

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs, :

- against - :

PATRICIA SANTANGELO, :

Defendant. :

-----X

Civil Action No. 05-cv-2414 (CM)

**DEFENDANT'S MOTION IN OPPOSITION TO  
PLAINTIFFS' MOTION TO DISMISS WITHOUT PREJUDICE,  
AND IN SUPPORT OF DEFENDANT'S MOTION TO  
DISMISS WITH PREJUDICE OR SET MATTER FOR TRIAL**

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## INTRODUCTION

1. Defendant, Patricia Santangelo respectfully submits this memorandum brief in support of her Motion in Opposition to “Plaintiffs’ Motion to Dismiss Without Prejudice pursuant to FED. R. CIV. P. 41(a)(2)” (“Plaintiffs’ Motion to Dismiss”).
2. Plaintiff’s Motion to Dismiss should be denied and the matter should either be dismissed *with* prejudice or set down for trial.

## STATEMENT OF FACTS

### A. In Opposition to Allegations in Plaintiffs’ Motion to Dismiss

3. Plaintiffs’ Motion to Dismiss contains false and misleading information, known to be so at the time it was claimed and thus misleads the Court. Plaintiffs’ claims, raised for the first time in this Motion and not based upon any good-faith reading of any evidence or deposition testimony, if true, would lead the Court to conclude that: dismissal without prejudice was appropriate; and, more importantly but flowing therefrom, that Defendant could not be considered to be a “prevailing party,” and therefore would not be entitled to an award of attorneys’ fees as part of costs, even though a separate determination may be required. 17 U.S.C. § 505

4. Some of this appears in the previous letter submission, but it is relevant here in context. Plaintiff attributes Ms. Santangelo’s present-day knowledge to what she “knew” when she first appeared before this Court in 2005. At the time, the Court recognized that Ms. Santangelo did not know “Kazaa from a kazoo.” It was a true assessment of Ms. Santangelo’s knowledge at the time, and nothing adduced through any discovery device changed the fact of

what Ms. Santangelo *knew* when she appeared before the Court. In order to “prove” this negative, all of the discovery and depositions would have to be placed before the Court to show that in no place was there a contradiction of such information.

5. In the more than 16 months between her appearance before the Court and her depositions, Ms. Santangelo, in participating in her defense, researched the “downloading industry,” learned how to use email, and learned other skills on the computer. Nonetheless, Plaintiffs proffer in Plaintiffs’ Memorandum Brief in Support of Their Motion to Dismiss Without Prejudice (“Brief”), at page 1:

Defendant’s *claims of technological illiteracy* and her *steadfast denials of any involvement by her*, her children, or her children’s friends lasted for well over a year – until plaintiffs, after substantial efforts in discovery, found that defendant *uses* e-mail and the Internet regularly, that two of her children and her son’s best friend [Matthew Seckler] did engage in the substantial infringement at issue, and that defendant had the full right and ability to control her children’s use of the computer. [Emphasis added.]

6. The above does not evidence any change in condition about Ms. Santangelo’s knowledge at the time of the alleged downloading (and which is alleged to have occurred well prior to the action). Further, nothing about what her children or the friend, Matthew Seckler,<sup>1</sup> did or did not do can be “imputed” to Ms. Santangelo’s actual knowledge or knowledge base at the time of the alleged downloading. Finally, Plaintiffs did not show that Ms. Santangelo had “the full right and ability to control her children’s use of the computer.”

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<sup>1</sup> What Mr. Seckler did was to install an insidious program which operates in the background in ways unknown to the user, owner, or other operator without Ms. Santangelo’s knowledge or permission. Mr. Seckler was only 13 or 14 at the time, and testified at his deposition that he did not know all the aspects of how the program worked when he installed it.

7. Plaintiffs continue, “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.” [Emphasis added.] Brief at p. 2.

8. This is the first time Plaintiffs have ever claimed that Ms. Santangelo “distributed” anything. They acknowledge she was not the direct infringer, have previously acknowledged that she did not “download” anything, but now accuse her of “distributing.” Quoting Plaintiffs’ Brief at page 1: “As a result, plaintiffs have now filed suit against defendant’s children, who are the direct infringers here. [P]laintiffs generally prefer to pursue the direct infringers, as opposed to *secondary infringers like defendant* [Ms. Santangelo] ....” [Emphasis added.] How can Ms. Santangelo be a secondary infringer here, but the distributor or downloader or infringer elsewhere in the same motion? She can not, and the other statements are false and misleading, and contrary to the evidence adduced through discovery.

9. The above supports that Plaintiffs are misleading the Court to avoid a ruling that Ms. Santangelo is a “prevailing party.”

10. Plaintiffs complain that “Defendant refused to settle prior to litigation.” Brief at p. 3. This is true, but Defendant had no obligation to settle; in fact, her demanded capitulation is the theme of Plaintiffs’ Brief, yet Plaintiffs have adduced no evidence of primary or secondary infringement, using their own standards presented in the cases in their Brief, explained *infra*.

11. “Moreover, when directly asked whether anyone in her home was downloading music, she replied, ‘I know nothing about them downloading or trading files.’”

Brief at p. 4.

12. This is consistent with what Ms. Santangelo told the Court originally and has not changed. Plaintiffs have never until this Motion even hinted that they believed Ms. Santangelo knew anything about what may have occurred at the time of the alleged infringements, much less adduced any evidence or testimony to that effect.

13. Plaintiffs claim Michelle Santangelo, daughter of Patricia Santangelo, admitted to downloading and uploading Plaintiffs' copyrighted sound recordings. Brief at p. 4. However, that is not what Michelle said and it is certainly not what she meant. It is, however, irrelevant to whether Ms. Santangelo is either primarily or secondarily liable for infringement without more. Nonetheless, Michelle has prepared an Affidavit explaining her treatment at deposition and her resulting confusion. Exhibit A. Plaintiffs' representative has since threatened an action for defamation of character, as well as threatening me with Rule 11 sanctions.

14. Ms. Santangelo is cited as having placed restrictions on her children's access to chat rooms (through the America On Line ("AOL") Parental Control Settings). Brief at p. 5. This might show a "limited" ability to "control;" "limited" because the scope of the settings are established by AOL. Without more, "right" and "ability" to control do not satisfy the legal tests for secondary liability offered by Plaintiffs' cases, *infra*.

15. Mr. Gabriel's Declaration at ¶ 12 claims "[u]pon information and belief," that Plaintiffs' agent, Media Sentry, sent "instant messages" advising [presumably Ms. Santangelo's IP address] that "distributing or downloading copyrighted music on the Internet without permission from the copyright owner is illegal." He continues, "[u]pon information and belief, the infringing activity continued []." Mr. Gabriel's statements, "upon information and

belief,” are not evidence and provide neither actual nor inferential proof.

a. Plaintiffs’ have painted Ms. Santangelo’s children to be liars, but that Mr. Seckler is honest. Yet Mr. Seckler acknowledged at his deposition that he saw no such warning messages, which is exactly what Michelle said at her deposition. In my questioning of Mr. Seckler, I asked about the pop-up warning messages allegedly sent by Plaintiffs’ agents.<sup>2</sup> Exhibit B, p. 140:

23 Q. Okay. So talking about the pop-up  
24 messages for a moment, in regard to when you  
25 were using any of the downloading programs at

[page] 141

1 Seckler  
2 the Santangelo’s home, did you ever see any  
3 pop-up messages telling you to stop  
4 downloading their --

5 A. No.

6 Q. When you were looking over  
7 Michelle’s shoulder and you said you believed  
8 she was downloading did you see any pop-up  
9 messages at that time?

10 A. No.

11 Q. Let me clarify. Did you see any  
12 pop-up messages advising her to stop  
13 downloading?

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<sup>2</sup> This document was received only in partially-formatted electronic form.

14 A. Oh, no.

When further questioned as to whether he actually knew – as opposed to believed – about whether Michelle was downloading (pp. 129-130):

24 Q. So you don't know for a fact that  
25 she was downloading them?

[page] 130

1 Seckler

2 A. No.

or using Kazaa (p. 130):

18 Q. How do you know she was on Kazaa as  
19 opposed to another program?

20 A. I guess I don't.

The various programs to “play” which come with the computer, and “download,” which do not, can look quite similar, which is to be proved at trial. In fact, Mr. Seckler does not know whether Michelle was downloading, though her alleged downloading is a cornerstone of Plaintiffs’ arguments, even though it is, again, irrelevant to whether Patricia Santangelo ever downloaded or engaged in any of the acts enunciated in their cited cases, *infra*.

b. Whether Plaintiffs sent such messages is also irrelevant as to what Ms. Santangelo knew or didn't know, as she never downloaded or played music on the computer and thus was never in a position to see such messages.

c. Further, there is an important question of canonical equity: comparing the Plaintiffs (who had a vested interest in their warning messages getting

through) with the Parents (who had no idea there existed warning messages and, further, no *reason* to know), who was and remains in the best position to resolve that issue?

Should Ms. Santangelo, instead, have left the Internet-gate open for the predators and pornographers or should the Plaintiffs have worked with the various ISP's and AOL to ensure that their messages were getting through to the people who needed to see them?

16. Plaintiffs mis-avail themselves of the “contributory infringing standard” of Metro-Goldwyn-Meyer Studios, Inc. v. Grokster Ltd., 545 U.S. 913, 930, 125 S. Ct. 2764, 2776 (2005), thus: one infringes contributorily by *intentionally inducing* or *encouraging* direct infringement and infringes vicariously by *profiting* from direct infringement while *declining* to exercise a right to stop or limit it. [Emphasis added.] Brief at p. 5.

17. No evidence was adduced to support that Ms. Santangelo was “intentional,” that she “induced” or “encouraged,” or that she “profited” by any downloading, or that she “declined” to exercise a right to stop or limit it. Brief at p. 6.

18. Plaintiffs also offer Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971), claiming the case offers that one may be vicariously liable if one has the right and ability to supervise the infringing activity *and also* has a *direct financial interest* in such activities. (The “Gershwin” case.) No financial interest of any type was ever alleged or proven against Ms. Santangelo, again, until alleged in Plaintiffs’ Motion to Dismiss. Brief at p. 5.

19. Plaintiffs pepper their Motion (pp. 2, 3, 6, 8, 9) with the claim that they “*tried*” to dismiss the case for six months. This is false. There was nothing stopping Plaintiffs from filing their Motion to Dismiss six months ago. Plaintiffs tie *their* desire to settle the case

on *their* terms with an imputed obligation of Ms. Santangelo to accede to their demands. This, too, ties in to their efforts to avoid liability for the possibility of owing legal fees. To be clear: Defendant was not interested in settling the matter and there will be no settlement. From the Defendant's perspective, if the Court will not dismiss the matter with prejudice, the Defendant prefers to take the matter to trial. Nothing Defendant has done or written has persuaded Plaintiffs of this fact.

20. Plaintiffs claimed they were looking for the person who was the *actual* infringer; they obtained that information in a deposition in April 2006 from Robert Santangelo, Jr., regarding Matthew Seckler. There was nothing stopping Plaintiffs from filing this same motion at that time.

21. Plaintiffs uncovered nothing different at depositions regarding Patricia Santangelo. Plaintiffs' arguments in its brief about Ms. Santangelo "steadfastly refus[ing] to take responsibility for either her or her children's actions" tells the Court nothing: first there had to be something for which to take responsibility, which Ms. Santangelo and the children deny; and, there had to be an obligation at law. Brief at p. 1. Plaintiffs point to none. Mr. Seckler's testimony at deposition is yet to be tested for completeness and relevancy, but, again, it has nothing to do with whether Ms. Santangelo was either a primary or secondary infringer (except that his testimony supports she was neither).

B. In Support of Defendant's  
Motion to Dismiss With  
Prejudice or Set the  
Matter Down for Trial

22. Plaintiffs knew from prior to suit that Ms. Santangelo had never downloaded anything in the context of Plaintiffs' materials, nor had she "enabled" or "profited" from her children doing so in any way. Grokster at 545 U.S. at 930, 125 S. Ct. at 2776

23. Plaintiffs further knew from the pleadings and depositions that Ms. Santangelo was neither a primary nor secondary infringer.

24. Plaintiffs have threatened me in writing with sanctions under Rule 11 because, for purposes of negotiations and for purposes acknowledged in the February 14 letter to the Court in regard to Michelle's deposition, I took certain positions and did not take others. Plaintiffs aver this "proves" something about my intentions or knowledge. Prophylactically:

a. In regard to Michelle's deposition, I used the word "polite" to get across a point which resulted in hostilities which word Plaintiffs now try to dismiss as having been "genuine," but which caused Mr. Gabriel to admonish that the deposition was "his."

i. In fact, in the month after Michelle's deposition, I wrote to Mr. Gabriel, "The other possibility is that your client, already represented by one who is too clever by half, thinks that the result will be altered by information gleaned in further discovery." Mr. Gabriel responded, "As for your repeated pot shots about [the representative], I recognize that they may be for your client's benefit, but these comments serve no purpose whatsoever. Let it go, and let's move on."

ii. They were not "pot shots;" they were and remain my view.

b. During discussions of possible settlement (apparently on June 12, 2006), I

acknowledged that Plaintiffs had made certain points in regard to secondary liability, describing particular points of law as “50/50.” My position, which was in the context of negotiations, was also based upon standards misrepresented to me by Plaintiffs. It is also of no moment to the matter before the Court: either the behavior meets all the necessary legal tests or it doesn’t.

25. Plaintiffs acknowledged in their Brief at p. 1. that they never intended to bring Ms. Santangelo to trial; that they only used her action to get to the “primary infringers”:

As a result, plaintiffs have now filed suit against defendant’s children, who are the direct infringers here. Because plaintiffs generally prefer to pursue the direct infringers, as opposed to secondary infringers like defendant, they now seek to dismiss this case without prejudice, because plaintiffs see no useful purpose in expending substantial resources seeking a judgment for secondary infringement ...  
[.]

26. Plaintiffs use this to show that they were interested in dismissing the action early on; however, while Plaintiffs may have taken great pains to “settle” on their terms, they took absolutely not one act toward “dismissing.” Instead, Defendant had been preparing for trial up through this motion, made seven months after the last deposition of Patricia Santangelo and eight months after the deposition of Michelle. Discovery was entirely complete.

27. Defendant had several times, as far back as May 2006 advised Plaintiffs she was not interested in settlement: May 20, 2006 by Jordan Glass, email to Richard Gabriel: “Consequently, the defendant considers the matter closed and is preparing for trial. There is no purpose in entertaining or wasting time on further settlement discussions.” May 3, 2006 by Jordan Glass, email to Richard Gabriel: “Plaintiffs’ settlement agreement, as proposed, is not acceptable. The Defendant has advised me to continue with pre-trial activities.” There was a court-directed settlement conference on October 17, 2006, but Defendant again rebuffed

Plaintiffs and continued with trial preparations.

28. There was nothing Ms. Santangelo could have done to force or enable Plaintiffs to file their motion, nor anything she could do to prevent them from doing so. Plaintiffs' acknowledgment that it used the lawsuit merely to get to the primary infringers is violative of Ms. Santangelo: she spent considerable time and resources in preparation for trial, and that is where the action should go if it is not dismissed with prejudice, with her being found as the prevailing party.

### **ARGUMENT**

29. Plaintiffs' action can not be dismissed except by order of the Court, once the Defendant has answered (without stipulation). FED. R. CIV. P. 41(a)(2) Instead, this matter has proceeded headlong toward trial and Plaintiffs took no step whatsoever to dismiss earlier. Their efforts at settlement were self-serving, and they had actual knowledge that Defendant was preparing to try the action.

30. Plaintiffs admit using this action merely as a springboard, costing Defendant extraordinary resources which she should not have had to expend, considering Plaintiffs' admission that it is not pursuing the case because it now has the party it "prefers" to sue. Plaintiffs' argument that Defendant could have stopped the action by "settling" is an unsupportable demand for capitulation. However, the Defendant should have the right to vindicate her position, based upon Plaintiffs' unwillingness to timely dismiss the action. The Plaintiffs were not reasonable in pursuing Ms. Santangelo, knowing she was not a direct infringer, and having formed no reasonable belief she was a secondary infringer and, most

telling, having had no legitimate intention of suing her on the secondary infringement.

31. Plaintiffs do not adduce that Defendant “induced” (intentionally or otherwise) or “encouraged” any alleged infringement, that she “profited” from any infringement, or that she “declined” to “exercise” a right to stop or limit any alleged infringement. Grokster, 545 U.S. 913, 930, 125 S.Ct. 2764, 2776 (2005). There can be no good faith claim when not one element of a proposition is met, yet Plaintiffs cite Grokster for the proposition of contributory infringement [presumably] as a good faith basis for having brought their claim against Ms. Santangelo to deflect the issue from their admission of using the action only to obtain further discovery.

32. Further, Plaintiffs do not adduce that Defendant had any “direct financial interest” in any alleged infringement, which is required under Gershwin, 443 F.2d 1159, 1162 (2d Cir. 1971), in conjunction with the “right and ability to supervise the infringing activity.”

33. But even the portion of Plaintiffs’ claim that it prefers to sue the direct infringer is not a good faith claim. Importantly, in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984), the Court held that “[a]lthough Sony’s advertisements urged consumers to buy the VCR to ‘record favorite shows’ or ‘build a library’ of recorded programs, id., at 459, 104 S.Ct. at 797 (Blackmun, J., dissenting), neither of these uses was necessarily infringing.” id., at 424, 454-455, 104 S.Ct. at 774, 795. [Underline added.] Cited in Grokster at 931, 125 S.Ct. at 2777. So, even if Michelle or Robert – or even Mr. Seckler – did download, it easily meets this test, which the Supreme Court also identified as potentially nothing more than “time-shifting” which was another “fair, not an infringing use.” 464 U.S. at 423-424, 104 S.Ct. at 774, 779. [Underline added.]

34. The activity complained of may not be infringement at all; there never was any evidence that Ms. Santangelo was a primary, direct or contributory infringer, nor was there meaningful or sufficient evidence that she was a “vicarious” infringer (as even the elements of “ability” and “control” were really in the hands of the Plaintiffs and AOL, and there was absolutely no evidence or even allegation regarding any pecuniary interest). In short, there was no legally cognizable case against Ms. Santangelo, of which Plaintiffs had actual knowledge from early in the action.

35. Ms. Santangelo should be found to be the prevailing party, as a dismissal with prejudice is usually considered a final adjudication on the merits. Witchard v. Montefiore Medical Center, et al., 2006 WL 2773870, \*6 (S.D.N.Y. 2006). (Exhibit C, unpublished case.) Or the matter should continue on toward trial, because a Defendant will be considered a “prevailing party” in a copyright infringement action when the Defendant successfully defends against significant claims actually litigated in the action. Repp v. Webber, 892 F.Supp. 552 (S.D.N.Y. 1995). At a minimum, Defendant should be afforded the opportunity to make a motion for summary judgment – but this does not get Defendant her day in Court.

36. In addressing the factors for a dismissal with prejudice, D’Alto v. Dahon California, Inc., 100 F.3d 281 (2d Cir. 1996) identifies the process and factors to be considered.

Once a defendant has answered a complaint, a plaintiff may no longer dismiss his suit as a matter of right. Under such circumstances, FED.R.CIV.P. 41(a)(2) provides in relevant part that “an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper.” Rule 41(a)(2) dismissals are at the district court’s discretion and only will be reviewed for an abuse of that discretion. See: Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990).

In Zagano, the Court delineated a number of factors that are relevant in determining whether a case has proceeded so far that dismissing it in order for the

plaintiff to start a separate action would prejudice the defendant. These factors include: “[1] the plaintiff’s diligence in bringing the motion; [2] any ‘undue vexatiousness’ on plaintiff’s part; [3] the extent to which the suit has progressed, including the defendant’s efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and, [5] the adequacy of plaintiff’s explanation for the need to dismiss.” 900 F.2d at 14; see also Bosteve, Ltd. v. Marauszski, 110 F.R.D. 257, 259 (E.D.N.Y. 1986); Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14, 18 (S.D.N.Y. 1953).

37. In this action, [1] Plaintiffs waited at least six and months and allowed Defendant to unnecessarily prepare for trial (when Plaintiffs could have brought the Motion to Dismiss six months’ ago having already, at that point, adduced all possible information in the action); [2] aside from the literal vexatious treatment Michelle received at the hands of Plaintiffs’ representative, the entire delaying of the dismissal process and mis-using the Defendant merely as a springboard to obtain other defendants was an expensive and unnecessary activity (which Plaintiffs blame on Defendant because of her unwillingness to succumb to Plaintiffs’ settlement demands); [3] the case is past the discovery phase and is awaiting a trial date and pre-trial motion calendar from the Court, the Defendant has made substantial investment in time and effort to prepare for the trial, and now faces additional litigation preparation on behalf of her children (and, while Plaintiffs made much in a side letter about the donations received from the Internet, the Court is well aware of the costs – not fees – associated with bringing an action to trial: the donations received did not even cover expenses through discovery, much less a trial); [4] there is no guarantee that without a dismissal with prejudice that Defendant will not have to defend the action again, but the next time with additional issues to consider in the context of the outcome of the action against her children (which keeps Ms. Santangelo in limbo on her own action for another 18-24 months); and, [5] Plaintiffs’ only explanation for the “need” to dismiss is that it is no longer Plaintiffs’ preference to pursue the action because Plaintiffs believe they

have a direct infringer to sue – which information was known to Plaintiffs for at least six months prior to bringing this Motion.

38. Plaintiffs make much of Point [2], claiming that Ms. Santangelo dragged out the litigation by refusing to provide information, and point to her alleged instruction to Michelle to not make a list of her friends. Brief at p. 5. This is false. Michelle testified that *she* asked her mother whether she should make a list, and Ms. Santangelo responded that it wasn't necessary – *at that time*, which was prior to the litigation. Plaintiffs adduced no information about the time frame or whether such was proper or improper. In any event, when Michelle provided her list at the deposition, Matthew Seckler, the actual Kaza installer was not on it, as they were not friends. Exhibit D, deposition of Michelle Santangelo. Mr. Seckler's name appears on p. 53 based upon a question asked by Plaintiffs. Michelle's "list" appears on pp. 47-49, and the "instruction" from Ms. Santangelo appears on pp. 45-47.

39. Ultimately, Plaintiffs have shown only three things: there is no evidence against Patricia Santangelo supporting any claim of infringement; Plaintiffs actions were, from the beginning, vexatious and in bad faith; and, Plaintiffs' claim should be dismissed with prejudice and Patricia Santangelo should be found to be the prevailing party.

### **CONCLUSION**

40. For all of the foregoing reasons, Defendant, Patricia Santangelo, respectfully requests that this Court enter an Order:

dismissing Plaintiffs' claims with prejudice;

finding Defendant to be the prevailing party; and,

allowing a motion for “costs,” including attorneys’ fees; or,  
in the alternative, setting down the matter for a trial.

Dated: Valhalla, New York  
28 February 2007

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