

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS, INC., ATLANTIC : X
RECORDING CORPORATION, BMG :
MUSIC d/b/a THE RCA RECORDS : 00 Civ. 4660 (SHS)
LABEL, CAPITOL RECORDS, INC. : Judge Sidney H. Stein
ELECTRA ENTERTAINMENT GROUP :
INC., HOLLYWOOD RECORDS, INC., :
INTERSCOPE RECORDS, INC., :
LAFACE RECORDS, MOTOWN :
RECORD COMPANY, L.P., SONY :
MUSIC ENTERTAINMENT, INC., :
 :
Plaintiffs — Counterclaim Defendants, :
 :
-against- :
 :
MP3BOARD, INC., :
 :
Defendant — Counterclaimant. :
 :
X
RECORDING INDUSTRY ASSOCIATION :
OF AMERICA, :
 :
Additional Counterclaim Defendant :
 :
MP3BOARD, INC., :
 :
Third-Party Plaintiff :
 :
-against- :
 :
TIME WARNER CORP., AMERICA :
ONLINE, INC. and NULLSOFT, INC. :
 :
Third-Party Defendants. :
 :
X

**MP3BOARD'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO RIAA'S MOTION FOR SUMMARY JUDGMENT, OR,
ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT AND FACTUAL BACKGROUND

MP3Board, Inc. ("MP3Board") disputes essential facts submitted by counterdefendant Recording Industry Association of America ("RIAA"). MP3Board further disputes the interpretation of law presented by RIAA in its opening memorandum. MP3Board especially disputes the assertion of RIAA in its Preliminary Statement that "RIAA's notices complied in every respect with the DMCA's notice and takedown procedure." In fact, the evidence shows:

Both the October 27, 1999 letter and the April 18, 2000 letter threatened MP3Board's Service Providers with an action for damages. ("...under the Digital Millennium Copyright Act, if you ignore this notice, you and/or your company may be liable for any resulting infringement. This letter does not constitute a waiver of any right to recover damages incurred by virtue of any such unauthorized activities...") These improper threats have always been at the center of MP3Board's counterclaim against RIAA, as was acknowledged by the Court during the hearing on February 1, 2001, when (as reported at 70:23-25 of the transcript, in a portion omitted from the attachment to Mr. Knowles' declaration and attached to the accompanying Rothken declaration), the Court stated: "threatening to litigate against a party who is known to be immune from suit, which is what MP3 Board alleged, constitutes a sufficient allegation of wrongful conduct." At *no point in RIAA's moving papers* is there any mention of the repeated threats of RIAA to MP3Board 's Service Providers.

The RIAA "investigation" of MP3Board prior to the October 27, 1999 letter lasted less than 90 minutes and RIAA investigators downloaded no more than 6 files through links found on MP3Board. (See MP3Board's dispute with RIAA Fact 28.) When it sent the April 18, 2000 letter, there was no additional investigation and the paralegal who wrote the letter could not recall ever having attempted to download anything using links on MP3Board. She

testified that her "assumption is that there was obvious company material on the printouts and that was enough to go on." (See MP3Board's dispute with RIAA Fact 36.)

Except for "no more than 6 downloaded files," the RIAA reached its conclusions solely on the basis of name of artist and name of song. But there is "no centralized database" that identifies authorized files and the most that RIAA could suggest is that MP3Board ask "the appropriate companies." It referred MP3Board to the database of commercial retailers like CD Now. (See May 25, 2000 letter) The representative of plaintiff UMG testified during deposition that his company had "about 1300 tracks available for sale on an individual download basis" plus "promotional releases of certain tunes in unsecured formats," i.e. MP3, including full length recordings; he further testified that he doesn't know where somebody could go to find out the sound recordings that UMG released and that "I don't have a list" of unauthorized sound recordings. (See MP3Board's dispute with RIAA Fact 19.)

Neither the RIAA nor anyone else can ascertain what material on the Internet is authorized or not authorized. (MP3Board is basically a directory of material available on the Internet). For example, in its letter of May 25, 2000, the RIAA wrote "it is *highly likely* that *most* links containing the names of *recognizable* artists are linking to copyrighted material." (emphasis added) There is no way to connect such vague references to specific action *and the RIAA knows it.*

The RIAA letters were lacking in any genuine specificity, referring, in the case of the April 18, 2000 letter to nothing more than "files on other Internet sites containing full-length recordings for other users to download, including songs by such artists as Third Eye Blind, Rage Against the Machine, No Doubt, Rammstein and the Bloodhound Gang." As shown in RIAA facts 41-46, when MP3Board President, Eli Mapstead, tried to verify the accuracy of the

representations in the RIAA letter, MP3Board's president, he found an *authorized* sound recording by Third Blind Eye on an official record site that was represented by a link on MP3Board.

The RIAA has confused copyrighted *sound recordings* with copyrighted *songs* and has, in its letters and before the Court, acted as it was properly enforcing copyrighted *songs*. In fact, RIAA member companies only own copyrights to particular sound recordings. The distinction is important because *other sound recordings, perhaps of the same songs as identified by the RIAA* are properly available over the Internet. For example, the rock band Metallica, which sued Napster and confronted Napster with over 350,000 names of individuals who had downloaded MP3's through Napster, has declared that "the band will always stand behind the live tape trading/file swapping network that it has long supported" and "we are not trying to stop any legitimate trading of fan things on Internet sites or anywhere. ... We love the idea of core fans trading things, [including] a live show from Greenland." Metallica did not object to "people who trade live show files only." (See MP3Board's dispute with RIAA Fact 19.)

In its letter of May 25, 2000, The RIAA wrote: "We demand that you immediately disable the site or all the infringing links from the Site. We reiterate that our objection is not limited to the links specially identified in Exhibit C, and that we demand the removal of any and all links to sound recordings that are copyrighted by our member companies." (emphasis in original)

RIAA never provided MP3Board or its Service Providers with any addresses (URLs) to files claimed to be infringing, listing only artists and song titles. (The only URL, "http://www.mp3board.com/category.smx?cat=2" was a transient search reference.) Now RIAA representatives declare that "[l]isting each URL would require ... that an investigator manually

highlight, copy, and paste each link ... into a word processing document." (Creighton declaration, ¶6) This declaration is obviously false. The URLs on a web page are downloaded to the visitor's computer in the "source" material and can be saved by use of a standard feature on browsers like Netscape and Internet Explorer. In addition, there is a "built-in" feature of Microsoft Internet Explorer (packaged with the Microsoft Windows operating system and universally available) that will print out all the URL's on any web page accessed over the Internet. There are also smaller-scale programs available "off-the-shelf" at mass marketing computer stores (like Comp USA) that can extract the URLs from any web page accessed over the Internet.

The RIAA's factual assertion that MP3Board could locate infringing material by using the RIAA's letters is false. For example, at page 19 of its memorandum, the RIAA cites the deposition testimony of Noah Mapstead for its assertion. What Mr. Mapstead actually said (at 198:6-15 and 199:17-22 of the deposition transcript submitted by RIAA) was: "That would require downloading every single file that was linked to as a result of doing a search of the site. ... And going through every single file and determining whether or not it was a full-length recording, to the extent that you could, and whether or not that particular file was authorized or unauthorized to be on the site, whether or not it was copyrighted by any particular company. ... There's no way -- you would have to hire hundreds of people with specific knowledge of music to identify each individual file."

In sum, the RIAA, which declares that it monitors the Internet for copyright infringement on behalf of the leading producers of sound recordings in the United States and issues copyright notices purportedly authorized by the DMCA, wrote outrageously improper threatening letters to

MP3Board's Service Providers, including a letter on April 18, 2000 that resulted in disruption of MP3Board's service. The RIAA "investigation" was a sham and a pretext. The RIAA would not take the minimum amount of effort to provide an effective notification by providing URL's (Internet addresses), but simply listed song titles, along with the demand that MP3Board delete "any and all links to sound recordings that are copyrighted by our member companies" when it knew and knows that investigation and determination by MP3Board of which links referred to RIAA members' sound recordings would require an industrial operation.

Question of fact are presented as to truth of bland statements in declarations submitted in support of RIAA's motions that it did not act for the purpose of harassing MP3Board or disrupting its economic relationships. A completely contrary conclusion is supported by the evidence: that the RIAA and its member companies did attempt to and are attempting to destroy MP3Board as an example of their power and of their determination to stifle free speech involving "MP3-related content," to dominate the distribution of downloadable music files over the Internet and to monopolize Internet resources, making it impossible for independent musical artists to establish themselves outside the hegemony of Record Companies.

For these reasons, and those stated below, the RIAA motions should be denied.

LEGAL ARGUMENT

I. LEGAL STANDARD

In *EZ-Tixz, Inc. v. Hit Tix, Inc.*, 919 F.Supp. 919, 732 (S.D.N.Y. 1996), the court stated:

"In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party." (citations omitted)

II. MP3BOARD HAS A PROPER CLAIM AGAINST THE RIAA FOR HAVING INTERFERED WITH MP3BOARD'S CONTRACTUAL RELATIONSHIP WITH ABOVE NET COMMUNICATIONS.

In its motion for summary judgment, the RIAA points to the fact that the contractual relationship between MP3Board and AboveNet Communications (with which RIAA interfered) was an indirect one, mediated by Lars Mapstead and/or his company Cyberzine. This fact does, indeed, identify an issue, but it is not the issue identified by RIAA. The issue (of whether MP3Board's interest in the relationship is enforceable) is one clearly to be decided in favor of MP3Board.

RIAA argument that its DMCA notices complied with the statute should also be rejected. The RIAA improperly threatened a lawsuit for damages against the service provider. RIAA is compelled to falsify the facts and declare that its "Notice was Actually Sufficient to Locate the Infringing Material." The facts here are very different from those presented in *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir.) and the procedural context is inapposite (the infringing materials posted on RemarQ were collected in two "newsgroups" devoted to ALS materials and bearing the ALS name; the district court dismissed the copyright holder's complaint and the court of appeals reversed, treating it as a summary judgment improperly granted in favor of Remarq; *the court of appeals also held that there were triable issues of fact that prevented summary judgment in favor of ALS*).

A. MP3Board Has a Proper Cause of Action for Interference with Contract.

As the RIAA acknowledges at p. 14 of its memorandum, on February 2, 2001, this court ruled: "A defendant seeking to protect its copyright by alerting a third party that the defendant's copyright is being infringed constitutes a justification defense to tortious interference." Despite this ruling, the RIAA argues that "MP3Board Bears a Heavy Burden of Showing That The RIAA's DMCA Notice Was Nonprivileged." (RIAA memorandum at 12) The RIAA attempts to support this argument by asserting that MP3Board's "proper" cause of action was one for "tortious interference with prospective economic advantage." *Id.* at 13.

This assertion is doubly fallacious. Interference with contract is the proper cause of action and the defense would not change even if the other tort was the correct one.

The indirect nature of the relationship between MP3Board and AboveNet identifies an issue, but it is not the issue asserted by the RIAA. A cause of action for interference with *prospective economic advantage* is "an unlawful interference with a *business opportunity* through methods which are not within the privilege of fair competition." *PMC, Inc. v. Saban Entertainment, Inc.*, 45 Cal.App.4th 579 (1996) (emphasis added), cited and followed in *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners*, 52 Cal.App.4th 867, 876 *et. seq.*, on which the RIAA relies. In other words, a claim based on a *prospective economic advantage* protects a relationship that has not ripened into "*enforceable right*." *PMC*, supra at 599 (inner quotation marks and citation omitted, emphasis added); accord *Bed, Bath & Beyond* at 52 Cal.App.4th 879. Both cases quoted from *Guard-Life Corp. v. S. Parker Hardware Mfg.* (1980) 428 N.Y.S.2d 628, 50 N.Y.2d 183, 406 N.E.2d 445 for the principles that "[T]he state of mind of the interfering tort-feasor [should not] be determinative. ...as a practical matter, he will usually be totally unaware of, and customarily indifferent to, the legal particulars of that contract." Rather: liability "*must depend on the worth and significance of the objective interest to be protected*." *PMC* at 599 (inner quotation marks omitted, all editing in *PMC*).

California law provides that MP3Board had and has a fully enforceable contract right. The RIAA's ignorance of the particulars is unimportant. The RIAA intended to, and did, push MP3Board off the Internet and cause damages. The damages were not suffered by Lars Mapstead (except as a shareholder of MP3Board). If he had no damages and MP3Board cannot recover for its damages, the "legal particulars" of the relationship between MP3Board and AboveNet will insulate the RIAA from liability.

The "legal particulars" are set forth in the accompanying declaration of Lars Mapstead. As part of an express agreement he has with AboveNet, AboveNet assigns a static internet

address to MP3Board in its system. (A static internet address is permanent, in contrast to the more common, always changing, dynamic internet address that is assigned each time a person or organization connects to the Internet.) AboveNet agreed to and does serve as the contact for MP3Board in connection with MP3Board's registration with Network Systems, Inc. ("NSI"). It was because AboveNet was the contact listed with NSI that RIAA was able to discover the relationship between AboveNet and MP3Board and write to AboveNet in October, 1999 and April, 2000. [See RIAA undisputed facts 14, 25, 29 ("the RIAA's investigation indicated that AboveNet was the ISP for MP3Board") and 37] The October 27, 1999 letter and subpoena the RIAA wrote to and served on AboveNet identified "www.mp3board.com" and stated: "We have determined that a user/customer of your system or network is infringing our member record companies' copyrighted sound recordings."

California Civil Code § 1559 provides:

"§ 1559 Enforcement by third party beneficiary.

WHEN CONTRACT FOR BENEFIT OF THIRD PERSON MAY BE ENFORCED. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

See *Karpe v. United States*, 335 F.2d 454, 463 (Ct. Cl. 1964) *cert. denied* 379 U.S. 964 (1965) (citing and applying § 1559). Indeed: "the contract creating the rights accruing to the third party beneficiary need not do so in express language." *Id.*

In *Ramona Manor Convalescent Hospital v. Care Enterprises*, 177 Cal.App.3d 1120, 1134, 225 Cal.Rptr. 120 (1986), defendant did not even know the name or identity of the party with whose contract it interfered and the court affirmed a verdict in favor of plaintiff, Ramona, whose "loss was neither remote from nor merely incidental to the tortious interference. Ramona suffered directly when its legitimate expectations under a signed lease for operation of the facility were stultified." More recently, in *Johnson v. Superior Court*, 80 Cal.App.4th 1050, 1064, 95 Cal.Rptr.2d 864 (2000), the California court held that a "John Doe" donor to a sperm bank had an enforceable interest in the contract between the sperm bank and parents of

a child born from the donated sperm:

"The promise in such a situation is treated as having been made directly to the third party. The third party need not be identified by name. It is sufficient if the third party belongs to a class of persons for whose benefit the contract was made. It is not necessary, however, that the contract be exclusively for the benefit of the third party; he need not be the sole or primary beneficiary." (citations omitted)

Accordingly, MP3Board had a fully enforceable contractual right to continued Internet access through MP3Board. The particulars of the relationship between MP3Board and AboveNet do not interpose to defeat that right and the RIAA's attempt to shift the gravamen of the tort to one for interference with prospective economic advantage cannot succeed.

[Even if the proper cause of action were one for "interference with prospective economic advantage," nothing would change in the context of this motion. The RIAA is somehow claiming that it has a stronger defense to interfere when only an "business opportunity" is at stake. There is no basis in law or reason for such a claim. On February 1, 2001, as described in the first bullet point set forth above at the beginning of this memorandum, the court ruled that "threatening to litigate against a party who is known to be immune from suit, which is what MP3 Board alleged, constitutes a sufficient allegation of wrongful conduct" even as to a cause of action for interference with prospective business advantage.]

The RIAA is also erroneous when it argues that the letters it wrote to AboveNet and Metromedia were "a classic pre-litigation demand letter ...[and] precisely the type of statement that the litigation privilege is intended to protect." (RIAA memorandum at 14) The RIAA was indeed privileged to write a "pre-litigation demand letter" to MP3Board. But MP3Board's interference claim is not based on a letter from the RIAA to MP3Board. The RIAA declared to *AboveNet* (and to Metromedia after it had acquired AboveNet):

"You should understand that this letter constitutes notice *to you* that this site operator may be liable for the infringing activity *on your server*. In addition, *under the Digital Millennium Copyright Act, if you ignore this notice, you and/or your company may be liable for any resulting infringement. This letter does not constitute a waiver of any right to recover damages* incurred by virtue of any such unauthorized activities..." (emphasis added)

The RIAA has never suggested or indicated in any way that it contemplated, in good

faith and on serious consideration, filing a lawsuit against AboveNet or Metromedia. Such "good faith and serious consideration" is the basis for the litigation privilege. *Aronson v. Kinsella*, 58 Cal.App.4th 254, 266, 68 Cal.Rptr.2d 305 (1997). On the contrary, the RIAA strong-armed AboveNet and Metromedia with wrongful threats to force MP3Board off the Internet.

The RIAA's improper strong-arm tactics require their motion to be defeated. In addition, the RIAA is factually and legally wrong in the remaining portions of their argument.

B. The RIAA's Purported Notifications Did Not Comply with the DMCA.

The RIAA's purported notifications to AboveNet and Metromedia were improper for several reasons. They improperly threatened a suit for damages against service providers that are immune from suit under 17 U.S.C. § 512(a). All three notifications also failed to properly identify material that was claimed to be infringing and information reasonably sufficient to permit the service provider to locate the infringing material as required under 17 U.S.C. § 512(c).

Section 512(a) provides:

"A service provider ***shall not be liable for monetary relief***, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connection for, material through a system or network controlled or operated by or for the service provider.." (emphasis added)

Here, AboveNet and Metromedia were the kinds of service provider referred to in Section 512(a). The RIAA has not addressed the issue and it is not possible to respond to any contentions that AboveNet and Metromedia did not qualify. But it is apparent that AboveNet and Metromedia were the kind of uninvolved service providers intended to be protected.

As quoted above, the letters to both AboveNet and Metromedia stated:

"You should understand that this letter constitutes notice ***to you*** that this site operator may be liable for the infringing activity ***on your server***. In addition, ***under the Digital Millennium Copyright Act, if you ignore this notice, you and/or your company may be liable for any resulting infringement. This letter does not constitute a waiver of any right to recover damages*** incurred by virtue of any such unauthorized activities..." (emphasis added)

The RIAA has never attempted to explain or justify these threats.

Under § 512(c)(A)(iii), the DMCA requires a notification to include "Identification of the material that is claimed to be infringing and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material."

For purposes of this motion, the key elements are (1) "identification of infringing material" and (2) "information reasonably sufficient to permit the service provider to locate the material." As to both of these elements, the RIAA notifications, and each such notification fall short. The RIAA did not identify the infringing material, but only provided indirect descriptions. There was no information that would have permitted AboveNet, Metromedia or MP3Board to locate the allegedly infringing material except by undertaking a mammoth industrial operation. The RIAA did not carry out a serious investigation of material claimed to be infringing, but spent 90 minutes and downloaded six files prior sending its strong-arm notifications to AboveNet and Metromedia. Even its more voluminous demand letter to MP3Board fell short. In an attempt to cover up its shortfalls, the RIAA falsifies the facts.

The October 27, 1999 letter to AboveNet referred to "over one thousand direct links to sound files on other Internet sites," but the only identification stated: "Many of these files contain recordings owned by our member companies, including songs by such artists as Sugar Ray, Ricky Martin, Radiohead, TLC, Red Hot Chili Peppers, Madonna, Shania Twain, Lou Bega, The Fugees and Ace of Base." The RIAA requested that AboveNet "remove the site, delete the infringing links or that you disable this site or the infringing links being offered via your system."

The April 18, 2000 letter to Metromedia was no better. "This site is offering direct links to files on other Internet sites containing full-length recordings for other users to download, including songs by such artists as Third Blind Eye, Rage Against the Machine, No Doubt, Rammstein and the Bloodhound Gang." Again, the RIAA requested that Metromedia "remove the site or the infringing links from your system."

Of course, the RIAA does not represent artists. Nor do RIAA member companies own copyrights to songs. RIAA member companies own copyright to particular *sound*

recordings." The difference is important, because those who own copyrights to songs, such as the group Metallica, can and do authorize free exchange of sound recordings that are not copyrighted by RIAA member companies. RIAA member companies also post their own authorized files. It is impossible for MP3Board to ascertain which sound recordings are authorized and which are not. There is no centralized database and the companies themselves do not keep track of authorized postings. When Eli Mapstead attempted to investigate the first artist group named in the April 18, 2000 letter, Third Blind Eye, he found a sound recording that was authorized by the copyright owner.

As the RIAA itself noted in its motion to dismiss filed on or about September 12, 2000, at p. 11:

"Congress intended the notice and take procedure to act as a 'formalization and refinement of a *cooperative process* that has been employed to deal efficiently with network-based copyright infringement.' H.R. Rep. No. 105-551, Part 2, 105th Cong. 2d Sess. ('House Report') at 54 (July 22, 1998)." (emphasis added)

What sort of *cooperative process* does these letter propose? Is it enough for the RIAA simply to complain about "over one thousand links" with a few ambiguous references to artists and say "delete all the infringing links" thereby compelling a small automated enterprise to either undertake a mammoth industrial operation or face ruinous litigation? If the RIAA, which represents "companies that own 90% of all legitimate sound recordings released in the United States" (May 25, 2000 letter) and that, collectively, earn billions of dollars each year, cannot or will not keep track of authorized vs. unauthorized music files on the Internet, does the DMCA permit it to throw the whole burden of investigation and enforcement onto Internet start-ups that do not enjoy its access to information? The RIAA does not address these questions, but instead falsifies the facts.

The May 23, 2000 letter to MP3Board , although more voluminous, is even worse. A multitude of ambiguous references to artists and songs creates an unbearable burden. All the RIAA could do was instruct MP3Board to go to "public resources (such as www.cdnw.com or www.allmusic.com) through which you can verify the ownership of any particular sound recording." And even this instruction is fallacious. Just because a Metallica song is

copyrighted on one sound recording, that does not mean that a recording of the same song from a live show is not authorized to be on the Internet. Nor does the RIAA instruction provide any help in identifying sound files that have been posted for promotional purposes on the Internet by the Record Companies or other authorized organizations.

Especially mendacious is the RIAA attitude toward the scores of pages of "printouts" attached to the May 25, 2000 letter. These were printed out on May 5, 2000 (Record Companies' Undisputed Fact 83) but not received by MP3Board until some three weeks later, by which time the MP3Board database had been reconstructed. (Creighton declaration ¶ 6: "sites, such as MP3Board, automatically collect thousands of links each day through the use of automatic 'spiders' that search the Internet"). The RIAA listed no actual addresses ("URLs"), even though those links could have been saved and extracted by an elementary software program and provided. (See Curtin opposition declaration). Instead, the RIAA declares that "Listing each specific URL would require enormous efforts and resources ...[and] would require that an investigator manually highlight, copy, and paste each link from the website into a word processing document." (Creighton declaration ¶ 6) Too much trouble for the RIAA to list the URLs, but not too much trouble, according to the RIAA, for MP3Board to investigate every link on its website by looking it up at CD Now, inquiring at the appropriate Record Company whether the sound file had been generally released (even if the Record Company had a list, which it typically does not) and verifying (somehow!) whether each particular sound file was not otherwise authorized for exchange by the owner, like Metallica. Is this the "cooperative process" that Congress contemplated?

Even more fallacious is the RIAA's argument that "MP3Board Testified That The Notice Was Actually Sufficient To Locate The Infringing Material." (RIAA memorandum at 17). The RIAA misses the point entirely. Yes, it is possible to enter an artist or song and get a list of links. But is the sound file found at the other end of a link authorized or not? That is the question that the RIAA does not and cannot address. Nor does a reference at page 17 of the RIAA memorandum to the entirely different situation in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001) provide the answer. Sound files in *Napster* do not reside

on the Internet; they reside on the hard drives of Napster registrants and are uploaded to Napster when a registrant interacts with other registrants through the Napster system. "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights." *Id.* at 1014. "The file name indices, therefore, are within the 'premises' that Napster has the ability to police." *Id.* at 1024 (one sentence away from the text the RIAA quotes.) Even if a presumption of "lack of authority" can be made as to files on the hard drives of Napster registrants, that presumption cannot be extended to the Internet as a whole. Authorized sound recordings on the Internet abound.

Implicitly acknowledging that the facts do not support its position, the RIAA engages in misrepresentation. "the April notice *did* provide a URL: it specified a particular website page on the "Re" line where some of the infringing links could be found. This fact alone destroys MP3Board's argument." (RIAA memorandum at 17) As RIAA investigator Mark McDevitt testified in deposition: "This link here that is in the re[] line is not a downloadable file." (See MP3Board's response to RIAA Fact 39)

As set forth in the factual background at the beginning of this memorandum, the RIAA's representation the MP3Board could investigate the status of the sound recordings referenced by links is false. For example, at page 19 of its memorandum, the RIAA cites the deposition testimony of Noah Mapstead for their assertion. What Mr. Mapstead actually said (at 198:6-15 and 199:17-22 of the deposition transcript submitted by RIAA) was: "That would require downloading every single file that was linked to as a result of doing a search of the site. ... And going through every single file and determining whether or not it was a full-length recording, to the extent that you could, and whether or not that particular file was authorized or unauthorized to be on the site, whether or not it was copyrighted by any particular company. ... There's no way -- you would have to hire hundreds of people with specific knowledge of music to identify each individual file."

The RIAA bases its representation that its notifications were sufficient on an instance when, in response to the April 18, 2000 letter, Eli Mapstead attempted to verify the assertions in the letter. He followed one link reference to the first artist identified in the letter, Third

Blind Eye, and discovered that the link was to an authorized file. In the face of hundreds of thousands of links, the RIAA's argument is too flimsy to stand.

In a final attempt to justify its notifications, the RIAA relies on *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001). That case presents very different facts and is procedurally inapposite.

ALS Scan creates and markets "adult" photographs, including a subscription system on the Internet and CD-ROMS. 239 F.3d at 620. RemarQ provides a subscription service that includes access to newsgroups, organized by topic. *Id.* "Two of the newsgroups to which RemarQ provides its subscribers access contain ALS Scan's name in the titles. These newsgroups — 'alt.als' and 'alt.binaries.pictures.erotica.als'— contain hundreds of postings that infringe ALS Scan's copyrights. These postings are placed in these newsgroups by RemarQ's subscribers." *Id.*

ALS Scan complained about the newsgroups, stating that they "were created for the sole purpose of violating our Federally filed Copyrights and Tradename. These newsgroups contain virtually all Federally Copyrighted images." *Id.* RemarQ refused to comply with the demand for removal of the newsgroups, but stated that ALS Scan must identify individual infringing items. ALS Scan brought suit and the district court granted RemarQ's motion to dismiss or for summary judgment. The court of appeals reversed.

"when a letter provides notice equivalent to a list of representative works that can be *easily* identified by the service provider, the notice substantially complies with the notification requirements." 239 F.3d at 625 (emphasis added)

The court of appeals remanded for further proceedings and also it affirmed the district court's ruling denying ALS Scan's motion for summary judgment. *Id.* at 626.

"If ALS Scan is able to prove that in fact the offending newsgroups' 'sole purpose' is infringement of ALS Scan's copyrights, it may be entitled to a remedy. However, because it is contested both that such is, in fact, the 'sole' purpose of the newsgroups, and that 'virtually all' the images posted in the newsgroups are infringing, we are unable to come to any legal conclusions." *Id.*

Although the RIAA contends that MP3Board's positions "were squarely rejected in ALS Scan," (RIAA memorandum at 19), it is clear that it is the positions of the RIAA that were "squarely rejected." Under circumstances showing infringement far more egregious than

those alleged here, the Fourth Circuit ruled that no summary judgment could be entered. The RIAA has not come anywhere near satisfying the test of "*easy*" identification. To make this case comparable to ALS Scan, the RIAA should have complained about a website titled "illegal_arista_recordings.com" and have come before the court with evidence that "virtually all" the sound files on "illegal_arista_recordings.com" were, in fact, pirated copies. It is noteworthy that, despite its present complaints about websites bearing a name such as "SuperIllegals," the RIAA has never complained about links to such a website or offered any evidence specific to such a website. Rather, the RIAA prefers the most indirect and ambiguous references imaginable. Its purpose is not to engage in a "cooperative process" but to drive MP3Board off the Internet with defective notices and fallacious arguments. That purpose should not succeed and the RIAA's motion should be denied.

III. MP3BOARD HAS A PROPER CLAIM FOR "KNOWING MATERIAL MISREPRESENTATION" UNDER 17 U.S.C. § 512(f).

Title 17 U.S.C. § 512(f) authorizes a cause of action against "[a]ny person who knowingly materially misrepresents under this section — that material or activity is infringing."

As was presented to the court in connection with the hearing on February 1, 2001, there are no authorities that have construed § 512(f).¹ At the hearing on February 1, the court ruled "There is some support that statements made in reckless disregard of the truth are sufficient." Transcript of proceedings at 72:17-18.

In its letter of October 27, 1999, the RIAA wrote that MP3Board "offers over one thousand direct links to sound files on other Internet sites for download. Many of these files contain recordings owned by our member companies, including songs by such artists as Sugar Ray, Ricky Martin, Radiohead, TLC, Red Hot Chili Peppers, Madonna, Shania Twain, Lou Bega, The Fugees and Ace of Base. *We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law.*" (emphasis added)

¹ *ALS Scan*, supra, (decided February 6, 2001) did note that "To the extent that ALS Scan's claims about infringing materials prove to be false, RemarQ has remedies for any injury it suffers as a result of removing or disabling infringing material. See 17 U.S.C. § 512(f), (g)."

In support of its "good faith belief," RIAA downloaded no more than 6 files prior to sending the October 27, 2000 letter. The investigation prior to the October 27, 2000 letter lasted less than 90 minutes. RIAA investigator McDevitt testified "when we find these links on sites that are not owned or operated by our member companies, especially at that time in October of '99, we can -- we have a -- a very strong *feeling* that -- those links -- the links in those files are infringing." (emphasis added) In fact, the RIAA "would not know for certain whether or not the recordings were full length or not." (See MP3Board opposition to RIAA Fact 29)

The April 18, 2000 letter identified a different set of artists: "Third Blind Eye, Rage Against the Machine, No Doubt, Rammstein and the Bloodhound Gang." Again the RIAA declared: "We have a good faith belief that above-described activity is not authorized by the copyright owner, its agent or the law. We assert that the information in this notification is accurate, based on the data available to us"

RIAA paralegal Sarah Ehrlich, who prepared the April 18, 2000 letter testified that no URLs for specific links were provided to her, that she did not review the MP3Board site and that she cannot recall every having attempted to download anything using links on MP3Board. Ms. Ehrlich's "assumption is that there was obvious company material on the printouts and that was enough to go on." (See MP3Board opposition to RIAA Fact 36)

When Mr. Eli Mapstead received the April 18, 2000 letter, he investigated the first artist group listed on the letter and found "an official label site offering Third Blind Eye music." (RIAA Fact 44) Mr. Mapstead downloaded a file, verified that the song was a Third Blind Eye recording and matched the URL of that site with a corresponding URL in the MP3Board database. (*Id.*, Facts 44-46)

The May 25, 2000 did not include any specific URL's. No identification was provided except as to artists and songs. Based only on artist name and song title, the RIAA declared that "we believe" that MP3Board's database contained "hundreds or thousands of additional infringing links. We do not limit our copyright notification to the links marked in Exhibit C, but hereby expressly object to any and all links located anywhere on the Site which allow users

to download sound recordings that are copyrighted by our member companies." (emphasis in original)

In the May 25, 2000 letter, RIAA asserted that "it is highly likely that most links containing names of recognizable artists are linking to copyrighted material." Printouts identified hundreds of song titles. Again, the letter declared "a good faith belief that none of the above-described activity is authorized by the copyright holder, its agent or the law."

Although RIAA investigator McDevitt testified that "I believe ... some of the links were tested," neither he nor anyone else would know how many were tested because there was no "written documentation that would somehow evidence that testing." *Id.* at 62:7-63:1 He could not even recall when the links were tested. See MP3Board response to RIAA Fact 57.

But some artists whose compact discs are marketed by RIAA member companies authorize distribution of sound recordings of copyrighted songs where the sound recordings are not copyrighted by RIAA member companies; for example, the rock band Metallica which sued Napster and confronted Napster with over 350,000 names of individuals who had downloaded MP3's through Napster, has declared that "the band will always stand behind the live tape trading/file swapping network that it has long supported" and "we are not trying to stop any legitimate trading of fan things on Internet sites or anywhere. ... We love the idea of core fans trading things, [including] a live show from Greenland." Metallica did not object to "people who trade live show files only." Opposition Kovsky declaration. One page attached as part of Exhibit C to the May 25, 2000 included 11 links to Metallica songs that were marked as "infringing." (See printout attached to the Creighton declaration with time of 6.07.45 PM 5/5/00).

These facts show one direct falsehood involving Third Blind Eye. But just as serious is the totally false claimed support for the purported DMCA notifications. With no written documentation of its investigation and with witnesses who testify to an almost total lack of recall, it is impossible to tell whether RIAA representatives are being truthful. Even if their testimony is credited, there is a "reckless disregard" for the truth of the statements made in a DMCA notification.

If summary judgment is granted in favor of the RIAA on the § 512(f) claim, § 512(f) ceases to have any effect. A copyright owner can conduct no investigation or a sham investigation, write a vague demand letter that makes indirect, even false claims, throw an intolerable burden on a service provider or information location tool and make it impossible for the information service provider or information location tool to deal with the situation. The evidence supports a finding that exactly that scenario occurred here. Summary judgment in favor of the RIAA would become a blueprint for abuse.

For the foregoing reasons, the motion for summary judgment of the RIAA should be denied.

CONCLUSION

For the foregoing reasons, the RIAA's motion for summary judgment, or, alternatively, for partial summary judgment, and each part thereof, should be denied.

Dated: April 23, 2001

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MP3Board, Inc.

PROOF OF SERVICE

Arista Records, Inc., et al. V. MP3Board, Inc.
Case No. 00 CV 4660 (SHS)
US District Court, Southern District of New York

I am over the age of 18 years, employed in the county of Marin, and not a party to the within action; my business address is 1050 Northgate Drive, Suite 520, San Rafael, CA 94903.

On April 23, 2001, I served the within:

**DEFENDANT MP3BOARD'S MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO RIAA'S MOTION FOR SUMMARY
JUDGMENT; MP3BOARD'S STATEMENT OF MATERIAL FACTS IN
OPPOSITION TO RIAA'S MOTION FOR SUMMARY JUDGMENT;
DECLARATION OF IRA P. ROTHKEN IN SUPPORT OF OPPOSITION;
DECLARATION OF ROBERT KOVSKY IN SUPPORT OF OPPOSITION;
DECLARATION OF C. MATTHEW CURTIN IN SUPPORT OF OPPOSITION;
DECLARATION OF LARS MAPSTEAD IN SUPPORT OF OPPOSITION**

on the parties in said action via Facsimile and by U.S. Priority Mail, by placing a copy in a sealed, postage prepaid envelope and depositing in a U.S. Mailbox and by Facsimile addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 23, 2001, at San Rafael, California.