

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ELEKTRA ENTERTAINMENT GROUP INC., a Delaware :  
corporation; VIRGIN RECORDS AMERICA, INC., a  
California corporation, UMG RECORDINGS, INC., :  
a Delaware corporation; BMG Music, a New York general  
partnership; and SONY BMG MUSIC ENTERTAINMENT, :  
a Delaware general partnership

Plaintiffs, : Case No. 05CV2414 (CM)(MDF)

-against- :

PATRICIA SANTANGELO, :

Defendant. :

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**DECLARATION OF RICHARD L. GABRIEL, ESQ. IN SUPPORT OF  
PLAINTIFFS' MOTION TO DISMISS WITHOUT PREJUDICE**

I, RICHARD L. GABRIEL, ESQ., declare:

1. I am a partner in the law firm of Holme Roberts & Owen LLP. I serve as lead counsel for plaintiffs in the above-captioned case. I have personal knowledge of the facts set forth in this declaration except as where stated on information and belief. As to such facts, I believe them to be true.

2. On April 11, 2004, defendant was found distributing the 1,322 sound recordings found on Exhibit B to the Complaint, a great many of which are sound recordings in which plaintiffs own the copyrights. Specifically, on April 11, 2004 at 12:15 P.M., plaintiffs' investigator, Media Sentry, detected an individual who was engaged in the distribution of plaintiffs' copyrighted sound recordings using the screen name laxattack857@fileshare at Internet Protocol ("IP") address 24.45.58.150, which Cablevision Systems Corporation

subsequently identified in response to a federal court subpoena as being registered to defendant. Upon further investigation, plaintiffs found defendant to be distributing plaintiffs' copyrighted sound recordings on well over 100 occasions beginning as early as August 6, 2003 and continuing through at least May 29, 2004. Plaintiffs further learned that this infringing activity occurred not only through the use of the screen name laxattack857@fileshare, but also through the use of the screen name mich8621@fileshare.

3. After learning defendant's true identity from Cablevision Systems, plaintiffs sent a demand letter to defendant. Based upon the statutory damages provisions of 17 U.S.C. § 504, which provide for statutory damages of anywhere between \$750 and \$30,000 per recording, and defendant's potential liability for plaintiffs' attorneys' fees and costs, see 17 U.S.C. § 505, I believe that defendant's potential exposure in this case is substantial. The library of recordings that she was found to have been distributing from her share folder was quite significant in its breadth and depth. Nonetheless, plaintiffs were initially willing to settle this case for an amount well below their actual damages plus injunctive relief.

4. Defendant refused to settle prior to litigation, and plaintiffs filed the instant lawsuit. Rather than taking responsibility for her actions and those of her family, however, defendant chose to take her case to the mass media. In interviews in numerous newspapers, web blogs, and on national television, defendant insisted that she did not know how to use the Internet and barely used e-mails (facts that she also alleged in this Court), that she was being unfairly targeted, that plaintiffs' action against her was frivolous, and that neither she, her children, nor a neighbor whom she at first blamed for the infringing conduct at issue, was responsible for such infringement. Based upon defendant's deposition testimony in this case and upon information

and belief, at best, defendant made these statements having made no reasonable effort to investigate the matter.

5. By way of example, on the December 27, 2005 Early Show on CBS, defendant said that she believes that it is wrong for the recording industry to sue 12-year olds and 14-year olds. Moreover, when directly asked whether anyone in her home was downloading music, she replied, "I know nothing about them downloading or trading files." Likewise, on the Today Show on NBC that same day, defendant falsely stated, "And the record industry has no problem suing a 12-year old." And, in a web blog called P2Pnet.net, she stated, in regard to her case, that "It's about the legal rights of all the people who are being unfairly sued . . . . I'm willing to take it as far as I have to to prevent other innocent people from being dragged into frivolous lawsuits. It's wrong." I believe that defendant made similar statements in other media outlets throughout the Spring of 2006.

6. Moreover, apparently in light of her above-noted views, defendant refused to disclose to plaintiffs her neighbor's identity for the better part of a year, even though she suspected that the neighbor was responsible for the infringement at issue and had said so publicly.

7. In light of the foregoing, plaintiffs were forced to prosecute their claims vigorously and to spend substantial time and money in discovery, all of which could have been avoided had defendant simply come forward with the actual facts when plaintiffs sought to have that conversation, before they filed this lawsuit. Ultimately, the depositions of defendant, her oldest children, and her former neighbor, which depositions took place between April and June 2006, proved plaintiffs to have been right all along.

8. First, at the depositions of defendant and of her daughter, Michelle Santangelo, both defendant and Michelle Santangelo admitted that Michelle Santangelo used the screen name mich8621, one of the screen names at issue. Michelle Santangelo further admitted to using peer-to-peer (“P2P”) services like iMesh and Kazaa for purposes of downloading and uploading plaintiffs’ copyrighted sound recordings.

9. Second, after substantial efforts to identify the neighbor, Matthew Seckler, whom defendant refused to identify for the better part of a year, I, on behalf of plaintiffs, deposed Mr. Seckler, and Mr. Seckler admitted that he and defendant’s son, Robert “Bobby” Santangelo, Jr., together downloaded and uploaded sound recordings using the screen name laxattack857@fileshare. Indeed, Mr. Seckler indicated that he and Bobby Santangelo engaged in this infringing activity several days each week. Notably, this was in stark contrast to the testimony of Bobby Santangelo, who testified under oath and, upon information and belief, falsely at his deposition, that he never listened to music on his computer without putting a CD in the CD drive (and, thus, did not engage in any of the file-sharing activity at issue in this case), but that he believed that Mr. Seckler was the person who listened to music on the computer by using the name “laxattack857.” Mr. Santangelo was vague or could not remember any details about Mr. Seckler’s use of the Santangelo family’s computer.

10. For her part, defendant conceded during her deposition, which I took, that she regularly uses the Internet and e-mail in connection with her work. She further conceded that she held the Internet service account through which the infringement occurred and that she had the right and ability to control her children’s use of the computer in her home. Indeed, defendant

had imposed certain controls on her children, as, for example, restrictions on going into chat rooms on the computer.

11. Moreover, both defendant and Michelle Santangelo testified that defendant had instructed Michelle Santangelo not to create a list of people who had used defendant's computer, even though Michelle Santangelo had offered to do so and even though plaintiffs had specifically requested this information, because, upon information and belief, defendant did not believe that it was appropriate for plaintiffs to take legal action against teenagers who violate plaintiffs' rights.

12. Upon information and belief, on over 100 occasions between August 6, 2003 and May 29, 2004, Media Sentry detected individuals using the screen names laxattack857@fileshare and mich8621@fileshare actively engaged in the unlawful uploading and downloading of plaintiffs' copyrighted works at the IP address associated with defendant's computer. On each of these occasions, Media Sentry sent instant messages to these users, advising them that distributing or downloading copyrighted music on the Internet without permission from the copyright owner is illegal. Upon information and belief, the infringing activity continued anyway.

13. In light of the foregoing, in the time since the above-referenced depositions were completed, plaintiffs have been attempting to resolve this matter with defendant and/or her children, but plaintiffs have been unable to make any progress. Plaintiffs' efforts have involved literally dozens of e-mails or telephone messages from me to defendant's counsel, a great many of which were not returned, necessitating further calls and e-mails from me. Indeed, precisely because of our inability to move this case to resolution, I, on behalf of plaintiffs, requested an in-

person settlement conference before Magistrate Judge Fox. Magistrate Judge Fox held that conference on October 17, 2006, but it, too, was unsuccessful.

14. Thereafter, I, on behalf of plaintiffs, continued to make efforts to resolve this case. Again, numerous telephone and e-mail messages from me to opposing counsel went unreturned.

15. In the course of all of the discussions that I did manage to have with defendant's counsel, I made clear that plaintiffs' desire was to enter into a global settlement with the entire Santangelo family. Alternatively, I advised defendant's counsel that, although plaintiffs believe that there are good grounds to continue their action against defendant and seek damages for defendant's secondary infringement, plaintiffs' preference was to pursue the direct infringers, and, as such, they were willing to stipulate to the dismissal of their claims against defendant and pursue defendant's children. Again, defendant has not responded to these proposals.

16. In light of the foregoing, on November 1, 2006, plaintiffs brought suit against Michelle Santangelo and Robert Santangelo, Jr. See Elektra Entertainment Group, Inc. v. Michelle Santangelo, et al., No. 06-cv-11520 (S.D.N.Y.).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of December, at Denver, Colorado.

  
RICHARD L. GABRIEL, ESQ.