infringement. In *Napster*, the court evaluated the situation where an individual made copyrighted sound recordings available for distribution on a peer-to-peer program, but did not submit evidence of actual distribution. The court held that “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.” *Id.* at 1014. This same analysis was also applied in *Matlow v. Solomon*, No. Civ. 04-6109, 2005 WL 309976 (D. Or. Feb. 7, 2005). In *Matlow*, the defendant “offered for sale unauthorized copies of [plaintiff’s] photographs by listing them on the eBay internet auction web site.” *Id.* at *1. Without proof of actual distribution, the court held that “it appears undisputed that defendant violated the copyright act.” *Id.*

Numerous other courts have applied the same analysis and have treated offers for sale or distribution as copyright infringement. *See, e.g., Wildlife Internationale, Inc. v. Clements*, 591 F.Supp. 1542, 1547 (S.D. Ohio 1984) (concluding that distribution consists of “sale or **offer of sale**,” without reference to whether the offer was accepted) (emphasis added); *Peer Int’l Corp. v. Latin American Music Corp.*, 161 F. Supp.2d 38, 55 (D.P.R. 2001) (finding that because works were made available in catalog, defendants “may have infringed upon Plaintiffs’ copyrights”); *Brode v. Tax Management, Inc.*, 1990 WL 25691 (N.D. Ill. 1990) (finding evidence of actual

dissemination was not required to defeat summary judgment where a copyrighted work was improperly made available on LEXIS).

This Court has applied this rule in the Internet context, recognizing that “posting music files, software or photographs on a webpage . . . has been held in numerous instances to constitute publication,” thus effectively constituting a distribution. *Getaped.com v. Cangemi*, 188 F. Supp.2d 398, 401 (S.D.N.Y. 2002) (“[M]erely by accessing [copyrighted material on] a webpage, an Internet user acquires the ability to make a copy of that webpage, a copy that is, in fact, indistinguishable in every part from the original. Consequently, when a website goes live, the creator loses the ability to control either duplication or further distribution of his or her work. A webpage in this respect is indistinguishable from photographs, music files or software posted on the web—all can be freely copied.”). This same conclusion was reached by this Court in *Sony Music Entertainment Inc. v. Scott*, No. 03-CV-6886 (BSJ) (S.D.N.Y. Jan. 3, 2006). In *Scott*, this Court granted summary judgment based on the fact that “Defendant distributed 944 music files through the Kazaa system, making each of them available for downloading to millions of other Kazaa users.” *Id.* at 2, (See Appendix, Sec. G). The court in *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503 (N.D. Ohio 1997) also reached a similar conclusion. In *Playboy*, the defendant operated an Internet bulletin board and made the plaintiff’s copyrighted pictures available for download. The plaintiff contended that such an act, even in the absence of proof of actual distribution, constituted copyright infringement. The court agreed with the plaintiff and found the defendant liable for copyright infringement noting: “Defendants disseminated unlawful copies of PEI photographs to the public by adopting a policy in which [defendant’s] employees moved those copies to the generally available files instead of discarding them.” *Id.* at 513. *See also State v. Perry*, 697 N.E. 2d 624, 628 (Ohio 1998) (finding

state criminal law preempted by federal copyright law and noting “[p]osting software on a bulletin board where others can access and download it is distribution.”); *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distribs. & Northwest Nexus, Inc.*, 983 F.Supp. 1167, 1173 (N.D. Ill. 1997) (granting summary judgment based on defendant’s admission that “once the files were uploaded, they were available for downloading by Internet users.”). As this precedent clearly establishes, making a copyrighted work available is an exclusive right of the copyright owner, the violation of which constitutes copyright infringement.

The few cases cited by Defendant are inapplicable and do not compel a different conclusion in this case. (Mem. Supp. Mot. at 4.) In each of these cases, the defendant simply *listed* the existence or availability of the copyrighted work in an index. In none of these cases did the Plaintiffs show that the defendants actually controlled unauthorized copies of the copyrighted work. Indeed, the court in *In re Napster* recognized this critical distinction when distinguishing its holding from the *Hotaling* decision. 2005 WL 1688374 at *6 (N.D.Cal. May 31, 2005) (comparing the different factual situation encountered in *Hotaling* by stating “[t]he infringing works never resided on the Napster system.”). Similarly, in *Arista Records, Inc. v. MP3Board, Inc.*, the court based its ruling on the fact that “no music files were located on the MP3Board Web site.” 2002 WL 1997918, at * 1 (S.D.N.Y. Aug. 29, 2002). Other courts have adopted a similar analysis when the defendant did not have the infringing work in his or her possession. *See, e.g., Obolensky v. G.P. Putnam’s Sons*, 628 F.Supp. 1552, 1555 (S.D.N.Y. 1986) (defendant simply listed the existence of the book in a trade journal and “never had possession, custody, or control of any copies of the [copyrighted work.]”); *CACI Int’l, Inc. v. Pentagon Tech. Int’l, Ltd.*, 1994 WL 1752376 at *4 (E.D.Va. June 16, 1994) (defendant merely offered to “provide a derivative work of [the] copyrighted material.”).

Thus, the question is not whether a defendant has simply put a title in an index. Rather, the inquiry should focus on whether the defendant actually made the work available, i.e., placed the name in an index and made the work available through that index. A ruling to the contrary would prejudice copyright owners when a defendant does not keep records of public use yet is unjustly rewarded by this omission.

**C. The WIPO Digital Treaties Implementation Act
Strongly Supports the Conclusion that U.S. Law
Protects the Exclusive Right to “Make Available”**

The plain language of two World Intellectual Property Organization (“WIPO”) treaties, both of which the United States has ratified and implemented, provide strong support for the conclusion that the right to “make available” is part of the distribution right. Moreover, the Copyright Office and numerous federal agencies have repeatedly taken the position that the right of “making available” copyrighted works, as used in the WIPO treaties, is protected by the Copyright Act’s grant of exclusive rights.

The United States has entered into two treaties that directly address the right of “making available”: the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”), or together the “WIPO digital treaties.” Those treaties make clear that a right of making available is protected. Indeed, if the Copyright Act did not protect this right—as Congress clearly stated it did—the United States would be out of compliance with its treaty obligations.

The WCT’s text establishes the right of “making available”:

Authors of literary and artistic works shall enjoy the **exclusive right of authorizing the making available to the public** of the original and copies of their works through sale or other transfer of ownership. (Article 6)

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their

works, by wire or wireless means, **including the making available to the public of their works . . .** (Article 8)

WIPO Copyright Treaty, Dec. 20, 1996, arts. 6 & 8, WIPO Doc. CRNR/DC/9.

Thus, the right of “making available” is provided for on the face of the WCT and WPPT treaties. The United States, upon ratification, was required to take whatever steps were necessary to bring U.S. law into compliance with the treaties’ terms. As part of implementation, the U.S. Department of Commerce transmitted to Congress the text of the treaties. Congress then, itself, reviewed the treaties and U.S. law in order to revise U.S. law appropriately. Both Congress and the Executive branch agreed that no changes were necessary to U.S. law to protect the exclusive rights (including “making available”) required by the treaties. Government witnesses and copyright experts from many agencies including the Commerce Department (and PTO),⁵ the State Department,⁶ and the U.S. Copyright Office⁷ all concurred in the decision to ratify the treatise without amending Section 106. Upon implementing the treaties, the House and Senate were in unanimous agreement that the then-existing Copyright Act already protected the right of making available.

Moreover, since the implementation of the treaties, the United States Copyright Office has taken the position that the Copyright Act grants a copyright owner the exclusive right

⁵ Statement of Bruce Lehman, PTO Commissioner, *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 & H.R. 2180 Before the House Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary*, 105th Cong. 87 (1997).

⁶ Testimony of Alan P. Larson, Assistant Secretary of State, *WIPO Copyright Treaty (WCT) (1996) and WIPO Performances and Phonograms Treaty (WPPT) (1996), Hearings Before the Senate and the Committee on Foreign Relations*, 105th Cong. (Sept. 10, 1998).

⁷ On the subject of controlling access to a work, the Copyright Office concluded that “[i]t has long been accepted in U.S. law that the copyright owner has the right to control access to his work, and may choose not to make it available to others or to do so only on set terms.” Statement of Mary Beth Peters, Register of Copyrights, *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 & H.R. 2180 Before the House Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary*, 105th Cong. 43 (1997).

of “making available” copies of a copyrighted work. The Register of Copyrights addressed the issue of offering copyrighted works on a peer-to-peer network directly: “[M]aking [a work] available for other users of a peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well of the reproduction right.” Letter from Marybeth Peters to Rep. Howard L. Berman 1 (Sept. 25, 2002) (citing *Napster*, 239 F.3d at 1014), *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).

Thus, the United States made a clear determination that no alterations were needed to the exclusive rights in Section 106 in order to fully protect all of the rights delineated in the WIPO treaties. As such, the Copyright Act includes the exclusive right of “making available.”

D. Defendant’s Actions Constitute Copyright Infringement

In the case at hand, Plaintiffs have gathered substantial evidence that Defendant has downloaded (copied) unauthorized copies of Plaintiffs’ copyrighted sound recordings. *See* Exh. B to the Complaint and Section “BACKGROUND”, *supra*. These unauthorized copies were, and likely still are, located on Defendant’s computer in his “share” folder. *See id.* Plaintiffs’ Complaint alleged a cause of action based on this evidence. *See* Complaint, ¶ 12 (Defendant “has used, and continues to use, an online media distribution program to download the Copyrighted Recordings.”). Because Defendant placed unauthorized copies of Plaintiffs’ copyrighted sound recordings in his share folder such that they were readily and instantaneously available for others to download, he has distributed Plaintiffs’ copyrighted sound recordings within the meaning of § 106(3). With the number of music files in Defendant’s “share” folder

available for distribution, Plaintiffs' Complaint does more than specify one instance of unauthorized copying and distribution; Plaintiffs' Complaint alleges up to 611 instances of unauthorized copying and distribution.

IV. DEFENDANT IS LIABLE FOR COPYRIGHT INFRINGEMENT REGARDLESS OF WHO DOWNLOADED THE FILES HE WAS DISTRIBUTING IN HIS OR HER SHARE FOLDER

Defendant cites a handful of cases for the proposition that "any alleged downloading of copyrighted files from defendants' computers by plaintiffs or their agents does not constitute 'distribution to the public' and therefore does not constitute copyright infringement." (Mem. Supp. Mot. at 4, fn. 3.). As shown below, Defendant's reliance on these cases is misplaced.

First, *Higgins v. Detroit Ed. Television Foundation*, 4 F.Supp.2d 701 (E.D. Mich. 1998) is inapplicable because it involves the situation where the plaintiff's agent purchased the sole copy of the allegedly infringing work. The court observed that "such a sale [of the only infringing copy] prevents the distribution of such copies to the general public." *Id.* at 705. In the case at bar, Defendant was offering an unlimited number of copies of Plaintiffs' copyrighted work to anyone who downloaded them. Even after Plaintiffs' investigator downloaded a copy of the work, it was still available to millions of other people. As such, the downloading by Plaintiffs' investigators did not "prevent[] the distribution of such copies to the general public" and *Higgins* is inapplicable.

Defendant also relies on *United States Naval Institute v. Charter Comm., Inc.*, 936 F.2d 692 (2d Cir. 1991). This case is distinguishable in that the plaintiff was accusing its exclusive licensee of infringing the copyright. Of course, no such infringement occurs in that situation because it is axiomatic that a person cannot be liable for infringing exclusive rights

granted to him or her. Here, Plaintiffs are not suing any licensee of their copyrighted sound recordings. Plaintiffs' action is against Defendant, an individual who has not been granted any rights to Plaintiffs' copyrighted works, and who has infringed Plaintiffs' copyrights.

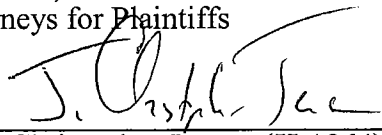
RSO Records, Inc. v. Peri, 1980 WL 1164 (S.D.N.Y. Sept. 5, 1980) is equally inapplicable. In *RSO*, the defendant asserted a counterclaim alleging that the plaintiff had induced or otherwise participated in defendant's infringement. In striking this counterclaim the court noted that a plaintiff cannot infringe its own copyright and, as such, cannot "participate in" or "induce" the defendant to infringe. In the case at hand, Defendant has not alleged that Plaintiffs induced or otherwise participated in his infringement. Indeed, such a claim would be nonsensical as Defendant was downloading and distributing Plaintiffs' copyrighted works independent of any action by Plaintiffs. As such, *RSO Records* also does not apply to the current case.

CONCLUSION

For all of the above reasons, Plaintiffs ask the Court to deny Defendant's motion in its entirety, and for such other relief as the Court deems just and equitable.

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