

**VIRGIN RECORDS AMERICA, INC., et al.,** Plaintiffs,

v.

**JOHN DOES 1-35,** Defendants.

Civil Action No. 05-1918 (CKK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2006 U.S. Dist. LEXIS 20652

April 18, 2006, Decided

April 18, 2006, Filed

COUNSEL: [\*1] VIRGIN RECORDS AMERICA INC., ARISTA RECORDS LLC, CAPITOL RECORDS INC, SONY BMG MUSIC ENTERTAINMENT, ATLANTIC RECORDING CORPORATION, BMG MUSIC, WARNER BROS. RECORDS INC., PRIORITY RECORDS LLC, UMG RECORDINGS INC, ELEKTRA ENTERTAINMENT GROUP INC., MOTOWN RECORD COMPANY, L.P., FONOVISA, INC., INTERSCOPE RECORDS, LOUD RECORDS LLC, MAVERICK RECORDING COMPANY, LONDON-SIRE RECORDS INC., Plaintiffs: Matthew Jan Oppenheim, Potomac, MD.

JUDGES: COLLEEN KOLLAR-KOTELLY, United States District Judge.

OPINIONBY: COLLEEN KOLLAR-KOTELLY

OPINION: MEMORANDUM OPINION

Plaintiffs Virgin Records America, Inc.; Arista Records LLC; Capitol Records, Inc.; Sony BMG Music Entertainment; Atlantic Recording Corporation; BMG Music; Warner Bros. Records Inc.; Priority Records LLC; UMG Recordings, Inc.; Elektra Entertainment Group, Inc.; Motown Record Company, L. P.; Fonovisa, Inc.; Interscope Records; Loud Records, LLC; Maverick Recording Company; and London-Sire Records Inc. (collectively, "Plaintiffs") brought this action alleging copyright infringement against John Doe Defendants #1-35 arising out of internet file sharing of digital sound recordings on September 29, 2005. Currently before the Court is Defendant Doe #18's [\*2] Motion to Quash the subpoena issued to Defendant's ISP, Verizon, regarding Defendant's IP address, 162.84.109.12, on the grounds that this Court lacks personal jurisdiction over Defendant, who is a resident of Fredericksburg, Virginia, with allegedly little or no contact with the District of Columbia. *See* Def.'s Mot. to Quash at 1-2. Upon a consideration of Defendant Doe #18's motion, Plaintiffs' Opposition, the attached exhibits, and the relevant case law, the Court shall deny without prejudice Defendant's Motion to Quash.

## I: BACKGROUND

Plaintiffs in this case are major recording companies who own copyrights in sound recordings. Collectively, they face what is alleged to be a massive problem involving digital piracy of those sound recordings over the Internet. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over peer-to-peer ("P2P") networks. *See A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107, 124 S. Ct. 1069, 157 L. Ed. 2d 893 (2004). [\*3] As a direct result of piracy on P2P networks, Plaintiffs assert that they have sustained and continue to sustain substantial financial losses.

Copyright infringement over P2P networks, wherein users disseminate (upload) and copy (download) copyrighted materials, is widespread in part because of the ability of users to conceal their identities by means of an alias. Copyright owners, such as Plaintiffs, can observe infringement occurring on P2P networks, but cannot (without assistance) identify the true names and locations of the infringers. All Defendants in this case, including Defendant Doe # 18, are allegedly active participants on a P2P network, and have distributed copyrighted sound recordings to others and/or downloaded such materials from other users of the P2P network. Plaintiffs discovered this infringement and brought this action on September 29, 2005, attaching to their Complaint a list of several copyrighted sound recordings that each Defendant disseminated without authorization. *See* Compl., Ex. A (Documents Identifying Defendants by ISP Addresses and Listing Downloaded Recordings) at 19 (listing Defendant Doe # 18's downloads from the P2P network, which include works [\*4] by Norah Jones, Pearl Jam, UB40, George Clinton, Ben Harper, Phish, and the Dave Mathews Band).

Although Plaintiffs gathered substantial evidence of the illegal conduct, they could not ascertain the names, addresses, or other contact information for Defendants. *Id.* P16. Plaintiffs could, however, identify the Internet Protocol ("IP") address from which each defendant was unlawfully disseminating Plaintiffs' copyrighted works. *Id.* Verizon - an Internet Service Provider ("ISP") - maintains logs that match these IP addresses with their users' computers. *Id.* PP14, 16. By looking at its IP address logs, Verizon can match the IP address, date, and time with the computer that was using the IP address when Plaintiffs observed the infringement. This Court, by a Memorandum Opinion and Order dated January 11, 2006, granted Plaintiffs' Motion for Leave to Take Immediate Discovery, which allowed Plaintiffs to serve a Rule 45 subpoena on Verizon that seeks information pursuant to 47 U.S.C. S. 551(c)(2)(B) such as each Defendant's name, address, telephone number, email address, and Media Access Control address. *See Virgin Records Am., Inc. v. John Does 1-35* [\*5] , 2006 U.S. Dist. LEXIS 20651, Civ. No. 05-1918(CKK) at 1-2 (D.D.C. Jan. 11, 2006) (memorandum opinion and order granting leave to take immediate discovery). The Court's January 11, 2006 Order required that "Verizon shall give written notice, which can include use of email, to the subscribers in question within five business days," which is how Defendant Doe # 18 learned of his/her involvement in this suit. *See id.*

Following Plaintiffs' subpoena(s) in this case, Defendant Doe # 18 filed a Motion to Quash the subpoena issued to his/her IP address, 162.84.109.12, contending that this Court lacks jurisdiction over him/her on January 31, 2006 (received February 9, 2006). *See* Def.'s Mot. to Quash at 1. Through what is essentially an affidavit, Defendant Doe # 18 avers that he/she has no regular contact with the District of Columbia, as he/she (1) lives in Fredericksburg, Virginia, and owns no real or other property in the District of Columbia; (2) has never sold any products or services to any individual within the District of Columbia; (3) has never acted as the director, manager, trustee, or other officer of any corporation incorporated under the laws of, or having its principal place of business within, [\*6] the District of Columbia; (4) has rarely visited the District of Columbia, except for personal purposes; and (5) has never been sued within the District of Columbia or held subject to its jurisdiction. *Id.* at 2-3. As such, Defendant Doe # 18 contends that "I do not have sufficient contacts with the District of Columbia to justify requiring me to respond to this lawsuit outside my jurisdiction and so far away from my home." *Id.* at 1.

## II: DISCUSSION

Upon a consideration of the background facts of this case and the relevant case law, it is clear that Defendant Doe # 18's Motion to Quash must fail for two reasons.

### *A. A Full Consideration of Personal Jurisdiction is Premature*

The first reason that Defendant's Motion to Quash is without merit is because it is premature to consider the question of personal jurisdiction in the context of a subpoena directed at determining the *identity* of the Defendant. In numerous cases across a variety of jurisdictions, Doe defendants - and *amici*, such as the American Civil Liberties Union, the Electronic Frontier Foundation, and Public Citizen - have raised the same personal jurisdiction argument that Defendant Doe # 18 raises [\*7] now. In each case, courts have rejected such an argument as "premature," even where the Doe defendants assert that they live outside the court's jurisdiction and have minimal or no contacts with that jurisdiction. *See, e.g., Elektra Entm't Group, Inc. v. Does 1-9*, 2004 U.S. Dist. LEXIS 23560, Civ. No. 04-2289(RWS), 2004 WL 2095581, at \*5 (S.D.N.Y. Sept. 8, 2004); *Motown Record Co., L.P. v. Does 1-252*, Civ. No. 04-439(WBH), at 3 (N.D. Ga. Aug. 16, 2004); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567-68 (S.D.N.Y. 2004); *UMG Recordings v. Does 1-199*, Civ. No. 04-0093(CKK), at 2 (D.D.C. Mar. 10, 2004).

These rulings that such a motion is "premature" are predicated upon the important fact that a court cannot render any kind of ruling on personal jurisdiction or catalog a defendant's contacts with the relevant jurisdiction before the defendant has actually been named. *See Sony Music Entm't Inc.*, 326 F. Supp. 2d at 567-68 (holding that "without identifying information sought by plaintiffs in the [ISP] subpoena, it would be difficult to assess properly the existence of personal jurisdiction over the Doe defendants"). Simply, the parties cannot [\*8] formally litigate any aspect of personal jurisdiction until the defendant has actually been identified. *See supra*. Indeed, the D.C. Circuit has stressed that "[a] plaintiff faced with a motion to dismiss for lack of personal jurisdiction is

entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum." *El-Fadl v. Cent. Bank of Jordan*, 316 U.S. App. D.C. 86, 75 F.3d 668, 676 (D.C. Cir. 1996); *see also U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77, 108 S. Ct. 2268, 101 L. Ed. 2d 69 (1988) ("Even if it were ultimately determined that the court [lacked personal jurisdiction], the order or process it issued in the conduct of the litigation would still be valid."). Given this general rule - which applies even when a plaintiff knows a defendant's identity - it would be illogical to deny Plaintiffs the opportunity to obtain the most basic identifying information that they seek in their subpoena to third-party Verizon, Defendant Doe # 18's ISP.

Ultimately, the denial without prejudice of Defendant Doe # 18's motion will [\*9] not prejudice him/her. Upon the denial of his/her motion to quash, Plaintiffs will contact the Defendant and discuss possible settlement, which has been quite common in cases parallel with this matter. If Defendant Doe # 18 chooses to litigate rather than settle, Plaintiffs, Defendant, and the Court can determine at a later point whether it is proper to continue in this jurisdiction, or whether transfer to another forum is in order. Plaintiffs might also choose to avoid any apparent jurisdictional issue by simply refile the suit against Defendant Doe # 18 in his/her applicable jurisdiction. As such, if this case proceeds in any significant way, it will almost certainly proceed in a jurisdiction acceptable to Defendant Doe # 18.

#### *B. Plaintiffs Have Made a Prima Facie Showing of Personal Jurisdiction Over Defendant Doe # 18*

The second reason that Defendant Doe # 18's Motion to Quash is without merit is the fact that Plaintiffs have made a *prima facie* showing of personal jurisdiction over Defendant Doe # 18. Three considerations support such a determination.

First, it is undisputed that Defendant Doe # 18 contracted with a District of Columbia-based ISP, i.e. Verizon, [\*10] and used Verizon's facilities allegedly to commit copyright infringement. As such, it is arguable that this Court has jurisdiction over Defendant Doe # 18 under the District of Columbia's long-arm statute, which confers jurisdiction over any person or business "transacting any business in the District of Columbia" or "causing tortious injury in the District of Columbia by an act or omission in the District of Columbia." *See* D.C. Code S. 13-423(a)(1), (a)(3).

Second, and more importantly, regardless of his/her place of residence, Defendant Doe # 18 has clearly directed tortious activity into the District of Columbia. It is alleged that Defendant, without the permission or consent of Plaintiffs, offered to the public - including persons within this jurisdiction - Plaintiffs' copyrighted sound recordings; in exchange, Defendant Doe # 18 was able to download recordings made available by others, including persons within this jurisdiction. As the Third Circuit has stressed, those transmitting copyrighted works nationwide "can anticipate that infringement may result at places remote" from the place of origin. *Edy Clover Prods., Inc. v. Nat'l Broad. Co.*, 572 F.2d 119, 120 (3d Cir. 1978). [\*11] Indeed, this court has specifically held that "the

download of music files by [defendant] constitutes transacting business in the District" of Columbia and is sufficient to establish personal jurisdiction. *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 31-33 (D.D.C. 2004) (Lamberth, J.); *see also Gorman v. Ameritrade Holding Corp.*, 352 U.S. App. D.C. 229, 293 F.3d 506, 510 (D.C. Cir. 2002) (During "the last century, courts held that, depending on the circumstances, transactions by mail and telephone could be the basis for personal jurisdiction notwithstanding the defendant's lack of physical presence in the forum. There is no logical reason why the same should not be true of transactions accomplished through the use of e-mail or interactive websites.").

Third, by installing P2P software and logging onto a P2P network, each defendant transformed his or her computer into an interactive Internet site, allowing others to complete transactions by downloading copyrighted works over the Internet. Importantly, each Defendant was disseminating copyrighted works to anyone that wanted them and was downloading copyrighted works from others [\*12] who offered them - including residents of this jurisdiction. Engaging in such "interactive" electronic transactions provides the sort of "continuous" and "systematic" contacts with the District of Columbia that the *Gorman* court and others have recognized as sufficient to support this Court's jurisdiction over Defendant Doe # 18. *See Gorman*, 293 F.3d at 511-13; *see also Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (distinguishing between passive websites which generally do not provide sufficient contacts with a forum to justify an assertion of jurisdiction with "interactive" websites which generally do support an assertion of jurisdiction).

Accordingly, even assuming that Defendant Doe # 18's Motion to Quash was not premature at this time, given the present record, it is clear that Plaintiffs have established a *prima facie* showing of personal jurisdiction over Defendant Doe # 18 sufficient to enable them to discover Defendant Doe # 18's identity and other personal information.

### III: CONCLUSION

For the reasons set forth above, the Court shall deny without prejudice Defendant Doe # 18's Motion to [\*13] Quash and allow Verizon to comply with Plaintiffs' subpoena. An Order accompanies this Memorandum Opinion.

Date: April 18, 2006

/s/ COLLEEN KOLLAR-KOTELLY

United States District Judge

**Interscope Records, et al., Plaintiffs, vs. Lindsey Duty, Defendant.**

No. 05-CV-3744-PHX-FJM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2006 U.S. Dist. LEXIS 20214

April 14, 2006, Decided

**NOTICE: [\*1] NOT FOR PUBLICATION**

COUNSEL: For Interscope Records, a California general partnership, Plaintiff: James C Ruh, Holme Roberts & Owen LLP, Denver, CO; Nadia A Sarkis, Holme Roberts & Owen, Denver, CO; Ray Kendall Harris, Susan Moon O, Fennemore Craig PC, Phoenix, AZ; Ira M Schwartz, DeConcini McDonald Yetwin & Lacy, Phoenix, AZ.

For Sony BMG Music Entertainment, a Delaware general partnership, Arista Records LLC, a Delaware limited liability company, Plaintiffs: Ray Kendall Harris, Susan Moon O, Fennemore Craig PC, Phoenix, AZ; Ira M Schwartz, DeConcini McDonald Yetwin & Lacy, Phoenix, AZ.

For Warner Bros. Records, Inc., a Delaware corporation, Capitol Records Inc., a Delaware corporation, Virgin Records America, Inc., a California corporation, Elektra Entertainment Group Inc., a Delaware corporation, UMG Recordings Inc., a Delaware corporation, Plaintiffs: James C Ruh, Holme Roberts & Owen LLP, Denver, CO; Ray Kendall Harris, Susan Moon O, Fennemore Craig PC, Phoenix, AZ; Ira M Schwartz, DeConcini McDonald Yetwin & Lacy, Phoenix, AZ.

For Lindsey Duty, Defendant: Sheila Marie Heidmiller, Macheledt Bales & Heidmiller LLP, Mesa, AZ.

For UMG Recordings Inc., a Delaware corporation, [\*2] Warner Bros. Records, Inc., a Delaware corporation, Virgin Records America, Inc., a California corporation, Elektra Entertainment Group Inc., a Delaware corporation, Counter Defendants: James C Ruh, Holme Roberts & Owen LLP, Denver, CO; Ira M Schwartz, DeConcini McDonald Yetwin & Lacy, Phoenix, AZ.

For Interscope Records, a California general partnership, Counter Defendant: James C Ruh, Holme Roberts & Owen LLP, Denver, CO; Nadia A Sarkis, Holme Roberts & Owen, Denver, CO; Ira M Schwartz, DeConcini McDonald Yetwin & Lacy, Phoenix, AZ.

For Sony BMG Music Entertainment, a Delaware general Partnership, Capitol Records Inc., a Delaware corporation, Arista Records LLC, a Delaware limited liability company,

Counter Defendants: Ira M Schwartz, DeConcini McDonald Yetwin & Lacy, Phoenix, AZ.

JUDGES: Frederick J. Martone, United States District Judge.

OPINIONBY: Frederick J. Martone

OPINION: ORDER

I

Developments in internet-based technology, including the use of online peer-to-peer networks, have dramatically increased the speed and ease with which information can be shared worldwide. These networks have been substantially used for the rapid transfer of copyrighted works, leading to [\*3] "infringement on a gigantic scale," *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2782, 162 L. Ed. 2d 781 (2005), and creating a flurry of federal litigation. Here, plaintiffs-various recording companies ("the Recording Companies")-allege that Lindsay Duty ("Duty") used a peer-to-peer network called Kazaa to download and distribute copyrighted music in violation of federal law. Duty counterclaims, seeking a declaratory judgment that she did not violate the copyright laws, and raising state common law tort claims for invasion of privacy and abuse of legal process. The court has before it Duty's motion to dismiss (doc. 8), the Recording Companies' amended opposition (doc. 20), and Duty's reply (doc. 22); the Recording Companies' motion to dismiss counterclaims (doc. 21), Duty's opposition (doc. 24), and the Recording Companies' reply (doc. 26); and the Recording Companies' motion to disregard Duty's affidavit, or in the alternative, to treat her reply brief as a motion for summary judgment (doc. 25) and Duty's response (doc. 30).

II

Duty moves to dismiss the Recording Companies' copyright infringement claim pursuant to Rule 12(b)(6), Fed. R. Civ. P. [\*4] , contending that A) the Recording Companies failed to satisfy the pleading requirement in Rule 8(a)(2), Fed. R. Civ. P., and B) the Recording Companies provide no evidence of dissemination. Duty also moves to dismiss the claim pursuant to Rule 12(b)(7), Fed. R. Civ. P., for the failure to join an indispensable party. We disagree with all three contentions, and accordingly deny Duty's motion to dismiss (doc. 8).

A

Pursuant to Rule 8(a)(2), a plaintiff need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." "Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002) (quotation omitted). "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits

of a claim." Id. (citation omitted).

The essential elements of a copyright infringement claim are A) plaintiff's ownership of a valid copyright and [\*5] B) defendant's unauthorized copying of constituent elements of the work that are original. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 1296, 113 L. Ed. 2d 358 (1991) (citation omitted). The Recording Companies allege that they own the copyrights to various songs, and that "Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others." Complaint at 3.

Attached to the complaint are exhibits A and B. n1 The complaint is clear that exhibit A is a list of recordings which are copyrighted by the Recording Companies, and that some of the recordings on exhibit B are copyrighted by the Recording Companies. The complaint fails, however, to explicitly identify the relevance of the two exhibits to this copyright infringement action.

----- Footnotes -----

n1 "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Fed. R. Civ. P. 10(c). Accordingly, we consider exhibits A and B herein.

----- End Footnotes----- [\*6]

In context, however, the relevance of the two exhibits is clear. Duty is alleged to have illegally used Kazaa to download and distribute various copyrighted works. Therefore, based upon the complaint alone, it is clear to the court that exhibit B is an alleged representation of Duty's Kazaa share folder, and that exhibit A is a list of some songs that the Recording Companies claim were illegally downloaded or distributed by Duty through her Kazaa share folder. Moreover, it is clear from Duty's motion to dismiss that she thoroughly understands the claims against her. Therefore, the complaint satisfies the liberal notice pleading standard of Rule 8(a). To the extent that there remains confusion with regard to the exact date or time of the incidences of alleged infringement, that can be clarified during discovery. n2

----- Footnotes -----

n2 Moreover, we conclude below that the mere filing of a copyrighted work in a peer-to-peer network share folder may constitute distribution and therefore infringement. Therefore, the existence of any of the Recording Companies copyrighted recordings in Duty's share file as represented in exhibit B to the complaint may constitute copyright

infringement. Therefore, additional date or time information may not be necessary to the Recording Companies' claims.

----- End Footnotes----- [\*7]

B

Duty also argues that "Plaintiffs' allegation that Defendant merely made recordings available for distribution to others fails to state a copyright claim" because "there is no liability for infringing upon the right of distribution unless copies of copyrighted works were actually disseminated to members of the public. Duty's Memorandum in Support of her Motion to Dismiss at 3 (emphasis in original). We disagree.

Pursuant to 17 U.S.C. § 106(3), the owners of a copyright have 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." "Distribute" is not defined under the Copyright Act, but the right of distribution is synonymous with the right of publication, *Ford Motor Co. v. Summit Motor Prod., Inc.*, 930 F.2d 277, 299 (3d Cir. 1991), and "publication" is defined under the Copyright Act. "Publication" is defined to include "the offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display." 17 U.S.C. § 101 [\*8] (emphasis added). Moreover, the Court of Appeals has stated that "Napster [a peer-to-peer file sharing company] users who upload file names to the search index for others to copy violate plaintiffs' distribution rights." *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001). Therefore, the mere presence of copyrighted sound recordings in Duty's share file may constitute copyright infringement. Accordingly, Duty's motion to dismiss for failure to state a claim upon which relief can be granted is denied (doc. 8). n3

----- Footnotes -----

n3 To be clear, we do not conclude that the mere presence of copyrighted sound recordings in Duty's share file constitutes copyright infringement. We have an incomplete understanding of the Kazaa technology at this stage, and the ultimate issue of liability is more appropriately considered on a motion for summary judgment where the parties will have an opportunity to fully explain the Kazaa technology, and the means by which a file can be made available for public download on Kazaa.

----- End Footnotes----- [\*9]

C

Duty also argues that the alleged infringement would not have been possible without the

use of Kazaa, and therefore the owner of Kazaa, Sharman Networks, Ltd. ("Sharman"), is a necessary and indispensable party to this suit. We disagree. The Recording Companies may have a viable claim against Sharman for direct, contributory or vicarious infringement. See *Metro-Goldwyn-Mayer Studios Inc.*, 125 S. Ct. at 2776. Furthermore, following this action, Duty may have a viable claim against Sharman for contribution. However, the possibility of related third-party liability does not preclude us from according complete relief among those already named as parties, nor does it represent sufficient harm to either Sharman or Duty to require joinder. Fed. R. Civ. P. 19(a); see *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7-8, 111 S. Ct. 315, 316, 112 L. Ed. 2d 263 (1990) (holding that joint tortfeasors are not necessary parties).

Duty argues that to the extent copyright infringement took place, it was not caused by her because Kazaa has an automatic upload feature which causes any user to unknowingly distribute computer files over the internet. [\*10] To the extent this is true, it might be a valid defense. However, for the reasons stated, it does not make Sharman a necessary party. Therefore, Duty's motion to dismiss for the failure to join an indispensable party is denied (doc. 8).

### III

Duty counterclaims A) seeking a declaratory judgment that she did not commit copyright infringement; B) claiming that the Recording Companies are liable for the invasion of privacy in accessing her computer files and C) publically identifying her as a file-sharer; and D) claiming that the Recording Companies are liable for the abuse of legal process. The Recording Companies move to dismiss each cause of action.

#### A

The Recording Companies sole claim is that Duty committed copyright infringement. Duty counterclaims, seeking a declaratory judgment that she did not commit copyright infringement. The issue of copyright infringement will be decided by this court regardless of the declaratory judgment claim unless the parties stipulate to settlement, or the Recording Companies move to voluntarily withdraw their complaint and the court so orders pursuant to Rule 41(a)(2), Fed. R. Civ. P. Therefore, [\*11] Duty's claim for a declaratory judgment is redundant and unnecessary, and the Recording Companies motion to dismiss it is granted (doc. 21).

#### B

Duty claims that the Recording Companies are liable for the tort of intrusion upon seclusion. A person is liable for that tort if he "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." *Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 279, 947 P.2d 846, 853 (Ct. App. 1997) (citing Restatement (Second) of Torts § 652B (1977)). Therefore, a defendant is liable "only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown

about his person or affairs." Id. (citing Restatement § 652B cmt. c).

Duty alleges that the Recording Companies committed this tort by "inva[ding] [her] alleged computer." Counterclaim at 7. More specifically, it appears that Duty claims that the Recording Companies committed this tort by accessing her Kazaa share folder, which is reproduced as exhibit [\*12] B to the complaint. The Recording Companies argue that Duty fails to state a claim upon which relief can be granted because the information in the share file is public, and therefore, there is no seclusion. Duty does not dispute this fact; she merely argues that she did not put the sound recordings in the share file. She argues that Kazaa did so automatically. However, whether Duty or Kazaa acted, it is undisputed that the share file is publically available, and therefore Duty cannot show that the Recording Companies intruded upon her private affairs. Accordingly, the Recording Companies' motion to dismiss Duty's intrusion upon seclusion claim is granted (doc. 21).

C

Duty claims that the Recording Companies are liable for the tort of false light for publically disclosing that Duty is a file-sharer by filing this lawsuit. The Recording Companies move to dismiss this claim arguing that they are protected by the Noerr-Pennington doctrine. The Recording Companies appear to be correct, but we need not further consider the substance of their argument because Duty failed to respond to it and, pursuant to LRCiv 7.2(i), we perceive the failure to respond as consent to the granting [\*13] of the motion with regard to this issue. Accordingly, the Recording Companies' motion to dismiss Duty's false light claim is granted (doc. 21).

D

Duty claims that the Recording Companies are liable for the state law tort of abuse of the legal process, which is defined as "a willful act in the use of judicial process . . . for an ulterior purpose not proper in the regular conduct of proceedings." *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257, 92 P.3d 882, 887 (Ct. App. 2004). To succeed on the claim, "a plaintiff must show that the defendant's improper purpose was the primary motivation for its actions, not merely an incidental motivation." Id. at 259, 92 P.3d at 889. Moreover, for abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

Restatement § 682 cmt. b.

Here, Duty claims that this is one case in thousands where the Recording Companies [\*14] are suing individual users of peer-to-peer networks such as Kazaa in an effort to frighten users away from the networks, thereby putting the networks out of business. This might be true. In fact, the Recording Companies state in their briefings that "they face a massive problem of digital piracy over the Internet" and accordingly they

have "sustained and continue to sustain devastating financial losses." Recording Companies' Amended Opposition at 2. It is not, however, an abuse of the legal process to organize a large-scale legal assault on small-scale copyright infringers that together cause devastating financial losses. Moreover, it is not an abuse of the legal process if the Recording Companies' goal in bringing these actions is to scare would-be infringers into complying with federal law, and thereby prevent the networks that allegedly facilitate the alleged infringement from doing so. It may be an abuse of the legal process for a collection of large corporate entities to use their substantial financial and intellectual capacities to prey upon less capable individuals and unfairly pressure them into settlement. However, while Duty sets forth general allegations with regard [\*15] to the Recording Companies' overall strategy, she sets forth no allegations with regard to such heavy-handed tactics in this litigation. Therefore, the Recording Companies' motion to dismiss Duty's abuse of process claim is granted (doc. 21).

#### IV

The Recording Companies move to disregard Duty's affidavit attached to her reply brief, or in the alternative to convert Duty's reply brief to a motion for summary judgment. When considering a motion to dismiss under Rule 12(b)(6), we accept the plaintiff's factual allegations as true. *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996). Accordingly, Duty's contradictory assertions of fact in her affidavit are irrelevant to the analysis. Moreover, it would be inappropriate to convert Duty's reply into a motion for summary judgment because the parties have not had an opportunity to conduct discovery and flesh out the factual issues that are necessary to the infringement claim. Furthermore, the facts set forth in the affidavit would have no effect on our resolution of Duty's motion to dismiss pursuant to Rule 12(b)(7). Accordingly, we grant the Recording Companies' motion to disregard Duty's affidavit (doc. 25).

[\*16] V

IT IS ORDERED DENYING Duty's motion to dismiss (doc. 8).

IT IS FURTHER ORDERED GRANTING the Recording Companies' motion to dismiss the counterclaims (doc. 21).

IT IS FURTHER ORDERED GRANTING the Recording Companies' motion to disregard Duty's affidavit (doc. 25).

For clarity, only the Recording Companies' copyright infringement claims remain.

DATED this 14th day of April, 2006.

Frederick J. Martone

United States District Judge