

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

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; BMG MUSIC;
CAPITOL RECORDS, INC.; ELEKTRA
ENTERTAINMENT GROUP INC.; INTERSCOPE
RECORDS; LAFACE RECORDS LLC; MOTOWN
RECORD COMPANY, L.P.; PRIORITY
RECORDS LLC; SONY BMG MUSIC
ENTERTAINMENT; UMG RECORDINGS, INC.;
VIRGIN RECORDS AMERICA, INC.; and
WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

LIME WIRE LLC; LIME GROUP LLC; MARK
GORTON; GREG BILDSON; and M.J.G. LIME
WIRE FAMILY LIMITED PARTNERSHIP,

Defendants.

Case No. 06 CV 5936 (KMW)

ECF Case

PUBLIC VERSION

**DEFENDANTS LIME WIRE LLC, LIME GROUP LLC, AND MARK GORTON'S OPPOSITION TO
PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION**

Michael S. Sommer
Tonia Ouellette Klausner
Lucy Yen (*pro hac vice* pending)
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Tel: (212) 999-5800
Fax: (212) 999-5899
msommer@wsgr.com; tklausner@wsgr.com

Colleen Bal (*pro hac vice*)
WILSON SONSINI GOODRICH & ROSATI, P.C.
One Market Plaza
Spear Tower, Suite 3300
San Francisco, California 94105
Tel: (415) 947-2000
Fax: (415) 947-2099
cbal@wsgr.com

*Attorneys for Defendants Lime Wire LLC, Lime Group LLC, Mark
Gorton, and M.J.G. Lime Wire Family Limited Partnership*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
TABLE OF ABBREVIATIONS	vii
I. PRELIMINARY STATEMENT	1
II. FACTUAL BACKGROUND	3
A. Company Background	3
B. Defendants’ Substantial Activities That Unquestionably Do Not Induce Copyright Infringement	4
C. [REDACTED]	5
D. Harm to Public Interest Caused by the Permanent Injunction Sought by Plaintiffs	6
III. PROCEDURAL BACKGROUND	8
A. The Court’s Decision to Postpone Adjudication of All but Thirty Works	8
B. The Court’s Summary Judgment Ruling	8
IV. ARGUMENT	9
A. The Court’s Summary Judgment Order as to Thirty Works Does Not Justify the Permanent Injunction Sought by Plaintiffs	9
B. Plaintiffs Have Not Proven They Are Entitled to an Injunction under <i>eBay</i>	9
1. Legal Standard	9
2. Plaintiffs Have Not Demonstrated Any Risk of Irreparable Harm, and There Is an Adequate Remedy at Law as to the Thirty Works	10
a. Plaintiffs Have Not Proven the “Staggering” Damages They Claim	10
b. [REDACTED]	11
3. The Public Interest Would Be Disserved by the Entry of the Permanent Injunction Sought by Plaintiffs	13
4. The Balance of Equities Weighs Against Entry of the Injunction Sought by Plaintiffs	14
C. The Injunction Sought by Plaintiffs Is Impermissibly Vague, Overbroad, and Punitive	14

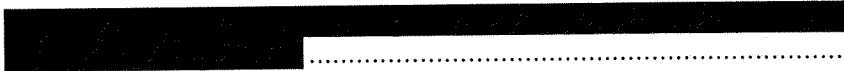
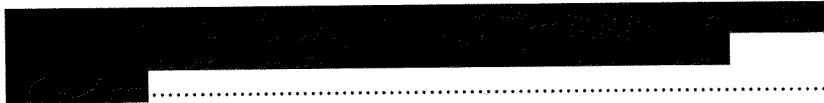
1.	An Order Ceasing Distribution and Advertising Is Unprecedented and Unwarranted	15
a.	Distribution	15
b.	Advertising.....	16
2.	Plaintiffs’ Proposed Injunction Fails Requirements of Proper Notice.....	17
a.	Definition of “Copyrighted Works”.....	17
b.	Works Protected “Under State or Common Law”	19
c.	Filtering Technology.....	19
3.	Plaintiffs’ Proposed Order Includes Systems and Conduct Over Which LW Has No Control	20
4.		21
5.	Plaintiffs’ Proposed Order Is Vague, General, and Extends Beyond Conduct the Court Found to Constitute Wrongful Inducement.....	21
D.	Plaintiffs’ Copyrights Misuse Bars Their Requested Relief.....	23
1.	A Copyright May Not Be Used to Secure Control Over Subject Matter Outside the Scope of the Copyright	23
2.		24
V.	CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES

	<u>Page(s)</u>
<i>A&M Records, Inc. v. Napster, Inc.</i> , Nos. C 99-05183 MHP, 00-1369 MHP, 2001 WL 227083 (N.D. Cal. Mar. 5, 2001), <i>aff'd</i> , 284 F.3d 1091 (9th Cir. 2002).....	18
<i>Alcatel USA, Inc. v. DGI Techs., Inc.</i> , 166 F.3d 772 (5th Cir. 1999)	23
<i>Amoco Prod. Co. v. Village of Gambell, AK</i> , 480 U.S. 531 (1987).....	1, 9
<i>Amstar Corp. v. Envirotech Corp.</i> , 823 F.2d 1538 (Fed. Cir. 1987).....	14, 17
<i>Ansul, Co. v. Uniroyal, Inc.</i> , 448 F.2d 872 (2d Cir. 1971).....	24
<i>Arista Records LLC v. Usenet.com, Inc.</i> , No. 07 Civ. 8822 (HB) (THK), slip op. (S.D.N.Y. Feb. 2, 2010).....	11
<i>Big E. Entm't, Inc. v. Zomba Enters., Inc.</i> , 453 F. Supp. 2d 788 (S.D.N.Y. 2006), <i>aff'd</i> , 259 Fed. Appx. 413 (2d Cir. 2008)	17
<i>Branch v. Ogilvy & Mather, Inc.</i> , 772 F. Supp. 1359 (S.D.N.Y. 1991).....	11
<i>Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs.</i> , 746 F. Supp. 320 (S.D.N.Y. 1990)	23
<i>Caffey v. Cook</i> , 409 F. Supp. 2d 484 (S.D.N.Y. 2006).....	11
<i>CBS v. Am. Soc'y of Composers, Authors & Publishers</i> , 562 F.2d 130 (2d Cir. 1977).....	23
<i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006).....	10
<i>Fonar Corp. v. Deccaidd Servs., Inc.</i> , 983 F.2d 427 (2d Cir. 1993).....	15, 17
<i>Grokster (remand)</i> , 518 F. Supp. 2d 1197 (C.D. Cal. 2007)	<i>passim</i>

TABLE OF AUTHORITIES

CASES (continued)

	<u>Page(s)</u>
<i>Howard Opera House Assocs. v. Urban Outfitters, Inc.</i> , 322 F.3d 125 (2d Cir. 2003).....	20
<i>Hypoxico Inc. v. Colorado Altitude Training</i> , 630 F. Supp. 2d 319 (S.D.N.Y. 2009).....	10
<i>In re Napster, Inc. Copyright Litig.</i> , No. C 04-2121 MHP, 2006 U.S. Dist. LEXIS 30338 (N.D. Cal. May 17, 2006)	19
<i>Lasercomb Am., Inc. v. Reynolds</i> , 911 F.2d 970 (4th Cir. 1990)	23, 24, 25
<i>Majorica, S.A. v. R.H. Macy & Co.</i> , 762 F.2d 7 (2d Cir. 1985).....	9
<i>Masterfile Corp. v. Country Cycling & Hiking Tours by Brooks, Inc.</i> , No. 06 Civ. 6363 (SAS) (FM), 2008 WL 313958 (S.D.N.Y. Feb. 4, 2008).....	11
<i>MercExchange, LLC v. eBay Inc.</i> , 467 F. Supp. 2d 608 (E.D. Va. 2006)	24
<i>MGM v. Grokster, Ltd.</i> , 259 F. Supp. 2d 1029 (C.D. Cal. 2003)	11
<i>MGM v. Grokster, Ltd.</i> , 380 F.3d 1154 (9th Cir. 2004)	11
<i>MGM v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	passim
<i>Mickowski v. Visi-Trak Corp.</i> , 36 F. Supp. 2d 171 (S.D.N.Y. 1999), aff'd, 230 F.3d 1379 (Fed. Cir. 2000)	15
<i>Morton Salt Co. v. G. S. Suppiger Co.</i> , 314 U.S. 488 (1942).....	23
<i>N.L.R.B. v. Express Publ'g Co.</i> , 312 U.S. 426 (1941).....	19
<i>Napster I</i> , 239 F.3d 1004 (9th Cir. 2001)	passim

TABLE OF AUTHORITIES

CASES (continued)

	<u>Page(s)</u>
<i>Northwestern Nat'l Ins. Co. of Milwaukee, Wis. v. Alberts</i> , 937 F.2d 77 (2d Cir. 1991).....	10
<i>Omicron Capital, LLC v. Omicron Capital, LLC</i> , 433 F. Supp. 2d 382 (S.D.N.Y. 2006).....	9
<i>Patsy's Italian Rest., Inc. v. Banas</i> , 575 F. Supp. 2d 427 (E.D.N.Y. 2008)	14
<i>Peregrine Myanmar Ltd. v. Segal</i> , 89 F.3d 41 (2d Cir. 1996).....	20
<i>Practice Mgmt. Info. Corp. v. Am. Med. Ass'n</i> , 121 F.3d 516 (9th Cir. 1997)	23
<i>PRC Realty Sys., Inc. v. Nat'l Ass'n of Realtors</i> , Nos. 91-1125, 91-1143, 1992 WL 183682 (4th Cir. Aug. 4, 1992).....	23, 24, 25
<i>Princeton Univ. Press v. Mich. Document Servs., Inc.</i> , 99 F.3d 1381 (6th Cir. 1996)	11
<i>Rosemont Enters., Inc. v. Random House, Inc.</i> , 366 F.2d 303 (2d Cir. 1966).....	23
<i>Salinger v. Colting</i> , ___ F.3d ___, No. 09-2878-cv, 2010 WL 1729126 (2d Cir. Apr. 30, 2010)	10
<i>Silverstein v. Penguin Putnam, Inc.</i> , 368 F.3d 77 (2d Cir. 2004).....	9
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	16
<i>Starter Corp. v. Converse, Inc.</i> , 170 F.3d 286 (2d Cir. 1999).....	14
<i>Stillman v. Travelers Ins. Co.</i> , 88 F.3d 911 (11th Cir. 1996)	23
<i>Universal City Studios Prods. LLP v. Bigwood</i> , 441 F. Supp. 2d 185 (D. Me. 2006)	9
<i>Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.</i> , 342 F.3d 191 (3d Cir. 2003).....	23

TABLE OF AUTHORITIES

CASES (continued)

Page(s)

<i>Waldman Publ'g Corp. v. Landoll, Inc.</i> , 43 F.3d 775 (2d Cir. 1994).....	14
---	----

STATUTES

17 U.S.C. § 502(a)	10
--------------------------	----

RULES

Fed. R. Civ. P. 65	17
Fed. R. Civ. P. 65(d)(1)(B)	15
Fed. R. Civ. P. 65(d)(1)(C)	15
Fed. R. Civ. P. 65(d)(2).....	20

OTHER AUTHORITIES

William F. Patry, 6 PATRY ON COPYRIGHT § 21:7 (2010).....	17
---	----

TABLE OF ABBREVIATIONS


12/7/07 Hrg. Tr.	Court Conference Transcript before The Honorable Gerard E. Lynch, dated December 7, 2007
6/7/10 Hrg. Tr.	Court Conference Transcript before The Honorable Kimba M. Wood, dated June 7, 2010
First Amended Compl.	First Amended Complaint for Federal Copyright Infringement, Common Law Copyright Infringement, Unfair Competition, Conveyance Made with Intent to Defraud and Unjust Enrichment, dated July 26, 2007 [docketed September 20, 2007]
Gorton	Mark Gorton
Gorton Decl.	Declaration of Mark Gorton in Support of Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, dated September 26, 2008
Gribble Decl.	Declaration of Dr. Steven D. Gribble in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 20, 2010
<i>Grokster (remand)</i>	<i>MGM v. Grokster, Ltd.</i> , 518 F. Supp. 2d 1197 (C.D. Cal. 2007)
Ito Decl.	Declaration of Joichi Ito in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 18, 2010
Kahle Decl.	Declaration of Brewster Kahle in Support of Defendants' Motion for Partial Summary Judgment, dated July 17, 2008
Kim Decl.	Declaration of Francis Kim in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 18, 2010
Klaus Decl.	Declaration of Kelly M. Klaus in Support of Plaintiffs' Motion for Permanent Injunction and exhibits attached thereto, dated June 4, 2010
Klausner Decl.	Declaration of Tonia Ouellette Klausner in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 21, 2010
LG	Lime Group LLC

LW	Lime Wire LLC
LW Store	Online store operated by LW located at <www.store.limewire.com>
Mendonca Decl.	Declaration of Brian G. Mendonca in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 19, 2010
Monday Decl.	Declaration of Tom Monday in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 18, 2010
Mot.	Memorandum of Law in Support of Plaintiffs' Motion for Permanent Injunction, dated June 4, 2010
<i>Napster I</i>	<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001)
Newby Decl.	Declaration of Gregory Newby in Support of Defendants' Motion for Partial Summary Judgment, dated August 27, 2002
Order	Amended Opinion and Order, dated May 25, 2010
P2P	Peer-to-Peer
Pavley Decl.	Declaration of John Pavley in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 19, 2010
Proposed Order	[Proposed] Permanent Injunction Against Lime Wire LLC; Lime Group LLC; and Mark Gorton, dated June 4, 2010
PX	Exhibits to Katherine B. Forrest Declaration in Support of Plaintiffs' Motion for Partial Summary Judgment, dated September 26, 2008
Searle Decl.	Declaration of George Searle in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 18, 2010
Zaidi Decl.	Declaration of Zeeshan Zaidi in Support of Defendants' Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 18, 2010

I. PRELIMINARY STATEMENT

It is black letter law that the imposition of a permanent injunction requires actual success on the merits. *See Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987). Further, injunctive terms must “have a common sense relationship to the needs of the specific case, and the conduct for which a defendant has been held liable.” *See Grokster (remand)*, 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007). Here, this Court has determined that Defendants induced the infringement of, *at most*, thirty of Plaintiffs’ works.¹ While the Court has noted that significantly more infringement may have occurred through use of LimeWire software, adjudication of that issue was expressly left for another day. Indeed, given the phasing of this case, it is undisputed that the Plaintiffs have not proven the most fundamental issue in a copyright case with respect to any other works, *i.e.*, whether they own or otherwise have standing to assert infringement of such other works. Nor have they proven any other work-specific issues, such as infringement or authorization.

As a result, the injunction sought by Plaintiffs has no meaningful relationship at all to the adjudicated legal violation. Among other things, it would cover all works allegedly owned by Plaintiffs, and would require Defendants to guess what those works are. It would require that LW immediately stop all software distribution and would put in Plaintiffs’ hands the ability to veto all subsequent versions of the software, thereby giving Plaintiffs control over a technology with noninfringing uses that have nothing whatsoever to do with Plaintiffs’ claimed copyrights. These uses include, but are not limited to, promotion of independent artists, dissemination of works in the public domain,



¹ In its recently-filed opposition to Defendants’ motion for reconsideration on the basis of lack of direct infringement, Plaintiffs argued that Defendants’ inducement liability could have been based on just “*one*” work. Docket No. 252 at 1 (emphasis in original). Certainly inducement as to a single work, like inducement as to thirty works, does not merit the wide-ranging injunctive relief sought here.

The scope of the permanent injunction sought by Plaintiffs would be unprecedented. Plaintiffs repeatedly cite to *Grokster*, *Fung* and other cases in which permanent injunctions were issued against P2P companies. But in every one of those cases, far-reaching permanent injunctions were issued only after full adjudication on the merits of all of the works at issue. Yet, even then, the permanent injunctions were not nearly as broad as the injunction sought here. In fact, Plaintiffs seek numerous provisions that were considered and *rejected* by those other courts after full adjudication of all works on the merits.

- **Distribution of Software** – The *Grokster* court rejected any requirement that the defendant immediately stop distributing its software upon imposition of a permanent injunction, both because a ban on distribution of a product with noninfringing uses might “grant rights to Plaintiffs beyond the limited monopoly permitted under the Copyright Act” and because it might also undermine future efforts to migrate users to a future, filtered version. *Grokster (remand)*, 518 F. Supp. 2d at 1231-32, 1236.
- **Notice of Copyrighted Works** – In stark contrast to Plaintiffs’ contention here that identifying their works to Defendants would be overly burdensome, the *Napster*, *Grokster* and *Fung* courts all required the plaintiffs to provide notice of the copyrighted works that were subject to the injunction. *See, e.g., Napster I*, 239 F.3d 1004, 1027 (9th Cir. 2001).
- **Cessation of Advertising** – The *Grokster* court also rejected the plaintiffs’ request that the defendant immediately cease all advertising, finding that the defendant’s continued advertising “will not have any effect on the quantum of induced infringement.” *Grokster (remand)*, 518 F. Supp. 2d at 1239. The same holds true here.
- **“Exhaustive” Filtering** – The *Grokster* court also rejected the plaintiffs’ request for an injunction that would require “exhaustive” filtering, as the Plaintiffs here also seek. “[A] permanent injunction requiring [defendant] to institute a perfect filter is not technologically feasible, and would be equivalent to a ban on [the software’s] distribution.” *Id.* at 1235-36.
- **Enjoining Conduct Beyond the Scope of Adjudicated Violation** – The *Grokster* court carefully considered the language of the proposed injunction to ensure that conduct not within the scope of the adjudicated inducement was not enjoined, and it struck substantial portions of the language sought by the plaintiffs. Remarkably, Plaintiffs here propose much of the very same language that the *Grokster* court struck.

[REDACTED]

As a result, Defendants respectfully request that the Court decline to issue a permanent injunction at this time, [REDACTED]

[REDACTED]

[REDACTED]. Alternatively, if the Court deems some form of injunction appropriate, Defendants request that the Court review Defendants' response to Plaintiffs' Proposed Order, *see* Klausner Decl., Ex. 1, which identifies the numerous flaws in Plaintiffs' Proposed Order – as previously identified in the very cases upon which Plaintiffs rely.



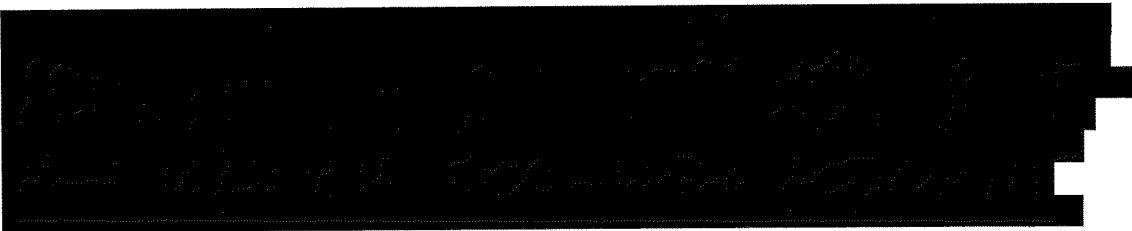
II. FACTUAL BACKGROUND

A. Company Background

LW was founded in June 2000 by Mark Gorton, an engineer and entrepreneur who has founded several other companies and a nonprofit organization. The LW Offering Memorandum distinguished past uses of P2P technology (including copyright infringement) and emphasized LW's intention to foster adoption of the technology for new business purposes. PX 3 at 11; PX 53. Thus, LW believed – and continues to believe – that greater uses for the technology will overtake media-file sharing and that users will come to understand its enormous potential for lawful use. *See* Gorton Decl. ¶¶ 5, 19, 23. LW is hardly alone in this view. For instance, Justice Breyer acknowledged in his concurring opinion in *Grokster* the “significant future market for noninfringing uses of Grokster-type peer-to-peer software.” *MGM v. Grokster, Ltd.*, 545 U.S. 913, 954-55 (2005) (Breyer, J., concurring).

B. Defendants' Substantial Activities That Unquestionably Do Not Induce Copyright Infringement

This Court has acknowledged the substantial evidence proffered by Defendants on summary judgment of noninfringing uses, including “(1) electronic copies of books in the public domain or authorized for online distribution; (2) historical documents, archival films, and other public domain works; and (3) digital music recordings produced by musicians seeking to promote their work through free online distribution.” Order at 45-46.² Additional noninfringing uses of the LimeWire software include:


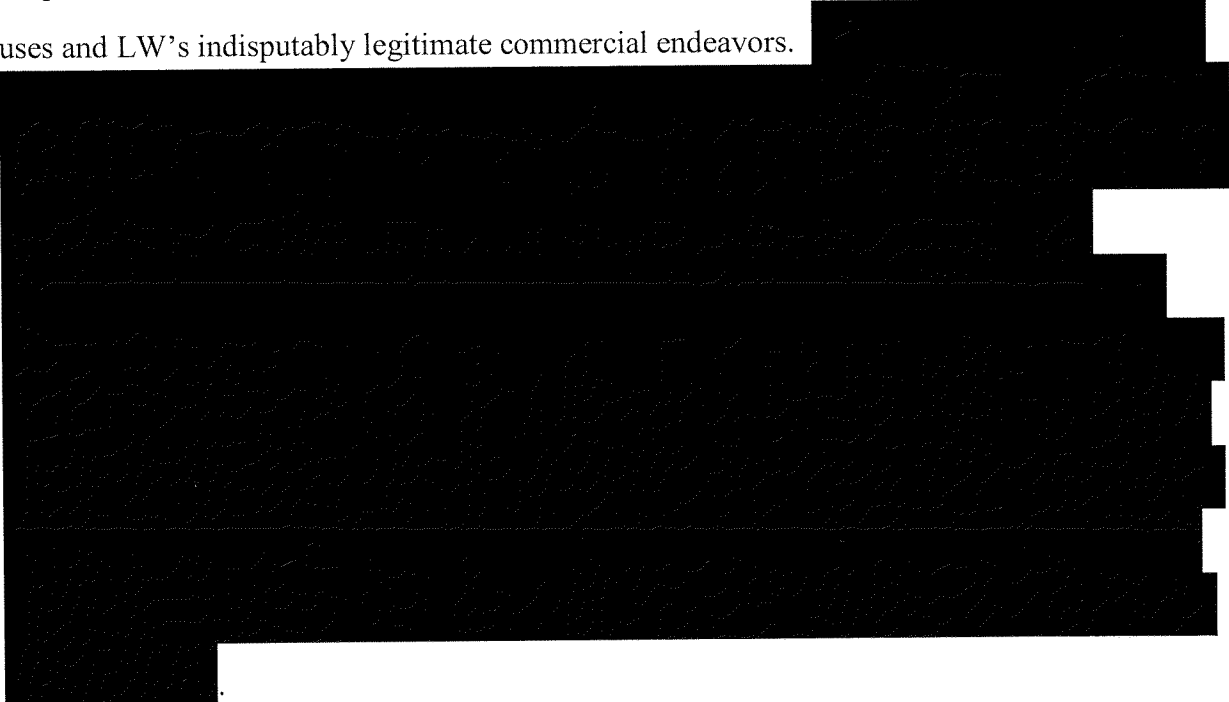
- 

- 
- Authors, artists, universities, the Obama administration, the United Nations, and governments across the globe have used Creative Commons³ licenses to permit further, royalty-free distribution of their copyrighted works. Ito Decl. ¶ 4. Many musicians using Creative Commons licenses have distributed their works freely online and through music sharing websites, e.g., ccMixter.org, Jamendo.com, IndabaMusic.com, Magnatune.com, Simuze.nl, BeatPick.com, CASHMusic.org, SectionZ.com, Opsound.org, PodsafeAudio.com, and AudioFarm.com. *Id.* ¶ 5. For instance, Nine Inch Nails distributed its album “The Slip” for free under a Creative Commons license which allowed anyone downloading the work to further distribute it, and numerous tracks from “The Slip” are available through use of the LimeWire software. Mendonca Decl. ¶ 5.

² Although the Court declined to decide on the record before it whether the LimeWire software is, as a matter of law, capable of “substantial non-infringing uses” within the meaning of the *Sony-Betamax* rule, (Order at 46), it cannot be disputed that the software can be used for many noninfringing purposes. See *Grokster*, 545 U.S. at 954.

³ Creative Commons is a nonprofit corporation dedicated to making it easier for people to share their own works and to build upon the work of others, consistent with rules of copyright. Ito Decl. ¶ 2.

- To encourage attendance at concerts and gain publicity, a growing number of artists approve the distribution of their live performances over P2P networks. *See id.* ¶¶ 7, 8.
- Entities that wish to more broadly distribute public domain literary works or films also find P2P networks a useful means of distribution. *See* Kahle Decl. ¶ 13; Newby Decl. ¶ 12. For example, Project Gutenberg, the oldest information provider on the Internet, archives and makes available public domain written works. *See* Newby ¶¶ 3-4. As the volunteer CEO of Project Gutenberg observed, any technology, such as P2P networks, that makes it easier and less expensive for individuals to distribute public domain works over the Internet helps achieve Project Gutenberg's goal of making public domain information freely available. *Id.* ¶¶ 11. Public domain works including *The Hound of the Baskervilles*, *Macbeth*, and *Adventures of Huckleberry Finn* are available using the LimeWire software. Mendonca Decl. ¶ 3. Similarly, the Internet Archive now makes available, among other things, almost 2,000 public domain films. Kahle Decl. ¶ 7.
- The Oyez Project (<http://www.oyez.org>) makes a wide variety of written, audio, and audiovisual content relating to the Supreme Court available pursuant to a Creative Commons license permitting the sharing of that content, including by P2P technology. Mendonca Decl. ¶ 10.

The injunction sought by Plaintiffs, which would ban Defendants from distributing the LimeWire software until some indeterminate time after Plaintiffs and the Court approved it (*see* Proposed Order at 12), would frustrate use of the software for these undeniably noninfringing uses and LW's indisputably legitimate commercial endeavors.



[REDACTED]

D. Harm to Public Interest Caused by the Permanent Injunction Sought by Plaintiffs

The injunction sought by Plaintiffs would be harmful to the public interest in a variety of ways. Two are particularly noteworthy. *First*, the immediate ban on distribution of the LimeWire software that Plaintiffs seek would stifle the public's noninfringing uses of the

technology, which fall within the core protections of the First Amendment. That would extend the rights granted to Plaintiffs by virtue of their copyrights well beyond their legitimate scope.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. PROCEDURAL BACKGROUND

A. The Court's Decision to Postpone Adjudication of All but Thirty Works

The Court's decision to limit the initial liability determination to a small number of works was announced at a hearing on December 7, 2007. At the time, the parties disputed the scope of the ownership documents that Plaintiffs were required to produce in discovery. Instead of resolving the issue directly, the Court decided to sever the claims of a small number of works and to postpone for another day ownership discovery and issues relating to alleged infringement of any works beyond thirty. 12/7/07 Hrg. Tr. at 3-4. Plaintiffs provided the list of thirty works to Defendants in a letter dated January 31, 2008, indicating that the thirty were those for which "plaintiffs, pursuant to the Court's ruling during the December 7 hearing, have provided discovery regarding ownership." Klaus Decl., Ex. 12. Plaintiffs, therefore, cannot seriously dispute that their purported ownership of works beyond the thirty remains to be determined in the case. Nor have any other work-specific issues been adjudicated for any of the remaining works, such as whether the works were directly infringed using the LimeWire software or whether use of the works was authorized. *See* 12/7/07 Hrg. Tr. at 3-4, 10-11; *see* Order.

B. The Court's Summary Judgment Ruling

The Court's ruling on the parties' cross motions for summary judgment makes clear that adjudication of ownership, authorization, and direct infringement is limited to the thirty works. *See, e.g.*, Order at 5.

On May 26, 2010, Defendants filed two motions for reconsideration of the Court's Summary Judgment Opinion and Order. One addresses the sufficiency of Plaintiffs' purported evidence of direct infringement and the Court's improper inferences in Plaintiffs' favor. (Docket No. 226). The other addresses the finding of infringement liability against Defendants LG and Mark Gorton, on the grounds that the Court failed to apply applicable law and improperly drew inferences in Plaintiffs' favor. (Docket No. 228). Both motions are currently pending.⁴

⁴ Defendants' Motions for Reconsideration are incorporated herein by reference. If the Court grants these, there will be no basis for any permanent injunction, even as to the thirty works.

IV. ARGUMENT

A. The Court's Summary Judgment Order as to Thirty Works Does Not Justify the Permanent Injunction Sought by Plaintiffs

A permanent injunction requires a showing of actual success on the underlying merits rather than speculative future harm. *See Amoco*, 480 U.S. at 546 n.12; *Omicron Capital, LLC v. Omicron Capital, LLC*, 433 F. Supp. 2d 382, 394 (S.D.N.Y. 2006). Indeed, in each of the cases on which Plaintiffs rely, *e.g.*, *Grokster*, *Fung*, and *Usenet*, permanent injunctions were issued only after full adjudication on the merits.⁵

Here, it is undisputed that there has been a finding of inducement as to *at most* thirty works. 12/7/07 Tr. at 10:20-21. As to the remaining works, there are merely allegations of infringement with no proof of the fundamental elements of infringement, *e.g.*, ownership, authorization, and direct infringement. Indeed, Plaintiffs admit they have not even provided discovery supporting their claims of ownership and direct infringement with respect to any works beyond the thirty. *See* 6/7/10 Hrg. Tr. at 3:12-15. Accordingly, Plaintiffs have not demonstrated a likelihood of success – much less *actual* success – as to anything but the thirty works. Plaintiffs' desire to prove additional works in the future is an insufficient basis on which to enter a permanent injunction with respect to those works, since there has been no actual adjudication (or even discovery). *See, e.g., Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185, 192 (D. Me. 2006) (limiting injunctive relief to only those works plaintiffs established were actually infringed).

B. Plaintiffs Have Not Proven They Are Entitled to an Injunction under *eBay*

1. Legal Standard

“The grant of injunctive relief is an extraordinary remedy.” *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 84 (2d Cir. 2004) (citing numerous copyright cases where alleged injury did not merit extraordinary relief). Plaintiffs must establish that they are entitled to a

⁵ Plaintiffs also rely on *Aimster* and *Napster* and claim that courts can enjoin defendants even in the absence of any final adjudication of liability. Mot. at 8 n.3. But in those cases, the courts issued only preliminary injunctions. It is far too late in this litigation for the Plaintiffs to seek preliminary injunctive relief. *Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir. 1985) (waiting seven months to file preliminary injunction precluded interim relief).

permanent injunction of the nature and scope they seek. 17 U.S.C. § 502(a) (empowering district court to grant injunctions only on terms that “it may deem reasonable to prevent or restrain infringement.”); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392 (2006); *Hypoxico Inc. v. Colorado Altitude Training*, 630 F. Supp. 2d 319, 325 (S.D.N.Y. 2009). A plaintiff seeking a permanent injunction must demonstrate that it has suffered irreparable harm; remedies at law are inadequate; the balance of hardships warrants a remedy in equity; and the public interest would not be disserved by a permanent injunction. *eBay*, 547 U.S. at 391.

2. Plaintiffs Have Not Demonstrated Any Risk of Irreparable Harm, and There Is an Adequate Remedy at Law as to the Thirty Works⁶

a. Plaintiffs Have Not Proven the “Staggering” Damages They Claim

There is no evidence of irreparable injury as to the thirty works. Irreparable injury does not exist where damages adequately compensate the harm suffered. *Salinger v. Colting*, ___ F.3d ___, No. 09-2878-cv, 2010 WL 1729126, at *9 (2d Cir. Apr. 30, 2010). Plaintiffs effectively concede that Defendants would be able to satisfy a judgment of actual or statutory damages as to the thirty works. *See* Mot. at 11.

To bolster their claim of “irreparable injury,” Plaintiffs assert that there are 6,000+ works at issue and that LW cannot possibly satisfy a judgment as to these works. But the operative Complaint identifies only 3189 works, and no other works are currently at issue. *See* First Amended Compl. [Docket No. 45] (attaching Exhibits A and B listing 3189 works); 12/7/07 Hrg. Tr. at 26 (declining to rule on Plaintiffs’ request to add additional works: “We are not going to add that at this point.”). Even if there were thousands of additional works at issue, Plaintiffs have established liability for *only* thirty works. *See* 6/7/10 Hrg. Tr. at 3:12-15.

In addition to speculating that they will be able to show infringement of thousands of works, Plaintiffs also speculate that they will win an award of *maximum* statutory damages as a result of Defendants’ alleged willfulness. But Plaintiffs have not and cannot prove willfulness.

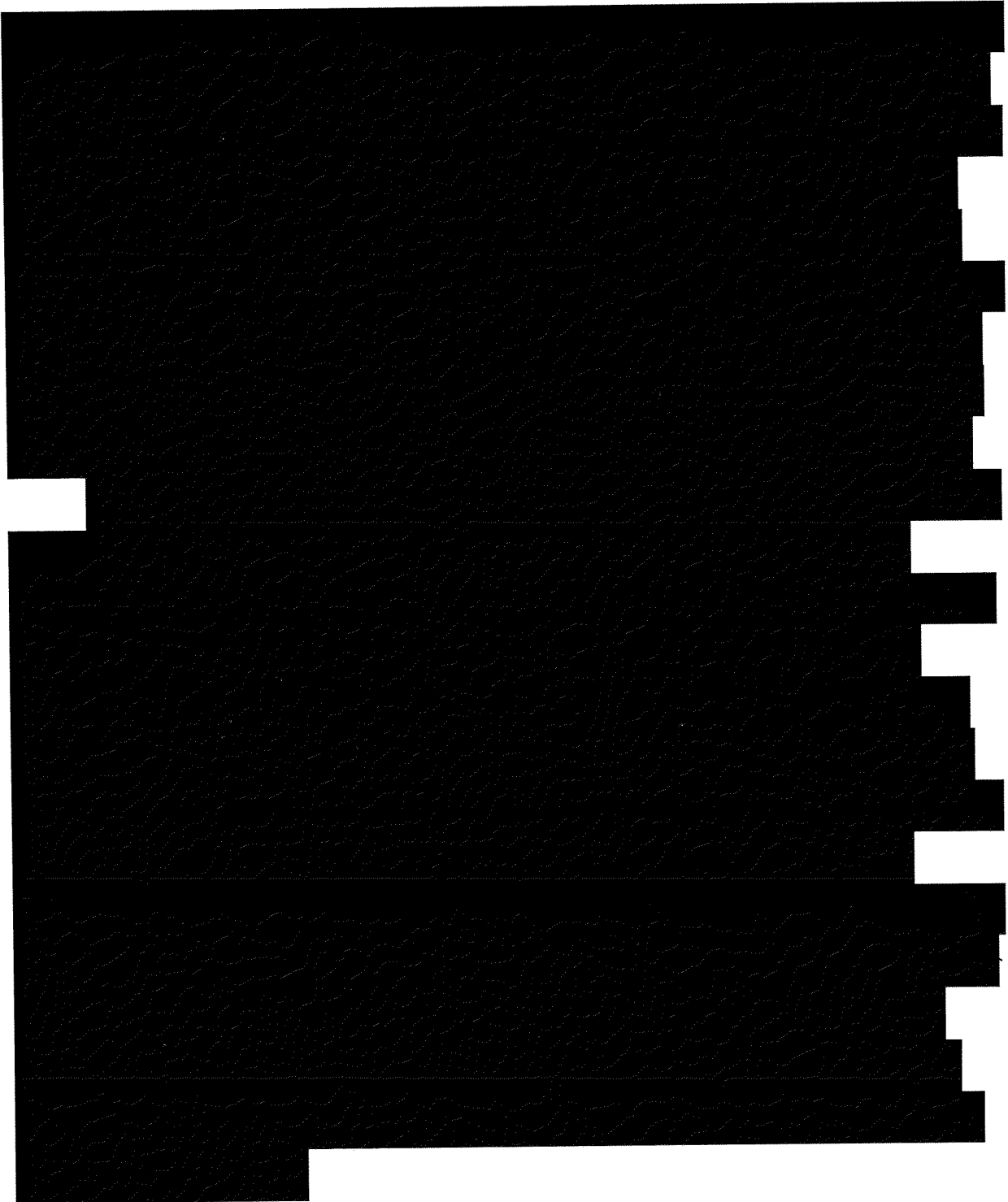
⁶ Because courts have repeatedly stated that the analysis associated with the first and second *eBay* factors overlaps, Defendants discuss them together. *See, e.g., Northwestern Nat’l Ins. Co. of Milwaukee, Wis. v. Alberts*, 937 F.2d 77, 80 (2d Cir. 1991).

Between its inception in 2000 and June of 2005 – the period during which most of the conduct the Court found to constitute inducement occurred – Defendants reasonably believed that their activities did not constitute copyright infringement.⁷ Because Defendants believed based on existing law that their actions were entirely legal, there can be no finding of willfulness. *See, e.g., Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (where law is unsettled, belief that actions do not constitute infringement is reasonable and not willful).

Further, even if Defendants were found liable for willful infringement, Plaintiffs' claim that Defendants will "almost certainly . . . be liable" for statutory damages in the "upward limit" is merely a reflection of their own wishful thinking. Mot. at 10. Indeed, in *Usenet*, a case Plaintiffs rely upon heavily, the court recommended statutory damages in the amount of \$7,500 per work, far below the maximum potential award, even where defendants' conduct was "nothing short of egregious." *Arista Records LLC v. Usenet.com, Inc.*, No. 07 Civ. 8822 (HB) (THK), slip op. at 14, 18 (S.D.N.Y. Feb. 2, 2010) (Mendonca Decl., Ex. A).

Permanent injunctions should not issue in the absence of "a threat of continuing violations." *See Masterfile Corp. v. Country Cycling & Hiking Tours by Brooks, Inc.*, No. 06 Civ. 6363 (SAS) (FM), 2008 WL 313958, at *5 (S.D.N.Y. Feb. 4, 2008); *see also Caffey v. Cook*, 409 F. Supp. 2d 484, 510 (S.D.N.Y. 2006) (denying permanent injunction as overbroad in absence of evidence of continuing threat of infringement).

⁷ For years, the *Grokster* courts supported the view that defendants could not be held secondarily liable for any copyright infringement by users of their software. In 2003, the Central District of California granted summary judgment in favor of the *Grokster* defendants. *MGM v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003). The Ninth Circuit Court of Appeals affirmed that decision on August 19, 2004. *MGM v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004). It was not until mid-2005 that the Supreme Court held that the *Grokster* defendants might be liable on a theory of inducement that had not previously been applied in the context of secondary copyright liability, and not until late 2006 that summary judgment was entered in favor of the *Grokster* plaintiffs.



Finally, Plaintiffs claim that they have suffered irreparable harm because LW is allegedly poisoning “generations of potential purchasers” who instead of paying for music have become accustomed to downloading their music for free. Mot. at 12. But Plaintiffs have been making

that same argument *for years*. See, e.g., *Napster I*, 239 F.3d at 1017. Whatever users' expectations regarding the availability of copyrighted music, those expectations arose long before any widespread use of LimeWire software.

3. The Public Interest Would Be Disserved by the Entry of the Permanent Injunction Sought by Plaintiffs

If Plaintiffs' proposed order were entered, Defendants would have to: (1) immediately cease distribution, (2) "exhaustively prevent" infringement of an unknown set of works, (3) shut down their website, (4) stop advertising, (5) abdicate control of the release of new versions of LimeWire software to Plaintiffs, (6) control unrelated third parties' use of Gnutella-compatible software, (7) take actions with respect to legacy software [REDACTED], and (9) be enjoined from conduct for which they have never been held liable, among other things.

This overbroad injunction would impede LW's noninfringing uses, including the dissemination of public domain works, the authorized reproduction of works, the promotion of independent artists through Creative Commons, [REDACTED]. See [REDACTED]. *See supra* at II.B. Here, Plaintiffs' proposed injunction would stifle not only LW's speech interests but also the speech of [REDACTED], independent artists, and [REDACTED]. Nothing in the Copyright Act allows a copyright holder's monopoly to extend so broadly. See *Grokster*, 518 F. Supp. at 1232 ("There is a distinction between forbidding distribution of a technology capable of substantial noninfringing uses and simply requiring sufficient efforts to minimize the prospective infringement that would otherwise be induced through the staple's distribution.").

[REDACTED]

[REDACTED]

4. The Balance of Equities Weighs Against Entry of the Injunction Sought by Plaintiffs

If entered, the injunction sought by Plaintiffs would quite possibly wipe out LW and all of its noninfringing uses. *See supra* at II.B; III.B.3. Given that there are only thirty works at issue, [REDACTED]

[REDACTED], the balance of equities weighs against entry of the injunction as requested by Plaintiffs.

[REDACTED]

Under these circumstances, the balance of equities simply does not justify the broad injunction sought by Plaintiffs. *See Grokster*, 518 F. Supp. 2d at 1220.

C. The Injunction Sought by Plaintiffs Is Impermissibly Vague, Overbroad, and Punitive

There are at least three fundamental requirements pertaining to the form and scope of injunctive relief. *First*, injunctions must be tailored to the proscribed harm and not impose unnecessary burdens on lawful activity. *See Grokster*, 518 F. Supp. 2d at 1226; *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 299-300 (2d Cir. 1999) (requiring district court to more narrowly tailor order to scope of injury); *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994). *Second*, “[p]unishment is not the purpose of an injunction”; an injunction must only address potential future harm. *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1549 (Fed. Cir. 1987) (declining to enjoin defendant as punishment for defendant’s purchase of infringing devices); *Patsy’s Italian Rest., Inc. v. Banas*, 575 F. Supp. 2d 427, 469 (E.D.N.Y. 2008)

(rejecting sections of plaintiff's proposed injunction which were punitive). *Third*, terms of the injunction must be specific and clearly delineate the enjoined conduct. *See* Fed. R. Civ. P. 65(d)(1)(B), (C) (injunction order must "state its terms specifically" and "describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required"). The Second Circuit has further clarified that this rule "is satisfied only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden [or required]." *Fonar Corp. v. Deccaidd Servs., Inc.*, 983 F.2d 427, 430 (2d Cir. 1993). "An unclear order provides insufficient notice to justify a sanction as harsh as contempt." *Id.* at 429. Plaintiffs' proposed injunction fails in numerous respects to comply with these requirements.

1. An Order Ceasing Distribution and Advertising Is Unprecedented and Unwarranted

a. Distribution

Plaintiffs demand that LW cease distribution and "certify that distribution . . . has stopped." *See* Proposed Order at 13 ¶ 5(a); *see also* 10 ¶ 2(b) (enjoining LW from "permitting . . . any User to use LimeWire System and Software"); 11 ¶ (2)(c) (enjoining LW from "supporting the operation of any computer server or website or distributing any software in any way related to the LimeWire System and Software"); 11 ¶ (c), 12 ¶ (e) (enjoining LW from "distributing any software in any way related to the LW System and Software" without approval from Plaintiffs). Plaintiffs cite no authority to support this request, and for good reason. Prior courts have considered and consistently rejected similar requests. *See, e.g., Grokster (remand)*, 518 F. Supp. 2d at 1236; *Napster I*, 239 F.3d at 1027.

As discussed in detail in *Grokster*, banning distribution of a technology with noninfringing uses goes far beyond the rights granted to copyright holders: "Were this court to hold that StreamCast could no longer distribute Morpheus in light of its inducement, such a ruling might grant rights to Plaintiffs beyond the limited monopoly permitted under the Copyright Act." *Id.* at 1231-32; *see also Mickowski v. Visi-Trak Corp.*, 36 F. Supp. 2d 171, 182 (S.D.N.Y. 1999) (denying proposed broad injunction against manufacture and sale of system

used to induce patent infringement because injunction would “impermissibly expand the scope of [plaintiff’s] patent monopoly by effectively granting [plaintiff] a monopoly over a product capable of noninfringing uses.”), *aff’d*, 230 F.3d 1379 (Fed. Cir. 2000).

[REDACTED]

. Searle Decl. ¶¶ 9-16; *Grokster*, 518 F. Supp. at 1236 (“[T]his Court also has doubts that an immediate shutdown order would most effectively stop further infringement.”).

Plaintiffs seek to prohibit distribution until Defendants develop a version of the LimeWire software that Plaintiffs have reviewed and approved, thereby gaining veto power and control over the functionality of future versions of LimeWire software. *See* Proposed Order at 12 ¶ (e). But Plaintiffs do not have any legitimate right to prior review and control of the development of LW’s technology. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984) (plaintiffs not entitled to exercise control over technology with noninfringing uses because that would “enlarge the scope of respondents’ statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection”).

b. Advertising

The proposed injunction would prohibit LW from “displaying, or permitting to be displayed any advertising in, through or by means of the LimeWire Software.” Proposed Order at 11 ¶ 2(d). Such a request was considered and rejected in *Grokster* because restricting advertising would have no effect on the amount of infringement. *Grokster (remand)*, 518 F. Supp. 2d at 1239. Here, too, advertisements do not affect the amount of claimed infringement; the number of users who could potentially infringe Plaintiffs’ copyrights is completely unrelated to the presence or absence of ads.

[REDACTED]

. Searle Decl. ¶¶ 5-8, 16. Thus, imposing a

restriction on advertising would be ineffective and improperly punitive. *Amstar Corp.*, 823 F.2d at 1549 (declining to enjoin defendant as punishment for purchase of infringing devices).

2. Plaintiffs' Proposed Injunction Fails Requirements of Proper Notice

To satisfy the notice requirement of Federal Rule of Civil Procedure 65, Defendants must be able to “ascertain from the four corners of the order precisely what acts are forbidden [or required].” *Fonar Corp.*, 983 F.2d at 430. Plaintiffs' Proposed Order fails that requirement in countless ways.

a. Definition of “Copyrighted Works”

The definition of “Copyrighted Works” must be limited to the thirty recordings on which Plaintiffs won summary judgment. *See* Klausner Decl., Ex. DD (list of the thirty works). Plaintiffs have not even provided discovery – much less proven entitlement to a permanent injunction – with respect to any other works. They, therefore, cannot properly expand the case from the thirty to some unidentified number of works which they claim is at least 200 times the number actually adjudicated.

Plaintiffs' proposed definition of “Copyrighted Works,” however, has no limitations at all and is vague and overbroad. *See* Proposed Order at 9 (““Copyrighted Works” means all copyrighted works (or portions thereof), whether now in existence or later created, in which any Plaintiff (including its parents, subsidiaries, affiliates, or distributed labels)⁸ owns or control an exclusive right under Section 106 of the United States Copyright Act (17 U.S.C. § 106), or under state or common law.”). The Second Circuit has rejected similarly vague definitions. *See Fonar Corp.*, 983 F.2d at 429 (vacating injunction order because “Maintenance Software” that was subject of injunction was never defined; rejecting plaintiff's argument that “defendants knew precisely what was prohibited, notwithstanding any vagueness in the restraining order” because specificity is required not only to provide notice but also to “facilitate appellate review”).

⁸ Plaintiffs do not have standing to sue as to copyrights owned by “parent[s]”, “subsidiar[ies]”, or “affiliate[s].” *Big E. Entm't, Inc. v. Zomba Enters., Inc.*, 453 F. Supp. 2d 788, 797-98, 800 (S.D.N.Y. 2006), *aff'd*, 259 Fed. Appx. 413 (2d Cir. 2008); *see also* William F. Patry, 6 PATRY ON COPYRIGHT § 21:7 (2010).

The Plaintiffs' proposed definition of "Copyrighted Works" suffers from an additional defect. If, after trial on the merits the Court were to determine that Plaintiffs were entitled to relief on additional works, the definition would place on Defendants the impossible burden of identifying every work the Plaintiffs might claim to own, under any existing law. Case after case, however, has placed the burden of identifying works subject to an injunction on plaintiffs. In *Napster*, for example, the Ninth Circuit ordered a notification procedure when the district court had initially placed the entire burden of identifying and locating copyrighted works on the defendant. *See Napster I*, 239 F.3d at 1027; *A&M Records, Inc. v. Napster, Inc.*, Nos. C 99-05183 MHP, 00-1369 MHP, 2001 WL 227083, at *1 (N.D. Cal. Mar. 5, 2001) (on remand, requiring plaintiffs to identify title of work, artist name, names of files containing such works, and certification that plaintiffs own such work), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

Subsequent file-sharing cases have similarly imposed notice requirements. For example, *Grokster* recognized that a notification procedure was "necessary to ensure that StreamCast will not be unfairly penalized for the architecture of its staple commodity": "[B]y requiring Plaintiffs to provide StreamCast with some notice before the latter's filtering responsibilities for a given copyright are triggered, there will be no threat of contempt proceedings simply because StreamCast failed for a time to filter certain files containing recently released . . . or hardly known copyrighted material." *Grokster (remand)*, 518 F. Supp. 2d at 1238. Contrary to Plaintiffs' claim (Mot. at 21), Judge Wilson's injunction order in *Fung* also incorporates a notice component. *See* Klaus Decl., Ex. 2 at 12 (defining "Copyrighted Works" as those which plaintiffs had identified).

Plaintiffs argue that a notification procedure is improper because the Ninth Circuit in *Napster* supposedly limited the requirement to the context of a substantial noninfringing use analysis applicable only to contributory infringement claims. Mot. at 20. Thus, Plaintiffs argue that the *Napster* court's concern with inhibiting noninfringing uses should not deter this Court from placing the entire burden of compliance on LW. *Id.* at 20-21. However, on remand in

Grokster, Judge Wilson rejected that argument, reasoning that nothing in the Supreme Court's *Grokster* decision overruled the notice requirement imposed by the Ninth Circuit in *Napster*. *Grokster (remand)*, 518 F. Supp. 2d at 1237 ("It must be recognized that the Supreme Court did not reach, or even comment on, the proper scope of an injunctive remedy."). Moreover, Plaintiffs' further argument that, in a subsequent case, the *Napster* lower court overruled the Ninth Circuit's notice requirement is flat out wrong. Mot. at 20-21. In truth, the subsequent decision was a case addressing notice required to pursue damages; the district court repeatedly distinguished between what can be remedied through damages and what is subject to an injunction, noting that "an injunction . . . may be narrower than the outer limits of Napster's liability" See *In re Napster, Inc. Copyright Litig.*, No. C 04-2121 MHP, 2006 U.S. Dist. LEXIS 30338, at *22-23, *25 (N.D. Cal. May 17, 2006).

b. Works Protected "Under State or Common Law"

Plaintiffs' definition of Copyrighted Works also includes all works "under state or common law." Such language is vague and overbroad. Plaintiffs never specify what state or common law it is referencing, much less what conduct such state or common law can enjoin. Once again, *Grokster* rejected similar language as overbroad. 518 F. Supp. at 1229 ("The 'state or common law' clause must be struck."); see also *N.L.R.B. v. Express Publ'g Co.*, 312 U.S. 426, 435-36 (1941) ("the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.").

c. Filtering Technology

Plaintiffs seek to require Defendants to implement the "most effective available means" of content-recognition filtering to "exhaustively prevent" users from infringing. Proposed Order at 9 ¶ (j) and (k). They also seek to require LW to "use all technologically possible means" to cease current infringement, *id.* at 11 ¶ (3), and "all reasonable lawful means" to persuade Legacy

Users to upgrade. *Id.* at 12 ¶ (f). The Second Circuit has found similar language to lack the specificity required under Rule 65. *Howard Opera House Assocs. v. Urban Outfitters, Inc.*, 322 F.3d 125, 129-30 (2d Cir. 2003) (injunction prohibiting defendant from making noise that “substantially and unreasonably interferes with other tenants” or “unreasonably disturb[s] other tenants” lacks reasonable detail); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 50 (2d Cir. 1996) (injunction requiring defendant to “take all other reasonably needful actions to facilitate plaintiffs’ resumption of their management authority” fails specificity requirements).

Even if “exhaustively preventing” were not vague, the *Grokster* court previously ruled that to “exhaustively” prevent infringement is impossible and cannot be ordered. *See Grokster (remand)*, 518 F. Supp. 2d at 1235-36 (“Based on the current record, a permanent injunction requiring StreamCast to institute a perfect filter is not technologically feasible, and would be equivalent to a ban.”); *see also* Pavley Decl. ¶ 50; Gribble Decl. ¶¶ 7-8.⁹

3. Plaintiffs’ Proposed Order Includes Systems and Conduct Over Which LW Has No Control

Plaintiffs define “Lime Wire” to include, *inter alia*, the directors, salespersons, independent contractors, distributors, corporations, parents, subsidiaries, affiliates, successors, and assigns of LW, LG, and Gorton. Proposed Order at 8. Plaintiffs, therefore, seek to make Defendants subject to penalty of contempt for the conduct of unidentified, independent actors, whom LW cannot possibly control. But Rule 65 defines limits on whom Plaintiffs can seek to bind: “The order [granting an injunction] binds *only* the following . . . : (A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)”. Fed. R. Civ. P. 65(d)(2) (emphasis added). Defendants therefore cannot be held liable for the actions of the numerous nonparties beyond their control included by Plaintiffs in their definition of “Lime

⁹



Wire.” Similarly, they cannot be held liable for the creation, distribution, operation, or use of commercial versions of Gnutella-compatible software not authorized by LW, including “FrostWire, “MP3 Rocket,” “Lionshare,” “Cabos,” “Acglite,” “Muwire,” and “Sprint.” Proposed Order at 8 ¶ (e); Pavley Decl. ¶¶ 45, 47, 49, 51; Gribble Decl. ¶¶ 21-22. Nor should they be held liable for the unknown number of Gnutella-compatible software developed by academic institutions.¹⁰ *Id.*

[REDACTED]

Plaintiffs’ proposed injunction requires LW to take various actions [REDACTED]

[REDACTED]

5. Plaintiffs’ Proposed Order Is Vague, General, and Extends Beyond Conduct the Court Found to Constitute Wrongful Inducement

Plaintiffs’ Proposed Injunction seeks to enjoin conduct wholly separate from the inducing acts that were the subject of the Court’s summary judgment order. For example, Defendants would be enjoined from “communicating to the public, uploading, linking to, transmitting, publicly performing or otherwise exploiting” any of the Copyrighted Works. Proposed Order at 10. Yet, Defendants were found liable only for inducement stemming from distributing and

¹⁰ [REDACTED]

maintaining LW software. *See* Order at 29. Because the Court did not find Defendants liable for direct, contributory, or vicarious infringement, it is inappropriate to issue an injunction barring them from violating the Copyright Act in any other manner. *See Grokster*, 518 F. Supp. 2d at 1228 (“[I]nducement is the only form of liability that is relevant to the permanent injunction. Under the circumstances of this case, it would be inappropriate to issue an injunction in which StreamCast would be barred from violating the Copyright Act in any other manner.”).

Even where Plaintiffs’ proposed injunction purports to address inducement, it relies on mere buzzwords, including “enabling, facilitating, permitting, assisting, soliciting, encouraging or inducing.” Proposed Order at 10; *see Grokster*, 518 F. Supp. 2d at 1228 n.24 (stating that such “buzzwords” do not constitute sufficient notice). Such vague terms “engender chaos” and are thus prohibited. *Id.* Instead, the injunction must identify “sufficiently specific actions that qualify as relevant to a finding of inducement.” *Id.* Plaintiffs’ proposed injunction falls short of this standard. Instead of defining specific, enjoined conduct, it seeks to capture all aspects of LW’s business, leaving LW to guess whether there remains anything LW *can* do.

In addition, many portions of Plaintiffs’ proposed order are simply incomprehensible, and it would be impossible for LW to ensure compliance with such opaque terms. For example, LW would be prohibited from “directly or indirectly” “assisting in or supporting the operation” of any computer server or website or distributing software “in any way related to the LimeWire System and Software.” Proposed Order at 11 ¶ (c). The sentence, by itself, is overbroad and unintelligible.

[REDACTED]

Courts have refused to enter such murky and far-reaching injunctions. *See Grokster (remand)*, 518 F. Supp. 2d at 1228 n.24.

D. Plaintiffs' Copyrights Misuse Bars Their Requested Relief

There exists an additional, independent reason the Court should deny Plaintiffs' Motion.

Plaintiffs are not entitled to injunctive relief at this time because their request is barred by

[REDACTED]

. See, e.g., *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 794 (5th Cir. 1999) (plaintiff's abusive licensing practices precluded injunctive relief).¹¹

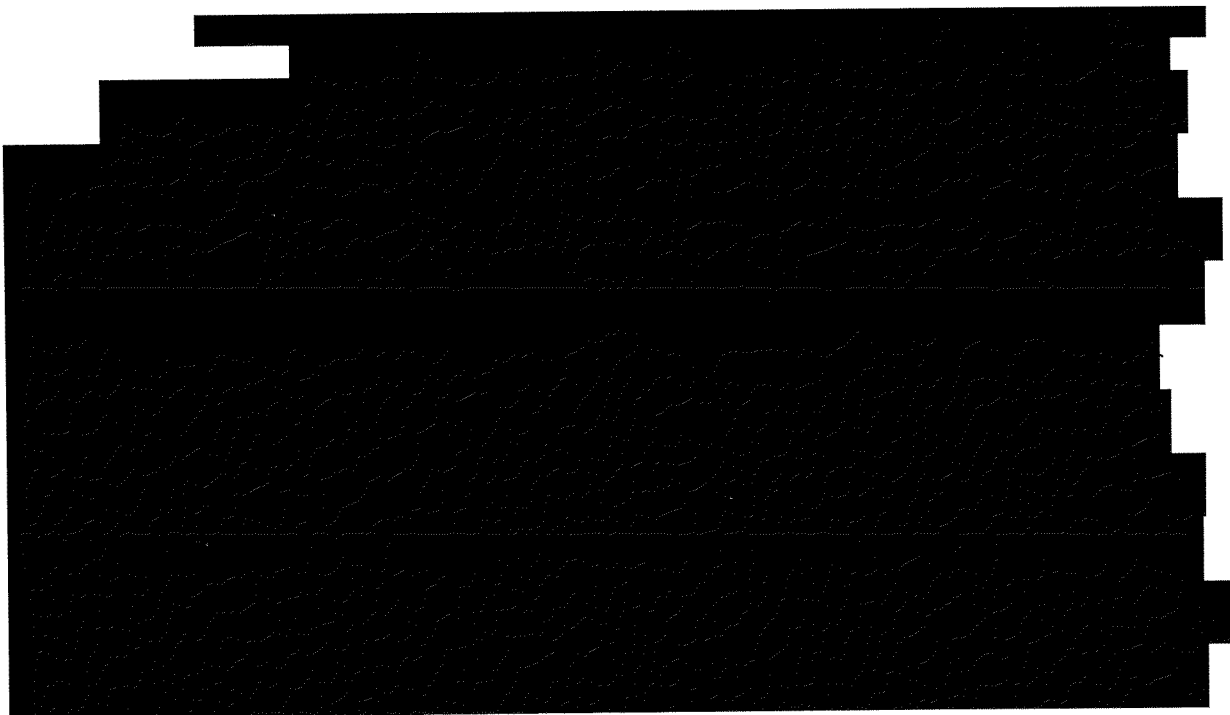
1. A Copyright May Not Be Used to Secure Control Over Subject Matter Outside the Scope of the Copyright

Copyright misuse is a defense to a claim of copyright infringement, which precludes relief, even where the defendant is liable for infringement. See, e.g., *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 204-05 (3d Cir. 2003); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 971, 977-79 (4th Cir. 1990). The misuse doctrine is based on the notion that public policy forbids use of the limited copyright monopoly "to secure an exclusive right or limited monopoly not granted by the [Copyright] Office." *Lasercomb*, 911 F.2d at 977. Thus, a copyright holder is guilty of misuse when it uses its copyrights to extend its control beyond dominion over its copyrighted, original expression. *Id.*; *Practice Mgmt.*, 121 F.3d at 521; *PRC Realty Sys., Inc. v.*

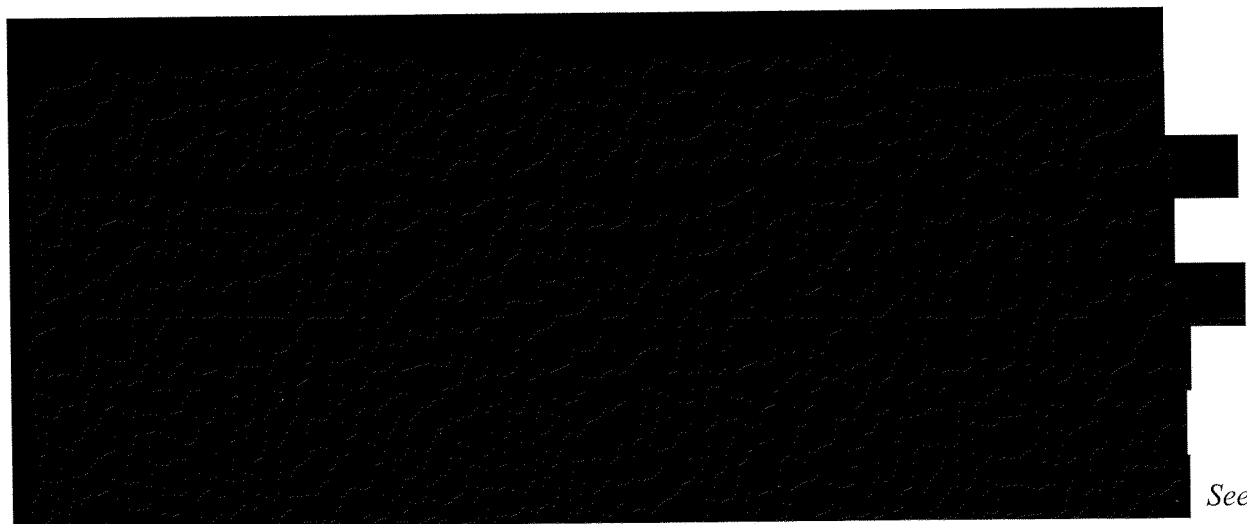
¹¹ See also *Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs.*, 746 F. Supp. 320, 328 (S.D.N.Y. 1990); cf. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942); *CBS v. Am. Soc'y of Composers, Authors & Publishers*, 562 F.2d 130, 141 (2d Cir. 1977); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311-13 (2d Cir. 1966). Defendants asserted copyright misuse as a defense in their answer (see Docket No. 5), conducted discovery regarding the defense (Klausner Decl., ¶ 2), and Plaintiffs never moved to strike or otherwise dismiss the defense. Thus, although Judge Lynch denied additional depositions on this topic (see Docket No. 70), the defense remains in the case. *Stillman v. Travelers Ins. Co.*, 88 F.3d 911, 913-14 (11th Cir. 1996) (affirmative defenses not addressed in successful motion for summary judgment remain to be decided in case).

Nat'l Ass'n of Realtors, Nos. 91-1125, 91-1143, 1992 WL 183682, at *11-12 (4th Cir. Aug. 4, 1992).

A copyright holder engaged in misuse is precluded from obtaining injunctive or monetary relief in connection with infringement of the copyright during the period of misuse. *See, e.g., Lasercomb*, 911 F.2d at 971; *PRC Realty*, 1992 WL 183682, at *12. This is so even where the alleged infringer has not been injured by the misuse and is not a party to the abusive licensing agreement. *Lasercomb*, 911 F.2d at 979. A finding of misuse does not invalidate the copyright; rather, it forever bars recovery of monetary damages in connection with infringement that took place during the period of misuse, and it precludes equitable relief from infringement until the misuse has ceased and the effects of the misuse have been purged. *See id.* at 979 n.22; *cf., Ansul, Co. v. Uniroyal, Inc.*, 448 F.2d 872, 881-82 (2d Cir. 1971) (patent misuse barred claim where restrictive conduct and its effects continued during period of infringement).¹²



¹² Because Plaintiffs have not supplemented their production with current license agreements, Defendants have no ability to determine whether [REDACTED] described below continue today. Accordingly, in conjunction with the present motion, Defendants respectfully request a supplemental production from Plaintiffs of all current license agreements for Plaintiffs' digital copyrighted works. *See MercExchange, LLC v. eBay Inc.*, 467 F. Supp. 2d 608, 611-12 (E.D. Va. 2006) (permitting updated discovery in connection with injunction motion).



Lasercomb, 911 F.2d at 978 (misuse found where plaintiff's licensing practice precluded others from implementing ideas, which are not protected by copyright; copyright only grants control over expression of ideas). To be clear, Plaintiffs have the right to prohibit their licensees from sublicensing Plaintiffs' copyrights to named third-parties, but cannot extend this right to control who their licensees do business with, which diminishes competition and development of independent ideas. *See, e.g., PRC Realty*, 1992 WL 183682, at *12.¹³

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion and decline to enter an injunction at this time. If the Court is inclined to issue an injunction, Defendants respectfully request that the Court reject the vague and overbroad injunction proposed by Plaintiffs. *See* Klausner Decl., Ex. 1.

Dated: June 21, 2010
New York, New York

By: /s/ Michael S. Sommer
Michael S. Sommer

WILSON SONSINI GOODRICH & ROSATI, P.C.

*Attorneys for Defendants Lime Wire LLC,
Lime Group LLC, and Mark Gorton*

¹³ Plaintiffs also misuse their copyrights through their purposeful mis-identification of their rights with the Copyright Office as ownership by way of "work for hire" rather than by "assignment." Due to the limited space available to address the issue of misuse, Defendants will not fully advance this theory of misuse at this time, but specifically reserve the right to raise it in connection with the damages phase of this case.