

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELEKTRA ENTERTAINMENT GROUP INC. et al.,

No. 05 CV 7340 (KMK)

Plaintiffs,

-against-

DENISE BARKER,

Defendant.

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**MEMORANDUM OF LAW OF
DEFENDANT TENISE BARKER IN SUPPORT
OF HER MOTION TO DISMISS THE COMPLAINT**

Preliminary Statement

Defendant Tenise Barker (incorrectly sued herein as “Denise Barker”), by her attorneys Beldock Levine & Hoffman LLP, respectfully submits this memorandum of law in support of her motion for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Complaint herein on the ground that it fails to state a claim upon which relief can be granted. A copy of the Complaint is annexed as Exhibit “A” to the accompanying affidavit of Morlan Ty Rogers.

ARGUMENT

THE COMPLAINT MUST BE DISMISSED BECAUSE IT DOES NOT PLEAD ANY SPECIFIC ACTS OR TIMES OF COPYRIGHT INFRINGEMENT

It is well established that a complaint alleging copyright infringement 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); DiMaggio v. International Sports Ltd., 97 Civ. 7767, 1998 U.S. Dist. LEXIS 13468 at *4-5 (S.D.N.Y. Aug. 31, 1998) (Appendix 1). To withstand a motion to dismiss, the complaint must therefore allege with specificity “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., 02 Civ. 1164, 2003 U.S. Dist. LEXIS 1967 at *3 (S.D.N.Y. Feb. 11, 2003) (Appendix 2) (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”); 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) (Appendix 3) (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 at *3, 2005 WL 1694073 at *2 (D.N.J. July 19, 2005) (Appendix 4) (dismissing copyright claim pursuant to Rule 12(b)(6) where complaint failed “to set out *particular* infringing acts *with some specificity*”) (italics added). See also 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) (Appendix 5) (granting motion for more definite statement).

Here, the Complaint must be dismissed since its sole allegation of copyright infringement – that the Doe Defendants used an online media distribution system “to download [certain allegedly copyrighted recordings], to distribute [them] to the public *and/or* to make [them] available for distribution to others,” Complaint, ¶ 12 (*italics added*), is made in the most conclusory manner. 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.¹ The Complaint must therefore be dismissed. Marvullo, *supra*, 105 F.Supp.2d at 230; Brought to Life Music, Inc., *supra*, 02 Civ. 1164, 2003 U.S. Dist. LEXIS 1967 at *3; Lindsay, *supra*, 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 at *8, 12; Stampono, *supra*, 2005 WL 1694073 at *2.

The exhibits annexed to the Complaint do not make up for the lack of specificity in alleging copying (downloading)² or distribution to the public (uploading). According to the Complaint, Exhibit A is a list of eight recordings whose copyright is allegedly owned by plaintiffs. Neither the Complaint nor Exhibit A itself sets forth allegations regarding actual copying or distribution of these recordings to the public. Exhibit B is simply a printout of a Kazaa list

¹That the three types of activities supposedly constituting copyright infringement are connected by the term “and/or” further demonstrates that plaintiffs do not know of any specific instances of actual infringement and have no basis for claiming any. See Lindsay, *supra*, 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 at *8.

²Since the music files allegedly on defendant’s computer 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 onto that computer. 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).

purporting to show that certain allegedly copyrighted recordings were *available* to a would be infringer through Ms. Barker's internet account.³

To the extent that these lists purport to identify sound recordings that were made *available* for downloading, such allegations simply fail to state a cognizable claim of copyright infringement since it is well established that no copyright infringement liability can be predicated upon making the works *available* unless there was actual dissemination of unauthorized copies. Arista Records, Inc. v. MP3Board, Inc., 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165 at *14 (S.D.N.Y. Aug. 29, 2002) (Appendix 7) (“[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) or that the copies being offered were themselves illegal copies.

³To 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, 79 Civ. 5098, 1980 U.S. Dist. LEXIS 13490 at *8 (S.D.N.Y. Sep. 5, 1980) (Appendix 6) (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”).

Merely making copyrighted works *available* for downloading by others does not, by itself, 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 U.S. Dist. LEXIS 16165 at *13-14 (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 U.S. Dist. LEXIS 21457 at *12 (E.D.Va. Jun. 16, 1994) (Appendix 8) (marketing of software package without actually distributing it does not constitute copyright infringement).

It is incomprehensible for the federal courts to be burdened with tens of thousands of identical lawsuits based on boilerplate complaints which allege, in essence, nothing – and for each defendant to be required to spend tens of thousands of dollars on litigation to do battle over the merits of "claims" that have not even been made.

Contrary to the foregoing decisions is Elektra Entertainment Group Inc. v. Santangelo 05 Civ. 2414, 2005 U.S. Dist. LEXIS 30388 (S.D.N.Y. Nov. 28, 2005) (Appendix 9), wherein Judge McMahon of this Court recently denied our motion to dismiss a boilerplate complaint virtually identical to the Complaint in the instant case. We respectfully disagree with Judge McMahon's decision and believe it is contrary to (1) the great weight of authority, (2) common sense, and (3) sound judicial administration. Since the Elektra decision was not an appealable order, we were unable to appeal therefrom. It is not binding on this Court, and we submit that this Court should decline to follow its conclusion.

It is clear that the Complaint does not make out "a concrete showing of a prima facie claim of copyright infringement." Sony Music Entertainment v. Does 1-40, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004). The Court should therefore dismiss the Complaint with prejudice for failure to state a claim upon which relief can be granted. See Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (dismissing without leave to replead because nothing in the complaint "suggests that the plaintiff has a claim that she has inadequately or inartfully pleaded and that she should therefore be given a chance to reframe").

CONCLUSION

The Court should grant the within motion in all respects.

Respectfully submitted,

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(incorrectly sued herein as “Denise Barker”)

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