

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; ARISTA
MUSIC, fka BMG MUSIC; CAPITOL
RECORDS, LLC fka CAPITOL RECORDS,
INC.; ELEKTRA ENTERTAINMENT
GROUP INC.; INTERSCOPE RECORDS;
LAFACE RECORDS LLC; MOTOWN
RECORD COMPANY, L.P.; PRIORITY
RECORDS LLC; SONY MUSIC
ENTERTAINMENT, fka 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; and M.J.G. LIME WIRE
FAMILY LIMITED PARTNERSHIP,

Defendants.

06 Civ. 05936 (KMW)
ECF CASE

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT ON THE DIRECT INFRINGEMENT
OF THE WORKS AT ISSUE**

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I. INTRODUCTION

Plaintiffs incontrovertibly have established that LimeWire users directly infringed each of Plaintiffs' copyrighted sound recordings *at least once*.

Defendants do not dispute that DtecNet and MediaSentry downloaded 11,205 of Plaintiffs' works from U.S.-based LimeWire users. Rather, Defendants' Opposition turns entirely on a legal proposition which has been universally rejected by an avalanche of judicial decisions, including from the Second Circuit and the Southern District (and which no court has ever adopted): that there is no "unauthorized copying" where "the evidence is based solely upon downloading by Plaintiffs' authorized agents." (Opp. at 1.) Defendants contend that this controlling and overwhelming authority does not "comport" with the Copyright Act (Opp. at 10). Unsurprisingly, it is Defendants' position that squarely conflicts with the law, and for good reason. Without the ability to rely on evidence collected by their investigators, it would be difficult for copyright owners to seek legal redress at all for the massive infringement on LimeWire and other P2P networks. The law does not provide for such a result.

Defendants ignore LimeWire users' violation of Plaintiffs' distribution right: By focusing solely on "unauthorized copying," *i.e.*, violation of the *reproduction* right, Defendants read the independent *distribution* right completely out of the statute. *See* 17 U.S.C. § 106 (3) (exclusive right to "distribute copies [of] the copyrighted work to the public.") As the Second Circuit and numerous other courts have made clear, digital transmissions to a copyright owner's investigators or agents constitutes evidence of unauthorized distribution. *See, e.g., Arista Records, LLC v. Doe 3*, 604 F.3d 110, 113-14, 122-23 (2d Cir. 2010) (complaint alleging downloads by "third-party investigator" adequately alleges violation of plaintiff's "distribution rights"). Unquestionably, LimeWire users, without *any authorization*, distributed copies of Plaintiffs' works to DtecNet and MediaSentry in violation of Plaintiffs' distribution right.

Plaintiffs did not “authorize” violation of their reproduction right: Plaintiffs did not “authorize” or “license” DtecNet and MediaSentry to download and make copies of their works (Opp. at 12). Rather, Plaintiffs retained them to investigate and counteract instances of infringement. The copies made on the computers of DtecNet and MediaSentry from LimeWire users’ unauthorized distribution of Plaintiffs’ works therefore were unauthorized and independently infringe Plaintiffs’ exclusive right of reproduction. *See, e.g., Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 149-50 n.16 (S.D.N.Y. 2009) (“uncontroverted evidence of unauthorized reproduction” included “forensic investigators”’ downloads).

The Court relied upon identical download evidence at the summary judgment stage: In holding LimeWire liable as a matter of law for the inducement of massive copyright infringement, the Court relied on identical download evidence in support of its finding of direct infringement. In suggesting otherwise, Defendants ignore the hard drives Plaintiffs submitted to the Court (Ex. 466) containing verified copies of 3,000 recordings downloaded from LimeWire users. These hard drives are identical to the undisputed MediaSentry evidence Plaintiffs have submitted on this Motion, and do not contain any hash-based analysis. The Court expressly relied upon this evidence, holding that “Plaintiffs have provided hard drives that contain digital copies of the Recordings, with electronic evidence that establishes that the Recordings were downloaded by LimeWire users without authorization. (Exs. 466, 487.)” *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 510, 507 (S.D.N.Y. 2010).

The Court should grant Plaintiffs’ Motion for Partial Summary Judgment on the direct infringement of the works at issue.

II. DEFENDANTS DO NOT DISPUTE PLAINTIFFS’ DOWNLOAD EVIDENCE OF DIRECT INFRINGEMENT OF 11,205 WORKS

Defendants do not dispute that DtecNet and MediaSentry downloaded 11,205 of

Plaintiffs' works from U.S.-based LimeWire users. (*See* Defendants' Responses to Plaintiffs' Statement of Material Facts Pursuant to Local Civil Rule 56.1 (Dkt No. 557).) Defendants do not challenge Plaintiffs' hard drive evidence, which includes accompanying files that verify the act of the download and the content of each file. Nor do Defendants contest the declarations from Thomas Sehested of DtecNet¹ and Chris Connelly of MediaSentry, which explain the download and verification processes they employed and the contents of the hard drive.

III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE DIRECT INFRINGEMENT OF THE WORKS AT ISSUE SHOULD BE GRANTED

A. Plaintiffs' Download Evidence Establishes Direct Infringement By LimeWire Users

As Defendants have no choice but to acknowledge (Opp. at 10), there is a unanimous judicial consensus that downloads by a copyright owner's investigators from a P2P user's shared directory constitute evidence of direct infringement. *See, e.g., Doe 3*, 604 F.3d at 113-14, 122 (complaint listing "6-10 songs downloaded from the IP address" of each defendant by plaintiff's "third-party investigator" alleges "not that defendants merely made songs available on the network but that defendants . . . distributed them"); *Usenet.com*, 633 F. Supp. 2d at 150 n.16 ("Courts routinely base findings of infringement on the actions of plaintiffs' investigators."); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008) ("distribution to MediaSentry can form the basis of an infringement claim"); *Warner Bros. Records Inc. v. Walker*, 704 F. Supp. 2d 460, 467 (W.D. Pa. 2010) ("MediaSentry downloaded actual copies of nine of the Copyrighted Recordings from Defendant's computer, establishing unauthorized

¹ Defendants suggest in their Opposition that Mr. Sehested was not "personally involved" in the verification of the downloaded files (Opp. at 5 & n.4). As Mr. Sehested explains in his declaration, the verification process was through the audio fingerprinting software Audible Magic (Sehested Decl., Ex. A at 2 (Dkt. No. 434)). Moreover, Mr. Sehested personally listened to a sampling of songs as well. Supp. Klaus Decl. Ex. 1 at 125:22-126:8. Defendants do not challenge the accuracy or contents of any of those downloads.

distribution as to those nine recordings.”); *Columbia Pictures Industries, Inc. v. Fung*, 2009 WL 6355911, at *9 (C.D. Cal. Dec. 21, 2009) (direct infringement based on “dot-torrent files downloaded from Defendants’ sites” that “cause the downloading of Plaintiffs’ copyrighted content”); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 978, 985 (D. Ariz. 2008) (investigator’s downloading of works constitutes direct infringement because “recording companies obviously did not intend to license MediaSentry to authorize distribution or to reproduce copies of their works”); *Sony BMG Music Entertainment v. Gray*, 2008 WL 4239219, at *2 (N.D. Cal. Sept. 15, 2008) (where “MediaSentry actually downloaded the eight sound recordings at issue” from defendant, this “establishes the substantive merits of plaintiffs’ claim that defendant distributed the Copyrighted Recordings to the public”); *Interscope Records v. Leadbetter*, 2007 WL 1217705, at *7 (W.D. Wash. Apr. 23, 2007) (direct infringement where “MediaSentry downloaded a sampling of the files from the dawnlead@KaZaA shared folder”); *Warner Bros. Records Inc. v. Malacara*, 2007 WL 613940, at *4 (E.D. Cal. Feb. 27, 2007) (direct infringement established where “MediaSentry downloaded a number of the works and verified that they were, indeed, Plaintiffs’ copyrighted recordings.”); *Disney Enterprises v. Farmer*, 427 F. Supp. 2d 807, 812-13 (E.D. Tenn. 2006) (direct infringement established where MediaSentry “downloaded four movies” from defendant “in order to obtain information to confirm the copyright infringement”).

Defendants concede that the courts in these cases did not require or rely upon any hash-based analysis in finding direct infringement. (*See* Opp. at 12 & n.8 (noting “no hash analysis considered by” the *Walker* and *Thomas* courts).) The fact that the copyright owner’s investigator downloaded the tracks from the defendant was sufficient to warrant a finding of direct infringement.

Nevertheless, Defendants ask this Court to disregard this controlling and overwhelming authority. Without citing a single case to the contrary, Defendants argue that these decisions do “not comport with the copyright statute.” (Opp. at 10.) This argument borders on the frivolous. It is Defendants’ position that neither “comports” with the law or with common sense. In the absence of evidence collected by their investigators, it would be difficult for Plaintiffs and other copyright owners to seek legal redress for the massive infringement on LimeWire and other P2P networks, who by design do not keep records of any of the unlawful activity occurring through their servers. As courts have recognized, the use of an “undercover investigator to detect ongoing violations of the law” is “especially” warranted “where it would be difficult to discover the violations by other means.” *Cartier, Inc. v. Symbolix, Inc.*, 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005).

1. Plaintiffs’ Download Evidence Establishes LimeWire Users’ Independent Violation Of The Distribution Right

Defendants argue that there was not “any unauthorized copying or downloading of the sound recordings between or among any Lime Wire users that were not retained, compensated or directed by Plaintiffs.” (Opp. at 11.) Even assuming this argument had any merit, which it does not (*see infra* Section III.A.2), it only addresses the *reproduction* of Plaintiffs’ works. It says nothing about the undisputed fact that was an unauthorized *distribution* of Plaintiffs’ works by LimeWire users who “were not retained, compensated or directed by Plaintiffs.”

Defendants conveniently read the “distribution” right completely out of the statute. As Defendants acknowledge, the exclusive rights of a copyright owner under the Act include the right to ““reproduce the copyrighted work in copies”” and to ““distribute copies [of] the copyrighted work to the public.”” Opp. at 7 (quoting 17 U.S.C. § 106). Defendants, however, conflate the two rights, arguing that “Plaintiffs are not entitled to partial summary judgment on

the issue of direct infringement because they have not submitted any evidence there has been *unauthorized copying*-- whether through ‘distribution’ or ‘reproduction’ -- of copyrighted works.” Opp. at 8 (emphasis added) (also noting that in “order to establish direct infringement, Plaintiffs must show . . . unauthorized copying of the copyrighted work”). As established in Plaintiffs’ opening papers, Plaintiffs’ download evidence demonstrates *two* independent acts of direct infringement by LimeWire end users: the violation of Plaintiffs’ exclusive distribution right through LimeWire users’ unauthorized distribution of the sound recordings to DtecNet and MediaSentry, and the violation of Plaintiffs’ exclusive reproduction right through the unauthorized copying of the files onto DtecNet’s and MediaSentry’s computers. *See, e.g., Fung*, 2009 WL 6355911, at *8 (the “acts of uploading and downloading are each independent grounds of copyright infringement liability.”). Both “making . . . a digital copy of [copyrighted] music” and “transmitting a digital copy of [copyrighted] music . . . infringes copyright.” *In re: Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003).

Thus, in *Doe 3*, the plaintiff’s complaint attached an exhibit listing “6-10 songs downloaded from the IP address” of each defendant by the plaintiff’s “third-party investigator.” 604 F.3d at 113-14. The Second Circuit affirmed the district court’s holding that “plaintiffs’ allegations of distribution were supported by Exhibit A to the Complaint, specifying their investigator’s ‘sampl[ing of] some of the downloads from shared folders.’” *Id.* at 114. The court rejected the plaintiff’s argument that this merely constituted “making available” evidence, holding that the complaint “alleges not that defendants merely made songs available on the network but that defendants” also “*distributed* them. . . . The Complaint thus alleges violations” of the copyright owners’ “distribution rights” under 17 U.S.C. § 106(3). *Id.* at 115, 122-23 (emphasis added).

Numerous other courts are in accord. In *Thomas*, the court held that “**distribution** to MediaSentry can form the basis of an infringement claim” where the defendant “provided the copyrighted works for copying and placed them on a network specifically designed for easy, unauthorized copying.” 579 F. Supp. 2d at 1216 (emphasis added). Similarly, in *Walker* the court held that the downloading by MediaSentry of the “copies of nine of the Copyrighted Recordings from Defendant’s computer, establish[ed] **unauthorized distribution** as to those nine recordings.” 704 F. Supp. 2d at 467 (emphasis added). Likewise, in *Gray*, where MediaSentry had “downloaded the eight sound recordings at issue” from the defendant, the court held that this “establishes the substantive merits of plaintiffs’ claim that defendant **distributed** the Copyrighted Recordings to the public.” 2008 WL 4239219, at *2 (emphasis added). And in *Leadbetter*, where “MediaSentry downloaded a sampling of the files” from the defendant’s KaZaA shared folder, the court rejected the argument that downloads by the copyright owner’s investigators “would not be dissemination to the ‘public’” and thus a violation of the distribution right. 2007 WL 1217705, at *7 & n.7.

Moreover, courts repeatedly have held that distributions of infringing products to a copyright owner’s agent outside of the P2P context constitute violation of the distribution right, as Defendants acknowledge in their papers. (See Opp. at 9 (citing *Dell Inc. v. Compudirect, Inc.*, 316 F. App’x 32, 34 (2d Cir. 2009); *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 32 (2d Cir. 1990).) See also *Microsoft Corp. v. Computer Care Center, Inc.*, 2008 WL 4179653, at *7 (E.D.N.Y. Sept. 10, 2008) (defendant infringed Microsoft’s distribution right where he “distributed infringing software to an investigator”); *Paramount Pictures Corp. v. Labus*, 1990 WL 120642, at *5 (W.D. Wis. Mar. 23, 1990) (finding violation of distribution right where defendant rented to plaintiffs’ agent “videocassettes of movies subject to plaintiffs’ exclusive

copyrights” and rejecting as “completely without merit” defendants’ contention that because distribution was to “plaintiffs’ agent” it was not to the “public”); *Gamma Audio & Video, Inc. v. Ean-Chea*, 1992 WL 168186, at *3 n.5 (D. Mass. July 3, 1992) (“Distribution to an agent of the plaintiffs engaged to document unauthorized transfers satisfies the ‘public’ requirement of § 106(3).”), *rev’d on other grounds*, 11 F.3d 1106 (1st Cir. 1993).

Defendants’ contention that such cases are “distinguishable” because the “unauthorized distribution” there “was complete as soon as investigators purchased the merchandise at issue” and the wrongdoing occurred “independently of the investigative action” (Opp. at 9-10) is nonsense. Here, the distribution similarly was complete as soon as the download was completed, and LimeWire users’ transmission and distribution of the recording to the investigators constituted independent wrongful conduct. Plaintiffs’ download evidence indisputably establishes LimeWire users’ violation of Plaintiffs’ exclusive right of distribution.

2. Plaintiffs’ Download Evidence Establishes the Unauthorized Reproduction Of Plaintiffs’ Copyrighted Works

In addition to demonstrating violations of Plaintiffs’ distribution rights, Plaintiffs’ download evidence independently establishes violations of Plaintiffs’ reproduction right through the copying of the files onto DtecNet’s and MediaSentry’s computers.

Contrary to Defendants’ unsubstantiated assumptions, DtecNet’s and MediaSentry’s downloading and copying of Plaintiffs’ works was not “authorized” by Plaintiffs (Opp. at 12). In *Howell*, the court rejected the argument that a copyright owner’s agent “cannot infringe the copyright owner’s rights when acting on the owner’s behalf,” stating that “the recording companies obviously did not intend to license MediaSentry to **authorize distribution or to reproduce copies of their works**. Rather, ‘the investigator’s assignment was part of [the recording companies’] attempt to stop [the defendant’s] infringement,’ and therefore the 12

copies obtained by MediaSentry are *unauthorized*.” 554 F. Supp. 2d at 985 (emphases added). Likewise, in *Usenet.com*, the court held that “uncontroverted evidence of *unauthorized reproduction*” of the plaintiffs’ works” included “direct evidence from their forensic investigators [DtecNet] of downloads of Plaintiffs’ copyrighted works from Defendants’ service.” 633 F. Supp. 2d at 149-50 (citing Sehested Declaration). The court rejected as “without merit” the defendants’ argument that “these downloads are not proof of unauthorized copying because Plaintiffs had ‘authorized’ the downloads by their investigators,” noting that “[c]ourts routinely base findings of infringement on the actions of plaintiffs’ investigators.” *Id.* at 150 n.16.

Likewise here, the copies made on the computers of DtecNet and MediaSentry from the LimeWire user’s unauthorized distribution of the works were not “authorized” by Plaintiffs, and they independently infringe Plaintiffs’ exclusive right of reproduction.

B. The Court Relied on Identical Download Data In Its Summary Judgment Decision

In holding Defendants liable as a matter of law for the inducement of massive copyright infringement, the Court relied on identical download evidence in support of its finding of direct infringement in its prior summary judgment decision.

In arguing to the contrary (Opp. at 12-14), Defendants ignore the summary judgment record that the Court relied upon in its Order. Beyond the hash-based analysis of 30 of the recordings at issue in the case, Plaintiffs also submitted hard drives to the Court containing verified copies of 3,000 recordings downloaded by Plaintiffs’ investigators from LimeWire users. The November 7, 2008 Declaration of Katherine Forrest describes these hard drives (Plaintiffs’ “Exhibit 466”) as “electronic storage media” containing “copyrighted sound recordings listed in the revised Exhibits A and B to the First Amended Complaint downloaded

from a LimeWire user,” that are “verified by the ‘DownloadLog.txt’ and ‘RequestLog.txt’ or ‘packet capture.txt’ file(s) accompanying each downloaded sound recording.” (11/7/08 Forrest Decl. ¶¶ 3-4.) These hard drives are identical to the MediaSentry data Plaintiffs have submitted on this Motion, and do not contain any hash-based analysis.

The Court expressly relied upon this hard drive evidence in finding direct infringement in its summary judgment order. The Court held that “Plaintiffs have provided hard drives that contain digital copies of the Recordings, with electronic evidence that establishes that the Recordings were downloaded by LimeWire users without authorization. (Exs. 466, 487).” *Lime Group LLC*, 715 F. Supp. 2d at 507. The Court cited Exhibit 466, which is the hard drive evidence Ms. Forrest describes in her November 7, 2008 declaration.

Irrespective of whether the Court relied upon such evidence at summary judgment, the law is beyond clear that evidence of downloads by Plaintiffs’ investigators, with or without any hash-based analysis, is more than sufficient to establish LimeWire users’ direct infringement of Plaintiffs’ exclusive distribution and reproduction rights.

C. Alternatively, Plaintiffs’ Direct Download Evidence Establishes That LimeWire Users Distributed Their Works By Making Them Available For Unauthorized Distribution

Given the uncontroverted evidence of the actual transfer of works using the LimeWire software and the overwhelming authority holding that evidence of transfers to a copyright owner’s investigator constitutes evidence of direct infringement, the Court need not decide whether making copyrighted sound recordings *available* for download, without proof of actual dissemination, is direct infringement of the distribution right. Several courts have held, however, that the mere making available of works for download does constitute infringement of copyright owner’s exclusive distribution right. *See, e.g., Sony BMG Music Entertainment v. Doe*, 2009 WL 5252606, at *4 (E.D.N.C. Oct. 21, 2009) (“complaint adequately states a claim for

infringement by distribution if it contains proper allegations that defendant made the subject songs available to the public”); *Motown Record Co. v. DePietro*, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007) (“A plaintiff claiming infringement of the exclusive-distribution right can establish infringement by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant ‘made available’ the copyrighted work”); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006) (“by using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet, Defendant violated Plaintiffs’ exclusive right to distribute the Motion Pictures”); *Warner Bros. Records, Inc. v. Payne*, 2006 WL 2844415, at *3 (W.D. Tex. July 17, 2006) (“Listing unauthorized copies of sound recordings using an online file-sharing system constitutes an offer to distribute those works, thereby violating a copyright owner’s exclusive right of distribution”). *See also Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (“When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”). And indeed, recent scholarly work examining the historical development of copyright law and the legislative history of the Copyright Act of 1976 rejects the view that Congress required proof of “actual distribution” to prove violation of the distribution right. *See* Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age* (October 08, 2010). UC Berkeley Public Law Research Paper No. 1679514, available at SSRN: <http://ssrn.com/abstract=1679514>.

Thus, the Court alternatively can grant Plaintiffs’ Motion on the basis of the uncontroverted evidence that LimeWire users made Plaintiffs’ works “available” for download and unauthorized distribution.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion.

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Respectfully submitted,

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