

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

FONOVISA, INC, *et al.*,

Plaintiffs,

vs.

LARRY ALVAREZ,

Defendant.

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CASE NO. 1-06-CV-011
ECF
JUDGE CUMMINGS

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

Plaintiffs Fonovisa, Inc, *et al.*, (“Plaintiffs”) respectfully submit this Response to the amicus curiae brief of the Electronic Frontier Foundation (“EFF” and “EFF’s Brief”).

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. Although the Court need not even reach this issue on Defendant’s challenge to the sufficiency of Plaintiffs’ Complaint, which alleges both unauthorized reproduction and distribution of Plaintiffs’ copyrighted sound recordings, see Complaint ¶ 15, the EFF’s position is without merit and should be rejected if considered.

The EFF argues that the language of the Copyright Act covers distribution of copyrighted works only if tangible materials are transferred. Plaintiffs have previously demonstrated that most of the arguments that the EFF now raises are baseless. See Plaintiffs’ Response to Defendant’s Motion to Dismiss (“Plaintiffs’ Brief”), Doc. No. 15, at 17-22. Plaintiffs here

respond to several arguments made by the EFF that Plaintiffs did not previously address. Specifically, in its brief, the EFF argues that the statutory language and legislative history support its view of the distribution right. Moreover, the EFF claims the authority of inapplicable case law, and summarily dismisses the vast majority of courts, if not every court, that has addressed this issue and rejected it finding, 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. For the reasons more fully set forth below, and supported by the EFF's own 2003 analysis of the issue¹, each of the EFF's arguments is without merit and should be rejected.

ARGUMENT

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

The EFF first claims that the statutory language of the Copyright Act demonstrates that unauthorized distribution of electronic files over peer-to-peer networks does not violate the exclusive right of distribution. For the reasons more fully set forth in Plaintiffs' and the Government's earlier briefs, see Plaintiffs' Brief at 17-19; Statement of Interest of the United States of America ("Government's Brief") Doc. No. 23, at 7-9, 11-15, this argument is baseless and would immunize the Internet from United States Copyright law. Indeed, the EFF's own arguments belie its current position. For example, the EFF apparently concedes, as it must, that an MP3 file residing on a downloader's computer constitutes a copy or phonorecord. See EFF

¹ The argument advanced in the EFF's Brief contradicts 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 Copyright law. See Fred von Lohmann, Peer-to-Peer File Sharing and Copyright Law after Napster, <<http://www.mp3offshore.com/copyrightlaw.html>> (Jan. 2003) (a copy of this article is attached as Appendix A).

Brief at 5. Thus, by definition, such an MP3 file residing on a downloader's computer is a "material object" under § 101 of the Copyright Act. Id. The EFF also concedes that that the transmittal of an MP3 file from one account to another creates an exact digital copy of the original file. See EFF Brief at 5 (transmittal of a file over a peer-to-peer network results in "creating a copy of the original file.") 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, an unauthorized transmittal of such a file satisfies the requirements of distribution under the Act. 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.

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

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

A. 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 satisfies that definition.

B. 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. In 1995, Congress, among other things, amended 17 U.S.C. § 115 to provide for the compulsory licensing of nondramatic musical compositions in connection with "digital phonorecord deliveries." The EFF implies that this was a limited expansion the § 106(3) distribution right and created a distribution right that did not exist before. Contrary to the EFF's suggestion, the 1995 Act did not amend § 106(3) and did not create any new distribution right. Rather, § 115 was amended to take into account that sound recordings were being transmitted digitally via the Internet. See Melville Nimmer & David Nimmer, Nimmer on

Copyright § 8.04[A] (2005). Thus, the compulsory license provided by § 115 was extended to electronic phonorecords, called digital phonorecord deliveries (DPDs). As such, a performing artist (or record company) could obtain a compulsory license for nondramatic musical works that were digitally distributed for reproduction via the Internet, and such reproduction and *distribution* would infringe the *already existing rights of digital distribution* and reproduction of the copyright owner of the underlying musical composition. Id. at § 8.04[L]. For this reason, Congress was careful not to otherwise limit or abridge any of the rights and remedies available to a copyright owner under the Copyright Act. See 17 U.S.C. § 115(c)(3)(H)(i).

Thus, notwithstanding the EFF's suggestion to the contrary, the 1995 Act acknowledged that there was an *existing* exclusive right of distribution in digital transmissions for the purpose of reproduction via the Internet and provided, in the case of nondramatic musical works, that this existing right would be subject to a compulsory license, as was the more old-fashioned method of distributing musical compositions on phonorecords. If the copyright owner of the nondramatic musical work did not already have an exclusive right of distribution in digital transmissions, such a compulsory license would have been completely unnecessary, and the compulsory licensing provision of § 115 for DPDs would have no meaning.

Consistent with the foregoing, the legislative history of the 1995 Act expressly states, “[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.

III. The Case Law On Which The EFF Relies Does Not Support Its Position.

As more fully set forth in Plaintiffs' Brief at 20-22, and the Government's Brief at 9-11, every court of which Plaintiffs are aware, including the United States Supreme Court, have concluded that the transmission of electronic files from one person to another does implicate the exclusive right of distribution set forth in the Copyright Act. The EFF does not - and could not - reasonably challenge this premise. Instead, the EFF claims that Agee and Perfect 10 are the only applicable opinions and that they support its position. The EFF is wrong, *inter alia*, because Agee is in apposite and Perfect 10 supports Plaintiffs' and the Government's argument.

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 Agee v. Paramount Communications, Inc., 59 F.3d 317, 326 (2d Cir. 1995). The Agee court expressly distinguished its facts from those at issue in Playboy Enterprises v. Frena, 839 F.Supp 1552 (M.D. Fla. 1993), 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.

Similarly, the EFF's reliance on Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006), like that of Defendant, is misplaced. Indeed, Perfect 10 fully supports Plaintiffs' position here. The EFF alleges that the Perfect 10 holding was "flatly at odds" with an understanding that transmission of files from one person to another implicates the distribution right. In fact, the Perfect 10 court directly contradicted the EFF's argument here, explaining, "*A distribution of a copyrighted work requires an 'actual dissemination' of copies In the internet context, an actual dissemination means the transfer of a file from one computer to*

another.” Id. at 844 (emphasis added). Because, as noted above, the distribution of MP3 files over peer-to-peer networks results in a file being transferred from one computer to another, under Perfect 10, a distribution has occurred for purposes of the Copyright Act.

For all of the foregoing reasons, and for the reasons more fully explained in Plaintiffs’ and the Government’s Briefs, the EFF’s contention that this Court should adopt a position contrary to that reached by every other court that has addressed the issue of distribution of electronic files should be rejected.

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.

Respectfully submitted,

/s/Lisa L. Honey

Stacy R. Obenhaus
Attorney in Charge
State Bar No. 15161570
Lisa L. Honey
State Bar No. 24048550
Gardere Wynne Sewell LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201
Tel: 214-999-3000
Fax: 214-999-4667
sobenhaus@gardere.com

OF COUNSEL:

Geoffrey H. Bracken
State Bar No. 02809750
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
Tel: 713-276-5555

ATTORNEYS IN CHARGE FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFFS' BRIEF IN RESPONSE TO THE AMICUS CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION** was forwarded in accordance with the Federal Rules of Civil Procedure on this 5th day of July, 2006, via regular U.S. mail, as follows:

John G. Browning Browning & Fleishman, P.C. 701 Commerce Street Suite 510 Dallas, TX 75202
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/s/Lisa L. Honey
LISA L. HONEY