

Cowan, Liebowitz & Latman, P.C.

Law Offices

1133 Avenue of the Americas • New York, NY 10036-6799

(212) 790-9200 • www.cll.com • Fax (212) 575-0671

October 5, 2005

J. Christopher Jensen
Direct (212) 790-9204
jcj@cll.com

**By Fax (718) 260-2518
and Electronically Filed**

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

Re: Atlantic Recording Corporation, et al. v. Huggins, No. 05CV1534 (DGT) (RML)

Dear Judge Trager:

We submit this response to Defendant's request for a pre-motion conference in accordance with Section IV of the Court's Individual Motion Practices. Plaintiffs submit this letter for two reasons: (1) because Defendant's request is premature and (2) to respond to the issues raised in Defendant's request for a pre-motion conference.

In his letter, Defendant asks the Court to schedule a pre-motion conference should this case not settle at the October 7, 2005 initial scheduling conference.¹ To request such a conference before the matter has been formally before the Court at the initial scheduling conference is premature and wasteful of the Court's time. Plaintiffs do not endorse this request, as new progress toward settlement may yet take place before or at the initial conference that would moot such an additional conference. Additionally, Defendant's request for the scheduling of a pre-motion conference is inconsistent with his request for a settlement conference and suggests Defendant does not intend to consider earnestly Plaintiffs' reasonable offers to compromise or otherwise settle this matter; instead, Plaintiffs believe Defendant is wielding this proposed conference as a threat should they not meet his demands of capitulation.

In any event, in support of his request for a pre-motion conference, Defendant makes two basic arguments. First, Defendant argues that Plaintiffs' Complaint fails to allege the specific acts of infringement or the time and date on which they occurred. Only fourteen days ago, the Southern District of Texas in *BMG MUSIC et al. v. Conklin*, Case No. H-05-1482, denied a motion to dismiss a complaint containing arguments nearly identical to those raised by Defendant's letter. As a result, the Southern District of Texas has flatly upheld the plaintiffs' arguments that they had adequately alleged the time frame and specific acts by which the defendant infringed their copyrighted works. Various other precedent also establishes that Defendant's assertion is baseless. Second, Defendant argues that, "the allegation that defendant merely made these recordings *available* for distribution to others fails to state a copyright claim." (Def.'s Letter at 2.) Plaintiffs' Complaint alleges conduct by Defendant that goes far beyond the "mere listing" of works available for download. Specifically, Plaintiffs allege that Defendant downloaded (copied) and actually distributed Plaintiffs' copyrighted sound recordings. (See Complaint, ¶ 14.) Plaintiffs have gathered substantial evidence supporting these allegations – evidence that cannot, of course, be considered on a motion to dismiss.

On April 8, 2004, Plaintiffs' investigators located an individual with the username sakdjlkas@fileshare using a peer-to-peer network to engage in copyright infringement on a massive

¹ On September 8, 2005, Defendant submitted a memo to the Court, which was endorsed by Judge Levy, requesting that the October 7, 2005 conference also be treated as a settlement conference. Plaintiffs are and remain willing to engage in reasonable settlement discussions.

scale. This individual had 769 music files on his computer and offered them freely for distribution to the millions of people who use similar peer-to-peer networks. As alleged in the Complaint, on information and belief, this individual previously downloaded all or many of these sound recordings without the permission of the record company copyright owners.

Plaintiffs' investigators further ascertained that the individual used Internet Protocol ("IP") address 162.84.221.175 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. ("Verizon") in order to determine who used the above-referenced IP address. Verizon identified Defendant Colin Huggins as the user of that address, and on March 24, 2005, Plaintiffs filed a Complaint against Defendant for copyright infringement.

To properly 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). Plaintiffs have properly alleged those elements.

Notably, Defendant does not deny liability for copyright infringement in his letter. Instead, Defendant suggests only that the Complaint is deficient because it does not sufficiently describe the acts by which the copyrighted works were infringed and/or the time frame during which the infringement took place. But Defendant's assertion that "the Complaint makes no attempt to describe the specific acts . . . or dates and times which they (infringements) allegedly occurred" is simply incorrect.

The actions described in Plaintiffs' Complaint unquestionably qualify as actionable copyright infringement. See *In re Aimster* 334 F.3d 643, 645 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *Hotaling v. Church Of Jesus Christ Of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029, 1034-35 (all holding that transmitting a digital copy of copyrighted music infringes copyright). Nonetheless, in support of his 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.'" (Def.'s Letter at 2.) The acts that 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. Here, Plaintiffs 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. See Complaint, ¶ 14. Plaintiffs have alleged the specific acts by which copyright infringement took place: the continuous reproduction and distribution of the Copyrighted Recordings using an online media distribution system. In the context of a motion to dismiss, the Court must accept these allegations as true. *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994). Moreover, in Exhibit B to the Complaint, Plaintiffs provided a comprehensive list of the works that Defendant has infringed. 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).²

Plaintiffs also have adequately specified the time frame during which copyright infringement took place. Defendant cites to the decisions in *Plunket v. Doyle*, 2001 WL 175252, at *4-6 (S.D.N.Y. Feb. 22, 2001), *Marvullo*, and *Brought to Life Music, Inc. v MCA Records, Inc.*, 2003 WL 296561 (S.D.N.Y. Feb. 11, 2003), to support his argument that the Complaint should be dismissed because it does not "describe the time period during which the infringing acts occurred." (Def.'s Letter at 2.) Notably, these decisions make no mention of any allegation of continuing infringement. In this case, however, Plaintiffs have alleged that as of March 24, 2005 – the date the Complaint was filed – "Defendant . . . has used, and

² Indeed, Plaintiffs could hardly be expected to do so: such infringement has been taking place for as long as the sound recordings have been available on Defendant's computer.

continues to use an online media distribution system to download the Copyrighted Recordings.” (Complaint, ¶ 14.)

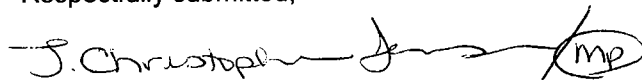
Courts in this District have previously recognized that an allegation of ongoing and continuous infringement satisfies the requirement that the Complaint specify the time period during which the subject copyright infringement occurred. For example, in *Franklin Electronic Publishers v. Unisonic Prod. 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 pleaded the time of infringement and, therefore, denied the motion to dismiss. See also *Home & Nature Inc. v. Sherman Specialty Co.*, 322 F. Supp. 2d 260, 266-67 (E.D.N.Y. 2004) (holding that plaintiff’s allegation continuing infringement was sufficient to give notice under Rule 8).³ Plaintiffs have alleged an ongoing and continuous infringement by Defendant. Plaintiffs’ Complaint therefore satisfies the requirement that it show the dates and times of the infringing acts.

Defendant’s argument that merely making “these recordings *available* for distribution to others fails to state a copyright claim”, is unavailing because Plaintiffs’ Complaint alleges conduct by Defendant that goes far beyond the “mere listing” of works available for download. In fact, Plaintiffs allege that Defendant downloaded (copied) and actually distributed Plaintiffs’ copyrighted sound recordings. (See Complaint, ¶ 14.) As previously noted, Plaintiffs have gathered substantial evidence supporting these allegations. See Ex. B to the Complaint. Plaintiffs’ Complaint properly alleges a cause of action based on this evidence. (See Complaint, ¶ 14.) Thus, Defendant’s “made available for distribution” theory is incorrect.

Defendant cites a number of cases that purportedly support the proposition that making an index of files available for download does not violate the copyright owner’s right of distribution. These cases, however, are irrelevant because they simply fail to address the conduct that is alleged in Plaintiffs’ Complaint. Nonetheless, should the Court wish to address Defendant’s “available for download” theory, Plaintiffs are prepared to provide additional briefing on this issue.⁴

Defendant’s request for a pre-motion conference should be denied; it is a premature request based on legally incorrect assertions.

Respectfully submitted,



J. Christopher Jensen (JJ-1864)

cc: Hon. Robert M. Levy (by fax: 718-260-2647)
Morlan Ty Rogers, Esq. (by fax: 212-557-0565)

³ Indeed, by its very nature, copyright infringement occurring through online media distribution systems is ongoing and continuous. This is illustrated here by the massive number of music files (769) detected in Defendant’s shared folder – files which, upon information and belief, were both downloaded and/or made available for distribution over an extended period of time. (See Complaint, Ex. B.) Plaintiffs cannot possibly know how long Defendant has been infringing their copyrights.

⁴ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); *In re Aimster*, 252 F.Supp.2d 634, 648 (N.D.Ill. 2002), *aff’d*, 334 F.3d 643 (7th Cir. 2003) (holding defendant liable for copyright infringement and citing evidence of “hundreds of works found to be available through the Aimster system”); *Hotelling v. Church of Jesus-Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (“When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”).