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November 15, 2005

By Hand

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

Re: Maverick Recording v. Anna Goldshteyn
EDNY No. 05 Civ. 4523 (DGT) (RML)
BLH File No. 7000.19002

Dear Judge Trager:

We represent defendant Anna Goldshteyn. 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 for copyright infringement. In addition, since service was improper, we will also include lack of personal jurisdiction due to insufficient service under FRCP 12(b)(2) & (4).

In copyright infringement cases, the complaint must "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.*' Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 230 (S.D.N.Y. 2000) (italics added). The complaint must allege "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 because it "fails to describe the time period during which infringing acts occurred).

The instant boilerplate 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.

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).


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 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's dismissal motion would have to be granted, unless plaintiffs were to voluntarily discontinue.

Additionally, since we will be making a Rule 12(b) motion, we will be including the lack of personal jurisdiction due to improper service. The service was not made pursuant to any provision of New York law, nor any provision of the FRCP, of which we are aware. It was delivered at a place that is not the defendant's dwelling place, to someone who was not the defendant.

As is the custom with these plaintiffs, no attempt at obtaining a waiver pursuant to FRCP 4(d) was made.

Respectfully submitted,



Ray Beckerman

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cc: Maryann E. Penney, Esq.
(By Hand and Electronic Notice)