

UNITED STATES DISTRICT COURT

Southern

District of

New York

PLAINTIFF

ELEKTRA ENTERTAINMENT GROUP INC., et al.,

THIRD PARTY SUMMONS IN A CIVIL ACTION

V. DEFENDANT AND THIRD PARTY PLAINTIFF

MICHELLE SANTANGELO and ROBERT SANTANGELO, JR.,

Case Number: 7:2006cv11520 (SCR)(MDF)

V. THIRD PARTY DEFENDANT

AOL, LLC, SHARMAN NETWORKS, PLC, and MATTHEW SECKLER

To: Name and address of Third Party Defendant

TBD

YOU ARE HEREBY SUMMONED and required to serve on

PLAINTIFF'S ATTORNEY (name and address)

Richard L. Gabriel, Esq. Holme, Roberts & Owen, LLP 1700 Lincoln, Suite 4100 Denver, Colorado 80203-4541 (303) 866-0331

DEFENDANT AND THIRD-PARTY PLAINTIFF'S ATTORNEY

(name and address)

Jordan D. Glass, Esq. 7-11 Legion Drive, Suite M-1C Valhalla, New York 10595-2052 (914) 831-3087

an answer to the third-party complaint which is served on you with this summons, within \_\_\_\_\_ days after the service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default may be taken against you for the relief demanded in the third-party complaint. There is also served on you with this summons a copy of the complaint of the plaintiff. You have the option of answering or not answering the plaintiff's complaint, unless (1) this is a case within Rule 9(h) Federal Rules of Civil Procedure, and (2) the third-party plaintiff is demanding judgment against you in favor of the original plaintiff under the circumstances described in Rule 14(c) Federal Rules of Civil Procedure, in which situation you are required to make your defenses, if any, to the claim of plaintiff as well as to the claim of the third-party plaintiff. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

CLERK

DATE

(By) DEPUTY CLERK

AO 441 (Rev. 8/01) Third Party Summons in a Civil Action

<b>RETURN OF SERVICE</b>		
Service of the Summons and complaint was made by me <sup>(1)</sup>	DATE	
NAME OF SERVER	TITLE	
<i>Check one box below to indicate appropriate method of service</i>		
<input type="checkbox"/> Served personally upon the third-party defendant. Place where served:  <input type="checkbox"/> Left copies thereof at the third-party defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left:  <input type="checkbox"/> Returned unexecuted:  <input type="checkbox"/> Other (specify):		
<b>STATEMENT OF SERVICE FEES</b>		
TRAVEL	SERVICES	TOTAL \$0.00
<b>DECLARATION OF SERVER</b>		
<p style="text-align: center;">I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.</p> <p>Executed on _____  <span style="margin-left: 100px;">Date</span> <span style="margin-left: 100px;"><i>Signature of Server</i></span></p> <p style="text-align: center;">_____  <i>Address of Server</i></p>		

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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ELEKTRA ENTERTAINMENT GROUP INC., et al.,	:	
	:	
Plaintiffs,	:	7:2006cv11520 (SCR)(MDF)
	:	
- against -	:	
	:	
MICHELLE SANTANGELO and	:	
ROBERT SANTANGELO, JR.,	:	
	:	
Defendants and Third-Party Plaintiffs,	:	<b>THIRD-PARTY COMPLAINT</b>
	:	<b>IN A CIVIL ACTION</b>
- against -	:	
	:	
AOL, LLC (a/k/a AMERICA ONLINE, formerly	:	
TWC, and formerly QUANTUM COMPUTER	:	
SERVICES), SHARMAN NETWORKS (a/k/a	:	
SHARMAN NETWORKS, PLC, f/k/a KAZAA), and	:	
MATTHEW SECKLER,	:	
	:	
Third-Party Defendants.	:	

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Defendants and Third-Party Plaintiffs, Michelle Santangelo and Robert Santangelo, Jr., by their attorney, Jordan D. Glass, as and for their Third-Party Complaint against the Third-Party Defendants allege:

1. At all times herein mentioned, Defendants and Third-Party Plaintiffs were and are residents of the State of New York and are subject to the personal jurisdiction of the above-named Court.
2. On information and belief, AOL, LLC (formerly TWC and formerly Quantum Computer Services) is a global Internet services and media company operated by and is a subsidiary of Time Warner, and is located in Dulles, Virginia.
3. On information and belief, Sharman Networks (and Sharman Networks,

PLC, formerly known as KaZaA) is headquartered in Australia and incorporated in the Republic of Vanuatu, and owns the rights to the Kazaa file sharing software.

4. Matthew Seckler is a natural person, who, on information and belief, is over the age of 18 years, not in the military service of the United States or of any state, and is domiciled in the State of New York.

5. On or about November 1, 2006, Plaintiffs brought an action against Defendants and Third-Party Plaintiffs to recover damages in the amount of an estimated \$35,000.00, but for as much as “over 1,000 sound recordings” times the alleged statutory damages of \$750.00 “for each infringement of each Copyrighted Recording pursuant to 17 U.S.C. § 504” as well as for injunctive relief and legal fees for injuries alleged to have been sustained as a result of such alleged copyright infringement. A copy of the original Complaint is attached as Exhibit A. A copy of the original Answer is attached as Exhibit B for background of the action. **[For purposes of this motion, Plaintiffs’ Complaint and Defendants’ Answer are incorporated by reference and not reproduced herein.]** Plaintiffs do not specifically state the time period involved, claiming only that the alleged copyright infringement continued to “in or about early 2005,” and later claiming that such infringements continue until present. It appears that the period in question is from 2002 to 2004.

6. The Defendants and Third-Party Plaintiffs deny that they or either of them are guilty of Plaintiffs’ allegations and affirmatively allege that the injuries sustained by Plaintiffs, if any, were solely caused by reason of the negligence and breaches of the Third-Party Defendants named herein: in the defective design of Sharman Network’s program, “Kazaa” which was a dangerous instrumentality in its each and every use as it existed in 2002-2004; the

trespassing and reckless installation by Matthew Seckler of such program; the failure to warn by AOL and Sharman; the failure to block the downloading of such files by AOL; the improper blocking of alleged (RIAA) warning messages by AOL and Sharman; and, the secretive file sharing system of and by Kazaa.

**AS AND FOR A CAUSE OF ACTION AGAINST AOL LLC  
FOR FAILURE TO WARN, RECKLESS ENDANGERMENT OF  
CHILDREN, GENERAL TORT AND BREACH OF CONTRACT**

7. Defendants and Third-Party Plaintiffs incorporate by reference all information in the paragraphs above, and the sections and their paragraphs which follow, and seek damages as specified at the end of the Third-Party Complaint.

8. AOL offers “parental controls” (“Controls”) and has long claimed such Controls are one of the main reasons why parents, in particular, should use AOL; namely, for the safety of their children. These Controls have limited settings available to the parents, but are easily manipulated by AOL.

9. On information and belief, AOL was aware that music files were being downloaded and illegally shared through its system.

10. On information and belief, AOL had the ability to stop such files from being accessed by children.

11. AOL, having offered its Internet Service Provider services, as well as its browser as a portal, undertook as part of its agreement with parents for such Controls to be useful, meaningful, effective and operative. Parents, in addition to signing any EULA,<sup>1</sup>

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<sup>1</sup> “End User License Agreement,” a contract of adhesion, abominably long, written in tiny print, which no one reads.

reasonably expected such Controls to be effective, relied upon AOL to know its own industry, were reasonable in relying upon AOL to know its industry, changed their positions to their detriment by using AOL instead of other ISP's and browsers. Children were subject and subjected to the terms of such Controls. AOL undertook for the children to be subject to and subjected to such Controls.

12. On information and belief, AOL failed to use its Controls to prevent illegal downloading, even though it had the information, superior knowledge, ability, skill, techniques, tools, power and authority to prevent such downloading.

13. On information and belief, AOL, through the same Controls above, improperly prevented messages allegedly sent by the RIAA (industry trade representatives of the Plaintiffs herein) which sought to warn children that the files they were downloading were in violation of copyright laws, and thereby prevented children from knowing that they should not be downloading such files.

14. In doing so, AOL breached its contract, created a dangerous condition for the children, Defendants and Third-Party Plaintiffs herein, which became the source of the Plaintiffs' claim in the form of alleged infringement.

15. Further, on information and belief, AOL had a duty to warn because it had undertaken to issue warnings on other matters, in the form of providing the Controls to prevent children from accessing, say, pornography or being contacted by pedophiles or adults with whom they would have no good reason to have contact.

16. AOL breached its duty to warn children about illegal downloading, failed to prevent such files from being downloaded, and failed to allow warning messages to be sent

through its Control settings and through its Instant Messaging (IM) system.

17. AOL's failure to warn, failure to allowing warnings, failure to intercept files, and failure to use its superior abilities to safeguard against such occurrences were the legal and proximate cause of the damages to the Defendants and Third-Party Plaintiffs herein.

18. Defendants and Third-Party Plaintiffs herein were damaged by AOL's failure to warn, failure to allow warning messages to be received, failure to intercept files which would be dangerous to children in whatever form, such as illegally obtained music files, thus creating the underlying elements of Plaintiffs' Complaint and endangering minor children thereby, subjecting them to litigation in the federal courts, potential debts far in excess of their ability to pay, interference with their home and school life, and placing them in an untenable position not of their own making.

19. Further, on information and belief, because AOL was able to prevent such downloads easily, and was reckless in not doing so, they endangered children by allowing them to become embroiled in such federal litigation, without regard for the consequences of such action and inaction.

**AS AND FOR A CAUSE OF ACTION AGAINST SHARMAN NETWORKS FOR TRESPASS, GENERAL TORT, DESTRUCTION OF PERSONAL PROPERTY, THEFT, AND INSTALLATION OF A DANGEROUS INSTRUMENT ON THE PROPERTY OF ANOTHER**

20. Defendants and Third-Party Plaintiffs incorporate by reference all information in the paragraphs above, and the sections and their paragraphs which follow, and seek damages as specified at the end of the Third-Party Complaint.

21. On or about September 5, 2005, The Federal Court of Australia ruled that

Sharman Networks, “though not itself guilty of copyright infringement, had ‘authorized’” users of its Kazaa software to illegally share copyrighted music files. Then, in approximately July, 2006, Sharman settled with the RIAA for promoting and enabling illegal downloading and file sharing for a reported at least \$100 million. This settlement did not take into account any of Sharman’s other victims – those who believed that they were allowed to listen to music on their own computers, and those who, like the Defendants and Third-Party Plaintiffs were completely unaware that their files were being shared, irrespective of the source of the original files.

22. On information and belief, as part of the background of the above action, Sharman, in 2003, had sued the RIAA for its use of Sharman’s software (Kazaa) to obtain information about Sharman’s users. Though it is unknown whether Sharman was aware of the relationship between the RIAA’s alleged actions and American law, it appears that the RIAA may have violated 15 U.S.C.A. §6501, the Children’s Online Privacy Protection Act. This action was settled with the main action, but the terms related to this are unknown.

23. Sharman owned, at the time of Plaintiffs’ Complaint against the Defendants and Third-Party Plaintiffs, software known as Kazaa, a heavily-promoted purpose of which was to enable music files to be downloaded and shared. Users would not necessarily know that files were being shared or that their own computers would become part of a giant international network sharing such files, whether such distribution was legally authorized or not, and whether such files were legally or illegally obtained. The complaints against Sharman’s virus programs, spyware, adware and other “malware” are well established, and Defendants and Third-Party Plaintiffs herein allege that it was Sharman’s downloads which caused their computer to “crash” irretrievably.

24. Further, Sharman's program was a dangerous instrument in its each and every use for an average consumer.<sup>2</sup> Sharman blocked warnings from the RIAA, which alleges it sent warnings to Kazaa users about illegal downloading and file sharing; Sharman's Kazaa software, upon installation, defaulted to "sharing" and making files public for the entire world, turning an otherwise lawful user who was listening to their own purchased CD's on their own computer into an unknown "distributor." Insidiously, unlike even a marijuana field that might be growing unbeknownst to an owner out on their "North 40," Kazaa's operations in the background could not be seen or detected by the average user. And, since more than one person often uses a computer, it was and is entirely possible that an interloper could create an unsafe or illegal situation for such owner or user due simply to the installation of Kazaa. Ultimately, such installation could – and in this case, did, cause the computer to "crash" due to being so thickly laden with malware as to render the computer inoperable. But the damage was more far-reaching: Plaintiffs sued Defendants and Third-Party Plaintiffs based upon the unseeable and unstoppable activities of Kazaa.

25. It is undisputed in the action that Matthew Seckler loaded Kazaa onto the Santangelo computer and did not establish settings to disable file sharing; however, Kazaa did not divulge its process to an unsuspecting user, thus rendering its operations invisible, unable to

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<sup>2</sup> That there can be "specially trained" people does nothing to remove the inherent danger from the program: gunpowder, fireworks, guns, acids and bases, medical instruments, construction materials, radioactive materials, drugs and all sorts of products are dangerous, restricted, require training and licensing. The mere fact that *some* person some place can use such items does not render them any less dangerous. In its own way, Kazaa was such a dangerous program, destroying computers and data, stealing information, distributing files in violation of copyright laws, and turning law abiding children unknowingly into pirating felons, and turning their parents into frightened debtors.

be detected, and therefore impossible to set.

26. Further, the RIAA claims that it sent messages to Kazaa users warning that the materials being downloaded were being done so in violation of copyright laws. Sharman affirmatively and wrongly blocked such messages from being delivered, thereby damaging Defendants and Third-Party Plaintiffs and being the legal and proximate cause of their injuries, in the form of Plaintiffs' Complaint against them.

27. Sharman, in making its software available to the public, had a duty for its Kazaa software to be safe to use, safe for the computer on which it operated, and to be designed to not engage in activity both illegal and unknown to the user to be so. Sharman also had a duty to allow users to be warned if their activities, occurring specifically through the Sharman software, were illegal.

28. Sharman breached each one of these duties, including blocking warning notices.

29. In designing and distributing its software in this way, Sharman created the conditions under which this lawsuit arose, regardless of the legality of the ownership of the underlying music files: it was the Sharman software, with its theft of files without permission of the user, that created the shared drive and shared files, exposed the Santangelo computer to the world, included no safeguards, and then loaded enough malware to bring the computer to a halt.

30. Sharman is liable to these Defendants and Third-Party Plaintiffs because it was reckless – indeed, purposeful, in allowing its software onto the market to create this havoc at the expense to the user and to line its own pockets.

31. Finally, while Sharman now boasts a relationship with the entertainment

industry, it has left tens of thousands of lawsuits in its wake and untold (and un-tolled) numbers of damaged computers, terabytes of destroyed data, and all of the foreseeable and unforeseeable consequences which arise therefrom.

**AS AND FOR A CAUSE OF ACTION AGAINST MATTHEW SECKLER FOR TRESPASS, GENERAL TORT, DESTRUCTION OF PERSONAL PROPERTY, AND INSTALLATION OF A DANGEROUS INSTRUMENT ON THE PROPERTY OF ANOTHER**

32. Defendants and Third-Party Plaintiffs incorporate by reference all information in the paragraphs above, and the sections and their paragraphs which follow, and seek damages as specified at the end of the Third-Party Complaint.

33. Third-Party Defendant Seckler was, as most an invitee or licensee to the Santangelo household and was never granted permission from Patricia Santangelo, owner of the Gateway computer, to install any programs whatsoever. In or about 2002, Mr. Seckler installed Kazaa without permission and did not notify Patricia Santangelo. At the time of installation, he recklessly failed to set Kazaa to not share files, nor did he exhibit any care in the installation of Kazaa and was reckless in his disregard for the consequences of his actions.

34. Kazaa was a dangerous instrumentality in its each and every use, there being no proper way for the program to be used because even if the “non-sharing” feature had been set, the mere downloading of music from the Internet might be adjudged illegal and Kazaa’s theft the Santangelos’ legally-owned recordings were and would remain unknown to them, all of which caused them to be in violation of law according to Plaintiffs, and which installation was the underlying cause of the lawsuit in which the Defendants and Third-Party Plaintiffs now find themselves.

35. Mr. Seckler became a trespasser when he violated his rights as an invitee or licensee.

36. Mr. Seckler breached his duty to the Santangelos to not install dangerous instrumentalities on their computer and to not set traps or install the tools of “inducing infringers” or thieves.

37. Mr. Seckler’s actions are the legal and proximate cause of injury to the Defendants and Third-Party Plaintiffs, such damages being in the form of having had legal action brought against them, the theft of their legally-owned music, and the destruction of their computer by having had viruses spread throughout the hard drive by Kazaa.

38. Defendants and Third-Party Plaintiffs are entitled to recover from Third-Party Defendant Seckler because Mr. Seckler installed Kazaa on the Santangelo computer without permission, did so recklessly and without regard for the consequences, for his own use, benefit and enjoyment, trespassing on the use of the bandwidth and hard drive space of the computer, in violation of any rights he might have had as an invitee or licensee to the premises, failed to set Kazaa to prevent file sharing, failed to return to the premises to reset Kazaa to prevent sharing once he learned same was possible, failed to notify the Santangelos or any of them that Kazaa could or should be set to prevent file sharing, and was otherwise reckless and disregarded the safety of the Santangelos and their computer.

\* \* \* \* \*

39. In the event that Plaintiffs should receive any judgment against the Defendants and Third-Party Plaintiffs, then Defendants and Third-Party Plaintiffs should be entitled to judgment against the Third-Party Defendants, as specified in the “**WHEREFORE**”

clause for contribution in the full amount of the amount of damages and costs awarded to Plaintiffs.

**WHEREFORE**, Third-Party Plaintiffs seek judgment against:

1. Third-Party Defendant AOL LLC, in the amount of one million dollars in damages;
2. Third-Party Defendant Sharman Networks, in the amount of one million dollars in damages;
3. both of the above Third Party-Defendants:
  - a. for any and all sums which may be adjudged against original Defendants and Third-Party Plaintiffs in favor of Plaintiffs;
  - b. for an injunction enjoining them from delivering any unlicensed mp3 or other audio or visual file in violation of the copyright laws of the United States, and that such injunction shall continue in force until they can differentiate such files for delivery;
  - c. ordering each to provide 100 of their own nationally-televised 60-second public service announcements, which shall not be Internet-based nor created in concert between them, for a minimum of 200 total announcements clarifying the confusion, rights and responsibilities of file downloading and file sharing, with wording to be approved by this Court or a special master appointed by the Court for this purpose;
  - d. ordering each to provide warning messages with each download informing users of their obligations regarding copyright laws, providing notice, in

- plain language chosen by the court-appointed special master;
- e. for Third-Party Plaintiffs' costs in this action;
  - f. for Third-Party Plaintiffs' reasonable attorneys' fees incurred herein;
4. Third-Party Defendant Matthew Seckler in the amount of one dollar provided he participates throughout the course of this action and that he does not default in the action, or for any judgment amount which might be incurred by the original Defendants herein, whichever is greater; and,
5. All along with such other, further, different and additional relief as the Court may deem just and proper.

Dated: Valhalla, New York  
15 August 2007

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