

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

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ELEKTRA ENTERTAINMENT GROUP :
INC., et al, :
 :
 Plaintiffs, :
 :
 -against- :
 :
 MICHELLE SANTANGELO and :
 ROBERT SANTANGELO, JR., :
 :
 Defendants. :
-----X

Civil Action No. 06-cv-11520 (SCR)(MDF)

FIRST AMENDED ANSWER

**DEFENDANTS DEMAND
A TRIAL BY JURY**

Defendants, Michelle Santangelo and Robert Santangelo, Jr., by their attorneys,
Jordan D. Glass, Esq., as and for their First Amended Answer to the Plaintiffs' Complaint, say:

1. Defendants withdraw their previous Answer in its entirety and substitute this in and for their Answer to the Complaint.

2. Deny paragraph 1, sentence 3 to the end of the paragraph. Deny knowledge or information sufficient to form a belief as to paragraph 1, sentence 1.

3. Aver that paragraph 2 can not be answered and is not a component of a "complaint" and is the logical equivalent of "will you stop beating your dog?" Defendants, however, deny generally that they are the "infringers." What Patricia Santangelo may or may not have done is irrelevant to this law suit. Defendants move that this paragraph be stricken under FRCP Rule 12(f).

4. Deny paragraphs 18, 19, 20 and 21. Further, Plaintiffs' claim of "continuing infringement" is spurious; they offer no evidence of present infringement and previously uncovered no evidence of "continuing infringement;" and, they can not make a good faith claim or *prima facie* case for "continuing infringement."

5. Deny knowledge or information sufficient to form a belief as to Plaintiffs' self-serving statements in paragraphs 3, 4 and 5 as to the actions or statements of others. Deny Plaintiffs' allegations about Defendants' infringement or alleged admissions contained in paragraphs 3, 4 and 5. As to the balance of the statements, their relevance to the within action is ambiguous at best, and Defendants move for a more definite statement of the claims to which they are to respond pursuant to FRCP Rule 12(e).

6. Deny knowledge or information sufficient to form a belief as to paragraphs 6, 7 and 8. Deny Plaintiffs' allegations about the Defendants contained in paragraph 8.

7. Deny knowledge or information sufficient to form a belief as to paragraphs 9, 10, 11, 12, 13, 16 and 17.

8. Defendants reaffirm each and every response above in answer to paragraph 15 as if set forth fully at length herein.

FIRST AFFIRMATIVE DEFENSE

9. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

10. Plaintiffs' claims against Defendants are barred by acquiescence.

THIRD AFFIRMATIVE DEFENSE

11. Plaintiffs' claims against Defendants are barred by estoppel.

FOURTH AFFIRMATIVE DEFENSE

12. Plaintiffs' claims against Defendants are barred by estoppel by acquiescence.

FIFTH AFFIRMATIVE DEFENSE

13. The alleged conduct, had it occurred, constituted fair use, as it would have been solely been for private entertainment and not for commercial use.¹

SIXTH AFFIRMATIVE DEFENSE

14. Plaintiffs failed to satisfy the pleading requirements applicable to copyright infringement. There is no liability for infringing upon the right of distribution unless copies of copyrighted works were actually disseminated to members of the public.

15. Defendants deny having disseminated any copyrighted works to members of the public.²

SEVENTH AFFIRMATIVE DEFENSE

16. On information and belief, Plaintiffs have engaged in a wide-ranging conspiracy to defraud the Courts of the United States.³

a. Plaintiffs, who are competitors, are a cartel acting collusively in violation of the antitrust laws⁴ and of public policy, by tying their copyrights to each other, collusively

¹ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

² See: http://www.eff.org/IP/P2P/RIAA_v_ThePeople/P2P_typical.pdf, page 2, with footnote 5, citing National Car Rental Sys. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 434 (8th Cir. 1993) (“[i]nfringement of the distribution right requires an actual dissemination of [...] copies”) (citing 2 Nimmer on Copyright § 8.11[A], at 8-124.1).

³ Atlantic Recording Corp., et al. v. Shutovsky, 1:06-cv-07904 (PKC) (S.D.N.Y.) (PACER), slightly modifying the Eighth Affirmative Defense.

⁴ For example, from the Federal Trade Commission: Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary:

In the Matter of Time Warner Inc.;

In the Matter of Sony Music Entertainment Inc.;

In the Matter of Capitol Records, Inc., d.b.a. “EMI Music Distribution”;

litigating and settling all cases together, and by entering into an unlawful agreement among themselves to prosecute and to dispose of all cases in accordance with a uniform agreement, and through common lawyers, thus overreaching the bounds and scope of whatever copyrights they might have.

b. Among the acts in furtherance of this conspiracy are: (1) bringing, without investigation sufficient to establish that the allegations and factual contention therein have evidentiary support, lawsuits against persons who are not specifically known to have infringed copyrights;⁵ (2) making false and unsupported allegations that the defendants in these actions have infringed copyrights, by making the unwarranted and technologically erroneous assumption that an Internet Protocol address is a unique identifier of a computer or an

In the Matter of Universal Music & Video Distribution Corp. and
UMG Recordings, Inc.; and,
In the Matter of BMG Music, d.b.a. "BMG Entertainment"
File No. 971-0070

"The Commission has unanimously found reason to believe that the arrangements entered into by the five largest distributors of prerecorded music violate the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually, each distributor's arrangement constitutes an unreasonable vertical restraint of trade under the rule of reason. A discussion of these violations is spelled out in our Analysis to Aid Public Comment."

See: <http://www.ftc.gov/os/2000/05/cdstatement.htm>

Cited in: <http://www.ftc.gov/opa/2000/05/cdpres.htm>

See also: <http://www.mndaily.com/articles/2002/10/15/3590>

and also: <http://www.mp3.com/news/stories/4248.html>

⁵ In Capitol v. Foster, Civil Action No. 5:04-cv-1569-W (W.D.Okla.) (LRW) (PACER), Judge Lee R. West ordered the RIAA to pay to Defendant Deborah Foster attorneys' fees in the amount of \$68,685.23 after the Plaintiffs' claims were dismissed with prejudice, the Court determining that Ms. Foster was the prevailing party.

individual;⁶ (3) using a corporation known as Settlement Support Center, LLC, as their agent to make extortionate threats to take criminal action and to defame defendants' names and destroy their credit in order to force defendants to pay sums which have no relation to Plaintiffs' actual damages, if any, and by delivering fraudulent releases to settling defendants (few of whom are represented by counsel), in that such releases do not constitute true releases of all claims, thereby misleading settling defendants into erroneously believing that they cannot be sued again; (4) commencing *ex parte* "John Doe"⁷ lawsuits which they have no intention of pursuing, but by means of which they are able to communicate with Federal District Court Judges and Magistrate Judges and other judicial officials on a daily basis, without providing defendants with notice or opportunity to be heard, in violation of attorneys' ethical obligations as officers of the Courts, and for which their actions seeking *ex parte* discovery against college students have been rebuffed by at least one District Court of the United States;⁸ (5) invading the privacy of these "John Doe" defendants by then serving subpoenas on Internet Service Providers (or universities) without notice to the potential defendants; (6) bringing the "John Doe" lawsuits in jurisdictions far removed from the domiciles of the "John Does," so that they have no meaningful opportunity to be heard or to retain counsel of their own choosing; (7) withdrawing such actions upon being

⁶ Id.

⁷ By way of example of a "John Doe" lawsuit, see: BMG Music v. Does 1-4, Civil Action No. 3:06-cv-01579 (MHP) (N.D.Cal.) (PACER).

⁸ Capitol Records v. Does 1-16, Civil Action No. 07-485 (WJ/LFG) (D.N.M.), 2007 WL 1893603 (D.N.M.). In this action, the University of New Mexico refused to turn over the names of the students based solely upon the RIAA's *ex parte* demands. The Court upheld the University's position.

challenged and thereby preventing defendants from obtaining relief for having to defend them; and, (8) engaging in other unconscionable conduct.

c. On information and belief, these and other plaintiffs and the Recording Industry Association of America (“RIAA”) have commenced some 19,000 actions in the District Courts of the United States in the past five years, possibly as many as 30,000 such actions, the overwhelming majority of which have resulted either in default judgments or extortionate settlements far in excess of any actual damages incurred by these Plaintiffs or other plaintiffs within and without the RIAA.

17. These actions, and the conduct underlying them, constitute misuse of Plaintiffs’ copyrights, thereby barring Plaintiffs claims.

EIGHTH AFFIRMATIVE DEFENSE

18. Plaintiffs’ claims are barred under the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

19. Upon information and belief, the alleged conduct, had it occurred, was authorized; indeed, on information and belief, Plaintiffs promoted, fostered and facilitated such conduct over the Internet and by other means.

TENTH AFFIRMATIVE DEFENSE

20. The Complaint fails to join one or more individuals and entities as parties to the action whose absence precludes complete relief to those already parties, or impairs Defendants’ ability to protect their interests within the meaning of Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure; therefore, this matter should be dismissed with prejudice. Plaintiffs’ claims against Defendants are also barred because Plaintiffs have failed to join the indispensable party or parties of the “online media distribution system” identified in Plaintiffs’

Complaint paragraph 18, and the person or persons or entities, also identified in paragraph 18, who or which obtained copies of the works allegedly “distributed” or “shared” by Defendants. Plaintiffs’ claims against Defendants are also barred because Plaintiffs have failed to join the indispensable party identified by Plaintiffs as the “neighbor and best friend” in Plaintiffs’ Complaint paragraph 3, with whom Plaintiffs claim to have made a settlement and who is known to the Plaintiffs to have been the person who loaded the allegedly offending program(s) onto the Santangelo Computer.

ELEVENTH AFFIRMATIVE DEFENSE

21. Defendants are not a necessary and proper party. Plaintiffs have sued the wrong persons.

TWELFTH AFFIRMATIVE DEFENSE

22. The claims alleged by each Plaintiff against the Defendants are neither well grounded in fact nor warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law within the meaning of Rule 11 of the Federal Rules of Civil Procedure.⁹

⁹ Among other bad faith claims is the timing of the alleged events. In Elektra v. Patricia Santangelo, Civil Action no. 7:05-cv-2414 (CM)(MDF) (S.D.N.Y.) (PACER), Plaintiffs deposed five members of the Santangelo family as well as the “neighbor and best friend,” and as such had the benefit of having conducted extensive inquiries prior to making any claims herein. Plaintiffs had specific verifiable information that the Computer alleged to have contained the downloaded files was destroyed by fire in July, 2004, yet Plaintiffs’ make the unfounded and unsupportable allegation of continued infringement “until in or about early 2005” (Complaint, paragraph 18). Importantly the fabricated date forms the only potential “factual” supporting basis to obtain an injunction. Using the fabricated date to attempt to defend against the statute of limitations for certain alleged downloads is another misleading characterization to obtain monetary damages.

THIRTEENTH AFFIRMATIVE DEFENSE

23. Plaintiffs' claims are barred under the doctrine of laches.

FOURTEENTH AFFIRMATIVE DEFENSE

24. The claims alleged by each Plaintiff against Defendants are barred by the statute of limitations, 17 U.S.C.A. § 507 (b), which provides that no civil action may be maintained under the federal Copyright Act unless the same is commenced within three years after the claim accrued.

FIFTEENTH AFFIRMATIVE DEFENSE

25. Plaintiffs have failed to mitigate their damages, if there actually be any, as required by law.

SIXTEENTH AFFIRMATIVE DEFENSE

26. To the extent Plaintiffs' accuse Defendant Robert Santangelo, Jr., of criminal acts, he specifically denies that he committed any criminal acts and asserts his Fifth Amendment rights under the United States Constitution. (Plaintiff verbally alleged perjury and piracy as possible crimes committed by Robert Santangelo, Jr.)

SEVENTEENTH AFFIRMATIVE DEFENSE

27. While maintaining that Defendants did not download any music, Defendants assert that all music alleged to have been downloaded was, in fact, already owned by the Defendants or immediate household family members prior to the dates of any alleged downloading, and that there is no evidence to support that Defendants were involved in any downloading whatsoever.

EIGHTEENTH AFFIRMATIVE DEFENSE

28. On information and belief, Plaintiffs promoted downloading free music, and then Plaintiffs, once having already enticed and encouraged children and teenagers to download music for free, turned on their audience and sued them for the same behavior they had previously encouraged. Plaintiffs exhibited their ability to turn on their audience by displaying physically threatening and frightening behavior during Defendant Michelle Santangelo's deposition.

NINETEENTH AFFIRMATIVE DEFENSE

29. To the extent that Plaintiffs have suffered damages, if at all, they have set their own public rate of damages at \$0.99 per song,¹⁰ of which they do not receive the entire

¹⁰ Plaintiffs make much of the alleged downloading being the same as if someone stole a CD from a store. While no one advocates theft of any sort, Plaintiffs' bizarre analogy really translates thus: if a CD were stolen, a minor would most probably receive a "youthful offender" conviction (if at all), which would then be "Adjourned in Contemplation of Dismissal" and sealed, with restitution paid – even at five times the price of the CD – of \$150.00. Under Plaintiffs' demands, however, with an average of 12 tracks per CD, this same defendant would owe a minimum of \$9,000.00 (plus \$490.00 in costs) – more than 63 times the worst-case disposition of the criminal case, and still many multiples of what even a New York lawyer would cost in the criminal case. What message does this send? Well, people *do* know to not steal CDs from stores because they were taught it was wrong – they were *on notice*, a central and basic tenet of American Jurisprudence; however, they were taught just the opposite about downloading music from the Internet and never educated or put on notice otherwise ... until it was too late.

Says who? No less than Sony, one of the Plaintiffs herein and member of the RIAA:

“What's changed since the original Walkman debuted is that Sony became the only conglomerate to be in both consumer electronics and entertainment. **As a result, it's conflicted: Sony's electronics side needs to let customers move files around effortlessly, but its entertainment side wants to build in restraints, because it sees every customer as a potential thief. The company's internal divisions reflect those in the marketplace**, where entertainment executives have declared war on consumers over file-sharing. But Sony's position is unique. It can settle the fight and flourish, or do nothing and be hobbled.

amount and can not claim more than their actual damages. Plaintiffs' actual damages are claimed to be \$0.70 per recording¹¹ and Plaintiffs seek statutory damages under the Copyright Act which are between 1,071 and 42,857 times the actual damages suffered.¹² Popular music

“Instead, it’s tried to play both sides. As a member of the Consumer Electronics Association, Sony joined the chorus of support for Napster against the legal onslaught from Sony and the other music giants seeking to shut it down. As a member of the RIAA, Sony railed against companies like Sony that manufacture CD burners. And it isn’t just through trade associations that Sony is acting out its schizophrenia. Sony shipped a Celine Dion CD with a copy-protection mechanism that kept it from being played on Sony PCs. Sony even joined the music industry’s suit against Launch Media, an Internet radio service that was part-owned by – you guessed it – Sony. Two other labels have since resolved their differences with Launch, but Sony Music continues the fight, even though Sony Electronics has been one of Launch’s biggest advertisers and Launch is now part of Yahoo!, with which Sony has formed a major online partnership. It’s as if hardware and entertainment have lashed two legs together and set off on a three-legged race, stumbling headlong into the future.”

This article is from February 2003, in the middle of the time claimed in the lawsuit against the Defendants. This clearly shows the entertainment industry in the midst of its own turmoil about free downloading. And, if Sony – one of the Plaintiffs herein – was undecided about whether downloading was OK, how were the Defendants herein – or defendants anyplace – supposed to know? Plaintiffs have always “vehemently denied” that they did anything to foster free online music downloading.

See: http://www.wired.com/wired/archive/11.02/sony_pr.html

¹¹ On information and belief, this number is actually lower, creating an even greater disparity between the actual damages and the statutory amount demanded by Plaintiffs.

¹² On its face, the statute allows for, but does not require, damages of between \$750.00 and \$30,000.00 per infringement violation under the section chosen by Plaintiffs, which is designed to be punitive. But this complicated matter of “damages” belies the Plaintiffs’ real intentions: if, as they publicly claim, they only want to be “made whole” by these alleged infringers, and deter others from doing the same, then they could just as easily have chosen the more applicable and less financially onerous section of 17 U.S.C.A. § 504(a)(1) referencing 17 U.S.C.A. § 504(b), for “actual damages.” An important distinction here is that these Defendants, and others similarly situated, to the extent that any downloading or even “sharing” actually occurred, were not engaged in any type of activity “for profit.” The legislative history indicates that this remedy was contemplated against businesses and “pirates,” not children and their unsuspecting parents. Plaintiffs, instead, chose the (founder of McDonald’s) Ray Kroc

sound recording downloads [allegedly owned by the Plaintiffs] and the consumer license to use them are lawfully obtainable to the public at \$0.99 per song and, of that \$0.99, roughly \$0.70 per song is paid by the retailer to the record label. The statutory damages sought by Plaintiffs under 17 U.S.C.A. § 504(c)(1) are **unconstitutionally** excessive and disproportionate to any actual damages which may have been sustained, in violation of the Due Process Clause of the Constitution of the United States.^{13, 14}

TWENTIETH AFFIRMATIVE DEFENSE

30. Plaintiffs can not meet their burden of proof that Defendants either downloaded or “shared” files.

TWENTY-FIRST AFFIRMATIVE DEFENSE

31. On information and belief, Plaintiffs were in the unique and best position to stop the distribution of such files over the Internet, as they possessed the technology and money to do so, but failed and refused to do so and thus were contributorily negligent. In a topically- and technologically-related action between the entertainment industry and end users,

approach: “If my competitor was drowning I’d stick a hose in his mouth and turn on the water.”

¹³ Paraphrasing Hon. David G. Trager, United States District Judge, E.D.N.Y., in his decision of UMG Recordings, Inc. v. Lindor, 2006 WL 3335048, *3 (E.D.N.Y.). The decision is available on PACER, Civil Action no. 1:05-cv-01095 (DGT)(RML) (E.D.N.Y.), Decision and Order (“Decision”) filed November 9, 2006, page 7.

¹⁴ Defendants shall promptly follow Rule 5.1(a) of the Federal Rules of Civil Procedure. Further, referencing 2006 WL 3335048 at *5 (E.D.N.Y.), Defendants shall notify the Court in a separate writing that the constitutionality of a federal statute or other Act of Congress affecting the public interest is being challenged pursuant to Local Rule 24.1 of the Southern and Eastern Districts of New York (“Local Rule”) to enable the court to be able to comply with 28 U.S.C.A. § 2430(a) and Rule 24(c) of the Federal Rules of Civil Procedure. At present, neither the United States nor one of its officers, agents, or employees is a party, even though that is expected to change. See: Decision on PACER, pages 12-13.

Viacom International recently sued YouTube for copyright infringement, and all of a sudden, technology appeared able to “provide a digital fingerprint” so that the online distributor system “would remove [the copyrighted material] within a minute or two.” YouTube, however, described its actions of generating such protective software as going “beyond what is required under the Digital Millennium Copyright Act, which gives Web hosts protection from copyright lawsuits as long as they comply with requests to remove unauthorized material.”¹⁵

32. On information and belief, Plaintiffs, through their national organization, the RIAA, lobbied Congress to set safe harbors with their collaborators and business partners, such as in the form of the Digital Millennium Act and other such laws, and are now using all such laws as the platform from behind which to sue children,¹⁶ people who are seriously ill and

¹⁵ Viacom International, Inc., et al v. YouTube, Inc. et al, 1:07-cv-02103 (LLS) (S.D.N.Y.) (PACER).

“For YouTube, a System to Halt Copyright-Infringing Videos,” *The New York Times*, July 28, 2007. See: <http://www.nytimes.com/2007/07/28/business/28google.html?ex=1186286400&en=1df5fcb5c650a3b8&ei=5070&emc=eta1>

Previously, however, on April 30, 2007, Google had taken the position that “the law was on its side” and that it was relying upon the “so-called ‘safe harbor’ provisions of the Digital Millennium Copyright Act, enacted in 1998.” This article, when read in context with the later article, screams about what happened to make Google undertake this project (in addition to a profit motive): who was an ISP, relations with the entertainment industry, and Congressional “interference” were now all called into question. Perhaps Congressional action was what they all feared most. But it supports the Defendants’ contentions that the technology and entertainment industries were always in the best position to resolve this matter technologically instead of placing an impossible burden upon the end users or their parents. “Google Calls Viacom Suit on YouTube Unfounded,” *The New York Times*, May 1, 2007. See: <http://www.nytimes.com/2007/05/01/technology/01google.html?ex=1185940800&en=89d81b34add41c00&ei=5070>

¹⁶ Priority Records v. Brittany Chan, 2006 WL 770446 (E.D.Mich.). On information and belief, Brittany Chan was only 14 years old at the time the litigation was brought. (PACER: 2:05-cv-73727 (LPZ)(RSW) (E.D.Mich.).)

whose illnesses may be exacerbated by the actions of the Plaintiffs,¹⁷ the elderly (and even deceased¹⁸), impoverished, and uneducated (or at least the technologically unsophisticated – for these purposes they suffer the same), targeting parties unable to defend themselves against multiple law firms with defenses requiring sophisticated technical acumen and six-figure discovery activities. Further, on information and belief, Plaintiffs colluded with America Online (“AOL”), in particular, in regard to the use of parental controls, both accusing parents of not setting such controls – for secondary liability purposes – and then hiding behind the fact that when parents did set such controls, that such controls effectively blocked the Plaintiffs’ agent’s (“Agent”) alleged warnings (“Warnings”) that downloading from KaZaA, iMesh, Napster, Grokster, LimeWire and others was improper or illegal (Plaintiffs’ claimed message has not been seen, so its exact contents are unknown, but is alleged to exist by Plaintiffs). So insidious is this scheme, it demands one answer, “*When* will you stop beating your wife?” Plaintiffs used this Hobson’s choice in the secondary liability cases thus: if parents set the controls to block “Instant Messages” (“IM”) from unknown senders from reaching their children (to prevent, say, pedophiles and pornographers from making contact), then the Agent’s Warnings, too, would be blocked. Plaintiffs claim this simultaneously “proved” a parent’s “ability or right to control” the use of the computer, thereby allegedly establishing secondary liability.¹⁹ Conversely, if a parent

¹⁷ Elektra v. Schwartz, 1:06-cv-03533 (DGT)(RML) (E.D.N.Y.) (PACER). On information and belief, Ms. Schwartz suffers from **Multiple Sclerosis** and uses a wheelchair.

¹⁸ Warner Brothers Records, et al. v. Scantlebury, 2:05-cv-74394 (ADT)(VMM) (E.D.Mich.) (PACER).

¹⁹ It is an illogical and unsustainable conclusion, suffering from, among other things, the “fallacy of the missing middle,” by which one could prove a dog is a cat:

Since all dogs are animals;
And all cats are animals;

failed to make use of such controls, then the parent would be accused of implicitly condoning the downloading. But who was in the better – indeed, best – position to work with AOL and even the Congress to allow such Warnings to bypass the parental controls? The parents who didn't even know the problem existed, or the Plaintiffs, who managed to obtain law enforcement authority for its Agents to directly access potential defendants' hard drives, bypassing any kind of parental controls (and perhaps going through firewalls and other security settings) to take “snap shots” of alleged “shared directories”? Clearly, if Plaintiffs could manage direct remote and secret access to potential defendants' hard drives, they could manage an arrangement with AOL and law enforcement to allow these Warnings to be passed through to the nation's unsuspecting children – that is, if they had *wanted* to stop the downloading and *prevent* these lawsuits.

33. It appears highly relevant that Congress was so concerned about protecting Verizon, AOL, AT&T, Netscape, and all other Internet Service Providers (“ISP”), that it did not recognize it had transferred the burden to Johnny and Janey Doe and their unsuspecting parents. It further goes to prove the Nashean point: The moment the technology was desired / Those best possessed were enabled when required.²⁰

Therefore, all dogs are cats.

It is only AOL which can determine how its parental controls are set *from its side*; parents only have access to setting options *provided by AOL*. Since the parents did not know that the Agents were trying to send such Warnings, or even that the downloading was occurring at all, they could not know that they should (or could) create an exception within the controls for such messages, and *this* is but one of the many actions Plaintiffs could have, but failed and refused, to take.

²⁰ Any number of companies or programmers, were there the will to do so, could have provided similar protection to the RIAA years ago, in particular for the music files alleged. But why do so when Johnny and Janey make such convenient whipping boys and girls?

TWENTY-SECOND AFFIRMATIVE DEFENSE

34. Plaintiffs notified only large businesses and the Federal Government that their employees and their respective families might be violating the law, but failed to make any meaningful or reasonable efforts to notify the public at large, even though they were in the best position to do so. As of January 2007, there were no publications available to the public at the United States Government's Federal Citizen Information Center warning against, or offering ways for parents to protect their children against, the allegedly illegal downloading.²¹

TWENTY-THIRD AFFIRMATIVE DEFENSE

35. To personally defend against the type of violation Plaintiffs allege, one needs specialized technical training not available to the average person; indeed, even the CEO of Warner Music could not – or *did not* takes steps to, or did not *know* to takes steps to, or did not *know how* to take steps to – prevent his own children from illegally downloading music (*infra*, paragraph 36). It is not a question of ignorance of the law – of which law the Plaintiffs, on information and belief, affirmatively encouraged and facilitated violation (if it is, in fact, a violation of any law); rather, it is a question of inability to know that a law is even being violated, an inability to defend against knowing of the violation without “methods assistance,”

Many companies have been using similar technology to identify certain types of files, even when those files are hidden inside another file, compressed, using a changed extension or by other efforts, such as Norton, McAfee, PC-Cillin, AdAware and more. Just try sending an executable (*.exe) file through Google's “gmail” and watch what doesn't happen: the attachment won't arrive, even if you change the extension, compress the file, and password protect it.

²¹ A search in January 2007 for “download” or “music” did not yield documents warning against downloading. Whether it so provides now is not relevant: the government of the United States was warned, but failed to provide notice to its citizens at the time the alleged downloading took place. See: <<http://www.pueblo.gsa.gov>>.

which assistance was available to Plaintiffs, but which they failed and refused to provide to consumers. Further, the type of technological defense necessary to combat such violations was not practicably available to home computer users when the alleged violations took place (and such defensive systems are still not largely available), but such technology *was* available to, and in use by, the Plaintiffs, large businesses, the United States Government and various state governments: one type of technology is called a “firewall” and most home computer users did not have them (or know how to use them) *when the violations were alleged to have occurred, back in 2002 through 2004*, importantly, when Robert Santangelo, Jr. was only 11-14 years of age and Michelle Santangelo was 15-17 years of age. The home computing world was entirely different then, and it is impossible to consider anyone’s actions, knowledge, inactions, or access to technology from that time based upon today’s knowledge and available technology. Plaintiffs chose whom they would warn (such as “big business” and the Federal Government – there was even a special notice for the White House), and once they took an action to affirmatively warn one group, they had an obligation to affirmatively warn all potential defendants similarly situated; and that, by the most basic definition, would include any computer user, whether in business, government or home. To not demand this means it would be acceptable for Plaintiffs to warn Utah, but not Missouri; businesses, but not individuals; African Americans, but not Latinos; males, but not females; people with incomes over \$100,000.00, but not under (but which Plaintiffs *did* do in the form of warning big business and big government but not individuals). The burden to do so on the Plaintiffs was low (through the Internet, ISP’s, various governmental agencies, computer manufacturers, computer superstores and distributors, *on their own CD’s and self-promoting shows*), and the Plaintiffs had the resources, technology and law available to them to accomplish this; the damage to the potential defendants was high (possibly

as many as 30,000 lawsuits and counting); but the Plaintiffs did nothing after taking their initial self-serving steps.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

36. Plaintiffs have crafted at least two additional and alternative forms of damages, which forms have not been offered to these Defendants, even though similarly situated. One alternative, explicated by Warner Music's CEO, Edgar Bronfman, upon disclosing that his own children were downloading music, is for a parent to *talk* to his or her children: "I explained to them [his children] what I believe is right, that the principle is that stealing music is stealing music. Frankly, right is right and wrong is wrong, particularly when a parent is talking to a child. A bright line around moral responsibility is very important. I can assure you they no longer do that." As to what else he did to them, he responded, "I think I'll keep that within the family."²² Plaintiffs have failed and refused to offer these Defendants the same form of damages. The other alternative, offered to large companies, was to simply erase the offending files from the hard drive. Plaintiffs have failed and refused to offer these Defendants the same form of damages. Exhibit A.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

37. Plaintiffs' first demand for damages is moot and frivolous and should be dismissed as Plaintiffs have acknowledged that the Computer relevant at all times to this action,

²² See: <http://blogs.reuters.com/2006/12/01/the-most-dangerous-download-of-all> and also: <http://secondlife.reuters.com/stories/2006/12/01/warner-music-boss-edgar-bronfman>

along with its hard drive, was destroyed in a fire more than 36 months' ago, and at least five months' prior to any Santangelo defendant having notice of any potential litigation.²³

TWENTY-SIXTH AFFIRMATIVE DEFENSE

38. Plaintiffs' claims against Defendants are barred due to a settlement agreement Plaintiffs reached with Sharman Networks, creators and distributors of the KaZaA software. Upon information and belief, this settlement was in the amount of \$115 million. Although Plaintiffs in their Complaint do not allege which media network the Defendants used (paragraph 18), Plaintiffs have previously identified KaZaA to have been the "online media distribution system" used by the Defendants.²⁴ Through Plaintiffs' settlement with Sharman Networks, Plaintiffs elected to accept a settlement which fully compensated Plaintiffs for the damages allegedly caused by Defendants and others. This settlement fully compensated Plaintiffs for any alleged infringement by Defendants, and therefore bars Plaintiffs from recovering any damages a second time for the same alleged infringements.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

39. Plaintiffs' claims against Defendants are barred due to a settlement agreement Plaintiffs reached with "neighbor and best friend" with whom the Plaintiffs, according to their Complaint (paragraph 3), have settled by having the "neighbor and best

²³ During the action Elektra v. Patricia Santangelo, Civil Action no. 7:05-cv-2414 (CM)(MDF) (S.D.N.Y.) (PACER), the details of the destruction of the computer by fire (in July 2004) and its final disposition were learned during the deposition of Robert Santangelo, Sr., conducted on June 27, 2006 by the Plaintiffs and which information has never been disputed. (Deposition Transcript, Pages 96 and 100.) Plaintiffs did not and do not assert that Defendants or their family disposed of the Computer to dispose of evidence or to frustrate the litigation.

²⁴ These allegations were made during depositions and at other times in the action Elektra v. Patricia Santangelo, Civil Action No. 7:05-cv-2414 (CM)(MDF) (S.D.N.Y.) (PACER).

friend” “pay[] a settlement amount” and for other relief received. Through Plaintiffs’ settlement with the “neighbor and best friend,” Plaintiffs elected to accept a settlement which fully compensated them for the damages allegedly caused by Defendants and possibly others. This settlement fully compensated Plaintiffs for any alleged infringement by Defendants, and therefore bars Plaintiffs from recovering any damages a second (or even third) time for the same alleged infringements.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

40. It is Plaintiffs’ contention that the offending programs were installed by Defendant Robert Santangelo, Jr.’s “neighbor and best friend,” and there is no allegation or evidence that such was done with the knowledge or permission of the owner of the Computer, Patricia Santangelo, mother of the Defendants, and with whom Defendants reside. The “neighbor and best friend” exceeded his authority in his use of the Computer, whether as a licensee or an invitee, and installed and used the programs for his own benefit and gain and, as such, was a trespasser. The existence of the offending programs were invisible to Patricia Santangelo; they were a trap set by the trespasser for his own benefit and gain. He gave no notice, asked no permission, and left no meaningful visible trail or warnings of his actions. That “neighbor and best friend” too, was duped by the provider, or earlier facilitated by the Plaintiffs, only supports the Defendants’ additional positions. Whether “neighbor and best friend” set such programs to “share” or “distribute,” or failed to set such programs to “not share” and “not distribute,” was and is unknown to Defendants and unknowable to their mother, Patricia Santangelo. In any event, “neighbor and best friend” caused any sharing or distribution to occur, not Defendants or Patricia Santangelo. Consequently, and for reasons separate and apart from those in the Twenty-Seventh Affirmative Defense, Plaintiffs’ claims against Defendants are

barred due to the settlement agreement Plaintiffs reached with the “neighbor and best friend,” with whom the Plaintiffs, according to their Complaint, paragraph 3, have settled by having the “neighbor and best friend” “pay[] a settlement amount” and for other relief received. Through Plaintiffs’ settlement with the “neighbor and best friend,” Plaintiffs elected to accept a settlement which fully compensated them for the damages allegedly caused by Defendants and possibly others. This settlement fully compensated Plaintiffs for any alleged infringement by Defendants, and therefore bars Plaintiffs from recovering any damages a second (or even third) time for the same alleged infringements.

TWENTY-NINTH AFFIRMATIVE DEFENSE

41. Plaintiffs claim they reached a settlement agreement with the “neighbor and best friend.” Plaintiffs failed to notify Defendants of such settlement to which settlement agreement Defendants (and perhaps others) were a necessary party as they had a direct interest in the structure, terms, scope, nature and outcome of the agreement, and such agreement necessarily impacted them. Since Plaintiffs failed to notify Defendants and reached such a settlement without their participation, knowledge or agreement, Plaintiffs should be barred from recovering any damages a second (or even third) time for the same alleged infringements, in particular those known to the Plaintiffs to have been caused by someone other than the Defendants (*i.e.*: the “neighbor and best friend”).

THIRTIETH AFFIRMATIVE DEFENSE

42. To the extent that any downloading occurred, if at all, it would have been the result of an agreement with some provider (which agreements, if any, were not created by Defendants, but under which Defendants impliedly and unknowingly operated). Such agreement, constituting either a fraud in the inducement or a contract, would have been voidable

as to Defendants because (at minimum) the Defendants were still minors at all times relevant to the action.²⁵ It is undisputed that the Computer on which the alleged downloaded music resided was destroyed five months' before any Santangelo defendant had any notice of any lawsuit. The Defendants, not then being in possession of any such downloaded music at the time of the lawsuit, and there being no allegations by the Plaintiffs that they remained in possession of any of such music, or that they continued to or then first started to download music onto any replacement computer (in particular, between the time of the destruction of the old computer and the time of the bringing of the lawsuit), the contract was voided by the Defendants and there were no damages to the Plaintiffs. Plaintiffs' damages can not be based upon "listening" to music over the Internet, as, on information and belief, anyone can listen to Plaintiffs' songs for free through AOL radio or any number of other "Internet radios," as well as for free on various AM or FM radio music stations; the damages must be based upon some benefit to the Defendants or damage to the Plaintiffs. There is no evidence that Defendants listened to anything either than on the Internet or on CD's already owned. Further, to the extent that the music listened to was the result of music being played on the computer from CD's already purchased and owned by the Defendants or their family, the "listening" was part of Plaintiffs' license and any "playing" is within the license provided by the Plaintiffs, which license, on information and belief, does not limit the mechanical or electronic devices on which Plaintiffs' CD's can be played – only the distribution could be part of the Plaintiffs' claim. Since there is no evidence the Defendants distributed anything, even if they had listened to music on the

²⁵ The Computer on which any downloading is alleged to have occurred was destroyed by fire in July 2004, at which time Robert Santangelo, Jr., was only 14 years of age and Michelle Santangelo was 17 years of age. Robert Santangelo, Jr., is still a minor.

computer – from CD’s already owned, ownership being based upon purchases and gifts (of original CD’s) and of neither by any alleged downloading – Defendants can not be attributed with causing any damages to any Plaintiff by having not ventured outside the license of the intiffs. Defendants having obtained no benefit, and the Plaintiffs not having been damaged, the action is therefore moot and should be dismissed with prejudice.

THIRTY-FIRST AFFIRMATIVE DEFENSE

43. On information and belief, Plaintiffs engaged in deceptive and misleading advertising in connection with the distribution of their copyrighted works. The nature of such deceptive and misleading advertising included, but was not limited to, enticing children and others to listen to music over the Internet, which, in turn, caused unsuspecting downloads and/or was associated with claims by others of allowable free downloading.

44. Plaintiffs’ claims are barred because of their deceptive and misleading advertising in connection with the distribution of their copyrighted works. Plaintiffs must not be allowed to profit from their deceptive and misleading actions.

THIRTY-SECOND AFFIRMATIVE DEFENSE

45. Plaintiffs’ claims are barred to the extent any persons, based on whose behavior Plaintiffs seek to hold Defendants liable, are innocent infringers.²⁶

²⁶ This does not purport to limit “innocent infringers” to the definition in 17 U.S.C.A. § 504(c)(2).

FACTS COMMON TO ALL COUNTERCLAIMS

46. Defendant-Counterclaim plaintiff Michelle Santangelo, is an individual residing within this district. Defendant-Counterclaim plaintiff Robert Santangelo, Jr., is an individual residing within this district.

47. On information and belief, plaintiff-Counterclaim defendant Elektra Entertainment Group, Inc., is a Delaware corporation with its principal place of business in the State of New York.

48. On information and belief, plaintiff-Counterclaim defendant Virgin Records America, Inc., is a California corporation with its principal place of business in the State of New York.

49. On information and belief, plaintiff-Counterclaim defendant UMG Recordings, Inc., a Delaware corporation with its principal place of business in the State of California.

50. On information and belief, plaintiff-Counterclaim defendant BMG Music is a New York general partnership with its principal place of business in the State of New York.

51. On information and belief, plaintiff-Counterclaim defendant Sony BMG Music Entertainment is a Delaware general partnership with its principal place of business in the State of New York.

52. This Court has jurisdiction of this action pursuant to 17 U.S.C.A. § 101 *et seq.* (copyright), 28 U.S.C.A. § 1331 (federal question) and 28 U.S.C.A. § 1338(a) (copyright). The Court has jurisdiction over counterclaims under U.S.C.A. Federal Rules of Civil Procedure Rule 13.

53. Counterclaim defendants allege they are the copyright owners or licensees of certain sound recordings relevant to this action.

54. On or about November 1, 2006, Counterclaim defendants commenced an action in the U.S. District Court for the Southern District of New York (06-cv-11520) against Counterclaim plaintiffs charging them with copyright infringement.

55. Counterclaim plaintiffs are accused therein of downloading and file-sharing certain computer files consisting of sound recordings allegedly owned or licensed by Counterclaim defendants.

56. The acts allegedly committed by Counterclaim plaintiffs as set forth in the Complaint therein do not constitute copyright infringement.

57. Counterclaim defendants do not allege any specific acts of downloading or file-sharing or provide any details of time and place regarding such acts as against Counterclaim plaintiffs.

58. There is an actual controversy between the Counterclaim plaintiffs and Counterclaim defendants.

59. Counterclaim defendants, through various concerted efforts and cartels, control or attempt to control the channels of creation, distribution, and sale of musical works throughout the United States and the world. They are not artists, songwriters or musicians. They did not write or record the songs they control or purport to control.

60. For a number of years, a group of large, multinational, multi-billion dollar record companies, including these Counterclaim defendants, have been abusing the federal court judicial system for the purpose of waging a public relations and public threat campaign targeting digital file sharing activities. As part of this campaign, these record companies hired unlicensed

private investigators – in violation of various state laws – who receive a bounty to invade private computers and private computer networks to obtain information – in the form of Internet Protocol (“IP”) addresses – allowing them to identify the computers and computer networks that they invaded. These unlicensed investigators perform these investigations in New York and other states.

61. Using information obtained from this illegal invasion, the record companies file so-called “John Doe” lawsuits – reportedly against more than 13,500 anonymous “John Does.” The “John Doe” lawsuits are filed for the sole purpose of activating the discovery powers of the court system – notably, the subpoena power – to obtain records from Internet service providers, to connect the IP addresses the names of individual account holders allegedly using those IP addresses at the time of the invasion. However, service providers have no way of knowing the identities of the person or persons who may be using the computer or computer network at the time the records companies invade it. In fact, there is not even any way to verify that the unlicensed investigators secretly snooping for IP addresses have obtained the correct ones.

62. After harvesting the names of account holders through these subpoenas, the record companies often dismiss the John Doe suits. The record companies then provide the personal information to their agent, the “Settlement Support Center,” which engages in deceptive and illegal practices aimed at extorting money from people allegedly identified from the secret lawsuits. Most of the people subjected to these secret suits do not even know that they have been sued until a demand for payment is made by lawyers for the record companies or by the Settlement Support Center operatives.

63 The Settlement Support Center is a company organized for the sole purpose of contacting prospective defendants and demanding that they pay thousands of dollars each to avoid the prospect of a federal lawsuit against them. This demand takes no account of the merits of any prospective claim against the putative defendant, but instead relies upon the inherent inequality in resources and litigation power between Counterclaim defendants and their individual victims.

64. As part of this campaign of extortion, Counterclaim defendants enhance the intimidation factor by actually filing suit in a number of instances with no prior warning. These suits are designed to attract media attention, and often do, as stories emerge of Counterclaim defendants' suits against the elderly, disabled, technologically clueless, and other vulnerable victims. Many of these victims have no idea how to operate a computer, let alone how to install and use peer-to-peer networking software to exchange music they would not likely be listening to anyway. But actual innocence is rarely a consideration to Counterclaim defendants.

65. The instant suit is just one example, yet it is an integral part of the Counterclaim defendants' extortion campaign. As a result, it is but one affirmative action out of thousands taken by the Counterclaim defendants in furtherance of their criminal extortion campaign.

66. Counterclaim defendants' litigation campaign, and its preceding extortionate demands and illegal investigations, are part of a concerted pattern of sham litigation.

67. Counterclaim defendants' true purpose is not to obtain the relief claimed in its sham litigation, but to intimidate, harass, and oppress the Counterclaim plaintiffs and other users of computer networks.

68. Upon information and belief, Counterclaim defendants have filed suit against more than thirty thousand (30,000) individuals alleging virtually identical claims.

69. Upon information and belief, Counterclaim defendants have only once proceeded to trial in any contested case raising these allegations.

70. Counterclaim defendants have not observed any specific instance of either Counterclaim plaintiff herein illegally downloading any sound recording.

71. Counterclaim defendants have not observed any specific instance of either Counterclaim plaintiff herein illegally uploading any sound recording.

72. Counterclaim defendants have not observed any specific instance of either Counterclaim plaintiff herein illegally disseminating any sound recording to anyone not otherwise authorized to receive it.

73. Neither Counterclaim plaintiff herein authorized any person to obtain information from any computer via the "online media distribution system" alleged by Counterclaim defendants and nor did anyone else provide such permission.

74. Neither Counterclaim plaintiff herein configured any Computer to "share" files.

75. Neither Counterclaim defendants nor their agents contacted either Counterclaim plaintiff herein to obtain their permission to obtain information from the Computer, nor did Counterclaim defendants contact anyone with any rights, dominion or control over the Computer to obtain his or her or their permission to obtain information from the Computer.

76. Neither Counterclaim defendants nor their agents contacted any person with authority to grant permission for Counterclaim defendants to obtain information from the

Computer identified in Counterclaim defendants' Complaint for the purpose of obtaining that permission.

77. Neither Counterclaim plaintiff herein has committed any infringement.

**FIRST COUNTERCLAIM
BREACH OF DUTY TO WARN; FALSE ADVERTISING
AND DECEPTIVE TRADE PRACTICES; INCLUDING
FALSE LABELS AND MISREPRESENTATIONS
RESULTING IN UNEQUAL TREATMENT UNDER LAW
NEW YORK MCKINNEY'S GENERAL BUSINESS LAWS § 349 *et seque*,
§ 350 *et seque*, and § 392-b *et seque*; and, 15 U.S.C.A. § 1451, *et seque***

78. Counterclaim plaintiffs reassert each and every allegation in paragraphs 1 through 77 of their Answer as if set forth fully at length herein, and incorporate same by reference.

79. Counterclaim defendants, whether individually or through their agent, the Record Industry Association of America ("RIAA"), had a duty to warn individuals – these Counterclaim plaintiffs (like defendants in the main action) and those similarly situated – of the type of copyright infringement or violation Counterclaim defendants allege, just as they warned large businesses and governmental agencies.

80. On information and belief, Counterclaim defendants actively and openly, as well as secretly and furtively, encouraged children and others to seek out, listen to, "play" and ultimately download (often unintentionally and unknowingly) Counterclaim defendants' claimed copyrighted materials from the Internet. In doing so, Counterclaim defendants thus "hooked" and entrapped them.

81. Counterclaim defendants thereafter changed their position and determined they did not want this same group to play or download music from the Internet.²⁷ Counterclaim plaintiffs and others similarly situated (like defendants in the main action) relied upon Counterclaim defendants' representations, upon which representations they were reasonable to rely, and upon which representations they did rely to their obvious detriment.²⁸

82. To the extent Counterclaim defendants were not happy with such representations in the marketplace, they were in the best position to change such notions, as they had the contacts with law enforcement, businesses, governments, OEM's, computer manufacturers, programmers, ISPs, news outlets, web sites, self-promoting television shows and all level of manufacturers and service providers. In fact, Counterclaim defendants engaged in a series of notifications to the government of the United States and to large corporations, as well as, on information and belief, to certain academic institutions. The RIAA's undated warning to large businesses, goes so far as to include a sample memo for such businesses to send to their employees. Id. Exhibit A.

²⁷ Peer-to-peer ("p2p") "sharing" and/or "distributing" is merely a byproduct of this process; a technological appurtenance created by companies, programmers, innovators, entrepreneurs, and even by the plaintiffs and their agents – but not by these or any other defendant similarly situated. The method of file sharing or downloading is a tertiary aspect of the matter.

²⁸ Most sentient defendants would accept a "judgment" of the present-day download fees of \$0.99 per song, or, better, a "talking to," by their parents or even a personal dressing down by Warner CEO Edgar Bronfman; alternatively, they could be offered what was offered to big business: "delete the files and don't do it again." To the extent that any 750 defendants may have obtained the value of a single free download, such was obliterated by even one of these lawsuits against one defendant for one download, which scenarios were setup by Plaintiffs themselves.

TO: (Distribution list)
FROM: (Senior Officer)
SUBJECT: Policy on Use of Copyrighted Material
DATE: (Insert)

The purpose of this memorandum is to remind you of (Organization's) policy on the use of copyrighted material on (Organization's) computer systems and networks.

Unauthorized copying, distribution and certain other use of copyrighted material is illegal and can expose you and (Organization) to severe civil and criminal liability under the copyright law. This applies to all types of copyrighted works, including music, movies, software and other literary and artistic works.

Employees must not make, store, transmit or make available unauthorized copies of copyrighted material using (Organization's) computers, networks or storage media. Nor may employees use peer-to-peer file transfer services or take other actions likely to promote or lead to copyright infringement. **If you have stored unauthorized copies of music, movies, software or other copyrighted works on (Organization's) computer systems, you *should delete those copies promptly.***²⁹

(Organization's) complete policy on the use of copyrighted material is attached. Please note that employees are subject to disciplinary action, including possible termination, for violation of this policy. (Compliance Officer) will be organizing regular audits of (Organization's) computers and networks to ensure compliance and, if necessary, will remove unauthorized copies if you have not done so.

²⁹ "Should," not even "absolutely must." Herein, the RIAA offers another alternative to the payment of damages: delete the offending material. So, these corporate defendants, with millions and possibly billions of dollars, armed with attorneys, receive the "punishment" of a "warning" and the restorative action of "deleting" the offending files. In contrast, non-asseted teenagers and their unsuspecting parents have the weight of the Federal Courts of the United States of America, along with the U.S.C.A. Copyright laws and cash damages put upon them, with no hopes of mounting a full and proper legal defense. This alone cries out for redress.

Please do not hesitate to contact (Compliance Officer) if you have any questions.³⁰

[All emphasis added.]

83. The seven page document is signed, “Hilary B. Rosen, Chairman and CEO, RIAA,” and “Jack Valenti, President and CEO, Motion Picture Association of America.”

³⁰ Strangely, the RIAA had an alleged “Clean Slate Program”, the timing of which appears to overlap the timing of the underlying alleged infringements of this lawsuit. According to the RIAA website: “Launched in September 2003, this program provided individuals who may have committed copyright infringement with an opportunity to avoid litigation supported or assisted by the RIAA for infringing acts on the condition that they refrain from future infringement. Public awareness about the illegality of unauthorized uploading and downloading on peer-to-peer networks has increased dramatically since the inception of the program. As a result, the program is no longer necessary. Those who have signed up for the Clean Slate Program will continue to enjoy its benefits. For all others, the easiest and simplest way to avoid being sued for infringement on peer-to-peer networks is to stop engaging in this illegal conduct.”

This is yet another offer not provided to these or other similarly-situated Defendants. Of course, the implication is that those who took advantage of the program *knew* what they were doing (they were *affirmative wrongdoers*), whereas people like Patricia Santangelo, mother of the Defendants herein, had no idea what was happening “behind the scenes” on their own computers, and so could not avail themselves of such an offer.

See: <http://www.riaa.com/issues/cleanSlate.asp>

84. Further, The Executive Office of the President (of the United States), through the Office of Management and Budget sent a memo to warn themselves and other federal employees, of the various dangers and alleged illegalities of downloading music (as well as pornography³¹ and other things ...) and “to show the American Public” responsible Internet practices.

85. The first page of the memo states:

The purpose of this memorandum is to detail specific actions agencies must take to ensure the appropriate use of certain technologies used for file sharing across networks. These actions are based on recommended guidance developed by the CIO Council in 1999. The effective use and management of file sharing technology requires a clear policy, training of employees on the policy, and monitoring and enforcement.

Background

A type of file sharing known as Peer-to-Peer (P2P) refers to any software or system allowing individual users of the Internet to connect to each other and trade files. These systems are usually highly decentralized and are designed to facilitate connections between persons who are looking for certain types of files. While there are many appropriate uses of this technology, a number of studies show, **the vast majority of files traded on P2P networks are copyrighted music files and pornography.** Data also

³¹ Pornography: This is one of the main reasons that parents set parental controls on AOL, to avoid “Internet Messages” from potential child predators and to keep children away from pornography. At the moment of this writing, a search at <search.yahoo.com> returned the following answer: “1-100 of about 302,000,000 for free music download - 0.23 sec.” That’s 302 *million* pages. The same search at <google.com> returned 325,000,000 pages.

Who was and remains in the better position to protect children and teenagers from accessing those sites? AOL, ISP’s and the RIAA; or parents? If the Internet and entertainment community managed it for pornography, they could have managed it for free music downloading. Add to this that the RIAA’s alleged warnings of illegal downloadings were “blocked” by AOL’s parental controls. Again, who had the power to work with AOL to allow such messages to go through: the RIAA, which supposedly “desperately” wanted to stop the problem, or parents who didn’t know the problem (or the IM’s) existed?

suggests P2P is a common avenue for the spread of computer viruses within IT systems.

Federal computer systems or networks (as well as those operated by contractors on the government's behalf) must not be used for the downloading of illegal and/or unauthorized copyrighted content. *It is important to ensure computer resources of the Federal government are not compromised and to demonstrate to the American public the importance of adopting ethical and responsible practices on the Internet.*³²

[The word "Background" is bolded in original. All other emphasis added.]

Exhibit B.

86. Counterclaim plaintiffs, and others similarly situated, received no such brochures or notices, only enticements for "free music" from computer providers, such as Gateway (brand of the Santangelo computer at that time). To a teenager, advertisements for free music are not replete with notices about when "free" starts and ends and what to do next. Once "hooked," as the companies clearly intended, with free music sites available all over the Internet, one not distinguishing itself from another, any reasonable teen would similarly behave.

³² How, exactly, anyone in the "American Public" is supposed to know what actions are and are not being taken by the Federal Government is a mystery, indeed, particularly considering the ramifications of various parts of the Federal Sentencing Guidelines ("USSG"). See, e.g.: 18 U.S.C.A. § 1030. The mere access of a "protected" computer is sufficient to receive a mandatory jail sentence. How a federal sentence is calculated is a complex matter, and the anti-terrorist statute aspect requires referencing additional sections of the USSG.

87. Gateway's advertisements promoted the power of its CD-burner.³³ If not for music, then for what – to a *teenager*?

88. Counterclaim defendants breached their duty to warn the public, and instead chose whom they would warn. Once having taken the affirmative step to issue warnings to some, they then failed to warn others, in particular, the Counterclaim plaintiffs and others similarly situated (like defendants in the main action).

³³ See: http://news.com.com/Off-key+efforts+hinder+paid+Net+music/2100-1023_3-932412.html?tag=sas.email

“Although Gateway is examining several ways of becoming a key player in the digital music evolution, it has been at odds with the music industry. Two months ago, the PC maker began a campaign against a bill proposed by Sen. Ernest “Fritz” Hollings, D-S.C. The bill seeks requirements that computer manufacturers and consumer-electronics companies install anti-piracy software in their digital devices, among other things.

“Gateway reacted strongly against the bill, saying it would be a threat to shipments of CD burners. The PC manufacturer then launched a series of TV advertisements and public statements promoting legal digital downloading. The campaign included 60-second TV ad spots as well as free demonstrations on how to legally download songs and burn them onto CDs through Gateway Country retail stores.” [Emphasis added.]

See also: <http://www.stereophile.com/news/11507/index.html>

“The Gateway/pressplay partnership is a fascinating twist in the continuing struggle of record labels against piracy, and **proof that record labels and technology companies will continue to experiment until they find a formula that works for everyone** – artists, copyright holders, content distributors, and consumers. “The Gateway Music Vault by pressplay is a great example of the technology and recording industries working together to drive innovation and ultimately serve consumer demand for legitimate digital music,” said Gateway chairman and CEO Ted Waitt. One goal is to eliminate the popular conception that downloading is piracy while supporting “consumers’ right to enjoy digital music legally,” he added.” [Emphasis added.]

But they did not seek “a formula for everyone.” Instead, the record labels sued everyone ... everyone, that is, with no meaningful chance to defend themselves.

89. The relief requested cannot be obtained in the action against the Counterclaim plaintiffs.

90. Counterclaim defendants' failure to adequately and meaningfully warn was the direct, legal and proximate cause of any damages which Counterclaim defendants have incurred, and Counterclaim plaintiffs have been damaged therefrom, as to their reputation, legal fees and expenses, distraction from school and life activities, held up to public obloquy, used as operatives against their friends for the benefit of the Counterclaim defendants' cartel and had stolen from them the one thing even this honorable Court has not the power to return: their *time*. But they can be compensated with money.

91. In addition to pecuniary damages, pursuant to Copyright Act § 505, Counterclaim plaintiffs are entitled to be awarded their attorneys' fees in this action.

SECOND COUNTERCLAIM
MISUSE OF COPYRIGHT³⁴

92. Counterclaim plaintiffs re-allege paragraphs 1 through 91 of their Answer and Counterclaims as if set forth fully at length herein, and incorporate same by reference.

93. Counterclaim defendants are competitors in the business of recorded music.

94. Counterclaim defendants are a cartel acting collusively in violation of the antitrust laws and public policy, by litigating and settling all cases similar to this one together,

³⁴ This Counterclaim was upheld as valid on May 18, 2007 (docketed June 27, 2007), by Hon. Charles L. Brieant, United States District Court Judge for the Southern District of New York, White Plains Courthouse, in the case of *Lava Records v. Amurao*, 7:07-cv-0321 (CLB) (S.D.N.Y. 2007).

and by entering into an unlawful agreement amongst themselves to prosecute and dispose of all cases in an identical manner and through common lawyers.

95. Counterclaim plaintiffs re-allege paragraphs 16, *et. seque*, through 17 of their Seventh Affirmative Defense.

96. Such actions represent an attempt by Counterclaim defendants to secure for themselves rights far exceeding those provided by copyright laws.

97. Such acts constitute misuse of copyrights, and lead to a forfeiture of the exclusive rights granted to Counterclaim defendants by those laws.

98. Counterclaim plaintiffs are entitled to a judgment that Counterclaim defendants have forfeited the exclusive rights, if any, which they possess in and to the sound recordings which they allege the Counterclaim defendants to have infringed.

99. Counterclaim plaintiffs are further entitled to costs and reasonable attorneys' fees and such other relief as may be just.

THIRD COUNTERCLAIM
COMPUTER FRAUD AND ABUSE³⁵
18 U.S.C.A. § 1030

100. Counterclaim plaintiffs re-allege paragraphs 1 through 99 of their Answer and Counterclaims as if set forth fully at length herein, and incorporate same by reference.

101. As an investigative precursor to their sham litigation, Counterclaim defendants have accessed a computer system without authorization and obtained information from that computer system in violation of Counterclaim plaintiffs' rights.

³⁵ This Counterclaim was upheld as valid on September 19, 2007, by Hon. Richard A. Lazzara, United States District Court Judge for the Middle District of Florida, Tampa Division, in the case of *UMG, et al. v. Del Cid*, 8:07-cv-368-T-26TGW.

102. In violation of 18 U.S.C.A. § 1030, Counterclaim defendants have intentionally accessed a protected computer without authorization, and as a result of such conduct, caused damage to each Counterclaim plaintiff in an amount exceeding \$5,000.00.

103. In violation of 18 U.S.C.A. § 1030, Counterclaim defendants have knowingly and with intent to defraud, accessed a protected computer without authorization, or exceeding any authorized access, and by means of that access furthered the intended fraud and obtained information of value.

104. Counterclaim plaintiffs are entitled to recover damages from Counterclaim defendants, along with injunctive relief for such loss that cannot be remedied by an action at law, and to prevent further unauthorized access.

FOURTH COUNTERCLAIM
DECEPTIVE AND UNFAIR TRADE PRACTICES ³⁶
15 U.S.C.A. § 1451, *et seque*, 15 U.S.C.A. Ch. 50,
NEW YORK MCKINNEY'S GENERAL BUSINESS LAWS § 349, 350, 392-b, *et seque*

105. Counterclaim plaintiffs re-allege paragraphs 1 through 104 of their Answer and Counterclaims as if set forth fully at length herein, and incorporate same by reference.

106. The acts of Counterclaim defendants occurred in commerce in the State of New York and elsewhere.

³⁶ This Counterclaim cause of action, citing Florida's Deceptive and Unfair Trade Practice Act, FLA. STAT. ANN. § 501.201 *et seq.*, was upheld as valid on September 19, 2007, by Hon. Richard A. Lazzara, United States District Court Judge for the Middle District of Florida, Tampa Division, in the case of *UMG, et al. v. Del Cid*, 8:07-cv-368-T-26TGW. The Counterclaim herein cites New York and Federal statutes.

107. The acts of the Counterclaim defendants enumerated in paragraphs 1 to 106, some individually, and when taken as a whole, are unlawful deceptive and unfair practices in the conduct of commerce.

108. Counterclaim defendants had a duty to act in concert with existing state and federal laws. Counterclaim defendants violated that duty as identified and enumerated in paragraphs 1 to 107, some individually, and when taken as a whole.

109. Counterclaim defendants, acting individually, acting together in concert and acting together as an improper trade group, proximately caused injury as a result and are the legal cause of such injury.

110. Counterclaim plaintiffs suffered damages as a result of Counterclaim defendants' violations of 15 U.S.C.A. § 1451, *et seque*, and 15 U.S.C.A. Ch. 50, and NEW YORK MCKINNEY'S GENERAL BUSINESS LAWS § 349 *et seque*, § 350 *et seque*, and § 392-b, *et seque*, and are entitled to recover actual damages, plus attorney's fees and court costs, along with injunctive relief barring further violations.

FIFTH COUNTERCLAIM
TRESPASS TO CHATTELS³⁷

111. Counterclaim plaintiffs re-allege paragraphs 1 through 110 of their Answer and Counterclaims as if set forth fully at length herein, and incorporate same by reference.

³⁷ This Counterclaim was upheld as valid on September 19, 2007, by Hon. Richard A. Lazzara, United States District Court Judge for the Middle District of Florida, Tampa Division, in the case of *UMG, et al. v. Del Cid*, 8:07-cv-368-T-26TGW.

112. As an investigative precursor to their sham litigation, Counterclaim defendants and/or their agents have accessed a computer system without authorization and obtained information from that computer system in violation of Counterclaim plaintiffs' rights.

113. Counterclaim defendants and/or their agents intentionally and without authorization, intruded into a computer to obtain information.

114. Counterclaim defendants' and/or their agents unlawful intrusion deprived Counterclaim plaintiffs of the use and possession of the Computer.

115. Counterclaim defendants' and/or their agents proximately caused injury as a result and are the legal cause of such injury.

116. Counterclaim plaintiffs are entitled to recover those damages from Counterclaim defendants.

SIXTH COUNTERCLAIM
CIVIL CONSPIRACY³⁸

117. Counterclaim plaintiffs re-allege paragraphs 1 through 116 of their Answer and Counterclaims as if set forth fully at length herein, and incorporate same by reference.

118. Counterclaim defendants have conspired amongst themselves and with others to commit illegal acts and to use the illegal methods described in the First Counterclaim through Fifth Counterclaim herein, inclusive.

³⁸ This Counterclaim was upheld as valid on September 19, 2007, by Hon. Richard A. Lazzara, United States District Court Judge for the Middle District of Florida, Tampa Division, in the case of *UMG, et al. v. Del Cid*, 8:07-cv-368-T-26TGW.

119. Counterclaim defendants have conspired amongst themselves and with others to commit the following illegal acts to further the ends of their conspiracy: (a) conducting investigations in New York against New York residents without license, in violation of, *inter alia*, NEW YORK MCKINNEY'S GENERAL BUSINESS LAWS §§ 72 and 73, *et seque*, and NEW YORK MCKINNEY'S GENERAL BUSINESS LAWS Article 7, generally; (b) unauthorized access to a protected computer system, in interstate commerce for the purpose of obtaining information in violation of 18 U.S.C.A. § 1030; and, (c) extortion and attempted extortion in violation of the Hobbs Act, 18 U.S.C.A. § 1951.

120. Counterclaim defendants have taken numerous overt acts to further the conspiracy.

121. Counterclaim defendants have acted in conscious disregard of and indifference to the rights of Counterclaim plaintiffs and intending to cause them harm.

122. Counterclaim plaintiffs have been damaged by the acts of the conspiracy and are entitled to recover those damages from Counterclaim defendants jointly and severally.

123. Counterclaim plaintiffs are also entitled to recover punitive damages from Counterclaim defendants jointly and severally.

WHEREFORE, Defendants demands judgment:

a. against the Plaintiffs, and each of them, dismissing their causes of action and awarding Defendants their costs, disbursements and attorneys fees;

b. awarding Defendants as Counterclaim plaintiffs damages on their counterclaims inclusive of costs, disbursements and attorneys' fees;

c. granting Defendants as Counterclaim plaintiffs injunctive where appropriate to prevent further violations of law and to remedy those losses for which no adequate remedy at law exists; and,

d. for such other, different, additional and further relief as the Court deems just and equitable.

Dated: Valhalla, New York
12 October 2007

S/

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