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BY MESSENGER

Hon. David G. Trager
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Atlantic Recording Corp. v. Huggins
EDNY No. 05 Civ. 1534 (DGT) (RML)
BLH File No. 700000.16702

Dear Judge Trager:

We represent defendant Colin Huggins in the above-referenced case brought by the record industry. In accordance with section IV of Your Honor's Individual Motion Practices, we are requesting a pre-motion conference regarding a motion to dismiss that we expect to file pursuant to Rules 12(b)(6) and 8(a) of the Federal Rules of Civil Procedure, on the grounds that the Complaint fails to state a claim upon which relief can be granted and does not satisfy the pleading requirements applicable to copyright infringement claims.

The Federal Rules of Civil Procedure require that a complaint give "fair notice of the claim asserted [to allow the defendant] to answer and prepare for trial." Simmons v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995). In copyright infringement cases, Rule 8(a)(2) "require[s] a plaintiff to plead with *specificity* the acts by which a defendant has committed copyright infringement.... [The complaint] must set out the '*particular infringing acts ... with some specificity*'. Broad, sweeping allegations of infringement do not comply with Rule 8." Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 230 (S.D.N.Y. 2000) (italics added).

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In copyright infringement cases, a complaint must therefore allege, *inter alia*, “by what acts during what time the defendant infringed the copyright.” Marvullo, *supra*, 105 F.Supp.2d at 230 (italics added); Brought to Life Music, Inc. v. MCA Records, Inc., 2003 WL 296561 at *1 (S.D.N.Y. Feb. 11, 2003) (granting Rule 12(b)(6) motion where “[p]laintiff ha[d] not attempted to describe ‘by what acts and during what time’ [the defendant] infringed the copyright”). See also Plunket v. Doyle, 2001 WL 175252 at *4-6 (S.D.N.Y. Feb. 22, 2001) (dismissing copyright infringement claim under Rule 8 because it “fails to describe the time period during which infringing acts occurred).

Here, the Complaint alleges in conclusory fashion and upon information and belief that defendant used “an online media distribution system” to download and distribute certain alleged copyrighted recordings to the public, and/or to make such recordings “available for distribution to others.” Complaint, ¶ 12. The Complaint makes no attempt to describe the specific acts of infringement or the dates and times on which they allegedly occurred. Indeed, the Complaint does not allege any actual instances of downloading or distribution.

Moreover, the allegation that defendant merely made these recordings *available* for distribution to others fails to state a copyright claim. It is well established that there is no liability for infringing upon the right of distribution unless copies of copyrighted works were *actually* disseminated to members of the public. Arista Records, Inc. v. MP3Board, Inc., 00 Civ. 4660, 2002 WL 1997918 at *4 (S.D.N.Y. Aug. 29, 2002) (“[i]nfringement of the distribution right requires an actual dissemination of ... copies”) (emphasis added); National Car Rental System, Inc. v. Computer Associates International, Inc., 991 F.2d 426, 434 (8th Cir. 1993) (“[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords”) (emphasis added) (citing 2 Nimmer on Copyright § 8.11[A], at 8-124); In re Napster, Inc., 377 F.Supp.2d 796, 802 (N.D.Cal. May 31, 2005) (copyright owner must prove that the defendant “actually disseminated” copies of the copyrighted work to members of the public).

Thus, it is fundamental that the mere listing of copyrighted works in an index of files *available* for downloading by others does not violate the copyright owner’s right of distribution. In re Napster, Inc., *supra*, 377 F.Supp.2d at 802, 805 (granting summary judgment on this issue); Arista Records, *supra*, 00 Civ. 4660, 2002 WL 1997918 at *4 (posting on MP3Board website of links leading to infringing audio files does not establish unlawful dissemination of copies of such files to the public). See also Obolensky v. G.P. Putnam’s Sons, 628 F.Supp. 1552, 1555-56 (S.D.N.Y.) (publisher did not infringe on copyright owner’s right of distribution of copyrighted book by listing the book in a trade publication as belonging to publisher where publisher neither copied the book nor sold any copies of the book; “there is no violation of the right to vend copyrighted works ... where the defendant offers to sell copyrighted materials but does not consummate a sale”), *aff’d*, 795

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F.2d 1005 (2d Cir. 1986); 2 Paul Goldstein, Copyright § 5.5.1, at 5:102 to 5-102-1 (2d ed. 2000 & Supp. 2005) (“an actual transfer must take place; a mere offer for sale will not violate the right”); SBK Catalogue Partnership v. Orion Pictures Corp., 723 F.Supp. 1053, 1064 (D.N.J. 1989) (merely “authorizing” a third party to distribute copyrighted works without proof that the third party actually did so does not constitute copyright infringement); CACI Intern., Inc. v. Pentagen Technologies Intern., 93 Civ. 1631, 1994 WL 1752376 at *4 (E.D.Va. Jun. 16, 1994) (marketing of software package without actually distributing it does not constitute copyright infringement).

Based on the foregoing, defendant clearly has a meritorious dismissal motion that should be granted.¹ The parties are scheduled to appear before Magistrate Judge Levy on October 7, 2005 for a settlement conference. In the event that this case does not settle then, we respectfully request that Your Honor schedule a pre-trial conference to consider our dismissal motion.

Respectfully yours,



Morlan Ty Rogers

cc: Maryann E. Penney Esq.
(by messenger)

¹In a similar “file sharing” case pending in the Southern District of New York in White Plains, Elektra Entertainment Group, Inc. et al. v. Santangelo, 05 Civ. 2414 (CM), our firm moved to dismiss a virtually identical complaint on the same grounds as discussed herein. That motion has been fully briefed, argued and submitted, and we are awaiting a decision from the Court.