

EXHIBIT 7

633 F. Supp. 2d at 154). The Magistrate Judge further rejected Reynolds' repeated argument that he should not be held personally liable for the actions of the corporate defendants given that he was "personally and intimately involved in many of the activities that form the basis of Defendants' copyright liability." Report at 18 n.8 (quoting Liability Order, *Arista Records*, 633 F. Supp. at 158).

In his Objections to the Magistrate Judge's Report and Recommendation, Reynolds now asks the Court effectively to reverse the Liability Order and decline to enter any damages award whatsoever.¹ According to Reynolds: (i) he is "innocent" of any wrongdoing, Obj. at 10; (ii) he merely operated an "online discussion service" not used to download files, *id.* at 25; (iii) he was not involved in the "day to day operations" of the corporate defendants, Reynolds Decl. ¶ 1; (iv) defendants never profited from any copyright infringement, Obj. at 33-34; and (v) a lower damages award is appropriate under the DMCA, the *Sony-Betamax* case, the U.S. Constitution and an "advice of counsel" defense. *Id.* at 9-21, 30, 37.

Respectfully, Reynolds' objections are specious at best. On repeated occasions before and after entry of the Liability Order, this Court has considered and rejected the overwhelming majority of the arguments raised by Reynolds. *See, e.g.*, Liability Order, *Arista Records*, 633 F. Supp. at 131-34, 150-59; Dkt. No. 295 (denying motion to reconsider appointment of a receiver); Sept. 22, 2009 Ltr. from District Court to Reynolds (denying motion for pro bono counsel). He should not be permitted to ignore the consequences of his conduct by endlessly seeking to relitigate the undisputed facts or evidence set forth in the Liability Order. As such, unless the Court requests otherwise, plaintiffs will only address the two arguments raised for the first time

¹ Defendants Usenet.com, Inc. and Sierra Corporate Design, Inc. have not objected to the Report and have waived their right to do so. *See, e.g., Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) (failure to object to magistrate's report waives objections).

by Reynolds in his objections to the Report, both of which fail to withstand even passing scrutiny.

First, Reynolds argues for the first time that he somehow has been prejudiced because “he has been denied the right to review” discovery produced by plaintiffs in this case under the terms of the Protective Order governing Confidentiality. Obj. at 3. But plaintiffs did not submit any of the documents they produced during discovery in support of their request for statutory damages. *See* Dkt. Nos. 267-76, 280-81. The only “highly confidential” data appended to plaintiffs’ request for statutory damages was UCI’s own financial information, which was produced by the defendants, including Reynolds. *See* Sept. 14, 2009 Declaration of Gianni P. Servodidio, Dkt. No. 276, at Ex. 3. Moreover, the Stipulated Protective Order in this case only prohibits Reynolds from reviewing documents designated by plaintiffs as “highly confidential.” *See* Dkt. No. 22 (Protective Order), at ¶¶ 5-6. As such, Reynolds has had full access to virtually all of the evidence and documents filed by plaintiffs in support of their summary judgment filings including the Waterman, Newburg, Sehested, Ward, McDevitt, and the former Sierra employee and plaintiffs’ declarations filed at that time. *See* Dkt. Nos. 112-14, 124-28, 139-41 (not filed under seal or filed under seal because they contained “confidential” but not “highly confidential” information). To the extent plaintiffs relied on any “highly confidential” documents, it was during the time when Reynolds was represented by counsel who had full access to all documents and presented a vigorous defense on his behalf.

In any event, Reynolds never argued in opposition to plaintiffs’ request for statutory damages that he somehow needed access to any “highly confidential” information produced by plaintiffs. Nor has he requested that the Protective Order be modified to allow him to see any such highly confidential information. *See* Reynolds’ Opposition to Plaintiffs’ Proposed Findings

of Fact and Conclusions of Law re Statutory Damages, Dkt. No. 285. Thus, the issue is not even properly before this Court. *See Grand River Enterprises Six Nations Ltd. v. King*, No. 02 Civ. 5068 (JFK), 2009 WL 1360686, at *3 (S.D.N.Y. May 15, 2009) (“The district judge will normally not consider arguments, case law, or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance.”)

Second, Reynolds’ argument that that the Magistrate Judge somehow erred in calculating damages based on certain years during which defendants purported to block access to infringing music files is misguided. *See* Obj. at 25-26. In analyzing defendants’ profits, the Magistrate Judge considered available subscriber data produced by Reynolds for the years 2008 and 2009, but only in the context of considering the overall profitability of defendants’ business over an extended period of time. Indeed, he expressly noted that “defendants operated their business for ten years prior to this litigation” and proceeded to consider defendants’ subscribers and gross income during the years 2005-2007 immediately prior to the commencement of the case when they offered unfettered access to all of the newsgroups comprised of 94% copyright infringing files. Report at 10.

Moreover, contrary to Reynolds’ unsupported accusations, plaintiffs already have established entitlement to damages based on works downloaded from, or available through, *defendants’ servers* over a multi-year period, and not merely during the years 2008 and 2009. Thus, the findings in the Report are fully supported by evidence of: (i) downloads from defendants’ own subscribers and employees, (ii) downloads from plaintiffs’ investigators; and (iii) downloads completed in connection with plaintiffs’ statistical analyses of infringing

newsgroups available through defendants' service. ² *Id.* at 6-7. This is the same evidence relied on and accepted by the Court in connection with the findings of direct and secondary infringement in the Liability Order. *See* Liability Order, *Arista Records*, 633 F. Supp. 2d at 148-49. And since Reynolds did not even purport to challenge this evidence in opposing plaintiffs' statutory damages request, his new-found objections once again have been waived. *Grand River*, 2009 WL 1360686 at *3.

Based on the foregoing and for the reasons set forth in plaintiffs' opening and reply memoranda in support of their request for statutory damages, plaintiffs respectfully request that the Court adopt the Report and Recommendation in full.

Dated: March 4, 2010

Respectfully submitted,

By: _____/s/
Gianni P. Servodidio

² Indeed, as noted by the Magistrate, "Plaintiffs likely could have proved a significantly larger number of infringements but for defendants' misconduct during discovery." Report at 8.

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