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

FONOVISA, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
LARRY ALVAREZ,	)	
	)	Civil Action No. 1:06-CV-011-C
Defendant.	)	ECF

ORDER

On this date, the Court considered:

(1) Defendant's Motion to Dismiss, filed March 6, 2006;

(2) Plaintiff's Response to Defendant's Motion to Dismiss, filed April 3, 2006;

(3) Supplement to Plaintiff's Response, filed April 20, 2006;

(4) Defendant's Reply Memorandum in Support of Motion to Dismiss, filed April 28, 2006;

(5) Statement of Interest of the United States, filed May 16, 2006;

(6) Amicus Curiae Brief of the Electronic Frontier Foundation in Support of Defendant's Motion to Dismiss, filed June 15, 2006;

(7) Plaintiff's Brief in Response to Amicus Curiae Brief of the Electronic Frontier Foundation, filed July 5, 2006; and

(8) Second Supplement to Plaintiff's Response, filed July 19, 2006.

EXHIBIT B

I.
PROCEDURAL HISTORY

Plaintiffs, Fonovisa, Inc.; BMG Music; UMG Recordings, Inc.; Interscope Recordings; Arista Records LLC; Atlantic Recording Corporation; and Elektra Entertainment Group, Inc. ("Plaintiffs"), filed Plaintiffs' Original Complaint for Copyright Infringement against Larry Alvarez ("Defendant") on January 23, 2006. Defendant was served through personal service upon Defendant on February 14, 2006, and return of service was filed February 27, 2006. On March 6, 2006, Defendant filed his Motion to Dismiss. On March 24, 2006, Plaintiffs filed an Unopposed Motion to Extend Time to File a Response to Defendant's Motion to Dismiss Plaintiffs' Complaint, which was granted on March 30, 2006. On April 3, 2006, Plaintiffs filed a Response to Defendant's Motion to Dismiss. On April 3, 2006, Plaintiffs BMG Music and Arista Records, LLC, by and through their attorneys, voluntarily dismissed their claims against Defendant without prejudice.

The Court granted Defendant's Motion for Leave to File Reply on April 20, 2006. On May 16, 2006, the United States of America filed a Statement of Interest in Opposition to Defendant's Motion to Dismiss the Complaint. On June 15, 2006, the Court granted the Motion of Electronic Frontier Foundation for Leave to File Amicus Curiae Brief in Support of Defendant's Motion to Dismiss the Complaint. Plaintiffs filed their Response to the Amicus Brief on July 5, 2006. On July 19, 2006, Plaintiffs filed a Second Supplement to their Response–a copy of an order entered in the United States District Court for the Western District of Texas by the Honorable Walter Smith relating to the very issues raised in Defendant's Motion to Dismiss.

EXHIBIT B

II.
FACTUAL BACKGROUND

Plaintiffs allege that they are, and at all relevant times have been, the copyright owners or licensees of exclusive rights under United States copyright to certain copyrighted sound recordings (the "Copyrighted Recordings"). (Pls.' Compl. at Ex. A (of the eleven specific songs listed on Exhibit A, Plaintiff Fonovisa, Inc. claims to be the copyright owner of two)). In the Complaint, Plaintiffs allege that among the rights granted to each Plaintiff under the Copyright Act, 17 U.S.C. §§ 101 *et seq*., are the exclusive rights to reproduce the Copyrighted Recordings and to distribute the Copyrighted Recordings to the public. Plaintiffs allege upon information and belief that Defendant, without permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download the Copyrighted Recordings in order to distribute the Copyrighted Recordings to the public. Plaintiffs allege that Defendant's actions constitute infringement of Plaintiffs' copyright and exclusive rights under copyright. Plaintiffs further allege that Defendant's actions have been willful and intentional in disregard of, and with indifference to, the rights of Plaintiffs. Plaintiffs allege that they should be entitled to injunctive relief, statutory damages, costs of the action, and reasonable attorneys' fees under the copyright laws of the United States.

Defendant contends that Plaintiffs have failed to state a claim upon which relief can be granted. Defendant contends that Plaintiffs failed to (1) completely plead specific works and ownership, (2) properly allege registration in sound recordings, and (3) allege any specific acts of infringement. Defendant further contends that section 106(3) of the Copyright Act does not

apply to electronic transmissions and that "merely making works available" does not violate right of distribution.

III.
STANDARD

Rule 12(b)(6) Failure to State a Claim

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court as follows: "[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." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir. 1997). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

Subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Further, "the plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v.*

EXHIBIT B

Prudential Sec. Inc., 94 F.3d 189, 194 (5th Cir. 1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). In other words, a motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). Finally, when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court must examine the complaint to determine whether the allegations provide relief on any possible theory. *See Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

IV.
DISCUSSION

Defendant argues that Plaintiffs have failed to state a valid copyright infringement claim. Defendant contends that "merely making works available" does not violate the right of distribution. The Court has considered Plaintiff's listed authorities from other jurisdictions and has determined that the allegations provide a possible theory of a right to relief. *See, e.g., Interscope Records v. Duty*, 2006 WL 988086 (D. Ariz. April 14, 2006). Moreover, a federal district court in this circuit has now ruled on the very arguments raised by Defendant and found that dismissal is not warranted on the allegations contained in the pleadings. *See, e.g., Warner Bros. Records et al. v. Payne*, C.A. No. W-06-CV-051 (W.D. Tex. July 17, 2006). This Court is not making a determination as to whether "making works available" violates the right of distribution. However, as stated by the two courts cited directly above, at this stage of the proceedings, Plaintiff's "making available" theory *may* impose a possible ground for liability.

EXHIBIT B

Defendant further argues that, by contending that section 106(3) of the Copyright Act is not applicable to "electronic transmissions," Plaintiffs have failed to state a valid copyright infringement claim. (Def.'s Mot. Dismiss 9.) Plaintiffs assert that unauthorized distribution of copyrighted sound recordings over P2P networks violates the exclusive right of distribution. (Pls.' Resp. 17.) Both sides have provided authorities on this issue. However, at this point, the Court will not conclude that the mere presence of copyrighted sound recordings in Defendant's share file constitutes infringement. The Court has an incomplete understanding of the P2P technology at this stage; and the ultimate issue of liability is more appropriately considered on a motion for summary judgment, when the parties will have an opportunity to fully explain the P2P technology and the means by which a file can be made available to distribute for public download on P2P systems.

Defendant also argues that Plaintiffs' Complaint lacks specificity and is ambiguous and vague because Plaintiffs have not alleged any specific acts of infringement with dates and times. Complaints in copyright infringement actions must comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure, which governs pleadings generally. While Plaintiffs have not alleged the dates and times that Defendant allegedly commenced his infringing activities, Plaintiffs have alleged that Defendant "continues to infringe." (Pls.' Compl. at ¶ 15.) Blanket references to "copying, using and/or incorporating" leave the defendant without sufficient notice as to how to answer and defend against the claims in the case. *Marshall v. McConnell*, 2006 WL 740081, *4 (N.D. Tex. 2006) (reasoning that the decision merely holds plaintiffs to the basic standards of Rule 8(a) that a complaint must give the opposing party "fair notice" of the claims asserted). Plaintiffs need not allege specific acts of infringement, because they have alleged

EXHIBIT B

continuous and ongoing acts of infringement. *Warner Bros. Records et al. v. Payne*, C.A. No. W-06-CV-051 (W.D. Tex. July 17, 2006) (citing *Franklin Elec. Publishers v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991)).

Here, the Court finds that Plaintiffs' pleadings meet the basic standards of Rule 8(a) by giving the opposing party "fair notice" of the claims asserted against him. As is clear from his Motion and Reply, Defendant clearly understands the claims asserted against him. *See Interscope Records*, 2006 WL 988086 at *2 ("[I]t is clear from [Defendant's] motion to dismiss that she thoroughly understands the claims against her. Therefore, the complaint satisfies the liberal notice pleading standard of Rule 8(a)."). "To the extent that there remains confusion with regard to the exact date or time of the incidences of alleged infringement, that can be clarified during discovery." *Id*.

In passing and in the alternative, Defendant requests the Court to order Plaintiffs to provide a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. Fed. R. Civ. P. 12(e). The Court will not consider this alternative request in this Order because a document that contains more than one pleading or motion must clearly identify each included pleading or motion in its title. LR 5.1(c). Defendant has not clearly identified this request in its title. Had the motion for more definite statement been properly filed, it would still be denied because Defendant has ample notice of Plaintiffs' claims for copyright infringement and there is no basis for requiring a more

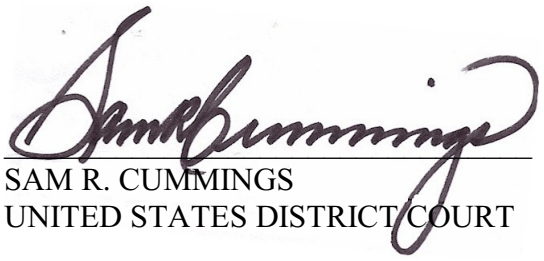
EXHIBIT B

definite statement under Federal Rule of Civil Procedure 12(e). Thus, Defendant's request for a more definite statement should be denied.

IV.
CONCLUSION

For the reasons stated above, the Court finds that Defendant's Motion to Dismiss should be **DENIED**. Plaintiffs have met the notice pleading requirements of Rule 8(a) and have possibly stated a claim upon which relief may be granted as to the alleged reproduction and distribution of their copyrighted works.

SO ORDERED this 24th day of July, 2006.



SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

EXHIBIT B