

A similar result is mandated here. First, LW has no continuing relationship with the users of LimeWire, through contracts, agreements, or otherwise. In most instances, LW does not know who those users are since LimeWire users do not register with LW or log in to a system. Like the distributor of any other product, whether copy machines or VCRs, LW has only minimal contact with users after product distribution. Those encounters are largely limited to providing technical support and updates, much as Xerox's customer contacts relate to service calls and recall notices. Thus, much as users of VCRs and Xerox machines are responsible for their proper use of those technologies, LimeWire users are responsible for utilizing LimeWire legally. In fact, LW advises users of this obligation at the time they download the software. SoF ¶¶ 152, 153.

Likewise, LW does not have the ability to control the manner in which users employ the LimeWire software. Unlike the *Napster* defendants, LW does not maintain central servers containing files or indices of files. It does not process or assist users' search requests. LW does not even know for which files its users are searching; it cannot see or monitor the searches. LW's system is like that analyzed by the Ninth Circuit in *Grokster*: "truly decentralized." LW users connect to each other over the Internet, create the network, and share what they will independent of LW. In fact, if LW ceased to exist, users of its software could continue to connect to the network and conduct searches. LW no more controls the actions of its customers than do any of the thousands of companies that provide the hardware and other software used in connection with the Internet.²²

²² Many other manufacturers and distributors make products that permit the alleged infringers to copy audio files, such as Intel chips and CD burners. Plaintiffs, however, are not suing those companies, perhaps, because some of their own affiliates sell these very items, e.g. Sony. LW, in which Plaintiffs have no interest, is much simpler to target.

Moreover, it is undisputed that LW does not have the right and ability to police its users' conduct. LW does not have the legal right to repossess or disable the LimeWire software possessed by users. It has no contract or any form of agreement with its users legally to allow LW to block access to the Gnutella network or disable the software. Like any other distributor of a product, once it leaves its hands, LW has no ability to police its users' conduct. As such, vicarious liability does not attach to LW as a matter of law.

V. PLAINTIFFS' CLAIMS FAIL BECAUSE THEY DO NOT HAVE ANY EVIDENCE OF DIRECT INFRINGEMENT BY A LIMEWIRE USER.

A threshold requirement of all of Plaintiffs' claims is an act of direct infringement. To satisfy that requirement, Plaintiffs consistently allege that unidentified LimeWire users "have directly infringed and are directly infringing Plaintiffs' copyrights . . . by, for example, creating unauthorized reproductions of Plaintiffs' copyrighted sound recordings and distributing copies of such sound recordings to the public in violation of Plaintiffs' exclusive rights under [Sections 106 and 501] of the Copyright Act." FAC ¶¶ 66, 79, 92. Plaintiffs have no evidence that any LimeWire user reproduced or distributed copies of any of Plaintiffs' 3,000 plus recordings that they claim have been infringed; thus, they cannot establish this threshold requirement of the various infringement claims.

A. Plaintiffs Cannot Show That Any LimeWire User Reproduced Any Of Plaintiffs' Copyrighted Recordings.

Plaintiffs first allege that unidentified LimeWire users created unauthorized reproductions of Plaintiffs' copyrighted recordings. FAC ¶¶ 66, 79 and 92. Section 106 of the Copyright Act grants copyright holders the exclusive right "to reproduce the copyrighted work in copies or phonorecords." 17 U.S.C. § 106(1). In order to establish a claim for copyright infringement under Section 106(1), therefore, proof is required "of

both ownership of a valid copyright and copying of protected elements of the work in question.” *Monroe v. Janes*, No. 9:06-CV-0859 (FJS/DEP), 2008 WL 508905, at *10 (N.D.N.Y. Feb. 21, 2008) (citing *Davis v. Blige*, 505 F.3d 90, 98-99 (2d Cir. 2007)).

LW is not aware of any evidence produced by Plaintiffs showing that any LimeWire user reproduced any of Plaintiffs’ copyrighted sound recordings. Consequently, Plaintiffs cannot establish a direct infringement of any right of reproduction under the Copyright Act.

B. Plaintiffs Cannot Show That Any LimeWire User Distributed Any Of Plaintiffs’ Copyrighted Recordings.

Plaintiffs next allege that unidentified LimeWire users distributed copies of Plaintiffs’ copyrighted sound recordings. FAC at ¶¶ 66, 79, 92. Section 106 of the Copyright Act grants copyright holders the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 106(3). Accordingly, a threshold requirement in an action for infringement of the distribution right in Section 103 is that there must be “an actual dissemination of either copies or phonorecords.” *National Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993); see 2 *Goldstein on Copyright* § 7.5.1 (3d ed. 2007) (“crux of the distribution right lies in the transfer...of a copy or phonorecord”; “actual transfer must take place.”); 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 8.11[A], at 8-124.1 n.2 (2007) (“right of distribution apparently is not infringed by the mere offer to distribute to members of the public”).

Thus, “proof of direct infringement by the primary infringer is a necessary precondition to establishing both contributory and vicarious liability under the Copyright Act.” *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 801 (N.D. Cal. 2005);

see also Perfect 10, 508 F.3d at 1162 (agreeing with district court’s holding that “distribution requires an ‘actual dissemination’ of a copy”); *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV 4660(SHS), 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002) (links to infringing material on website did not establish “unlawful ‘distribution’”; record companies were required “to show that an unlawful copy was disseminated ‘to the public’”). “[M]erely exposing music files to the internet is not copyright infringement.” *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008).

As with Plaintiffs’ allegations of unauthorized reproduction, LW is not aware of any evidence produced by Plaintiffs showing that any LimeWire user distributed any of Plaintiffs’ copyrighted sound recordings. Plaintiffs’ burden to show direct infringement by unauthorized distribution cannot be met by merely showing that a copyrighted work was *available* to be downloaded by a LimeWire user.

VI. PLAINTIFFS’ STATE LAW COPYRIGHT INFRINGEMENT AND UNFAIR COMPETITION CLAIMS ALSO FAIL.

Plaintiffs also assert two separate state law claims in Counts IV and V: common law copyright infringement and unfair competition. As fully briefed in the Memorandum of Law in Support of Greg Bildson, Mark Gorton, Lime Group LLC, and M.J.G. Lime Wire Family Limited Partnership’s Motion for Summary Judgment, those claims cannot survive. LW hereby incorporates by reference the arguments in that Memorandum regarding Plaintiffs’ state law claims and similarly asks this Court to dismiss those claims against LW.

CONCLUSION

LW respectfully requests summary judgment in its favor on all of Plaintiffs’ claims.

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Respectfully Submitted,

Of counsel:

Lauren E. Handler
SDNY (LEH 6908)
PORZIO, BROMBERG &
NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962-1997
(973) 538-5146 (Facsimile)
(973) 889-4326 (Telephone)
lehandler@pbn.com

/s/
Charles S. Baker (CB1365)
Joseph D. Cohen (JC3017)
Susan K. Hellinger (SH8148)
PORTER & HEDGES, LLP
1000 Main Street, 36th Floor
Houston, Texas 77002
(713) 226-6000 (Telephone)
(713) 228-1331 (Facsimile)
cbaker@porterhedges.com
jcohen@porterhedges.com
shellinger@porterhedges.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was filed by means of the Court's ECF system on the 18th day of July, 2008. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via Federal Express.

Katherine B. Forrest
Teena-Ann V. Sankoorikal
Cravath, Swaine & Moore, LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
(212) 474-3700 (fax)

Kenneth L. Doroshov
Karyn A. Temple
Recording Industry Association of America
1025 F Street, NW, 10th Floor
Washington, DC 20004
(202) 775-0101
(202) 775-7253 (fax)

/s/

Charles S. Baker

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