

(JMA) (attached hereto as Exhibit A); *Elektra Entm't Group, Inc. v. Crawford*, 226 F.R.D. 388, 390 (C.D. Cal. 2005); *Elektra Entm't Group, Inc. v. Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *1-2 (S.D.N.Y. Nov. 28, 2005); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, at 565 (S.D.N.Y. 2004); *Arista Records LLC v. Gruebel*, 453 F. Supp 2d 961 (N.D. Tex. 2006); *Fonovisa v. Alvarez*, No. 1:06-CV-011-C-ECF, slip op. at 8 (N.D. Tex. July 24, 2006) (attached hereto as Exhibit B); *Interscope Records v. Duty*, 2006 U.S. Dist. LEXIS 20214 (D. Ariz. April 14, 2006); *Maverick Recording Co. v. Goldshetyen*, 2006 U.S. Dist. LEXIS 52422 (E.D.N.Y. July 31, 2006); *Warner Bros. Records, Inc. v. Payne*, 2006 U.S. Dist. LEXIS 65765 (W.D. Tex. July 17, 2006).

To succeed on a motion to dismiss for failure to state a claim, Defendant must show that, when viewed in a light most favorable to Plaintiffs, the Complaint fails to state a claim for which relief may be granted. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A sufficient claim for copyright infringement need only contain two allegations: (1) that the plaintiff owns a valid copyright; and (2) that the defendant violated one or more of the exclusive rights in 17 U.S.C. § 106, such as reproduction or distribution of the plaintiff's copyrighted works. *See Feist Pubs., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

Plaintiffs' allegations go well beyond the requirement for sufficiency and set forth claims that, if proven, would entitle them to relief. For the reasons set forth in detail below, Defendant's Motion should be denied.

STATEMENT OF ALLEGATIONS

Plaintiffs are the copyright owners or licensees of exclusive rights under United States copyright with respect to the seven (7) copyrighted sound recordings identified in Exhibit A and certain of the sound recordings identified in Exhibit B to the Complaint (the "Copyrighted Recordings"). *See* Complaint ¶¶ 11-12; Exhibits A and B to Complaint. Plaintiffs specifically

allege that, as of the date the Complaint was filed, Defendant has used and continues to use an online media distribution system to download, distribute, and make available the Copyrighted Recordings to others without the permission or consent of Plaintiffs. *See* Complaint ¶ 13.

Defendant is alleged to have used the KaZaA file sharing network—and the username “sublimeguy14@KaZaA”—to download and/or distribute, for example, Nirvana’s “Come As You Are” from the album “Nevermind”; Sublime’s “April 29, 1992 (Miami)” from the album “Sublime”; and GreenDay’s “Minority” from the album “Warning.” *See* Complaint ¶ 13 and Exhibits A and B. Plaintiffs claim that Defendant’s downloading and distribution of these and other of Plaintiffs’ copyrighted sound recordings identified in Plaintiffs’ Complaint infringes Plaintiffs’ copyrights. *See* Complaint ¶ 13.

Exhibit B to the Complaint is a copy of the shared folder as it appeared on Defendant’s computer as of the date Plaintiffs’ investigator observed Defendant’s alleged infringement. Exhibit B identifies the online media distribution system used by Defendant (i.e., KaZaA), the manner by which Defendant infringed Plaintiffs’ copyrights, the name of the alias or screen name that was used, and a comprehensive list of all 816 audio files in Defendant’s share folder as of the date Plaintiffs’ investigator observed it. By that time, Defendant had downloaded, distributed, and made available unauthorized copies of the Copyrighted Recordings, which conduct Plaintiffs believe was ongoing at the time the Complaint was filed.

Defendant has now moved to dismiss the Complaint. Notably, Defendant does not and could not dispute that Plaintiffs are entitled to bring suit against individuals disseminating

copyrighted works over online media distribution systems.¹ Instead, Defendant argues that Plaintiffs have failed to state a claim upon which relief can be granted because they allegedly did not identify the specific act, dates, and times of the alleged copyright infringement. *See* Motion at 2-11. As more fully set forth below, Plaintiffs have pled all required elements to support a claim for copyright infringement. For these reasons, Defendant's Motion should be denied.

ARGUMENT

1. LEGAL STANDARD FOR MOTIONS TO DISMISS.

When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the “facts are considered in the light most favorable to the non-moving party, who receives the benefit of all reasonable inferences.” *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56 (1st Cir. 2004) (citing *Carreiro v. Rhodes Gill & Co., Ltd.*, 68 F.3d 1443, 1446 (1st Cir. 1995)). The allegations found in the complaint “must be enough to raise a right to relief above the speculative level.” *Bell At. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (requiring plaintiff to plead “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [her claim]”). Ultimately, a court should not dismiss a complaint for failure to state a claim unless the complaint fails to include “plausible grounds” for relief. *Id.*

¹ *See In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (“swap[ping] computer files containing popular music . . . infringes copyright”); *A & M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (same); *Elektra Entm't Group, Inc. v. Bryant*, 2004 WL 783123, at *4 (C.D. Cal. Feb. 13, 2004) (“Plaintiffs allege that Defendant has used an online media distribution system to download, meaning copy, Plaintiffs' copyrighted sound recordings and to distribute those recordings to other users of the system. These facts constitute direct copyright infringement”).

2. PLAINTIFFS' COMPLAINT IS LEGALLY SUFFICIENT.

(a) Defendant's Arguments Have Been Consistently Rejected by Numerous Courts Around The Country, Including This Court.

As an initial matter, numerous courts throughout the United States, including this Court, have rejected the very same arguments that Defendant is making here. *See, e.g., Huttunen*, Civ. No. 05-CV-30280-NG (Dec. 28, 2006 electronic order denying defendant's motion to dismiss) ("A complaint is subject to dismissal under Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved by the plaintiff. The plaintiff's complaint alleges all of the elements required to meet this minimal, threshold standard for allegations of copyright infringement."); *Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *1-2 (denying motion to dismiss for failure to state a claim); *Conklin*, No. H-05-1482 (same); *Duty*, 2006 U.S. Dist. LEXIS 20214 (finding plaintiffs' complaint to be sufficient and further finding that any confusion regarding dates and times of infringement "can be clarified during discovery");² *cf. Elektra Entm't v. Avery*, 2007 U.S. Dist. Lexis 50197 (E.D. Cal. July 10, 2007), adopted by 2007 U.S. Dist. Lexis 58122 (E.D. Cal. Aug. 9, 2007) (finding, in context of a motion for default judgment, that the record companies' complaint states a claim for copyright infringement); *Arista Records v. Alicea*, 2006 U.S. Dist. Lexis 86665 (E.D. Cal. Nov. 28, 2006), adopted by 2007 U.S. Dist. Lexis 16681 (E.D. Cal. Mar. 7, 2007) (same); *Priority Records v.*

² *Greubel*, 453 F. Supp. 2d 961 (N.D. Tex. 2006) ("Plaintiffs' pleading provides a short and plain statement that alleges both their copyright ownership and violation of one or more of the exclusive rights identified in 17 U.S.C. § 106"); *Alvarez*, No. 1:06-CV-0011-C (N.D. Tex. July 24, 2006) (finding that plaintiffs' allegations presented a possible ground for liability, which rendered dismissal inappropriate) (Exhibit B); *Duarte*, No. SA-06-CV-615 (W.D. Tex. May 2, 2007) (plaintiffs' evidence confirms that plaintiffs are the owners of the copyrighted material, the infringement originated from [the defendant's] Internet account... and the infringement occurred within three years of the filing of this lawsuit") (attached hereto as Exhibit C); *Payne*, 2006 U.S. Dist. LEXIS 65765 (holding that plaintiffs had sufficiently alleged ownership and registration of the sound recordings and defendant's reproduction and distribution of plaintiffs' copyrighted works).

Rodriguez, 2007 U.S. Dist. Lexis 2231 (E.D. Jan. 10, 2007), adopted by 2007 U.S. Dist. Lexis 7981 (E.D. Cal. Feb. 5, 2007) (same); *Elektra Entm't v. Smith*, 2007 U.S. Dist. Lexis 28864 (E.D. Cal. Apr. 18, 2007) (same); *Warner Bros. Record Inc. v. Pinheiro*, Civil No. C-06-04913-JSW at *6 (JCS) (N.D. Cal. June 21, 2007) (“The allegations and evidence [in the plaintiffs’ complaint] are therefore sufficient to support a claim for copyright infringement”) (attached hereto as Exhibit D); *Motown Record Company, L.P. v. Mushonga*, Civil No. 06-cv-383-L(AJB) at 3 (S.D. Cal. Feb. 15, 2007) (“the court finds that the complaint sufficiently states a claim that Defendant infringed Plaintiffs’ copyright with respect to the eight sound recordings listed in Exhibit A”) (attached hereto as Exhibit E); *Elektra Entm't Group v. McCovery*, Civil No. CV 05-03160 (DDP) (C.D. Cal. Jan. 30, 2006) (finding complaint sufficient where the plaintiffs alleged that the defendant had copied, distributed to the public, and made available for distribution the plaintiffs’ sound recordings) (attached hereto as Exhibit F). Indeed, every court to have addressed the arguments made by Defendant in a motion to dismiss to date has rejected them.

As every court that has addressed the issue to date in a motion to dismiss has found that the plaintiff recording companies’ complaints were sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), Plaintiffs respectfully request that this Court follow its own prior decision and each of these courts and reject Defendant’s Motion to Dismiss.

(b) The Complaint Complies With the Liberal Notice Pleading Requirements of Rule 8.

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). In the context of a copyright claim, a plaintiff need only allege: (1) that the plaintiff owns valid copyrights and (2) that the defendant violated one or more of the exclusive rights set forth in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs' copyrighted works. *See Feist Pubs., Inc.*, 499 U.S. 340, 361 (1991); 4 M. & D. NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2005) ("Reduced to most fundamental terms, there are only two elements necessary to the plaintiffs' case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant").

Here, Defendant does not – and could not – claim that Plaintiffs have failed to satisfy these standards. Plaintiffs have alleged that they own or control valid copyrights for each of the Copyrighted Recordings at issue. *See* Complaint, ¶ 11. Plaintiffs have also alleged that Defendant has violated their exclusive rights of reproduction and distribution with respect to the Copyrighted Recordings at issue. In Paragraph 13 of the Complaint, Plaintiffs allege "Plaintiffs are informed and believe that as of August 10, 2004, Defendant, without the permission or consent of Plaintiffs, had continuously used, and continued to use, an online media distribution system to download and/or distribute to the public the Copyrighted Recordings" and "in doing so, Defendant has violated Plaintiffs' exclusive rights of reproduction and distribution. Defendant is specifically alleged to have used the KaZaA file sharing network—and the username "sublimeguy14@KaZaA"—to download and/or distribute, for example, Nirvana's "Come As You Are" from the album "Nevermind"; Sublime's "April 29, 1992 (Miami)" from the album "Sublime"; and GreenDay's "Minority" from the album "Warning." *See* Complaint ¶ 13 and Exhibits A and B. Defendant's actions constitute infringement of Plaintiffs' copyrights and exclusive rights under copyright." *See* Complaint, ¶ 13. In light of the standards set forth

above, these allegations are sufficient to state a claim for copyright infringement, and Defendant's motion should be denied.

Notwithstanding the foregoing, Defendant contends that the Complaint is insufficient because it fails to allege each individual act of infringement and because it fails to specify the dates or times on which the infringements occurred. These arguments have no merit and have been rejected by virtually every court to consider them.

Contrary to Defendant's assertions, Plaintiffs are not required to allege each individual act of copyright infringement in their Complaint. *See Carell v. Shubert Org, 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."); *Greubel*, 453 F. Supp. 2d at 964 (rejecting a heightened pleading requirement for copyright litigation).

Nor are copyright plaintiffs required to specify the dates or times on which the infringement occurred, particularly where, as here, plaintiffs have alleged continuous and ongoing acts of infringement. *See Franklin Elec. Publishers v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991) (holding that the assertion of continuous and ongoing infringement satisfies the pleading requirements applicable to claims for copyright infringement); *Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *4 (same); *Alvarez*, 2006 U.S. Dist. LEXIS 95559 (same); *Payne*, 2006 U.S. Dist. LEXIS 65765 (same). Defendant's contentions that *Franklin Electronic Publishers* has never been cited by any other authority, is contrary to other known authorities, and is irrelevant in the context of this case are simply incorrect. Indeed, five of what Defendant cites as the "first Six RIAA 12(b)(6) Decisions" denying a defendant's

motion to dismiss rely on *Franklin Electronic Publishers*. See *Greubel*, 453 F. Supp. 2d at 964; *Payne*, 2006 U.S. Dist. LEXIS 65765, at *6; *Alvarez*, 2006 U.S. Dist. LEXIS 95559, at *10; *Goldshetyen*, 2006 U.S. Dist. LEXIS 52422, at *10. As courts around the country have relied on *Franklin Electronic Publishers* in cases with facts nearly identical to the present case, Defendant's arguments fail.

Indeed, it makes no sense, generally, in copyright lawsuits like this one to require a plaintiff to allege with specificity when and how an infringement occurred, because such actions are not typically done in plain sight of the copyright holder. Rather, online piracy typically takes place "behind closed doors and beyond the watchful eyes of a copyright holder." See *Payne*, 2006 U.S. Dist. LEXIS 65765, at *7. Moreover, in cases like this one, Plaintiffs cannot be expected to allege each individual act of infringement, because the infringement has been taking place for as long as the sound recordings have been available for distribution from Defendant's computer, and this information is exclusively within Defendant's control.

The cases on which Defendant relies are distinguishable and unavailing. In *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225 (S.D.N.Y. 2000), 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 that the defendants "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

plaintiffs copyright.” *Id.* at 230-31. Here, however, Plaintiffs have pleaded the precise acts “by which [the] defendant directly . . . violated plaintiffs copyright”, i.e., the reproduction and distribution of Plaintiffs’ copyrighted sound recordings using an online media distribution system.

Defendant cites *Brought to Life Music, Inc. v. MCA Records, Inc.*, 2003 WL 296561, at *1 (S.D.N.Y. Feb. 11, 2003), for the proposition that a complaint must allege “by what acts during what time the defendant infringed the copyright.” *See* Motion at 2. In *Brought to Life*, however, 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 was] not alleged to have (i) reproduced plaintiffs work; (ii) prepared derivative works based on plaintiffs work; (iii) distributed copies of plaintiffs work to the public for sale; or (iv) performed plaintiffs work publicly by means of digital audio transmission.” *Brought to Life Music, Inc.*, 2003 WL 296561 at *1. Similarly, the plaintiff in *Tom Kelley Studios Inc. v. International Collectors Society*, 1997 US Dist. LEXIS 14571 (S.D.N.Y. Sept. 25, 1997) failed to allege *any* specific acts of trademark infringement or *any* specific works which were infringed. Here, unlike *Brought to Life* and *Tom Kelley*, Plaintiffs have specifically alleged that Defendant violated Plaintiffs’ exclusive rights of reproduction and distribution in specific sound recordings through his use of the KaZaA online media distribution system—precisely the sort of allegations that were missing from the complaint in *Brought to Life*.

In *Lindsay v. The Wrecked & Abandoned Vessel R.M.S. Titanic*, 1999 LEXIS 15837 at *8, 12 (S.D.N.Y. Oct. 13, 1999), another case on which Defendant relies, the court denied one defendant’s motion to dismiss because the plaintiff’s allegations against that particular defendant were, on their face, vague and conclusory. As to the other defendants, however, the court

found that the plaintiff's allegations that the defendants had displayed images from the subject documentary on their own website and incorporated portions of the subject work into their own work were sufficient to state a claim for relief. Here, Plaintiffs' allegations are neither vague nor conclusory like those against the lone successful defendant in *Lindsay*. Indeed, Plaintiffs' allegations are far more detailed than the allegations found to be sufficient in *Lindsay*. Thus, *Lindsay* supports Plaintiffs' position in this case, not Defendant's.

In *DiMaggio v. International Sports LTD.*, 1999 U.S. Dist. LEXIS 13282 (S.D.N.Y. Aug 30, 1999), the court dismissed the copyright claim against the defendant without discussion or analysis. As the case contains no discussion or analysis of the copyright claim that would apply to this case, Defendant's reliance on *DiMaggio* is misplaced.

Finally, in *Gee v. CBS, Inc.*, 471 F. Supp. 600 (W.D. Mo. 1986), the complaint was deemed insufficient for reasons that do not apply here. The plaintiff in *Gee* did not plead whether he owned the copyright at issue, which original work was subject to the copyright claim, whether the work in question had been registered, or by what acts and during what time frame defendant infringed the copyright. 471 F. Supp. at 643. Here, unlike the cases cited by Defendant, Plaintiffs have pled their ownership of the copyrights, identified the registered works at issue, and alleged that Defendant has continuously offered those works freely for distribution to the millions of people who use similar online media distribution systems.

For all of the foregoing reasons, the Complaint in this case more than adequately pleads the requisite elements of a claim for copyright infringement, and Defendant's Motion to Dismiss should be denied.

3. THIS COURT NEED NOT REACH DEFENDANT’S “ACTUAL DISSEMINATION” ARGUMENT, BUT, EVEN IF IT DID, PLAINTIFFS HAVE PROPERLY PLED THAT THEORY AS WELL.

Defendant next argues that “it is well established that no copyright infringement liability can be predicated upon making the works available unless there was actual dissemination of unauthorized copies.” *See* Motion at 4. Defendant’s argument is wrong.

First, in their Complaint, Plaintiffs allege that Defendant infringed their copyrights in the Copyrighted Recordings by using an online media distribute system to download (copy) those Recordings and to distribute those Recordings to the public. *See* Complaint ¶ 13. Because Plaintiffs have alleged actual downloading and distribution of specific sound recordings by Defendant, the Court need not reach the question of whether making sound recordings available to others on a peer-to-peer network also violates the distribution right (the so-called right of “making available”). Indeed, several courts have so held. *See, e.g., Greubel*, 453 F. Supp. 2d 961; *Payne*, 2006 U.S. Dist. LEXIS 65765, and *Duty*, 2006 U.S. Dist. LEXIS 20214. For this reason alone, Defendant’s Motion based on “actual dissemination” should be denied.

Second, even had Plaintiffs only alleged that Defendant was making the Copyrighted Recordings available, thereby necessitating that the Court reach this issue, Defendant’s argument would still fail, because the text of the copyright statute, the applicable legislative history, prevailing case law and the United States’ actions with respect to certain international treaties all demonstrate that making files available for distribution is a violation of the copyright owner’s exclusive right of distribution.

(a) The Text Of The Copyright Act And The Legislative History Establish That “Making Available” Is An Exclusive Right Of The Copyright Owner.

The exclusive right of distribution is significantly broader than Defendant suggests. Section 501(a) of the Copyright Act provides, in relevant part, “Anyone who violates any of the

exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright or right of the author, as the case may be.” One of the exclusive rights referred to in that section is the right of distribution that is set forth in 17 U.S.C. § 106(3). That section provides:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following . . .

(3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . .

Reading sections 501 and 106(3) together shows, first, that it is an actionable infringement for one to violate a copyright owner’s exclusive right to authorize the distribution of copies or phonorecords of a copyrighted work. Thus, contrary to Defendant’s position, the distribution right does not require a consummated transfer of the copyrighted work at issue. Here, Defendant authorized distribution by placing Plaintiffs’ copyrighted works in his shared folder, where they were then available to other online media distribution system users. This violates the express language of § 106(3).

Moreover, in adopting the language of § 106(3), Congress specifically noted that that section established the exclusive right of publication and gave the copyright owner the right to control the first public distribution of an authorized copy of the work. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675-76. This determination has led various courts and commentators to find that distribution and publication are synonymous. *See, e.g., Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995); *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 299 (3d Cir.), *cert denied*, 502 U.S. 939 (1991); NIMMER ON COPYRIGHT § 8.11(A) (2005) (noting that the right of distribution “is a

right to control the work's publication The term 'distribution' rather than 'publication' was used merely 'for the sake of clarity'").

"Publication," in turn, is defined as:

[T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or 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). Accordingly, under the clear language of the statute, the making available of a work (i.e., the offering to distribute that work) falls within the exclusive right of distribution.

The United States Copyright Office has reached precisely the same conclusion. The Register of Copyrights addressed the issue of offering copyrighted works on an online media distribution system directly: ***"[M]aking [a work] available for other users of a P2P 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) (emphasis added) (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2000)), 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)* (attached hereto as Exhibit G). The Copyright Office's interpretation of the Act is entitled to deference where, as here, it is a reasonable one. See *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 490 & n. 9 (3d Cir. 2003); *Batjac Productions Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998), cert. denied, 526 U.S. 1158 (1999) ("[T]he Register [of Copyrights] has the authority to interpret the copyright

laws and [] its interpretations are entitled to judicial deference if reasonable.”) (citations omitted).

For all of the foregoing reasons, the language of the Copyright Act demonstrates that the exclusive right of distribution is violated where, as here, a defendant uploads a copyrighted work and makes it available for download by other users on an online media distribution system.

(b) Case Law Supports The Principle That The Exclusive Right Of Distribution Subsumes The Right Of Making Available.

The courts, too, have found that, even in the absence of proof that a copyrighted work has actually been fully transmitted to another, the section 106(3) distribution right is violated when a copyrighted work is made available for others on a peer-to-peer file sharing network. *See Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (“[P]eople who post or download music files are primary infringers.”); *Sony Pictures Home Entm’t, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-22 (N.D. Tex. 2007) (granting summary judgment to the plaintiff motion picture companies based on evidence that their copyrighted motion pictures were made available for download from the defendant’s computer); *Motown Record Co. v. DePietro*, 2007 U.S. Dist. LEXIS 11626, * 12-13, FN 38 (E.D. Pa. 2007) (“A plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant ‘made available’ the copyrighted work.”).

In addition to these authorities, on October 2-4, 2007, national counsel for Plaintiffs tried the case of *Capitol Records, Inc. v. Thomas*, Case No. 06-CV-1497 (MJD/RLE) (D. Minn.), which involved claims of copyright infringement that are virtually identical to the claims at issue in this case and resulted in a verdict for the record company plaintiffs totaling \$222,000.00. During the trial, an issue arose in the context of jury instructions as to whether it is a violation of

the exclusive right of distribution for one to make sound recordings available on a peer-to-peer network, without proof of actual receipt of the sound recording by a third-party. After hearing argument and reviewing the case law, the *Thomas* court agreed with the record companies' position and instructed the jury as follows:

The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown.

A copy of this jury instruction is attached as Exhibit H hereto, and is also available on PACER in the *Thomas* case, Doc. No. 97, Jury Instruction No. 15.

In the *Napster* case, the Ninth Circuit evaluated the situation where individual Napster users made copyrighted sound recordings "available for copying by other Napster users." 239 F.3d at 1011. The evidence in the *Napster* case showed that the names of the music files stored in the Napster user's "user library" were "uploaded" to the Napster servers where they were displayed for other users, who could then search the file names and download copies of the actual music files directly from the original user's computer, such that each user would then have copies of the files. *Id.* at 1011-12. Based on this evidence, the Ninth Circuit held that "***Napster users who upload file names to the search index for others to copy violate [the copyright holder's] distribution rights.***" *Id.* at 1014 (emphasis added). The Ninth Circuit also rejected Napster's fair use, "space-shifting" defense for the same reason. Specifically, the court held that Napster could not argue that its users were engaged in legitimate space-shifting because, in addition to downloading, the use of Napster's peer-to-peer file sharing "***simultaneously involve[d] distribution of the copyrighted material to the general public.***" *Id.* at 1019 (emphasis added).

On remand, the plaintiffs in the *Napster* case argued “that Napster itself directly infringed plaintiffs’ distribution rights by maintaining a centralized indexing system listing the file names of all MP3-formatted music files available on the Napster network.” *In re Napster*, 377 F. Supp. 2d 796, 802 (N.D. Cal. 2005). The district court, however, rejected the plaintiffs’ indexing argument, holding that, absent proof that music files had been “uploaded onto the network,” the fact that such files had been listed on the Napster index did not infringe the plaintiffs’ distribution right. *Id.* at 803.

Although some have argued that the district court’s decision on remand in the *Napster* case runs counter to the “making available” right of distribution, the Ninth Circuit recently reaffirmed its holding in the *Napster* case regarding distribution in *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007). In *Perfect 10*, the Ninth Circuit held that the defendant, Google, had not infringed the plaintiffs’ right of distribution by providing links telling users of Google’s search engine where to find the plaintiffs’ copyrighted images. *Id.* at 718-19. In reaching its decision in the *Perfect 10* case, the court first reiterated the “deemed distribution rule” that formed the basis of its *Napster* decision. Specifically, the court reiterated that “***the distribution rights of the plaintiff copyright owners [in the Napster case] were infringed by Napster users (private individuals with collections of music files stored on their home computers) when they used the Napster software to make their collections available to all other Napster users.***” *Id.* at 719 (emphasis added) (citing *Napster*, 239 F.3d at 1011-14). The court held, however, that the “deemed distribution rule” did not apply to Google because, “[u]nlike the participants in the Napster system . . . Google does not own a collection of Perfect 10’s full-size images and does not have a collection of stored full-size images it makes available to the public.”

Id. Thus, Google itself did not “distribute” the plaintiff’s images in violation of the Copyright Act. *Id.*

Other courts have also concluded that placing files in a “shared folder” available to other users for download constitutes a distribution of the files. In *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007), for example, the Tenth Circuit held a defendant criminally liable for using KaZaA to distribute child pornography. *Id.* at 1220. The evidence in the case showed that the defendant had stored pornographic images and videos “in a shared folder on his computer accessible by other users of the network.” *Id.* at 1220-21. On appeal, the defendant argued that the prosecution had no evidence of actual transmission of files to other users. *Id.* at 1223. The court, however, rejected that argument, “We have little difficulty in concluding that [the defendant] *distributed* child pornography” by placing the pornography in his computer’s KaZaA shared folder. *Id.* at 1123-24.

Likewise, in *Lott*, the plaintiffs presented evidence that the defendant shared “files containing the [the plaintiffs’ copyrighted] Motion Pictures, ***making them available for download*** by other [peer-to-peer] users.” *Id.* at 719 (emphasis added). Based on this evidence, and relying on the Ninth Circuit’s *Napster* ruling, the *Lott* court held that the defendant had violated the plaintiffs’ right of distribution and granted summary judgment in the plaintiffs’ favor. *Id.* at 722 (citing *Napster*, 239 F.3d at 1014); *see also DePietro*, 2007 U.S. Dist. LEXIS 11626, * 12-13, FN 38 (“A plaintiff claiming infringement . . . can establish infringement by... proof that the defendant ‘made available’ the copyrighted work”); *Duty*, 2006 U.S. Dist. LEXIS 20214, at * 4 (“[T]he mere presence of copyrighted sound recordings in [defendant’s] share file may constitute copyright infringement.”); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 402 (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"); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire & Equip. Distris. & Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1180 (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"); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) ("Defendants disseminated unlawful copies of PET 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").

Finally, although not a file sharing case, the Fourth Circuit's decision in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), is instructive. In *Hotaling*, the defendant library obtained unauthorized copies of the plaintiffs' work, added a listing of the unauthorized copies to its index of available works, and made the unauthorized copies available for the public to check out of its library. *Id.* at 203. Based on this evidence, the Fourth Circuit held that, even in the absence of proof that the work had actually been provided to the public, the work had been distributed within the meaning of 17 U.S.C. § 106(3). *Id.* Analogous to the evidence presented in *Napster*, it was sufficient that the title of the work had been included in an index and that the library had an unauthorized copy of the work that could have been checked out by a member of the public. *See id.* It was not necessary for the plaintiffs to show that the work had ever actually been checked out. *Id.*

The cases Defendant relies on do not support his argument that actual dissemination is required. First, as established above, the *Hotaling* Court held that even in the absence of proof that the work had actually been provided to the public, the work had been distributed within the meaning of 17 U.S.C. § 106(3). *Hotaling*, 118 F.3d 199 at 203.

Next, the primary issue in *National Car Rental Systems, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993), was whether liability could attach under the Copyright Act for the mere *use* of copyrighted computer software, as opposed to the distribution of the software. The court commented on the distribution requirement only in the context of rejecting the plaintiffs' argument that allowing others to use the program constitutes distribution. *Id.* at 434. Further, Defendant's citation to *In re Napster, Inc.*, 377 F. Supp. 2d 796 (N.D. Cal. 2005) is based on a misunderstanding of case law, as discussed above.

Finally, Defendant cites to *Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist. LEXIS 16165, 13-14 (S.D.N.Y. 2002), for support of his actual dissemination argument. *See* Motion at 4-5. The *MP3Board* court, however, found the plaintiffs' allegations sufficient to survive the defendant's motion for summary judgment and allowed the case to proceed. *See id.* Thus, any suggestion that *MP3Board* supports Defendant's argument is without merit.

Because Plaintiffs have properly alleged that the actual digital audio files were available for download (i.e., there were files behind the index and available for distribution from Defendant's computer), the cases cited by Defendant are inapposite and Plaintiffs' allegations that Defendant violated Plaintiffs exclusive right of distribution are more than adequate to state a claim for relief.

(c) The WIPO Digital Treaties Support Plaintiffs' Position Here.

The plain language of two World Intellectual Property Organization (“WIPO”) treaties, both of which the United States has ratified and implemented, also provide strong support for the conclusion that the right to “make available” is part of the distribution right.

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 provides:

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 (emphasis added).

The provisions in Articles 6 and 8 of the WCT (and the corresponding Articles 12 and 14 in the WPPT) guarantee copyright owners the right to authorize the making available for their works and sound recordings in both traditional and electronic formats. This right is invoked (and infringed if undertaken without authorization) whether or not a tangible copy is actually transferred, transmitted or distributed. Thus, the right of “making available” is provided for on the face of the WCT and WPPT treaties.

The United States, upon ratification of these treaties, was required to take whatever steps were necessary to bring U.S. law into compliance with the treaties' terms. In other words, if existing U.S. law did not include the same making available right, then U.S. law would have had to be amended to include that right before the U.S. could ratify the treaties. As part of implementation process, 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 determine if U.S. law already included a right of making available, or if U.S. law needed to be appropriately amended. 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, finding that the existing right of distribution subsumed a making available right. Government witnesses and copyright experts from many agencies, including the Commerce Department (and PTO),³ the State Department,⁴ and the U.S. Copyright Office,⁵ all concurred in the decision to ratify the treaties without amending Section 106. As such, 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.

³ Statement of Bruce Lehman, PTO Commissioner, WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 & HR. 2180 Before the House Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, 105th Cong. 87(1997).

⁴ 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).

⁵ 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 HR. 2281 & HR. 2180 Before the House Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, 105th Cong. 43 (1997).

Moreover, since the implementation of the treaties, the United States Copyright Office has taken the position that the exclusive right of distribution in the Copyright Act grants a copyright owner the exclusive right of “making available” copies of a copyrighted work. As noted above, the Register of Copyrights addressed the issue of offering copyrighted works on a P2P 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, *supra*.

Thus, the United States has 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, including the right of making available. As such, the Copyright Act includes the exclusive right of “making available.”

(d) Reference To The CCIA And ISIA Amicus Brief In *Barker* Is Improper And Does Not Help Defendant.

At pages 5 to 9 of his Motion, Defendant relies on the brief of an amicus curiae filed in another case. Defendant’s reliance on this amicus brief is improper and does not help him. First, a brief by an *amicus curiae*, other than a governmental entity, requires either leave of the court or a brief stating that all parties have consented to its filing. Fed. R. App. P. 29(a). No such leave has been requested or granted here, and Plaintiffs object to Defendant’s use of the amicus brief. Second, the assertions contained in the amicus brief are simply inaccurate and should be rejected. As demonstrated above, the text of the copyright statute, the applicable legislative history, prevailing case law and the United States’ actions with respect to certain international treaties all demonstrate that making files available for distribution is a violation of the copyright owner’s exclusive right of distribution.

CONCLUSION

For all of the foregoing reasons, Defendant's Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2008, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to defendant Joel Tenenbaum.

/s/ John R. Bauer

John R. Bauer