

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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:
RECORDED BOOKS, LLC, : Civil Action No. 8:07-cv-01427-DKC
:
Plaintiff, :
:
v. : **DECLARATION OF BRIAN T.**
: **DOWNING IN SUPPORT OF**
: **PLAINTIFF RECORDED BOOKS,**
OCLC ONLINE COMPUTER LIBRARY : **LLC’S MOTION FOR**
CENTER, INC. d/b/a NETLIBRARY, : **PRELIMINARY INJUNCTION**
:
Defendant. :
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I, Brian T. Downing, hereby declare and state as follows pursuant to 28 U.S.C. § 1746:

1. I am the Publisher of plaintiff Recorded Books, LLC (“Recorded Books”). I submit this declaration in support of Recorded Books’ motion for preliminary injunction.

BACKGROUND OF RECORDED BOOKS

2. Founded in 1979 by Henry Trentman—who, while searching for an alternative to standard radio programming to fill his hours on the road, came up with the idea of listening to recordings of all the great books he could not find time to read—Recorded Books has grown to become the world’s largest independent publisher and distributor of unabridged audiobooks.

3. Over the last several decades, Recorded Books has distributed its audiobooks to consumers, libraries, and schools throughout the United States primarily on cassettes and compact discs.

4. Today, Recorded Books offers more than 7,000 audiobook titles. It is the trusted publisher of Stephen King, James Patterson, David Baldacci, Jimmy Carter, and Stephen Breyer, among many others. Recorded Books has licensing agreements with all major English language publishers and literary agencies.

5. Recorded Books owns federally-registered copyrights for the sound recordings of nearly all of its audiobooks.

6. Recorded Books derives almost all of its revenue from the sale, licensing, and distribution of its copyrighted audiobooks. In 2006 alone, Recorded Books' revenue from the distribution of audiobooks and related materials exceeded \$80 million.

RECORDED BOOKS' AGREEMENT WITH NETLIBRARY

7. In an effort to expand its audiobook offerings beyond cassettes and CDs into electronic formats that can be downloaded from the Internet, Recorded Books in September 2004 entered into an eContent Production and Distribution Agreement (the "Agreement") with the defendant, OCLC Online Computer Library Center, Inc. ("OCLC"). A true and accurate copy of the Agreement is attached hereto as Exhibit A.

8. The Agreement granted OCLC's NetLibrary division ("NetLibrary") the worldwide, nonexclusive right and license to distribute downloadable electronic copies of certain of Recorded Books' audiobook titles via an Internet-based subscription service for libraries. *See* Agreement, §§ 1, 3.

9. The Agreement allowed public, school, university, and military libraries ("Subscribing Libraries" or "Recipients") the right to purchase, for a fixed fee that was determined based on the library's total circulation or population served, a subscription to a "Bundled Collection" of Recorded Books' audiobook titles. *Id.*, Exhibit C, § 2.

10. In turn, the Subscribing Libraries' patrons were permitted to select and download to their computer or personal listening device electronic copies of the titles contained in the Bundled Collection. The Agreement imposed a cap on the total number of downloads, or "Checkouts," that the Subscribing Libraries' patrons could make during the term of the subscription. *Id.*

11. Recorded Books and NetLibrary agreed to share the revenues from the sale of subscriptions according to a formula set forth in the Agreement. *Id.*

12. Under the Agreement, Recorded Books was required on a periodic basis to provide content, in the form of electronic copies of its audiobook titles, to NetLibrary to be added to the Bundled Collection. *Id.*, Exhibit C, § 4.

13. NetLibrary, in turn, was required to host and provide the technical and customer support for the Internet-based subscription service on a Recorded Books/NetLibrary co-branded website. *Id.*, § 1(c), and Exhibit B.

14. One of the key terms of the Agreement provided that the Internet-based subscription service described in the Agreement would be the exclusive means by which either party would distribute electronic copies of audiobooks over the Internet. In particular, § 1(a) of Exhibit C to the Agreement (the “Exclusivity Provision”) provided as follows:

The Subscription sales model described in this Agreement is the exclusive means by which netLibrary will market, distribute, and sell to Recipients digital electronic versions of Audio Books that can be downloaded via the Internet. The Subscription sales model described in this Agreement is the exclusive means by which Recorded Books will market, distribute, and sell to Recipients digital electronic versions of Audio Books that can be downloaded via the Internet.

15. The Agreement also provided that if NetLibrary were to enter into an agreement to provide audiobook content via a subscription service to which Recorded Books was not a party, Recorded Books would have the immediate right to terminate the Agreement. In particular, the Exclusivity Provision provided that:

netLibrary and Recorded Books will allow other content providers to contribute content and to participate in this Subscription sales model on equivalent terms. If, without Recorded Books’ consent, netLibrary signs an Agreement to allow another content provider to contribute Audio Book content and to participate in a Subscription sales model to which Recorded Books is not a party;

then, subject to Section 1.(e) of Exhibit B, Recorded Books may give netLibrary written notice terminating this Agreement immediately.

16. The Agreement also included a number of specific terms relating to NetLibrary's obligation to host and support the Internet-based subscription service. In particular, Exhibit B and Schedule B-1 to the Agreement imposed technical and customer service requirements for the services that NetLibrary was to provide under the Agreement.

17. Section 1(d)(i) of Exhibit B to the Agreement required NetLibrary to provide "[t]he interface and NL System activities reasonably necessary to ensure the site functionality specified in Section 3 and 4 of Schedule B-1" to the Agreement.

18. Section 3 of Schedule B-1 to the Agreement, titled "Interface," provided in relevant part:

(a) netLibrary will offer 3 access points from which Patrons of Recipients that purchase the Recorded Books/netLibrary Audio Books offering will be able to discover and download Audio Books. They will be able to discover and download Audio Books from:

(i) the co-branded netLibrary / Recorded Books site,

(ii) MARC records^[1] for Audio Book titles loaded in their library's catalog or in OCLC's WorldCat catalog, and

(iii) their library's affiliated netLibrary site, if applicable.

* * * *

(c) *MARC Records for Audio Books*

netLibrary will provide Recipients that purchase the Recorded Books/netLibrary Audio Book offering with MARC records for all Audio Books in the offering at no additional charge.

* * * *

¹ MARC records refer to "MAchine-Readable Cataloging records."

19. Section 4 of Schedule B-1 to the Agreement, titled “NL System,” provided in relevant part:

(a) When a Patron clicks the Audio Book Download Link on one of the Audio Book interfaces, the NL System will perform the following steps:

(i) the NL System will check out the Audio Book to the Patron for 21 days.

(ii) the NL System will deliver a license to access the Audio Book for the specified Checkout period to the Patron’s computer or other device.

(iii) (iii) [sic] the NL System will Download the audio book file from the netLibrary to the Patron’s computer or other device one of two different encoding levels: low band-width (7 Kbps) and high band-width (37 Kbps).

(b) *DRM*² *Standards* – Recorded Books and netLibrary have agreed on the following DRM standards.

* * * *

(ii) DRM will be engaged to restrict the Checkout period to 21 days.

* * * *

20. Section 1(d)(ii) of Exhibit B to the Agreement required NetLibrary to provide “[t]he network and infrastructure activities reasonably necessary to ensure site maintenance and stability, and to avoid material disruptions in service, including the activities specified in Section 5 of Schedule B-1” to the Agreement.

21. Section 5 of Schedule B-1 to the Agreement, titled “Network and Infrastructure,” provided in relevant part:

* * * *

² “DRM” refers to Digital Rights Management.

(b) Networking/Bandwidth Usage – In the initial phases of this project, netLibrary will use existing ISP routers for Audio Book File Download traffic. As Recipients purchase Audio Book Subscriptions, bandwidth demand is likely to increase. netLibrary will monitor Audio Book File Download activities and will take the steps that are commercially reasonable to ensure that it has adequate bandwidth to satisfy expected bandwidth demand.

22. Section 1(d)(iii) of Exhibit B to the Agreement required NetLibrary to perform “[t]he activities reasonably necessary to ensure the performance of order processing, submittal, fulfillment, and customer support functions specified in Section 6 of Schedule B-1” to the Agreement.

23. Section 6 of Schedule B-1 to the Agreement, titled “Order Processing, Submittal, Fulfillment, and Customer Support,” provided in relevant part:

* * * *

(iv) Customer Support – NetLibrary will use commercially reasonable efforts to provide Customer Support to and will serve as the primary point of contact for Recipients that purchase Subscriptions to the Bundled Collection(s). netLibrary will use existing Customer Support processes to perform this obligation.

* * * *

24. Section 1(d)(v) of Exhibit B to the Agreement required NetLibrary to provide:

A reasonable quantity of customer support to Recipients, with said support including:

- (1) Responding in a timely fashion to Recipients’ Support Queries.
- (2) Maintaining resources to respond to Recipients’ Support Queries.
- (3) Maintaining documentation of netLibrary’s responses to Recipients’ Support Queries.

25. In addition to Recorded Books’ right immediately to terminate the Agreement based on NetLibrary’s violation of the Exclusivity Provision, the Agreement also provided that

if NetLibrary committed other material breaches of the Agreement, then Recorded Books “may terminate this Agreement at any time after providing the other party with 60 days’ prior written notice of the occurrence of ... [the] violat[ion] [of] any material provision of this Agreement or ... breaches of this Agreement that, in the aggregate, are material.” *Id.*, § 4(b).

26. Finally, in the event of termination, § 1(e)(iii) of Exhibit B to the Agreement provided in relevant part:

netLibrary will on the effective date of termination cease selling and marketing Subscriptions to the Bundled Collection(s) but netLibrary may continue to host and distribute copies of NL Electronic Versions of Audio Books contained in the Bundled Collection(s) to Recipients with Subscription Terms that expire after the Termination of the Agreement if netLibrary gives Recorded Books written notice of the identity of these Recipients.

* * * *

NETLIBRARY VIOLATED THE EXCLUSIVITY PROVISION OF THE AGREEMENT

27. Notwithstanding the unambiguous Exclusivity Provision in the Agreement, NetLibrary has entered into one or more agreements with other content providers that allow those providers to contribute audiobook content and to participate in Internet-based subscription services with NetLibrary. Recorded Books is not a party to these agreements, nor has it consented to NetLibrary entering into them.

28. In particular, in conjunction with the Bibliographical Center for Research (“BCR”), NetLibrary is now offering an Internet-based audiobook subscription service to BCR’s member libraries that competes directly with the Recorded Books/NetLibrary Internet-based subscription service covered by the Agreement.

29. As described in BCR’s promotional materials appearing on its website:

The BCR Shared eAudiobook Collection includes 200 titles from publishers such as Random House, Books on Tape, Listen and Live, Listening Library and Blackstone Audio. Among the

mixture of fiction, non-fiction and some children's titles you'll find titles from best-selling authors such as Robert B. Parker, Sue Grafton, Jonathan Kellerman, Alice Munro and Dean R. Koontz. The collection includes "My Life in France" by Julia Child and "Life After Death: The Burden of Proof" by Deepak Chopra and as well [sic] as two titles from the popular "Artemis Fowl" series.

A true and accurate copy of a printout from BCR's website is attached hereto as Exhibit B.

30. Just like the Recorded Books/NetLibrary subscription service, the BCR/NetLibrary subscription service allows patrons of BCR's member libraries to access and download selections from an initial bundled collection of audiobook works from a variety of publishers, and "new content or additional titles will be added to the collection on a regular basis (bi-annually)."

31. In addition, just like the Recorded Books/NetLibrary subscription service, the BCR/NetLibrary subscription service requires the subscribing libraries to "pay fees annually to participate in the BCR Shared eAudiobooks Collection."

32. There is no question that the BCR/NetLibrary subscription service is a "Subscription sales model" that violates the Exclusivity Provision of the Agreement. NetLibrary requires libraries that participate in the BCR/NetLibrary subscription service to enter into a "Consortium Agreement for Audio Book Purchases – Library Audio Book Agreement." The form of this agreement that can be downloaded from the BCR website requires participating libraries to enter a "Subscriber Name" into the agreement. A true and accurate copy of the form Consortium Agreement for Audio Book Purchases – Library Audio Book Agreement is attached hereto as Exhibit C.

33. NetLibrary also has established a relationship with SOLINET (formally known as the Southeastern Library Network) to provide an Internet-based subscription service to SOLINET's member libraries.

34. Just like the Recorded Books/NetLibrary subscription service (as well as the BCR/NetLibrary subscription service), the SOLINET/NetLibrary subscription service allows member libraries to purchase a subscription that allows their patrons to access and download works from a bundled collection of audiobooks, except that they are from non-Recorded Books publishers.

35. As stated on the SOLINET website, “[u]nlike the shared eBook collections, the shared eAudiobook collection is a subscription. Member funds will be pooled and titles for the collection will be selected from the approximately 2,100 currently available NetLibrary eAudiobooks from Blackstone, Random House, Listen and Live and others.” (Emphasis added.) A true and accurate copy of a printout from SOLINET’s website is attached hereto as Exhibit D.

36. It is also clear from NetLibrary’s own press releases and website that NetLibrary is violating the Agreement’s requirement that “[t]he Subscription sales model described in this Agreement is the exclusive means by which netLibrary will market, distribute, and sell to Recipients digital electronic versions of Audio Books that can be downloaded via the Internet.”³

37. For example, on February 12, 2007, NetLibrary issued a press release announcing that it had “launched a new purchase model for its growing collection of eAudiobooks.” According to the press release, “[l]ibrarians now have the option to add individual titles to their collections from leading publishers including Random House, Blackstone Audio, and many more to come.” A true and accurate copy of NetLibrary’s February 12, 2007 press release is attached hereto as Exhibit E.

³ “Recipients” are defined in the Agreement as “a public, school, or university library; military base; or any library associated with these institutions.” Agreement, § 2(a)(x).

38. In other words, in direct contravention of the Exclusivity Provision, NetLibrary is currently “market[ing], distribut[ing] and sell[ing] to Recipients digital electronic versions of Audio Books that can be downloaded via the Internet” other than through “[t]he Subscription sales model described in th[e] Agreement.”⁴

39. NetLibrary has also intermingled on its website audiobook works available under the Recorded Books/NetLibrary subscription service with audiobook works available under other subscription services, giving the false impression to patrons of Subscribing Libraries that they are able to access a wider variety of works than they really are.

40. NetLibrary’s practice of intermingling works available under competing subscription services has already caused dissatisfaction, and is expected to cause significant additional dissatisfaction, among patrons of Subscribing Libraries who see references to non-Recorded Books audiobooks that they are not able to download. A true and accurate copy of a printout from NetLibrary’s website showing Recorded Books works intermingled with other publishers’ works is attached hereto as Exhibit F.

NETLIBRARY VIOLATED OTHER MATERIAL PROVISIONS OF THE AGREEMENT

41. In addition to violating the Exclusivity Provision, NetLibrary has consistently failed to live up to its technical and customer service responsibilities under the Agreement. NetLibrary’s failures have resulted in a near-endless stream of customer complaints, most of which have yet to be remedied.

⁴ Although NetLibrary refers to some of its competing products as fitting within a “purchase model”—no doubt in a strategic effort to circumvent the Exclusivity Provision—the reality is that many of them, especially the BCR and SOLINET products, mirror the Recorded Books/NetLibrary subscription service. In any event, regardless of the term NetLibrary uses to describe its various services, it is plain that it is distributing electronic audiobooks via the Internet other than through the Recorded Books/NetLibrary subscription service covered by the Agreement.

42. For example, NetLibrary has repeatedly failed to appropriately index and/or allow Subscribing Libraries access to selected titles reliably or with reasonable stability. Complaints regarding these failures have been received from libraries in Thompson, Connecticut; Scoville, Connecticut; Seneca Falls, New York; Avon Lake, Ohio; the State of Wyoming; CLAMS (Cape Libraries Automated Materials Sharing) Consortia; as well as from a number of individual library patron customers. Recorded Books first notified NetLibrary in writing of these deficiencies in November of 2006, but the causes of these failures have not been corrected, and complaints were still being received as recently as March of 2007.

43. NetLibrary has also repeatedly failed to make MARC records—both initial batches and monthly updates—available to Subscribing Libraries and their patrons for downloading reliably or with reasonable stability in a timely fashion. Complaints have been received from libraries in Mohawk Valley, New York; Fulton County and Atlanta, Georgia; Capital Area, Pennsylvania; Morris County, New Jersey; Henderson, Kentucky; Beamis, Colorado; Jackson County, Indiana; and CLAMS Consortia. Recorded Books notified NetLibrary in writing by e-mail of these deficiencies in December of 2006, but NetLibrary has failed to implement a system that achieves stable delivery, and complaints were still being received as recently as April of 2007.

44. NetLibrary has also failed to implement a streamlined authentication process in response to complaints from library subscribers. Moreover, in the course of attempting to address this issue, NetLibrary caused a week-long shutdown of the system in the Iowa City Public Library in January of 2007 that resulted in specific complaints of sub-par customer support. This became well-known among library patrons in Iowa and damaged Recorded Books' reputation and business prospects.

45. NetLibrary has also failed to address customer concerns and complaints regarding the size of the files transmitted, which results in inadequate bookmarking, and failure of compatibility with otherwise suitable players. Recorded Books specifically notified NetLibrary of the need to address these issues during meetings on February 8, 2006, and conveyed the importance of these issues at that time. NetLibrary has failed to correct these problems.

46. NetLibrary has also failed to implement a DRM system that restricts a "Checkout" period (*i.e.*, the period of time during which a patron has access to the copyrighted audiobook file) for a patron to twenty-one days in violation of Sections 1(a)(i), 4(a)(i), and 4(b)(ii) of Schedule B-1 of the Agreement. A restricted Checkout period is crucial for protecting the value of Recorded Books' copyrights under the licensing structure set forth in the Agreement. Without restrictions on the Checkout period, instead of lending Recorded Books' copyrighted audiobooks for a limited time period, Subscribing Libraries are permitted to give away an unlimited number of perpetual copies of Recorded Books' copyrighted sound recordings. NetLibrary has been aware of this failure since soon after the effective date of the Agreement, but has not provided any practical technical method for restricting the Checkout period.

47. The consistent failure of NetLibrary to fulfill the technical and customer service requirements of the Agreement has resulted in ongoing customer complaints and subscriber dissatisfaction with the Recorded Books/NetLibrary subscription service. This dissatisfaction has had a substantial adverse effect on Recorded Books' reputation in the marketplace that is impossible to quantify.

48. One example of the damaging effect of NetLibrary's inability to live up to its technical and customer service obligations can be found on the Baltimore County Public Library

website, which states: “There is currently a problem with downloading the license necessary to play Recorded Books/NetLibrary audio books. Technical support staff are working to resolve this issue. The problems seem to occur when customers are using Firefox or Internet Explorer 7. Netscape and earlier versions of Internet Explorer appear to work as expected. Technical support staff are working to resolve this issue. You may experience trouble, particularly in acquiring a license to play the file you have downloaded.”

49. Importantly, for patrons who are unable to resolve this technical problem, the Baltimore County Public Library suggests that they “consider our other downloadable audio book option – OverDrive.” A true and accurate copy of a printout from the Baltimore County Public Library website is attached hereto as Exhibit G.

50. In short, NetLibrary’s failures are resulting in Recorded Books’ Subscribing Libraries referring their patrons to one of Recorded Books’ direct competitors. Unfortunately, Recorded Books found out about this problem through its own Internet search. Unless specifically brought to its attention by a Subscribing Library, Recorded Books has no way of determining the extent to which this type of problem is happening.

RECORDED BOOKS EXERCISED ITS RIGHT TO TERMINATE THE AGREEMENT

51. On April 20, 2007, primarily due to NetLibrary’s violation of the Exclusivity Provision (which allows for immediate termination), but also due to its other material breaches (for which Recorded Books had provided more than sixty days notice), Recorded Books sent NetLibrary notice that it was exercising its right to terminate the Agreement. A true and accurate copy of Recorded Books’ April 20, 2007 termination letter to NetLibrary is attached hereto as Exhibit H.

52. NetLibrary responded to Recorded Books’ termination letter on April 30, 2007. Although NetLibrary devoted twelve single-spaced pages to challenging Recorded Books’

account of NetLibrary's failures in living up to its technical and customer service requirements, nowhere did NetLibrary offer any facts to support its claim that it had not entered into "an Agreement to allow another content provider to contribute eAudioBook content and to participate in a Subscription sales model to which Recorded Books is not a party."

53. Rather, NetLibrary stated that "[a]ny actions that NetLibrary has taken to pursue alternate business models" with respect to audiobook content providers other than Recorded Books were justified.

54. In addition, notwithstanding Recorded Books' termination of the Agreement, NetLibrary stated in its letter that it "will continue to accept orders from Libraries for the purchase of eAudioBook Subscriptions." A true and accurate copy of NetLibrary's April 30, 2007 letter to Recorded Books is attached hereto as Exhibit I.

**NETLIBRARY CONTINUES TO UNLAWFULLY SELL NEW SUBSCRIPTIONS
UNDER THE AGREEMENT**

55. In accordance with § 1(e)(iii) of Exhibit B to the Agreement, Recorded Books has informed NetLibrary that it will continue to fulfill its obligations with respect to those NetLibrary subscriptions that were in effect on or before May 31, 2007, but has informed NetLibrary that NetLibrary is not licensed to enter into any new agreements or to renew existing agreements with Subscribing Libraries to provide content from Recorded Books after May 31, 2007.⁵

⁵ Recorded Books originally sent an e-mail to the Subscribing Libraries on May 4, 2007 stating that Recorded Books had terminated its relationship with NetLibrary and that subscriptions for the Recorded Books/NetLibrary service would need to be renewed by May 18, 2007. In response to requests from Subscribing Libraries, Recorded Books extended the cut off date for new subscriptions and renewals to May 31, 2007. A true and accurate copy of Recorded Books' e-mail to the Subscribing Libraries is attached hereto as Exhibit J.

56. In addition, as required by the Agreement, Recorded Books continues to provide new content to NetLibrary so that NetLibrary may in turn provide it to Subscribing Libraries that have unexpired subscriptions that were commenced on or before May 31, 2007.

57. Despite Recorded Books' instruction to NetLibrary to no longer sell or renew subscriptions after May 31, 2007, NetLibrary continues to do so. Attached hereto as Exhibit K are true and accurate copies of e-mail receipts for the post-May 31, 2007 subscription renewals by NetLibrary for the Minneapolis Public Library (dated June 11, 2007) and the Hennepin County Library (dated June 11, 2007).

58. Moreover, NetLibrary recently sent an e-mail to the Subscribing Libraries that stated:

* * * *

Because of the number of eAudiobook Subscriptions that libraries have purchased, Recorded Books and OCLC NetLibrary have satisfied a revenue milestone that automatically extends our agreement from 2007 until 2010.

* * * *

Unfortunately, we understand that the Recorded Books sales force has informally told many libraries that Recorded Books has terminated its agreement with OCLC. This is incorrect. We also understand that many libraries were sent an e-mail from Recorded Books management last week stating that all upcoming eAudiobook renewals must be completed by May 18, 2007. Again, this message is incorrect. Recorded Books does not have the right to immediately terminate the agreement, and has not satisfied the agreement's provisions for termination. Consequently, there is no need to accelerate the timing of your subscription renewal.

You will not experience any change in your eAudiobook Subscription as a result of the recent communication from Recorded Books. You will receive access to Recorded Books eAudiobooks for the full term of your eAudiobook Subscription. You may renew your eAudiobook Subscription at your convenience at any time prior to its expiration. You will continue

to receive new eAudiobook content as Recorded Books delivers it to NetLibrary.

A true and accurate copy of NetLibrary's e-mail to the Subscribing Libraries is attached hereto as Exhibit L.

THE HARM TO RECORDED BOOKS IN THE ABSENCE OF AN INJUNCTION

59. Without injunctive relief from this Court, NetLibrary will continue to cause Recorded Books substantial irreparable harm.

60. Because the Agreement requires Recorded Books to continue to support subscriptions that were in effect as of May 31, 2007, and because Recorded Books is obligated to continue to provide NetLibrary with additional content to fulfill those subscriptions, Recorded Books has no feasible way of preventing NetLibrary from selling new subscriptions or distributing its copyrighted audiobooks to libraries that did not have subscriptions as of May 31, 2007.

61. Insofar as its portfolio of copyrighted audiobooks is Recorded Books' most valuable asset, it is virtually impossible to calculate the potential damage to Recorded Books that could flow from the loss of control over the distribution of its works by an entity with whom it no longer is affiliated. Recorded Books has provided NetLibrary with nearly 2,000 copyrighted audiobooks. A true and accurate copy of a non-exhaustive list of copyrighted audiobooks owned by Recorded Books (together with their U.S. Copyright Office registration numbers) that NetLibrary continues to unlawfully copy and distribute is attached hereto as Exhibit M.

62. Moreover, by continuing to offer a sub-par subscription service that it falsely represents as affiliated with Recorded Books, NetLibrary will cause substantial harm to Recorded Books' reputation in the marketplace.

63. Accordingly, to prevent future harm to Recorded Books, it is necessary to enjoin NetLibrary from continuing to sell Recorded Books subscriptions to libraries.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.


BRIAN T. DOWNING

Executed on: June 19, 2007
Prince Frederick, Maryland

LIBA/1796762.4