

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ARISTA RECORDS LLC, CAPITOL	)	DEFENDANT'S
RECORDS, INC., UMG RECORDINGS,	)	MOTION TO DISMISS
INC., ELEKTRA ENTERTAINMENT)	
GROUP INC., and WARNER BROS.)	
RECORDS INC.,)	
)	
Plaintiffs,	)	Civil Action No.
	)	4-05CV-531-Y
v.)	
)	
DAVID GREUBEL.	)	JUDGE MEANS
)	
Defendant.)	

DEFENDANT DAVID GREUBEL'S

MOTION TO DISMISS PLAINTIFFS' COMPLAINT

NOW COMES Defendant DAVID GREUBEL, by his attorneys, and respectfully moves for entry of an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Plaintiff's Complaint ("Complaint") on the grounds that the Plaintiffs have failed to state a claim upon which relief can be granted. In the alternative, David Greubel respectfully moves this Court to order Plaintiffs to provide a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. David Greubel also moves for such other and further relief as to which it is entitled.

In support of his motion, David Greubel submits his accompanying memorandum in Support of Defendant's Motion to Dismiss Plaintiffs' Complaint.

WHEREFORE, David Greubel respectfully prays for entry of an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Plaintiffs' Complaint in its entirety or, alternatively, an order, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, requiring Plaintiffs to provide a more definite statement, and for such other and further relief as to which he is entitled.

Dated: Chicago, Illinois
February 24, 2006

Respectfully submitted,

By: s/Charles Lee Mudd Jr.
CHARLES LEE MUDD JR.

Illinois State Bar No. 6257957
Law Offices of Charles Lee Mudd Jr.
3344 North Albany Avenue
Chicago, Illinois 60618
(773) 588-5410
(773) 588-5440 facsimile
cmudd@muddlawoffices.com

s/John G. Browning
JOHN G. BROWNING
Texas State Bar No. 03223050

Browning & Fleishman, P.C.
701 Commerce Street
Suite 510
Dallas, Texas 75202
(214) 752-4130
(469) 227-9010 facsimile

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been mailed to all attorneys of record on this the 24th day of February 2006, addressed as follows:

Kristi Belt
Shook Hardy & Bacon
Chase Tower
600 Travis Street
Suite 1600
Houston, Texas 77002-2911
713-227-8008
kbelt@shb.com

s/Charles Lee Mudd Jr.
Charles Lee Mudd Jr.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

ARISTA RECORDS LLC, et al.,	)	DEFENDANT'S
	)	MEMORANDUM IN SUPPORT
	)	OF MOTION TO DISMISS
Plaintiffs,)	
)	
v.	)	Civil Action No.
	)	4-05CV-531-Y
DAVID GREUBEL,)	
)	
Defendant.	)	JUDGE MEANS

**DEFENDANT DAVID GREUBEL'S MEMORANDUM IN SUPPORT OF HIS
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION and PRELIMINARY STATEMENT	1
PROCEDURAL BACKGROUND	3
ARGUMENT	3
I. MOTION TO DISMISS STANDARD	4
II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM	4
A. <u>Complaint Lacks Specificity and is Ambiguous and Vague</u>	4
1. <i>Plaintiffs Fail to Completely Plead Specific Works and Ownership</i>	6
2. <i>Plaintiffs Fail to Properly Allege Registration in Sound Recordings</i>	7
3. <i>Plaintiffs Fail to Allege Any Specific Acts of Infringement</i>	8
B. <u>Section 106(3) of Copyright Act Not Applicable to Electronic Transmissions</u>	9
C. <u>Merely Making Works Available Does Not Violate Right of Distribution</u>	11
D. <u>Plaintiffs' Complaint Should Be Dismissed</u>	13
III. DAVID GREUBEL'S MOTION FOR MORE DEFINITE STATEMENT	14
CONCLUSION	14

TABLE OF AUTHORITIES**CASE LAW**

<u>Arista Records, Inc. v. MP3Board, Inc.</u> , 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165 at *13-14 (S.D.N.Y. Aug. 29, 2002)	11, 12, 13
<u>Brought to Life Music, Inc. v. MCA Records, Inc.</u> , 02 Civ. 1164, 2003 U.S. Dist. LEXIS 1967 at *3 (S.D.N.Y. Feb. 11, 2003)	7, 9
<u>CACI Intern., Inc. v. Pentagen Technologies Intern.</u> , 93 Civ. 1631, 1994 U.S. Dist. LEXIS 21457 at *12 (E. D. Va. Jun. 16, 1994)	11, 13
<u>Consumer Prod. Safety Comm'n v. Gte Sylvania</u> , 447 U.S. 102, 108 (1980)	11
<u>Dae Han Video Production, Inc. v. Chun</u> , 89 Civ. 1470, 1990 U.S. Dist. LEXIS 18496, at *22 (D. Va. June 18, 1990)	2
<u>De Jesus v. Sears, Roebuck & Co., Inc.</u> , 87 F.3d 65, 70 (2d Cir. 1996)	5
<u>DiMaggio v. International Sports Ltd.</u> , 97 Civ. 7767, 1998 U.S. Dist. LEXIS 13468 at *4-5 (S.D.N.Y. Aug. 31, 1998)	5, 7, 8
<u>Fernandez-Montes v. Allied Pilots Ass'n</u> , 987 F.2d 278 (5th Cir. 1993)	5
<u>Gee v. CBS, Inc.</u> , 471 F. Supp. 600, 643-644 (E. D. Pa. 1979), <u>aff'd</u> , 612 F.2d 572 (3d Cir. 1979)	5, 6, 7, 8
<u>Gmurzynska v. Hutton</u> , 257 F.Supp.2d 621, 631 (S.D.N.Y. 2003)	11
<u>Guidry v. Bank of LaPlace</u> , 954 F.2d 278, 281 (5 th Cir. 1992)	4
<u>Harris v. New York State Dept. of Health</u> , 202 F.Supp.2d 143, 175 (S.D.N.Y. 2002)	11
<u>Higgins v. Detroit Education Television Foundation</u> , 4 F.Supp.2d 701, 705 (E. D.Mich. 1998)	12
<u>Hogan Sys. v. Cybresource Int'l., Inc.</u> , 158 F.3d 319, 324 (5th Cir. 1998)	5
<u>Hung Tang v. Ho Yong Hwang</u> , 799 F. Supp. 499, 503 (E. D. Pa. 1992)	7, 8
<u>In re Napster, Inc.</u> , 377 F.Supp.2d 796, 805 (N. D. Cal. May 31, 2005)	11, 12, 13

TABLE OF AUTHORITIES (cont'd)

<u>Jefferson Airplane v. Berkeley Systems, Inc.</u> , 886 F. Supp. 713, 715 (N.D. Cal. 1994)	7
<u>Kaiser Aliminimum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.</u> , 677 F.2d 1045, 1050 (5 th Cir. 1982)	4, 5
<u>Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic</u> , 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 at *8, 12 (S.D.N.Y. Oct. 13, 1999)	7, 9
<u>Marvullo v. Gruner & Jahr</u> , 105 F.Supp.2d 225, 230 n.6 (S.D.N.Y. 2000)	4, 5, 7, 8
<u>Miller v. Universal City Studios</u> , 650 F.2d 1365, 1375 (5 th Cir. 1981)	5
<u>National Car Rental System, Inc. v. Computer Associates International, Inc.</u> , 991 F.2d 426, 434 (8 th Cir. 1993)	12, 13
<u>Obolensky v. G.P. Putnam's Sons</u> , 628 F.Supp. 1552, 1555-56 (S.D.N.Y.)	11, 13
<u>On Davis v. The Gap, Inc.</u> , 246 F.3d 152, 172 (2d Cir. 2001)	2
<u>Peer Int'l Corp. v. Luna Records, Inc.</u> , 887 F. Supp. 560, 568 (S.D.N.Y. 1995)	2
<u>Perfect 10 v. Google</u> , No. CV 04-9484 AHM, 2006 U.S. Dist. LEXIS 6664, n.11 (C.D. Cal. Feb. 21, 2006)	10
<u>RSO Records, Inc. v. Peri</u> , 596 F. Supp. 849, 826 (S.D.N.Y. 1984)	2, 12
<u>Russello v. United States</u> , 464 U.S. 16, 23 (1983)	10
<u>SBK Catalogue Partnership v. Orion Pictures Corp.</u> , 723 F. Supp. 1053, 1064 (D. N.J. 1989)	11, 13
<u>SCLC v. Supreme Court</u> , 252 F.3d 781, 786 (5 th Cir. 2001)	5
<u>Stampone v. Stahl</u> , 05 Civ. 1921 at *3, 2005 WL 1694073 at *2 (D.N.J. July 19, 2005)	9
<u>State Farm Mutual Automobile Insurance Co. v. Campbell</u> , 538 U.S. 408, 424-25, 123 S. Ct. 1513, 1524 (2003)	2

TABLE OF AUTHORITIES (cont'd)

<u>Tom Kelley Studios Inc. v. Int'l Collectors Society Inc.</u> , 97 Civ. 0056, 1997 U.S. Dist. LEXIS 14571 at *2-3 (S.D.N.Y. Sept. 11, 1997)	9
<u>Yorktown Square Associates v. Union Dime Savings Bank</u> , 79 A.D.2d 1040, 1041, 435 N.Y.S.2d 343, 344 (2d Dep't 1981)	11
<u>U.S. Naval Institute v. Charter Communications, Inc.</u> , 936 F.2d 692, 695 (2d Cir. 1991)	12

LEGISLATIVE HISTORY

H.R. 2441, 104th Cong. § 2 (1995); S. 1284, 104th Cong. § 2 (1995)	10
H.R. Rep. No. 94-1476, at 53, 72, 138 (1976)	10

SECONDARY AUTHORITY

Brian Hiatt, <i>Music Fans Want Lower CD Prices</i> , ROLLING STONE, February 23, 2006	1
EFF White Paper, RIAA v. the People: Two Years Later (Nov. 2005)	2
2 Paul Goldstein, COPYRIGHT § 5.5.1, at 5:102 to 5-102-1 (2d ed. 2000 & Supp. 2005)	11, 13
2 Nimmer on Copyright § 8.11[A]	12, 13
R. Anthony Reese, <i>The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies</i> , 2001 U. OF ILL. L. REV. 83, 126 (2001)	10

TABLE OF AUTHORITIES (cont'd)

STATUTES and RULES

Fed. R. Civ. P. 8	4, 5, 7, 8
Fed. R. Civ. P. 12(b)(6)	3, 4, 5, 9
Fed. R. Civ. P. 12(e)	14, 15
Fed. R. Civ. P. 81	4
17 U.S.C. § 101	10
17 U.S.C. § 106(1)	9
17 U.S.C. § 106(3)	9, 10, 11, 12, 13, 14
17 U.S.C. § 106(4),(5),(6)	10
17 U.S.C § 411(a)	7

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

ARISTA RECORDS LLC, et al.,	)	DEFENDANT'S
	)	MEMORANDUM IN SUPPORT
Plaintiffs,	)	OF MOTION TO DISMISS
)	
v.	)	Civil Action No.
	)	4-05CV-531-Y
DAVID GREUBEL,)	
)	
Defendant.	)	JUDGE MEANS

**DEFENDANT DAVID GREUBEL'S MEMORANDUM IN SUPPORT OF HIS
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

NOW COMES Defendant DAVID GREUBEL ("David Greubel"), by his attorneys, and respectfully submits this Memorandum in Support of His Motion to Dismiss Plaintiffs' Complaint, and states as follows:

INTRODUCTION AND PRELIMINARY STATEMENT

This Court should not be seduced by the Plaintiffs' efforts to blame individual consumers for lost revenue in the entertainment industry. While the Plaintiffs have become quite talented at deploying smoke and mirrors in courts and in Congress through the use of misleading statistics,¹ this Court must remain focused on the real persons living in this District whom the Plaintiffs have chosen to prosecute through their Litigation Machine.

¹ David Greubel does not seek to debate here the cause and effect of the Plaintiffs' declining revenue in CD sales. However, it is interesting to note that recent statistics suggest that a majority of consumers find compact discs to be too expensive and that the quality of music has declined. See Brian Hiatt, *Music Fans Want Lower CD Prices*, ROLLING STONE, February 23, 2006, at 12. These consumer sentiments, as well as the overwhelming success of iTunes, likely contribute to the entertainment industry's declining CD sales.

David Greubel, an upstanding single parent of four children, did not engage in any of the activities alleged in the Plaintiffs' Complaint.² At most, he provided his children with a family computer through which they could access the Internet and benefit from the many positive aspects of technology and education available online. The Plaintiffs represent recording companies that are members of the Recording Industry Association of America ("RIAA"). They do not represent artists. Since 2003, the RIAA has actively and continuously engaged in extortive and predatory litigation tactics designed to misguidedly recoup financial losses in compact disc ("CD") sales.³ In fact, the RIAA has misused copyright law and the Courts to create a veil of fear designed to frighten average consumers into paying thousands of dollars in settlements to avoid prolonged litigation. Although a consumer could purchase an electronic sound recording for approximately \$1.00 through iTunes, www.itunes.com, the RIAA threatens these consumers with a statutory penalty of \$750 per sound recording despite its knowledge that no rationale court could uphold such an award and that such an award, 750 times the likely actual damages, would be inherently unconstitutional.⁴ In so doing, the Plaintiffs employ a settlement

² David Greubel admits that a motion to dismiss is not the proper forum in which to dispute factual allegations. As such, he does not seek to do so here. However, absent a statement to the contrary, the Plaintiffs will misleadingly suggest that he does not dispute liability for the alleged copyright infringement. In fact, he does.

³ For an overview of the history of the recording industry's litigation campaign, see EFF White Paper, RIAA v. the People: Two Years Later (Nov. 2005) (available at <http://www.eff.org/IP/P2P/RIAAatTWO_FINAL.pdf>).

⁴ As courts have recognized statutory damages to be punitive in nature, On Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001), statutory damages must necessarily have a reasonable relationship to the Plaintiffs' alleged actual damages caused by the alleged infringement (not some ephemeral speculation on the cause of lost CD sales). See Peer Int'l Corp. v. Luna Records, Inc., 887 F. Supp. 560, 568 (S.D.N.Y. 1995); RSO Records, Inc. v. Peri, 596 F. Supp. 849, 826 (S.D.N.Y. 1984); Dae Han Video Production, Inc. v. Chun, 89 Civ. 1470, 1990 U.S. Dist. LEXIS 18496, at *22 (D. Va. June 18, 1990). As the Supreme Court has held, due process will prohibit an award of statutory damages meeting or exceeding a proportion of ten times or more actual damages. See State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 424-25, 123 S. Ct. 1513, 1524 (2003). In fact, an award of statutory damages at four times actual damages "might be close to the line of constitutional impropriety." Id. Thus, an award of 750 times actual damages of \$1.00 is clearly beyond constitutional impropriety. To the extent that Plaintiffs seek more than \$750 per sound recording, their demand becomes even more unconscionable and unconstitutional.

warehouse through which the alleged infringers cannot speak with counsel and often hear misrepresentations of fact and law by novice “negotiators.”

The instant litigation represents but one of the thousands of suits filed against consumers by the RIAA and its record companies. The Plaintiffs continue to use the same formulaic pleadings without sufficient specificity. Indeed, the Plaintiffs arguably hope never to pursue the litigation past the pleading stage. To see this, one need only look at the number of lawsuits filed, the number of individuals who settle, and the number of cases the Plaintiffs’ voluntarily dismiss to avoid pushing a court’s patience too far and causing its docket to become too stale.

This Court should thoroughly examine the form of litigation the RIAA and its Record Companies has laid before it. This Court should review the deficiencies in the Complaint and its allegations. This Court should see past the “smoke and mirrors” employed by the RIAA to distract the courts and Congress from the emptiness within its pleadings. This Court should grant David Greubel’s motion and dismiss the Complaint in its entirety.

PROCEDURAL BACKGROUND

The Plaintiffs filed the Complaint against David Greubel on August 19, 2005. Compl. (Doc. #1). Some time thereafter, Mr. Greubel learned of this litigation for the first time through the news media. On October 10, 2005, the Plaintiffs effectuated service of process. (Doc. #9). In January 2005, David Greubel moved for an extension of time in which to Answer or otherwise respond to the Complaint (Doc. #13), which the Court subsequently granted. (Doc. #14).

ARGUMENT

David Greubel moves to dismiss the Plaintiffs’ Complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. MOTION TO DISMISS STANDARD

In this Circuit, a “motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted,” Kaiser Alimunimum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982). With a Rule 12(b)(6) motion, the Court must accept as true all *well-pleaded* facts in the complaint and view them in the light most favorable to the plaintiff. Id. (emphasis added). The Court should not dismiss a complaint for failure to state a claim upon which relief can be granted “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.” Id. However, these strong policies favoring liberal pleading have limitations. The Court cannot accept as true conclusory allegations in the complaint. Id. Indeed, a plaintiff must plead specific facts, not mere conclusory allegations, to avoid dismissal. Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992). Finally, “a complaint that shows relief to be barred by an affirmative defense” may also be dismissed for failure to state a claim. Kaiser Alimunimum, 677 F.2d at 1050.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM

The Plaintiffs’ Complaint suffers from several fatal deficiencies. To begin, the Plaintiffs’ Complaint lacks sufficient specificity required in copyright litigation. Moreover, the “distribution right” upon which the Plaintiffs vaguely rely does not apply to electronic transmissions. Even if it did, the mere act of making sound recordings available online does not constitute actionable infringement.

A. Complaint Lacks Specificity and is Ambiguous and Vague

The Plaintiffs’ Complaint lacks sufficient specificity as required by the Federal Rules of Civil Procedure. See generally Compl.; Fed. R. Civ. P. 8.⁵ It contains nothing more than

⁵ Despite Fed. R. Civ. P. 81(a)(1), the requirements of Fed. R. Civ. P. 8 do apply to copyright actions. Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 230 n.6 (S.D.N.Y. 2000).

ambiguous and vague conclusory allegations. Id. Consequently, this Court must dismiss the Plaintiffs' Complaint in its entirety. Id.

A plaintiff must prove its ownership and an infringer's copying of a copyright to prevail on a claim of copyright infringement. Hogan Sys. v. Cybresource Int'l., Inc., 158 F.3d 319, 324 (5th Cir. 1998) (citing Miller v. Universal City Studios, 650 F.2d 1365, 1375 (5th Cir. 1981)). To sufficiently allege copyright infringement, a plaintiff must "plead with specificity the acts by which a defendant has committed copyright infringement." Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 230 (S.D.N.Y. 2000) (construing Rule 8(a)(2) of the Federal Rules of Civil Procedure). "Broad, sweeping allegations of infringement do not comply with Rule 8." Id. Indeed, "[a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." Id. at 228 (citing De Jesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65, 70 (2d Cir. 1996)); see also SCLC v. Supreme Court, 252 F.3d 781, 786 (5th Cir. 2001) (quoting Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278 (5th Cir. 1993)); Kaiser Aluminum, 677 F.2d at 1050. Consequently, a copyright plaintiff must allege "which specific original works are the subject of the copyright claim;" "that the plaintiff owns the copyrights in those works;" and "that the copyrights in question have been registered in compliance with the [Copyright Act.]" DiMaggio v. International Sports Ltd., 97 Civ. 7767, 1998 U.S. Dist. LEXIS 13468 at *4-5 (S.D.N.Y. Aug. 31, 1998); Fed. R. Civ. P. 8(a)(2). Finally, the plaintiff must allege with specificity "by what acts during what time the defendant has infringed the copyright" Gee v. CBS, Inc., 471 F. Supp. 600, 643-644 (E. D. Pa. 1979), aff'd, 612 F.2d 572 (3d Cir. 1979); see also Marvullo, 105 F.Supp.2d at 230; DiMaggio, 1998 U.S. Dist. LEXIS 13468 at *4-5; Fed. R. Civ. P. 8(a)(2).

1. *Plaintiffs Fail to Completely Plead Specific Works and Ownership*

Here, the Plaintiffs have only partially met their obligation to plead specific works and ownership. The Plaintiffs have alleged ownership in the specific sound recordings identified in Exhibit A to the Complaint. Compl. ¶ 11; Exhibit A. In Exhibit A, the Plaintiffs demonstrate their understanding of the necessary allegations of ownership in a copyright infringement action and identify the copyright owner, the Artist, the recording title, the album title, and the “S.R.#” for each of the ten (10) listed sound recordings. *Id.*

In stark contrast, the Plaintiffs have not sufficiently plead ownership in *any* sound recordings contained in the voluminous Exhibit B attached to the Complaint. On its face, Exhibit B lists 1087 filenames.⁶ Compl., Exhibit B. The Plaintiffs ambiguously and vaguely allege that their “Copyrighted Recordings also include certain of the sound recordings listed on Exhibit B which are owned by or exclusively licensed to one or more of the Plaintiffs or Plaintiffs’ affiliate record labels” Compl. 11. Apart from this sweeping allegation, the complaint does not specify which sound recordings of the 1087 filenames in Exhibit B the Plaintiffs own and/or David Greubel allegedly infringed. *Id.* This is not sufficient. As one court has explicitly stated, “[t]o have complied with [Rule 8], plaintiffs would have had to identify *each* song composed by Bessie Smith which is the subject of the copyright claim, and for each song they would have had to allege that they presently own the copyright.” *Gee*, 471 F. Supp. at 644. Thus, the Plaintiffs have failed to provide any of the required copyright information relating to the 1087 file names listed in Exhibit B to place David Greubel on fair and sufficient notice of

⁶ Not all of these filenames on Exhibit B could be legitimate sound recordings. Many of the filenames exhibit a size of 0 kilobytes. Many of the filename types indicate the files to be graphic images. Moreover, nothing in Exhibit B identifies the filenames as actual sound recordings for which the Plaintiffs have copyright ownership.

their infringement claims.⁷ See Gee, 471 F. Supp. at 644, aff'd, 612 F.2d 572 (3d Cir. 1979). Consequently, at a minimum, Exhibit B should be stricken and the Plaintiffs' Complaint should be dismissed with respect to any of the vague allegations relating to "certain of the [filenames] listed on Exhibit B which are owned by or exclusively licensed to one or more of the Plaintiffs or Plaintiffs' affiliate record labels" Compl. 11; Fed. R. Civ. P. 8(a)(2); Gee, 471 F. Supp. at 644, aff'd, 612 F.2d 572 (3d Cir. 1979); Marvullo, 105 F.Supp.2d at 230; DiMaggio, 1998 U.S. Dist. LEXIS 13468 at *4-5; Brought to Life Music, Inc. v. MCA Records, Inc., 02 Civ. 1164, 2003 U.S. Dist. LEXIS 1967 at *3 (S.D.N.Y. Feb. 11, 2003); Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 at *8, 12 (S.D.N.Y. Oct. 13, 1999).

2. *Plaintiffs Fail to Properly Allege Registration in Sound Recordings*

"Registration or the application for copyright registration is a jurisdictional prerequisite to a suit for [copyright] infringement." Hung Tang v. Ho Yong Hwang, 799 F. Supp. 499, 503 (E. D. Pa. 1992); Jefferson Airplane v. Berkeley Systems, Inc., 886 F. Supp. 713, 715 (N.D. Cal. 1994). Indeed, "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with the [Copyright Act]." 17 U.S.C. § 411(a). Because "the possession of a registration certificate creates a rebuttable presumption that the work in question is copyrightable," Hung Tang, 799 F. Supp. at 503 n. 8, the Plaintiffs should be required to attach the certificates of registration or, at the minimum, identify the registration numbers for the copyrighted works in question. See Gee, 471 F. Supp. at 644, aff'd, 612 F.2d 572 (3d Cir. 1979) ("Plaintiffs must also allege that each work is suitably

⁷ Indeed, David Greubel cannot determine whether the Complaint alleges ten (10) counts of infringement or 1087. And, although David Greubel contends statutory damages to be unconstitutional in relation to the Plaintiffs' actual damages, the vagueness in the Plaintiffs' Complaint represents a difference of between \$7,500 and \$815,250. Of

registered, provide registration numbers and state by what act or acts and on what dates defendants infringed the copyrights.”). As the Plaintiffs have failed to do so, the Complaint should be dismissed for failure to plead with sufficient specificity as to the registration of the sound recordings. Id.; Hung Tang, 799 F. Supp. at 503

3. *Plaintiffs Fail to Allege Any Specific Acts of Infringement*

The Plaintiffs’ greatest weakness lies in their failure to identify any specific acts of infringement occurring at any specific points in time. See generally Compl. The Complaint merely alleges in a broad, conclusory manner that “Plaintiffs are informed and believe that Defendant, without the permission or consent of plaintiffs, has used, and continues to use, an online media distribution system to download the Copyrighted Recordings, to distribute [them] to the public, and/or to make [them] available for distribution to others.” Compl. ¶ 13. On this basis, the Plaintiffs contend David Greubel has violated their exclusive rights of reproduction and distribution. Id. This cannot suffice. The Plaintiffs make no effort to describe the specific acts of infringement or the dates and times on which the acts allegedly occurred. Id. Examined closely, the Complaint does not allege *any* actual instances of downloading or distribution. Id. The Plaintiffs attempt to circumvent this weakness by alleging “ongoing” conduct. However, as the Complaint does not allege *even one* actual instance of infringement, there simply exists no basis for suggesting it alleges *ongoing* infringement. As such, the Plaintiffs have failed to sufficiently “plead with specificity the acts by which a defendant has committed copyright infringement.” Marvullo, 105 F.Supp.2d 230. They have failed to state a claim upon which relief can be granted as to both Exhibit A and Exhibit B. Therefore, the Plaintiffs’ Complaint must be dismissed in its entirety. Id.; Fed. R. Civ. P. 8(a)(2); DiMaggio, 1998 U.S. Dist. LEXIS

course, this presumes the exception to the statutory minimum pursuant to 17 U.S.C. 504(c)(2) would not be applicable.

13468 at *4-5; Brought to Life Music, Inc., 2003 U.S. Dist. LEXIS 1967 at *3 (granting 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”); Lindsay, 1999 U.S. Dist. LEXIS 15837 at *8, 12 (dismissing copyright infringement claim pursuant to Rule 12(b)(6); vague and conclusory allegations of infringement pleaded using “and/or” do not satisfy requirement of pleading particular infringing acts with specificity); Stampone v. Stahl, 05 Civ. 1921, 2005 WL 1694073 at *2-3 (D.N.J. July 19, 2005) (dismissing copyright claim pursuant to Rule 12(b)(6) where complaint failed “to set out *particular* infringing acts *with some specificity*”) (emphasis added); Tom Kelley Studios Inc. v. Int’l Collectors Society Inc., 97 Civ. 0056, 1997 U.S. Dist. LEXIS 14571 at *2-3 (S.D.N.Y. Sept. 11, 1997).

B. Section 106(3) of the Copyright Act Not Applicable to Electronic Transmission

The Plaintiffs’ push too far in seeking to surreptitiously apply their exclusive distribution right to electronic transmissions. In their copyright claim, the Plaintiffs allege violation of two distinct rights under the Copyright Act. They allege violation of their exclusive right to reproduction provided for by 17 U.S.C. § 106(1) and their exclusive right to distribution provided for by 17 U.S.C. § 106(3).⁸ Compl. ¶ 12. With respect to § 106(3), the Plaintiffs allege that the Defendant used an “online media distribution system” to distribute their copyrighted recordings. Compl. ¶ 13. “Online media distribution system” or electronic software, for short, refers to alleged transmission of their copyrighted works over computer networks. However, the § 106(3) exclusive right to distribution does not apply to electronic transmissions over computer networks. Consequently, § 106(3) is inapplicable to the Plaintiffs’ Complaint.

⁸ David Greubel disputes liability under both statutory provisions.

Section 106(3) provides that the owner of a copyright has the exclusive right: “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.”⁹ 17 U.S.C. § 106(3) (emphasis added). This limitation to “copies or phonorecords” is critical because the Copyright Act defines both as “material objects” in which copyrighted works have been fixed. 17 U.S.C. § 101. Consequently, “the copyright owner’s exclusive right of distribution is a right to distribute such tangible, physical things.” R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy Over RAM Copies*, 2001 U. OF ILL. L. REV. 83, 126 (2001). Section 106(3)’s legislative history supports this interpretation. H.R. Rep. No. 94-1476, at 53, 72, 138 (1976). These “tangible, physical things” and “material objects” do not include electronic transmissions. Indeed, recent attempts to amend § 106(3) to include electronic transmissions have failed. See H.R. 2441, 104th Cong. § 2 (1995); S. 1284, 104th Cong. § 2 (1995). In the instant case, the Plaintiffs do not allege any distribution of “tangible, physical things” and “material objects.” See Compl. Indeed, though insufficiently plead, the Plaintiffs’ Complaint is based solely upon alleged electronic transmissions. Id. Thus, the Plaintiffs do not have a viable § 106(3) infringement claim. See 17 U.S.C. § 106(3); Reese, *The Public Display Right*, 2001 U. OF ILL. L. REV. at 126; see also Perfect 10 v. Google, No. CV 04-9484 AHM, 2006 U.S. Dist. LEXIS 6664, n.11 (C.D. Cal. Feb. 21, 2006) (declining a copyright owner’s invitation to extend the § 106(3) right to encompass transmissions over the Internet, finding the issue moot in light of Plaintiffs’ reproduction and public display claims). Therefore, this Court must dismiss Plaintiffs’

⁹ This language should be compared to 17 U.S.C. § 106(4)-(6) that grants a copyright owner the exclusive right to perform or display “the copyrighted work” publicly. The difference between the statutory language in § 106(3) and 106(4)-(5) is significant. As the Supreme Court has noted, where a legislative body “includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the [legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.” Russello v. United States, 464 U.S.

§ 106(3) claim for failure to state a claim upon which relief may be granted. Id.

C. Merely Making Works Available Does Not Violate Right of Distribution

Even should § 106(3) apply to electronic transmissions, the mere act of listing alleged copyrighted works in an electronic file directory accessible by others does not, by itself, constitute § 106(3) copyright infringement.¹⁰ In re Napster, Inc., 377 F.Supp.2d 796, 805 (N. D. Cal. May 31, 2005) (granting summary judgment on this issue); Arista Records, Inc. v. MP3Board, Inc., 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165 at *13-14 (S.D.N.Y. Aug. 29, 2002) (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.) (“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 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 U.S. Dist. LEXIS 21457 at *12 (E. D. Va. Jun. 16, 1994) (marketing of software package without actually distributing it does not constitute copyright infringement). This principle applies

16, 23 (1983). Indeed, “[a]bsent a *clearly expressed* legislative intention to the contrary,” a statute’s language “must ordinarily be regarded as conclusive.” Consumer Prod. Safety Comm’n v. Gte Sylvania, 447 U.S. 102, 108 (1980).

¹⁰ Since the sound recordings allegedly on exhibited on Exhibit B could just as well have been copied legally from compact discs or purchased from an authorized online service, it is pure speculation for Plaintiffs to claim that such files were illegally downloaded. Such unwarranted speculation cannot defeat a motion to dismiss. Harris v. New York State Dept. of Health, 202 F.Supp.2d 143, 175 (S.D.N.Y. 2002); Gmurzynska v. Hutton, 257 F.Supp.2d 621, 631 (S.D.N.Y. 2003); see also Yorktown Square Associates v. Union Dime Savings Bank, 79 A.D.2d 1040, 1041, 435 N.Y.S.2d 343, 344 (2d Dep’t 1981) (mere speculation by plaintiff cannot defeat a motion to dismiss).

regardless of whether the directory of alleged copyrighted works actually makes these electronic files available to an unknown, would-be infringer. See id. Indeed, liability for § 106(3) copyright infringement does not exist absent actual dissemination of unauthorized copies.¹¹ See Arista Records, Inc., 2002 U.S. Dist. LEXIS 16165 at *14 (“[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 at 802 (copyright owner must prove that the defendant “*actually disseminated*” copies of the copyrighted work to members of the public). Consequently, a claim for § 106(3) copyright infringement cannot be predicated solely upon an individual having made available certain electronic files. See id.

Here, Exhibit B purportedly represents a passive list of apparent electronic files (“Exhibit B Files”) allegedly made available from a particular computer (“Exhibit B Computer”).¹² Presumably, an unknown, would-be infringer could access the Exhibit B Computer through computer networks and access the Exhibit B Files. By their Complaint and the attachment of

¹¹ To the extent that plaintiffs claim that they (or their agents) viewed or downloaded actual copies of these recordings from defendant’s computer, such activity still would not involve distribution or dissemination “to the public” and thus would not constitute copyright infringement. U.S. Naval Institute v. Charter Communications, Inc., 936 F.2d 692, 695 (2d Cir. 1991) (“It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him”); RSO Records v. Peri, 1980 U.S. Dist. LEXIS 13490 at *8 (complaint alleging that plaintiffs participated in reproduction and distribution of infringing copies failed to state valid infringement claim against defendants; “a copyright owner cannot infringe his own copyright”); Higgins v. Detroit Education Television Foundation, 4 F.Supp.2d 701, 705 (E. D.Mich. 1998) (“[a] plaintiff may not claim to have been damaged by reason of a defendant’s sale of alleged infringing copies if the copies were sold to plaintiff’s agent because such a sale prevents the distribution of such copies to the general public”).

¹² The Court will note that nothing contained within Exhibit B identifies David Greubel or any member of his family by name. Moreover, nothing contained within Exhibit B specifies that the apparent files listed thereon represent actual sound recordings. While the sufficiency of the evidence is not at issue on this motion, the lack of explanation in the Complaint further demonstrates the Plaintiffs’ insufficient pleading.

Exhibit B, the Plaintiffs erroneously suggest that the owner of the Exhibit B Computer would be liable for § 106(3) copyright infringement for the mere act of storing Exhibit B Files on the Exhibit B Computer and, through her Internet account, making them available to an unknown, would-be infringer. Assuming David Greubel to be the owner of the Exhibit B Computer, the Plaintiffs erroneously suggest that David Greubel is liable for § 106(3) copyright infringement for making the Exhibit B Files available to an unknown, would be infringer through his Internet account. At its best, Exhibit B merely reflects the availability of certain electronic files. Compl., Exhibit B. Nothing more. Id. It does not reflect or evidence any actual instances of distribution (uploading to other computers) or reproduction (downloading from another computer). Logically then, it does not exhibit any dates and times of transfer (distribution or reproduction). As such, the Plaintiffs' have failed to state a cognizable claim of § 106(3) copyright infringement. See In re Napster, Inc., 377 F.Supp.2d at 805; Arista Records, Inc., 2002 U.S. Dist. LEXIS 16165 at *13-14; Obolensky, 628 F.Supp. at 1555-56, aff'd, 795 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); SBK Catalogue Partnership, 723 F. Supp. at 1064; CACI Intern., Inc., 1994 U.S. Dist. LEXIS 21457 at *12; National Car Rental System, Inc., 991 F.2d at 434 (citing 2 Nimmer on Copyright § 8.11[A], at 8-124). Therefore, this Court must dismiss the Plaintiffs' Complaint as it applies to their claim for violation of its § 106(3) right to exclusive distribution. See id.

D. Plaintiffs' Complaint Should Be Dismissed

As the Plaintiffs have failed to sufficiently plead a claim for copyright infringement, this Court must dismiss Plaintiffs' Complaint in its entirety for failure to state a claim upon which relief may be granted. At a minimum, this Court must dismiss the Plaintiffs' Complaint as it applies to the vague and ambiguous allegations regarding Exhibit B. Indeed, Exhibit B should

be stricken from the Complaint altogether. Additionally, the Plaintiffs misapply their alleged Section 106(3) distribution right to electronic transmissions. Even were Section 106(3) applicable to electronic transmissions, the mere availability of electronic files does not constitute copyright infringement. For these reasons, the Plaintiffs' claim as it applies to the Section 106(3) distribution right must be dismissed for failure to state a claim upon which relief may be granted.

III. DAVID GREUBEL'S MOTION FOR MORE DEFINITE STATEMENT

Should this Court deny any portion of his motion to dismiss, David Greubel respectfully moves this Court for an order requiring Plaintiffs to provide a more definite statement with respect to those portions pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. Rule 12(e) provides that:

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. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten (10) days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed and make such order as it deems just.

Fed. R. Civ. P. 12(e). In moving for a more definite statement, David Greubel incorporates the arguments above in which he discussed the ambiguity and vagueness in the Plaintiffs' Complaint, identified the defects of which he complains, and specified the details needing to be plead. *See supra* I.

CONCLUSION

For the foregoing reasons, David Greubel respectfully moves this Court to grant its Motion to Dismiss Plaintiffs' Complaint in its entirety. In the alternative, David Greubel moves

this Court to order Plaintiffs to provide a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure.

Dated: Chicago, Illinois
February 24, 2006

Respectfully submitted,

By: s/Charles Lee Mudd Jr.
CHARLES LEE MUDD JR.

Illinois State Bar No. 6257957
Law Offices of Charles Lee Mudd Jr.
3344 North Albany Avenue
Chicago, Illinois 60618
(773) 588-5410
(773) 588-5440 facsimile
cmudd@muddlawoffices.com

s/John G. Browning
JOHN G. BROWNING
Texas State Bar No. 03223050

Browning & Fleishman, P.C.
701 Commerce Street
Suite 510
Dallas, Texas 75202
(214) 752-4130
(469) 227-9010 facsimile

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been mailed and faxed to all attorneys of record on this the 24th day of February 2006, addressed as follows:

Kristi Belt
Shook Hardy & Bacon
Chase Tower
600 Travis Street
Suite 1600
Houston, Texas 77002-2911
713-227-8008
kbelt@shb.com

s/Charles Lee Mudd Jr.
Charles Lee Mudd Jr.