

**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

**DEFENDANTS LIME WIRE LLC, LIME GROUP LLC, AND MARK GORTON'S  
REPLY MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER THE  
COURT'S MAY 11, 2010 ORDER AS AMENDED ON MAY 25, 2010**

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, and Mark Gorton*

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A. The Hard Drives and “Electronic Evidence” Are Not Evidence of Direct Infringement.....	1
B. The Hash Analysis is Not Evidence of Direct Infringement .....	5
C. Dr. Waterman’s Analysis is Not Evidence of Direct Infringement .....	7
D. Default and Consent Judgments Are Not Evidence of Direct Infringement .....	8
III. CONCLUSION.....	10

## TABLE OF AUTHORITIES

### Page

### CASES

<i>Abrams v. Interco Inc.</i> , 719 F.2d 23 (2d. Cir. 1983).....	10
<i>Ali v. Mukasey</i> , 529 F.3d 478 (2d Cir. 2008).....	9
<i>Arista Records, Inc. v. Mp3Board, Inc.</i> , No. 00-4660, 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002).....	3, 7, 8
<i>Arista Records, LLC v. Usenet.com, Inc.</i> , 633 F. Supp. 2d 124 (S.D.N.Y.2009).....	4
<i>Atlantic Recording Corp. v. Brennan</i> , 534 F. Supp. 2d 278 (D. Conn. 2008).....	9
<i>Atlantic Recording Corp. v. Howell</i> , 554 F. Supp. 2d 976 (D. Ariz. 2008).....	2, 3, 5, 7
<i>Basic Books, Inc. v Kinko’s Graphics Corp.</i> , 758 F. Supp. 1522 (S.D.N.Y. 1991) .....	5
<i>Capitol Records, Inc. v. Thomas</i> , 579 F. Supp. 2d 1210 (D. Minn. 2008) .....	3
<i>Elektra Entm’t Group, Inc. v. Martin</i> , No. 07-0073-WS-B, 2007 WL 1975482 (S.D. Ala. July 2, 2007) .....	9
<i>Gallo v. Prudential Residential Servs.</i> , 22 F.3d 1219 (2d Cir. 1994).....	8
<i>Giannullo v. City of New York</i> , 322 F.3d 139 (2d Cir. 2003).....	1
<i>Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.</i> , 973 F.2d 155 (2d Cir. 1992).....	9
<i>In re Napster Copyright Litig.</i> , 377 F. Supp. 2d 796 (N.D. Cal. 2005).....	3, 5
<i>Jackson v. Bache</i> , 381 F. Supp. 71 (N.D. Cal. 1974) .....	10
<i>Jorgensen v. Epic/Sony Records</i> , 351 F.3d 46 (2d Cir. 2003).....	4
<i>Microsoft Corp. v. Rechanik</i> , 249 Fed. Appx. 476 (7th Cir. 2007) .....	4
<i>Olan Mills, Inc. v. Linn</i> , 23 F.3d 1345 (8th Cir. 1994).....	4
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979).....	10
<i>Prince Group, Inc. v. MTS Prods.</i> , 967 F. Supp. 121 (S.D.N.Y. 1997) .....	4
<i>Repp v. Webber</i> , 132 F.3d 882 (2d Cir. 1997).....	4
<i>Sony BMG Music Entm’t v. Lee</i> , No. CV 306-099, 2007 WL 1221313 (S.D. Ga. Apr. 23, 2007).....	9
<i>U2 Home Entm’t v. Fu Shun Wang</i> , 482 F. Supp. 2d. 314 (E.D.N.Y. 2007) .....	4

**TABLE OF AUTHORITIES**

**CASES**  
**(continued)**

	<b><u>Page(s)</u></b>
<i>United States v. DiPaolo</i> , 466 F. Supp. 2d 476 (S.D.N.Y. 2006).....	10
<i>United States v. Int’l Bldg. Co.</i> , 345 U.S. 502 (1953) .....	10
<i>Uzdavines v. Weeks Marine, Inc.</i> , 418 F.3d 138 (2d. Cir. 2005).....	10

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO  
RECONSIDER THE COURT'S MAY 11, 2010 ORDER  
AS AMENDED ON MAY 25, 2010**

**I. INTRODUCTION**

In their Motion for Reconsideration, Defendants demonstrated that Plaintiffs submitted no direct evidence of infringement, and the evidence Plaintiffs did submit of “availability” and “request” of files is insufficient. Plaintiffs’ *post hoc* efforts to recast the highly inferential and circumstantial evidence they submitted as actual evidence of direct infringement are futile. Accordingly, Defendants respectfully request that the Court reconsider its ruling concerning direct infringement, and upon reconsideration, deny Plaintiffs’ motion for summary judgment.

**II. ARGUMENT**

Plaintiffs’ failure to submit evidence establishing the most fundamental aspect of their summary judgment motion – evidence of direct infringement – requires denial of that motion. Although Plaintiffs repeatedly characterize the non-evidence they submitted as “uncontroverted,” whether or not the evidence is “controverted” is not the relevant issue. If the evidence itself is insufficient, summary judgment must be denied. *Giannullo v. City of New York*, 322 F.3d 139, 140-41 (2d Cir. 2003) (“[W]here the movant fail[s] to fulfill its initial burden of providing admissible evidence of the material facts entitling it to summary judgment, summary judgment must be denied, even if no opposing evidentiary matter is presented, for the non-movant is not required to rebut an insufficient showing.”) (citations and internal quotation marks omitted). The non-moving party is under no obligation to controvert evidence unless and until the moving party presents evidence sufficient to establish its claims. *Id.* That threshold was never reached here.

**A. The Hard Drives and “Electronic Evidence” Are Not Evidence of Direct Infringement**

Plaintiffs purported to rely on “packet capture” data to support their summary judgment motion, and the Court credited this data as supposedly demonstrating direct infringement by LimeWire users. Am. Order at 27. But as explained in our opening brief, Plaintiffs never provided any explanation as to what the data supposedly represent. In opposition, Plaintiffs

point to the declaration of Katherine Forrest and claim that it “describes precisely what this data is.” Opp. at 7. But that is false. The Forrest Declaration is an attorney declaration stating in one conclusory sentence that files called “Downloadlog.txt” and “RequestLog.txt” or “packet capture.txt” are found on hard drives submitted by Plaintiffs. *See* Decl. of Katherine Forrest, ¶ 4. Plaintiffs have submitted nothing showing that the “packet capture” data demonstrate even that files were “made available” by LimeWire users, much less how the files were obtained or their authorization status. In the absence of any such evidence, summary judgment must be denied. *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) (denying summary judgment where data from plaintiffs’ investigators was inconclusive).

Plaintiffs concede that the hard drives and “electronic evidence” they submitted show, at most, only that *their own investigators downloaded* files available on the computers of LimeWire users. Opp. at 8. Plaintiffs’ do not even argue – because they recognize that the record cannot support it -- that the Court’s broader ruling that “the Recordings were downloaded *by LimeWire users* without authorization” has been demonstrated. Am. Order at 27 (emphasis added).

In the absence of any evidence of downloading by LimeWire users, Plaintiffs instead argue that “uploading” a file could constitute infringement, such that there could be a direct infringement by the “uploaders” of files that Plaintiffs’ agents downloaded. Opp. at 9. However, this argument depends entirely on Plaintiffs’ startling and unsupported assertion that “a LimeWire user had to *upload*” a recording in order for its investigators to have downloaded it. *Id.* That is wrong: As Plaintiffs have admitted, the LimeWire software allows downloading of files that are *already available* on the hard drive of another user’s computer, without any necessity for anyone to have “uploaded” the files to anywhere else. Pltf. SUF 64, 77 (Plaintiffs’ admissions that LimeWire software allows users to make files “available”). Thus, users can simply make available for download by others files that already exist on their computer hard drives. “Making available” a copyrighted work is not an infringement, as the Court implicitly

recognized its Order (basing direct infringement finding on belief there was evidence in the record showing more than just “requests” and “availability” of files). Am. Order at 28.

The great weight of authority confirms that simply “making available” a copyrighted work is not a “distribution” of that work and is not an infringement. *In re Napster Copyright Litig.*, 377 F. Supp. 2d 796, 802-05 (N.D. Cal. 2005) (finding plaintiffs’ argument contrary to the “weight” of judicial authority, and the text and legislative history of the Copyright Act); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 981-84 (D. Minn. 2008); *Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008). Even where a Plaintiff’s investigator downloaded files from a P2P user’s computer, that alone is insufficient to show that the user distributed the files. *Howell*, 554 F. Supp. 2d at 985 (evidence of downloads by plaintiffs’ investigators insufficient to show direct infringement; denying Plaintiffs’ summary judgment motion); *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00-4660, 2002 WL 1997918, at \*3-4 (S.D.N.Y. Aug. 29, 2002) (investigators’ activity insufficient to show distribution, which requires copies to be disseminated “to the public”).<sup>1</sup>

Next, Plaintiffs assert that their own investigators’ downloads can themselves constitute the primary copyright infringement on which secondary liability can be premised – a specious position that has never been adopted by any court.<sup>2</sup> In all of the cases on which Plaintiffs purport to rely, the investigators’ activities occurred in tandem with allegedly infringing actions by *others* who were direct infringers. The investigators’ acts themselves were not held to infringe, but merely supported the finding of direct infringement by a third party. Those cases

---

<sup>1</sup> The court in *Thomas* assumed that a “distribution” could occur when Plaintiffs’ investigator downloaded files from a P2P user who made files available, but only where “Plaintiffs presented evidence that [the P2P user], herself, provided the copyrighted works for copying and placed them on a network specifically designed for easy, unauthorized copying.” *Thomas*, 579 F. Supp. at 1216. Plaintiffs here have submitted no evidence as to how the files at issue came to be “made available” (including whether LimeWire software was used as opposed to other P2P software), and the *Thomas* court’s reasoning that investigator-initiated “distributions” are necessarily unauthorized is not persuasive. *See infra* n.4.

<sup>2</sup> And, of course, it would strain the bounds of credulity for Plaintiffs to suggest that any conduct of Defendants somehow *induced* Plaintiffs’ own investigators to engage in direct infringement of works claimed to be owned by Plaintiffs themselves. If Plaintiffs direct their agents to download, that is *per se* not an inducement by Defendants.

are thus inapplicable here. For example, relying on the *Usenet* case, Plaintiffs argue that if an investigator downloaded a file that had been illegally uploaded by someone else, the investigator's download could be evidence of a separate act of infringement by the uploader (*i.e.*, copying the file through the upload). But, the technology at issue in *Usenet* is distinguishable because a download there could only occur after an upload of the relevant file to the defendant's web board. *See Arista Records LLC v. Usenet. com, Inc.*, 633 F. Supp. 2d 124, 132, 150 (S.D.N.Y. 2009) (citing, among other evidence of direct infringement, investigators' downloads from web board where files had been uploaded).<sup>3</sup> As set forth above, Plaintiffs have admitted that uploading is not necessary with LimeWire software – the LimeWire software allows for the downloading of files already existing on the computers of other users. Plaintiffs also cite *U2 Home Entm't v. Fu Shun Wang*, 482 F. Supp. 2d. 314 (E.D.N.Y. 2007), a case in which a default judgment was entered where Plaintiffs' investigators purchased bootleg DVDs from the defendant. There, the investigator's purchase was evidence of the defendant's distribution; it was not itself an infringement. *Id.*; *see also Microsoft Corp. v. Rechanik*, 249 Fed. Appx. 476 (7th Cir. 2007) (investigator's purchase showed defendant's distribution). In *Olan Mills*, the Plaintiff's investigators provided photos to the defendant, which the defendant then reproduced; again, the alleged infringement was the defendant's reproduction, not any activity by Plaintiffs. *Olan Mills, Inc. v. Linn*, 23 F.3d 1345 (8th Cir. 1994).

None of these cases hold that an act of copying performed by Plaintiffs' own agent at Plaintiffs' direction could constitute the primary infringement on which a claim of secondary liability could be based.<sup>4</sup> If that were so, plaintiffs could always manufacture a so-called "direct

---

<sup>3</sup> Plaintiffs' heavy reliance on *Usenet* is inapposite for additional reasons, including that the court issued a discovery sanction against the defendant pursuant to which the transmission of files from defendant's servers was deemed established. *Usenet*, 633 F. Supp. 2d at 132.

<sup>4</sup> Only "unauthorized" copying is infringement. *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003); *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) ("Copyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying."); *Prince Group, Inc. v. MTS Prods.*, 967 F. Supp. 121, 125 (S.D.N.Y. 1997) ("Plaintiff must also show unauthorized copying by Defendants."). Copying by Plaintiffs' own agents at Plaintiff's behest is not unauthorized.



infringement” of any software that can copy or distribute files by using the software to copy or distribute, and then claiming that the software vendor should be held secondarily liable for the plaintiffs’ own copying. The “direct infringement” requirement would disappear entirely. Plaintiffs’ position would improperly turn secondary liability into a free-floating tort untethered from actual infringement, with no requirement that they prove a real-world infringement -- only an authorized use by plaintiffs themselves. This is why secondary infringement requires a “direct infringement *by a third party.*” *Napster*, 377 F. Supp. 2d at 801 (emphasis added).

Thus, while Plaintiffs cite cases finding that a copyright owner did not authorize *others* to infringe by means of their investigators’ activities, it cannot be the case that the investigators’ *own actions* were unauthorized or constituted infringements.<sup>5</sup> Although Plaintiffs characterize the *Howell* case as finding Plaintiffs’ investigators’ actions to be unauthorized, Opp. at 10, the discussion they cite was actually addressing whether *the P2P user’s* purported distribution was unauthorized. *Howell*, 554 F. Supp. 2d at 985. Plaintiffs have no authority to back their absurd claim that their own agents’ and counsel’s authorized downloading activity infringed their copyrights and rendered Media Sentry and Cravath Swaine & Moore liable to Plaintiffs for infringement. Absent that predicate, there is no “primary infringer” under Plaintiffs’ theory: because Plaintiffs’ investigators could not be held liable for their copying at Plaintiffs’ direction, LimeWire cannot be derivatively liable for those same actions.

#### **B. The Hash Analysis is Not Evidence of Direct Infringement**

In its summary judgment ruling, the Court found that “[a] conclusive determination of whether a particular audio file was downloaded through LimeWire may be made through

---

<sup>5</sup> Even those cases finding direct infringement by third parties resulting from the activities of plaintiffs’ investigators are not necessarily correct, as a plaintiff who directs its agents to induce and actively participate in “infringing” transactions with third parties could easily cross the line into impliedly authorizing the third parties’ activity. *See, e.g., Basic Books, Inc. v Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1540 (S.D.N.Y. 1991) (estoppel arises where “plaintiff has aided the defendant in infringing or otherwise induced them to infringe or has committed covert acts such as ‘holding out ... by silence or inaction.’”), *citing* Nimmer on Copyright, § 13.07, at 13-134. But even assuming *arguendo* that the analysis is valid, it has no application to the investigator’s *own* acts of copying.

analysis of its ‘hash.’” Am. Order at 27 n.21. In our opening brief, we explained that this conclusion was erroneous. Plaintiffs do not try to defend this finding in their Opposition.

Instead, by mischaracterizing the declaration testimony of their own witnesses, Plaintiffs ask the Court to assume that it is overwhelmingly likely that files with the same hash values on the computers of two different users were directly copied “via LimeWire.” Opp. at 10. According to Plaintiffs, the probability of two files having the same hash value through any means other than copying the file using LimeWire software is purportedly one in “one quintillion.” *Id.* The purported evidence cited by Plaintiffs for this proposition, however, says nothing of the kind. In fact, the Sehested and Kempe declarations address only the probability that two files having the same hash value are not copies of each other. Sehested Decl. ¶ 5 & n.1; Kempe Decl. ¶ 6 & n.1. Those declarations never address what the probability is that the files were copied from one another *using LimeWire software* (as opposed to some other software). Nor do they address the probability that the files contain the same hash value because they were each independently acquired from the same source (such as iTunes). In other words, the evidence submitted by Plaintiffs shows that hash values are very good at showing whether two files are identical, but they show nothing about whether the files were transmitted using LimeWire software. Plaintiffs offer no additional evidence as to why sharing via LimeWire software is the only possible explanation for identical files being found on numerous computers, and have no response to Defendants’ argument that digital files can be transmitted in countless ways other than via LimeWire.

Finally, Plaintiffs claim that direct infringement liability exists “*irrespective* of whether LimeWire users lawfully acquired the sound recordings that they subsequently shared and downloaded through LimeWire.” Opp. at 11. But Plaintiffs offer no support for this proposition, and it lacks merit. Implicit in the argument is an assumption that the files were “shared and downloaded through LimeWire,” but that is exactly the factual predicate for which Plaintiffs have offered no proof. For example, if numerous computer users downloaded a legitimate file

from iTunes or Amazon, the identical file would be on numerous computers. Plaintiffs do not dispute this possibility, other than to claim with no evidentiary support that it is unlikely. On summary judgment, inferences must be drawn in the non-moving party's favor, which precludes a finding for Plaintiffs on this point. *See, e.g., Howell*, 554 F. Supp. 2d. at 986 (finding disputed issue of fact where evidence "did not conclusively indicate" infringement). Even if one believed that a high likelihood of infringement existed, that would not justify dispensing with the most basic requirements of proof or abandoning established summary judgment standards. *See Mp3Board, Inc.*, 2002 WL 1997918, at \*3 ("At the summary judgment stage, the record companies cannot rely solely upon circumstantial evidence and admissions by Mp3Board officers that it is statistically 'likely' that direct infringement occurred.").

### **C. Dr. Waterman's Analysis is Not Evidence of Direct Infringement**

Plaintiffs do not dispute that Dr. Waterman's analysis did not include any instances of transfers "executed" by the LimeWire software. Nor do they dispute that Dr. Waterman's analysis was solely directed to files *available* for download on the Gnutella network and *requested* for download over the Gnutella network by unidentified users using unidentified software. *Opp.* at 11. Nor do they seek to support the Court's erroneous ruling that "Dr. Waterman analyzed the rate at which sample files were requested for download *by LimeWire users*" or that "he estimated that the 98.8% files requested for download *through LimeWire* are copyright protected and not authorized for free distribution." *Am. Order* at 28 (emphasis added).

Instead, Plaintiffs argue that Dr. Waterman's analysis of *available* files and *requests* for files on the Gnutella network allowed him to "conclude" that "the vast majority of file transfers executed by the LimeWire client are for infringing files." *Opp.* at 11. The transformation of general data about files that may be available or requested over the Gnutella network into a "conclusion" about transfers that were *actually executed* using LimeWire software is unsupported by any explanation in his report, and is nothing more than sleight-of-hand. Plaintiffs point to nothing in Dr. Waterman's report that is actual evidence of direct

infringement, and instead ask the Court to draw the impermissible inference at this stage of the proceedings that it is statistically likely that direct infringement occurred using LimeWire. Opp. at 12. On summary judgment, such evidence is not sufficient. *Mp3Board, Inc.*, 2002 WL 1997918, at \*3; *see also Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1223 (2d Cir. 1994).

**D. Default and Consent Judgments Are Not Evidence of Direct Infringement**

Rather than pointing to any actual evidence of direct infringement, Plaintiffs assert that they obtained *default* and *consent* judgments of copyright infringement against LimeWire users.<sup>6</sup> Far from showing direct infringement, these uncontested judgments instead show that Plaintiffs have never actually litigated a direct infringement case against a LimeWire user. Plaintiffs do not point to any factual evidence of infringement adduced from the defendants in these actions, presumably because there was none: the lawsuits ended when the defendant either failed to respond or stipulated to Plaintiffs' demands without discovery or trial. Plaintiffs argue that the default judgments themselves show that direct infringement was "admitted" by the defendants in those actions.<sup>7</sup> Opp. at 13. However, the cases cited by Plaintiffs for the proposition that a default operates as an "admission" are taken out of context and do not support their effort to use the default judgments to show direct infringement in this action against different defendants.

For purposes of the entry of default judgment, a defaulting party is deemed to have admitted the well-pleaded allegations of the complaint regarding liability, but not damages.

---

<sup>6</sup> In many cases, the judgments relied on by Plaintiffs have nothing linking them to LimeWire use; often the complaints averred only that the defendant used an "online media distribution system", with no mention of LimeWire. *See, e.g.*, Declaration of Colleen Bal in Support of Reply Memorandum, Exs. 1-6. In one of the complaints, plaintiffs actually reference the "KaZaa" software instead, and appear to have named in the complaint a different individual than the one against whom they obtained a default. *Compare id.* Ex. 6 (complaint against Elizabeth Chestnut in Case No. 07-cv-00478 (D. S.C.) with exhibit referencing "KaZaa") with Ex. 497 (default judgment against Kathleen Hamilton aka Kathleen Jones in Case No. 07-cv-00478 (D. S.C.)).

<sup>7</sup> Plaintiffs do not make this argument as to the consent judgments, which disclaim any admission of liability: *See, e.g.*, Ex. 497 (consent judgment in *Warner Records Inc. v. Bentz* at 1; "Without admitting or denying liability, Defendant has not contested Plaintiffs' allegations. . .").

*Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992).

Consequently, at a damages hearing following entry of default, the court need not hear evidence of liability or make substantive liability determinations, but need only be satisfied of the sufficiency of the allegations of the complaint. *Id.*; *see also Sony BMG Music Entm't v. Lee*, No. CV 306-099, 2007 WL 1221313, at \*1 (S.D. Ga. Apr. 23, 2007) (damages hearing following default entry); *Elektra Entm't Group, Inc. v. Martin*, No. 07-0073-WS-B, 2007 WL 1975482, at \*2 (S.D. Ala. July 2, 2007) (same). The legal fiction of allegations “deemed” admitted for purposes of entering a default judgment says nothing about whether the allegations were actually true; rather, it signifies only that the defendant failed to defend the case. Nothing about the existence of a default judgment is itself “evidence”; it does not make the underlying allegations more or less likely to be true than they would be otherwise.<sup>8</sup>

By arguing that the prior judgments incorporate “admissions” and “irrefutable findings of direct infringement,” Opp. at 13, Plaintiffs seem to seek to rely on issue preclusion (also known as collateral estoppel). But of course issue preclusion is not applicable here; Plaintiffs do not even attempt to argue that the prerequisites for it have been met. Collateral estoppel applies where “(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was ‘actually litigated and actually decided,’ (3) there was ‘a full and fair opportunity for litigation in the prior proceeding,’ and (4) the issues previously litigated were ‘necessary to support a valid and final judgment on the merits.’” *Ali v. Mukasey*, 529 F.3d 478, 489 (2d Cir. 2008). Under Second Circuit law, “[t]he general rule is well-established that default judgments lack issue-preclusive effect.” *United States v. DiPaolo*, 466 F. Supp. 2d 476, 484 n.9 (S.D.N.Y. 2006) (citations omitted); *see also Abrams v. Interco Inc.*, 719 F.2d 23, 33 n.9 (2d. Cir. 1983) (noting

---

<sup>8</sup> Thus, even if one could assume that all of the complaints in the defaulted actions sufficiently pleaded direct infringement using LimeWire software, the default judgments would still be not admissible evidence of such infringement. And here, the assumption is unsupported – in some cases, Plaintiffs pleaded that the defendants “made available” files for download, which as noted does not constitute infringement. *See, e.g.,* Bal Decl. Exs. 1-6; *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 282 (D. Conn. 2008) (denying default judgment where “problematic” allegation of “mak[ing] the Copyrighted Recordings available for distribution to others” did not state a claim of infringement by distribution).

“the accepted view that the decision of issues not actually litigated, *e.g.*, a default judgment, has no preclusive effect in other litigation”).<sup>9</sup> In addition, as a non-party to the prior actions, Defendants had no full and fair opportunity to litigate the claims therein and therefore cannot be not bound by any collateral estoppel effect. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (holding that it would violate due process for a judgment to be binding on a litigant who was not a party and had no opportunity to be heard). Whatever *res judicata* effects the default and consent judgments may have against the defendants who were parties to them, they cannot have any preclusive effects as to Defendants in this case.<sup>10</sup>

Plaintiffs’ strategy of suing unsophisticated, *pro se* individuals lacking the ability and/or inclination to mount a defense, then seeking to use the resulting default against a nonparty to those actions, does not comport with due process. There is no basis on which the default and consent judgments proffered by Plaintiffs could support a finding of direct infringement here.

### III. CONCLUSION

For the foregoing reasons, Defendants request that the Court grant the Motion for Reconsideration. Upon reconsideration, the Court should deny Plaintiffs’ motion for summary judgment and grant Defendants’ motions of noninfringement.

Dated: June 23, 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*

---

<sup>9</sup> Consent judgments likewise have no preclusive effect. *United States v. Int’l Bldg. Co.*, 345 U.S. 502 (1953); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 146 (2d. Cir. 2005). They are also inadmissible hearsay. *See, e.g., Jackson v. Bache*, 381 F. Supp. 71, 100 n.1 (N.D. Cal. 1974) (excluding stipulated judgments as inadmissible hearsay).

<sup>10</sup> The default and consent judgments should have been excluded for the additional reason that Plaintiffs failed to submit the evidence with their opening papers, and instead argued *in their reply papers* that the evidence supported a required element of their infringement claim.

