

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

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ELEKTRA ENTERTAINMENT GROUP :
INC., et al., :

7:2006-cv-11520 (SCR)(MDF)

Plaintiffs, :

-against- :

MICHELLE SANTANGELO and :
ROBERT SANTANGELO, JR., :

Defendants. :

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**DEFENDANTS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF DEFENDANTS' MOTION
SEEKING LEAVE TO SERVE THIRD-PARTY COMPLAINTS**

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3. The last two pages of the proposed Third Party Complaint identify where to serve all three Third Party Defendants. Note that AOL (by its Registered Agent) and Matthew Seckler (personally or through his attorneys) can be served within the State of New York. There is no reason to expect inordinate delay.

As to service, Fed.R.Civ.P. Rule 4(m) states:

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

FED. R. CIV. P. 4(m).

4. There is every reason to believe that accomplishing service as to Matthew Seckler and AOL will not require any particular consideration; however, the last line makes clear that this does not apply to service upon Sharman.

5. As to Sharman, Fed.R.Civ.P. Rule 4(f) controls based upon Fed.R.Civ.P.

Rule 4(h), which states:

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) [...]

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

FED. R. CIV. P. 4(h).

Finally, Fed.R.Civ.P. Rule 4(f) states:

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) [...]

(2) [...]

(3) by other means not prohibited by international agreement as may be directed by the court.

FED. R. CIV. P. 4(f).

6. Provided Rule 4(f)'s parts (1) and (2), omitted, referencing the various international laws to be followed or, more precisely, not violated by the method of service chosen, this Court can sculpt or direct which method of service Defendants may use, as empowered by Rule 4(h). As to Sharman, if the Court grants the motion to serve Sharman by email as offered in the moving papers, it is reasonable to believe that Sharman will be adequately notified, in particular because it is a company whose business exists because of and to provide services through the Internet. Yet, even if no accommodations are granted, Sharman can be served by the same personal service method as in Lewan, so there is no reason to expect an inordinate delay. Plaintiffs previous difficulties are not the litmus test by which the Defendants efforts should be adjudged: this Court can set limits as well as methods.

B. In a Similar Case, the Court Identified the Standard in Support of Adding Third Parties

7. An important point is raised in another downloading case involving Sharman and Kazaa. In Interscope v. Duty, 2006 WL 988086, PACER 05-CV-3744-PHX-FJM (D.Ariz. 2006), the court considered the relationship between the plaintiffs, defendant and non-

party Sharman. In Interscope, the defendant claimed in her motion seeking to dismiss plaintiffs' complaint that plaintiffs had an obligation to join Sharman as a necessary party. The court denied the motion citing the standard for demanding that the plaintiff was required to join Sharman, which is different than that of a defendant seeking third party practice. But the court also concluded that the defendant, "may have a viable claim against Sharman for contribution." Id. at *2. Such conclusion fits squarely within the language of Fed.R.Civ.P. Rule 14, which states in pertinent part:

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. [...]

Emphasis added.

FED. R. CIV. P. 14(a).

8. This supports Defendants' contention herein that bringing in Sharman as a Third Party Defendant is appropriate as Defendants' legal position meets the standard required under Rule 14. The defendant in Interscope was not seeking to defend with a relevant third party in place; rather, she was seeking to dismiss plaintiffs' claims *ab initio*.

C. Plaintiffs' Claims in Opposition are Incorrect

9. In support of their opposition, Plaintiffs make several irrelevant, misleading or false assertions. Among them:

a. that Defendants' third party complaint did not propose that the Third Party Defendants would be liable to the original Defendants as Third Party Plaintiffs for any amounts

due the original Plaintiffs. Gabriel Memorandum of Law (“Gabriel”) at 5. This is false. Such claim is specifically stated in the original Third Party Complaint, paragraph 39, as Exhibit A to Defendants’ moving papers, which stated:

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.

(Bold in original.)

b. that the Defendants filed their third party complaint more than 10 days after their Answer is misleading: the date was set by the Court in response only to Plaintiffs’ complaint regarding service; otherwise, Defendants would have served such complaint timely, which could not be done outside the structure set by Judge Robinson. Gabriel at p.6.

c. the state of the music industry’s alleged losses are irrelevant to whether these Defendants are entitled to file third party complaints. Gabriel at 3.

d. The Plaintiffs have alleged throughout their claims that there are “1,322 songs” about which they could sue the Defendants (Gabriel at 4), and the statutory language allows them to sue for \$3,000.00 per violation. The total potential liability to the Defendants is a minimum of \$3.966 million, plus legal fees and expenses. The amount alone makes the matter “complex” and the potential of such an outcome against these Defendants is devastating. The Defendants are entitled to defend themselves in whatever way the law and this Court will allow.

e. Plaintiffs misleadingly aver to the Court that Defendants failed to allege that Matthew Seckler downloaded the offending files; yet, it was Plaintiffs who claimed in the

case against the mother of these Defendants (Patricia Santangelo) that it was under Matthew Seckler's screen name – "laxattack857" – that the complained-of files were downloaded and shared. Gabriel at 12.

f. Plaintiffs allege that the Third Party claims are not derived from the Plaintiffs' original claims, but this is false: Plaintiffs claim Defendants distributed files. Defendants claim that they were listening to their own music and that it was the Third Parties or their products which either directly or indirectly stole such legitimate music from the Defendants and distributed it, if such distribution took place at all. This is not the "guns kill people" argument: the Defendants did not install Kazaa (they didn't buy the gun); Matthew Seckler did. The Defendants did not ignore copyright notices; AOL blocked them (and took the safety off a loaded gun which it – and only it – controlled). The Defendants did not distribute files; Kazaa "pulled the trigger," stole their files, and distributed them. The only connection between the Defendants and the offending files is their unwitting operation of a booby-trapped computer designed only for entrapment, which the Defendants didn't even own. The Defendants did not distribute files; they did not ignore the unseen, unforwarded notices. In fact, the *only* people or entities who are directly connected to the offending files are the Third Party Defendants. The Plaintiffs' claims against the Defendants, and the Defendants' claims as Third Party Plaintiffs against the Third Party Defendants, arise directly from the original Plaintiffs' allegations against the original Defendants.

10. Plaintiffs misperceive throughout their answering papers the purpose for which Defendants' cases in its moving papers are cited: such cases lay out the tests by which the law is applied, and with relevance. That a court found against a particular party is not the test for

a well-reasoned decision presented by an officer of the Court, even when acting as an advocate. Each case is confounded by its special facts and it is this Court's ability to apply these standards to this matter's special facts which will yield a meaningful result. Indeed, this copyright law problem is relatively new, with little settled law and which landscape is constantly changing. The standards to be applied are often well established; how they are applied to these cases is what is novel.

D. The Third Party Complaint is Modified to Meet Plaintiffs' Concerns

11. Though, as above, Plaintiffs' claim that Defendants' Third Party Complaint did not include proposing that the Third Party Defendants would be liable to the original Defendants and Third Party Plaintiffs was false (Gabriel at 5), the Third Party Complaint has been modified to include an entire cause of action addressing just that point. Further, the *ad damnum* clause has been modified to better reflect the amount of potential liability facing the original Defendants. Exhibit B.

E. Conclusion

12. The Third Party claims sought to be prosecuted will not create an unreasonable delay and Plaintiffs will not be prejudiced by their inclusion. The proposed third parties have information relevant to the action, will help uncover the whole truth of the matter, and "[will] or may" have an obligation to the Defendants in the action for all or part of the Plaintiffs' claim against the Defendants, if any, in concert with the language of Rule 14(a).

WHEREFORE, Defendants respectfully request this Court:

- a. grant leave to serve upon AOL, LLC, Sharman Networks, PLC, and Matthew

Seckler, a Summons and Third-Party Complaint,

- b. all along with such other, further, additional and different relief as the Court determines to be just in the premises.

Dated: Valhalla, New York
12 September 2007

S/

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