

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS, INC., ATLANTIC
RECORDING CORP., CAPITOL
RECORDS, INC., ELEKTRA
ENTERTAINMENT GROUP INC.,
INTERSCOPE RECORDS, J RECORDS,
MOTOWN RECORD COMPANY, L.P.,
PRIORITY RECORDS LLC, THE RCA
RECORDS LABEL, a unit of BMG Music,
SONY MUSIC ENTERTAINMENT INC.,
UMG RECORDINGS, INC., VIRGIN
RECORDS AMERICA, INC., and
WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

AT&T BROADBAND CORP., CABLE &
WIRELESS USA, SPRINT CORP. -
ADVANCED NETWORK SERVICES,
and UUNET TECHNOLOGIES, INC.,

Defendants.

Civil Action No.

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR A PRELIMINARY INJUNCTION**

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Entertainment Inc., UMG
Recordings, Inc., Virgin Records
America, Inc., and Warner Bros.
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
A. Plaintiffs' Valuable Intellectual Property	2
B. The Internet And Music Piracy	3
C. The Listen4ever Website's Infringement Of Plaintiffs' Copyrights	5
D. Listen4Ever's Attempt To Evade United States Copyright Law	6
E. Plaintiffs' Efforts to Have Listen4ever Cease And Desist From Its Infringing Activity And To Have Defendants Block Access To The Listen4ever Site	8
ARGUMENT	9
I. INJUNCTIVE RELIEF UNDER § 512(J)(1)(B) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT IS WARRANTED	9
A. Plaintiffs Are Likely To Succeed On The Merits	10
1. The Plaintiffs Have Valid Copyrights in the Copyrighted Sound Recordings	10
2. The Listen4ever Site Infringes Plaintiffs' Copyrights in the Copyrighted Sound Recordings	10
B. Plaintiffs Will Suffer Irreparable Harm If The Court Does Not Grant The Requested Relief	12
C. The Balance Of Hardships Favors Plaintiffs, And There Are Fair Grounds For Litigation	15
D. Each Of The Four Factors Enumerated In § 512(j)(2) Weigh In Favor Of Issuing An Injunction Against Defendants To Block Access To The Listen4ever Site	15
1. An Injunction to Block Access to the Listen4ever Site Would Not Significantly Burden Either the Defendants or the Operation of Defendants' Systems or Networks	16

TABLE OF CONTENTS
(continued)

	<u>Page</u>
2. Plaintiffs Will Suffer Serious and Irreparable Harm in the Digital Network Environment If Steps Are Not Taken to Prevent Infringement by Listen4ever	16
3. An Injunction to Block Access to Listen4ever Would Be Technically Feasible and Effective, and Would Not Interfere with Access to Noninfringing Material at Other Online Locations	17
4. A Less Burdensome and Comparably Effective Means of Preventing or Restraining Access to the Infringing Material Is Not Available to Plaintiffs	17
CONCLUSION	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>A&M Records, Inc. et al. v. Napster, Inc.,</u> 284 F.3d 1091 (9th Cir. 2002)	1
<u>A&M Records, Inc., et al. v. Napster, Inc.,</u> 239 F.3d 1004 (9th Cir. 2001)	11
<u>ABKCO Music, Inc. v. Stellar Records, Inc.,</u> 96 F.3d 60 (2d Cir. 1996).....	9, 13, 15
<u>Gershwin Publ'g Group v. Columbia Artists Management, Inc.,</u> 443 F.2d 1159 (2d Cir. 1971).....	11
<u>MAI Systems Corp. v. Peak Computer, Inc.,</u> 991 F.2d 511 (9th Cir. 1993)	11
<u>Novelty Textile Mills v. Joan Fabrics Group, Inc.,</u> 558 F.2d 1090 (2d Cir.1977).....	10
<u>Paramount Pictures Corp. v. Carol Publ'g Group, et al.,</u> 11 F. Supp. 2d 329 (S.D.N.Y. 1998).....	9, 13
<u>Peer Int'l Corp. v. Luna Records, Inc.,</u> 887 F. Supp. 560 (S.D.N.Y. 1995)	12
 <u>STATUTES</u>	
17 U.S.C § 101	2
17 U.S.C § 106 (1), (3)	11
17 U.S.C § 410(c)	10
17 U.S.C § 512(j)(1)(B)(ii)	9
17 U.S.C § 512(j)(2)(A)-(D).....	10, 16

Plaintiffs Arista Records, Inc., Atlantic Recording Corp., Capitol Records, Inc., Elektra Entertainment Group, Inc., Interscope Records, J Records, Motown Record Company, L.P., Priority Records LLC, The RCA Records Label, a unit of BMG Music, Sony Music Entertainment Inc., UMG Recordings, Inc., Virgin Records America, Inc., and Warner Bros. Records Inc. (collectively, "Plaintiffs") submit this memorandum of law in support of their motion, brought on by Order to Show Cause, for a preliminary injunction ordering AT&T Broadband Corp., Cable and Wireless USA, Sprint Corporation – Advanced Network Systems ("Sprint"), and UUNet Technologies, Inc. ("UUNet") (collectively, "Defendants") to block access to the website www.Listen4ever.com, through which Plaintiffs' copyrighted sound recordings are made available for illegal copying and distribution on the Internet.

PRELIMINARY STATEMENT

This action arises out of the blatant copyright infringement of Listen4ever.com ("Listen4ever"), which built, maintains, and controls a website, <http://www.listen4ever.com> (the "Listen4ever Site" or "the Site"), that it knowingly, willfully, and intentionally designed to engage in the wholesale infringement of Plaintiffs' sound recordings. With functions such as the ability to download entire sound recording albums directly from Listen4ever's central server, the Listen4ever Site makes infringing music files more readily available than Napster, which currently is subject to a preliminary injunction as a result of its contributory and vicarious copyright infringement. See A & M Records, Inc. et al. v. Napster Inc., 284 F.3d 1091 (9th Cir. 2002). Among the recording artists whose works are being unlawfully copied and distributed through the Listen4ever Site are: Coldplay, Christina Aguilera, Bruce Springsteen, Red Hot Chili Peppers, Duran Duran, Eric Clapton, Barbra Streisand, Lenny Kravitz, Whitney Houston, Dirty Vegas, Billy Idol, and Nelly.

In an attempt to shield itself from the practical reach of United States law, Listen4ever uses offshore servers located in the People's Republic of China to host the website through which its infringing activities occur. Listen4ever, however, provides its infringing services to the majority of Internet users in the United States via the backbone routers owned and operated by Defendants. In enacting the Digital Millennium Copyright Act ("DMCA"), Congress anticipated that infringers might attempt to move offshore to avoid and delay service of process and enforcement of U.S. copyright law. Thus, it enacted § 512(j) of the DMCA, which permits a copyright owner to seek injunctive relief (and solely injunctive relief) to require Internet service providers ("ISPs") to block access to such sites. This is exactly the situation here and the limited relief plaintiffs are seeking.

Each day that Internet users in the United States can access the Listen4ever Site, Plaintiffs' copyrights in their sound recordings are infringed countless times. Copies of these sound recordings are made available for viral distribution by users of the Listen4ever Site, thereby exponentially increasing the irreparable harm to Plaintiffs.

Accordingly, Plaintiffs respectfully request that the Court issue a preliminary injunction requiring Defendants to block Internet communications to and from Listen4ever's servers that travel through Defendants' backbone routing systems.

STATEMENT OF FACTS

A. Plaintiffs' Valuable Intellectual Property

Plaintiffs are engaged in the business of producing and manufacturing sound recordings containing performances of musical compositions. (See Declaration of Frank Creighton, dated August 15, 2002, attached to Plaintiffs' Order to Show Cause as Exhibit 1 ("Creighton Decl.") ¶ 3.) In addition, Plaintiffs distribute and sell those sound recordings in phonorecords (as defined in 17 U.S.C. § 101, which include, without limitation, compact discs)

and over the Internet, and/or license those distribution activities to others. (Creighton Decl., ¶ 3.) Plaintiffs are among the leading producers of sound recordings in the United States. (Creighton Decl., ¶ 3.)

Plaintiffs are the copyright owners or owners of exclusive rights under United States copyright law with respect to certain copyrighted sound recordings embodied in their phonorecords, including but not limited to those listed on Exhibit A of the Complaint in this action (the "Copyrighted Sound Recordings"). (Creighton Decl., ¶ 4.) Each Plaintiff has applied for and/or received Certificates of Copyright Registration from the Register of Copyrights for its Copyrighted Sound Recordings. (Creighton Decl., ¶ 4.) Each Plaintiff has the exclusive rights to, *inter alia*, "reproduce the [Copyrighted Sound Recordings] in copies or phonorecords" and to "distribute copies [of the Copyrighted Sound Recordings] in phonorecords . . . to the public." (Creighton Decl., ¶ 4.) Listen4ever has made each of the sound recordings listed in Exhibit A of the Complaint in this action, as well as other copyrighted sound recordings owned by the Plaintiffs, available for unlawful and unauthorized copying and distribution over the Internet. (Creighton Decl., ¶ 4.)

B. The Internet And Music Piracy

The Internet is a vast collection of interconnected computers and computer networks that communicate with each other. (Creighton Decl., ¶ 6.) It allows hundreds of millions of people around the world to communicate freely and easily and to exchange ideas and information, including academic research, literary works, financial data, music, movies, graphics, and an unending and ever-changing array of other data. (Creighton Decl., ¶ 6.)

The Internet offers tremendous opportunities for the music business as well as for everyone who loves music. (Creighton Decl., ¶ 7.) Indeed, the Internet provides distinct advantages for music because, unlike tangible products, it is possible not only to market and sell

music online, but also to deliver it to the consumer digitally and instantly. (Creighton Decl., ¶ 7.) Record companies, including Plaintiffs, technology companies, and Internet companies alike are creating exciting businesses to permit the public to take advantage of the opportunities that these new technologies make possible. (Creighton Decl., ¶ 7.)

Unfortunately, in addition to creating opportunities for new and creative models for legitimate businesses, the Internet also has afforded opportunities for the wide-scale piracy of sound recordings and musical compositions. (Creighton Decl., ¶ 8.) The most notorious example to date has been Napster, which is now subject to a federal court preliminary injunction to cease its infringing conduct. (Creighton Decl., ¶ 8.)

Technology has been widely distributed that enables individuals to copy a song from a commercially released CD onto the hard drive of their computers (a process known as "ripping") and then to compress this digitized file so that it is small enough to be readily distributed over the Internet. (Creighton Decl., ¶ 9.) Most Internet piracy of sound recordings is accomplished using a compression technology. (Creighton Decl., ¶ 9.) The best-known type of compression technology is MP3, which stands for Motion Picture Expert Group 1, Audio Layer 3. MP3 is an algorithm that reduces the size of a digital music file so that it more easily and quickly can be copied, transmitted, and downloaded over the Internet. (Creighton Decl., ¶ 9.) Another popular compression technology is WMA, which stands for Windows Media Audio. (Creighton Decl., ¶ 9.) Many MP3s and WMA files do not incorporate any security embodied in the music file to limit further copying and distribution of the sound recording. (Creighton Decl., ¶ 9.) Thus, once a sound recording has been converted into an unsecured compressed format, it can be copied further and distributed an unlimited number of times, without significant degradation in sound quality. (Creighton Decl., ¶ 9.)

It is well known, and has been widely reported, that major record companies have generally not authorized their sound recordings to be reproduced and distributed in unsecured compression formats such as MP3 and WMA. (Creighton Decl., ¶ 10.)

C. The Listen4ever Website's Infringement Of Plaintiffs' Copyrights

The Listen4ever Site is hosted on servers located in the People's Republic of China. (Creighton Decl., ¶ 11.) By employing an easily used, web-based system, the Listen4ever Site enables users to connect to its central servers and encourages and enables them to download music from a centralized location containing thousands of such files, thereby making unlawful copies of any and as many recordings they choose. (Creighton Decl., ¶ 11.)

The Listen4ever Site can be easily accessed by software that comes pre-packaged on most personal computers. (Creighton Decl., ¶ 13.) It is thus a far more blatant form of copyright infringement than the Napster system. (Creighton Decl., ¶ 13.) Using a standard Internet browser, users connect their computers to Listen4ever's hub of computer servers by logging on to the website <www.listen4ever.com>. (Creighton Decl., ¶ 13.) Once connected, users of the Site can perform a search for artists, songs, or albums of interest, listed according to categories such as "male artist," "female artist," "various artists," "bands," and "soundtracks." (Creighton Decl., ¶ 13.) Users can also click on direct links to categories such as "new albums," "full albums," "hot albums," and "top downloads." (Creighton Decl., ¶ 13.)

The Listen4ever Site is even more egregious than the now-enjoined Napster system in that it stores on its central servers music files that users have made available for distribution. (Creighton Decl., ¶ 14.) A user who has selected a music file for copying connects to the central server and downloads the file by clicking on the link in the index provided by the Listen4ever Site. (Creighton Decl., ¶ 14.) The file automatically is copied and saved to the user's individual computer hard drive. (Creighton Decl., ¶ 14.) Moreover, while the focus of

Napster seemed to be to facilitate the downloading of individual songs, the Listen4ever's Site's focus is the downloading of entire albums. (Creighton Decl., ¶ 14.) The Site's main page prominently features a range of albums available for copying. (Creighton Decl., ¶ 14 and Ex. A.) Additionally, the Site features albums that have not yet been commercially released. For instance, the most recent album by artist Mary J. Blige, "Dance for Me," was available in full on the Listen4ever Site before its release to stores on August 13, 2002. (Creighton Decl., ¶ 15.)

Each time a sound recording is downloaded from the Listen4ever Site, Listen4ever makes an unauthorized copy of the recording on its central servers and engages in an unauthorized distribution of that recording, and the user who downloads it makes an unauthorized copy. (Creighton Decl., ¶ 16.) Once downloaded, it is very easy for users to virally distribute the file using other popular communications technologies. (Creighton Decl., ¶ 16.) At any given time, thousands of files are available for download through the Listen4ever Site. (Creighton Decl., ¶ 16.) The overwhelming majority of sound recordings available on the Listen4ever Site are being distributed and copied in violation of copyright law. (Creighton Decl., ¶ 16.) Countless instances of unlawful downloading, copying and distribution of sound recordings occur each day that the Listen4ever Site is accessible to Internet users. (Creighton Decl., ¶ 16.)

D. Listen4Ever's Attempt To Evade United States Copyright Law

Apparently aware that the Listen4ever Site constitutes a blatant violation of United States copyright law, Listen4ever has attempted to avoid the ambit of United States copyright law by using host servers located in the People's Republic of China. (Creighton Decl., ¶¶ 11, 18.) In addition, the Listen4ever Site's operators seem to be based there as well. (Creighton Decl., ¶ 18.) Strikingly absent from the Listen4ever Site is any indication of the person or entity that operates Listen4ever. (Creighton Decl., ¶ 18.) The only information

Plaintiffs have been able to locate is that the domain name appears to have been registered to an individual in Tianjin, China. (Creighton Decl., ¶ 18.) Even the Listen4ever Site's links for contacting the operators sends e-mail to an anonymous Yahoo! e-mail account. (Creighton Decl., ¶ 18.) Listen4ever's connections to China notwithstanding, the Listen4ever Site uses a U.S. top level domain name, .com, is written entirely in English, appears to target an American audience by focusing on United States copyrighted works, and does not appear to feature Chinese music. (Creighton Decl., ¶ 19.)

Despite the fact that the Listen4ever Site's servers are located in China, Listen4ever can gain access to Internet users in the United States by using Defendants' Internet routing services. Defendants are in the business of providing Internet backbone routing services. (See Declaration of Professor David J. Farber, dated August 14, 2002, attached to Plaintiffs' Order to Show Cause as Exhibit 2 ("Farber Decl.") ¶¶ 9-10.) Defendants provide routing connections to and from a website's host server, through which communications from a user's computer travel to the host server. (Farber Decl., ¶ 10.) Via Border Gateway Protocol ("BGP"), Defendants' routers exchange information about other known routers, the addresses they can reach, and the best available route between the addresses. (Farber Decl., ¶ 10.) Defendants' routers recognize addresses by reading the Autonomous System Number ("ASN"), or grouping of Internet Protocol ("IP") blocks, associated with the batch of addresses. (Farber Decl., ¶ 10.) The routers then determine the best pathway between the computer requesting a connection with a particular address and that address's host computer. (Farber Decl., ¶ 10.) Defendants essentially coordinate and provide the most efficient connection between computers on the Internet. (Farber Decl., ¶ 10.) Defendants' routing services are the principal means through which Listen4ever gains access to Internet users in the U.S. (Farber Decl., ¶ 10.)

E. Plaintiffs' Efforts to Have Listen4ever Cease And Desist From Its Infringing Activity And To Have Defendants Block Access To The Listen4ever Site

Attempts were made initially to get Listen4ever voluntarily to cease and desist its infringing activity. (Creighton Decl., ¶ 22.) These attempts were not successful. (Creighton Decl., ¶ 22.) Plaintiffs, through the Recording Industry Association of America ("RIAA") and its international affiliate, the International Federation of Phonographic Industries ("IFPI"), have sent Listen4ever three cease and desist notices. (Creighton Decl., ¶ 22.) Listen4ever, through a representative whose name appears to be Mike Smith, responded to IFPI by electronic mail on August 13, 2002, stating that Listen4ever had taken down the albums and redirected the Listen4ever Site to another site. (Creighton Decl., ¶ 22.) Despite this assurance, the Listen4ever Site remains accessible and thousands of albums still remain available for download. (Creighton Decl., ¶ 22.) Moreover, IFPI's investigations revealed that Listen4ever appears to be trying to create the appearance of being shut down by occasionally redirecting traffic to another website seemingly affiliated with Listen4ever. (Creighton Decl., ¶ 23.) This website, www.lmp3.net, also contains infringing sound recordings. (Creighton Decl., ¶ 23.) Listen4ever's evasive behavior clearly indicates its desire to continue operating beyond the practical reach of U.S. law.

In addition, Defendants were given express notice of the infringing activity occurring through their backbone routing services. (Creighton Decl., ¶ 24.) On August 5 and August 6, 2002, Plaintiffs, through RIAA, contacted Defendants to alert them to the rampant infringing activities on the Listen4ever Site and to seek their assistance in preventing further acts of infringement. (Creighton Decl., ¶ 24 and Ex. C.) Specifically, Plaintiffs asked Defendants to block access to the Internet Protocol ("IP") addresses (numeric "names" by which computers identify each other over the Internet) hosted on the Listen4ever servers in China. (Creighton Decl., ¶ 24.) Defendants in essence responded that they were reluctant to block communications

to and from Listen4ever traveling over their networks simply at the request of RIAA, but would of course comply with a court order directing them to do so. (Creighton Decl., ¶ 24.) Plaintiffs thus have no choice but to petition this Court for injunctive relief.

ARGUMENT

I. INJUNCTIVE RELIEF UNDER § 512(J)(1)(B) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT IS WARRANTED

The Listen4ever Site presents a clear example of willful and egregious copyright infringement via the Internet by an entity trying to avoid liability under United States law by using host servers for its website located in China. Congress intended to prevent the harmful effects of such a maneuver when it enacted § 512(j) of the Digital Millennium Copyright Act, which allows for an order restraining an ISP from allowing access to a specific online location hosted on servers outside the United States. See 17 U.S.C. § 512(j)(1)(B)(ii).

A preliminary injunction issued pursuant to § 512(j)(1)(B)(ii) ordering Defendants to block access to the Listen4ever Site is necessary and appropriate in this case to protect Plaintiffs from irreparable harm. It is well settled in this Circuit that a party is entitled to a preliminary injunction if it establishes (1) irreparable harm; and (2) either (a) that it will likely succeed on the merits or (b) that there are sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and that a balancing of the hardships tips decidedly in favor of the moving party. See ABKCO Music v. Stellar Records, 96 F.3d 60, 64 (2d Cir. 1996) (affirming grant of preliminary injunction in favor of publisher of the Rolling Stones' music against manufacturer of "CD&G's", a CD that also displays lyrics to a song for use in Karaoke machines); see also Paramount Pictures Corp. v. Carol Publ'g Group, et al., 11 F. Supp. 2d 329, 332 (S.D.N.Y. 1998) (granting preliminary injunction in favor of owner of

copyrights in the *Star Trek* television series and films against publisher of book containing plot summaries of episodes and films). All of these elements are present in this case. In addition, the four considerations enumerated in § 512(j)(2) weigh in favor of granting such a preliminary injunction against Defendants. See 17 U.S.C. § 512(j)(2)(A)-(D).

A. Plaintiffs Are Likely To Succeed On The Merits

To establish a prima facie case of copyright infringement for the purpose of obtaining an injunction, a plaintiff must show ownership of a valid, existing copyright and copying of the copyrighted material. See Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977).

1. The Plaintiffs Have Valid Copyrights in the Copyrighted Sound Recordings

Plaintiffs are the copyright owners or owners of exclusive rights under United States copyright with respect to certain copyrighted sound recordings embodied in their phonorecords, including but not limited to those listed on Exhibit A of the Complaint in this action (the "Copyrighted Sound Recordings"). (Creighton Decl., ¶ 4.) Each Plaintiff has applied for and/or received Certificates of Copyright Registration from the Register of Copyrights for its Copyrighted Sound Recordings. (Creighton Decl., ¶ 4.) These Certificates are *prima facie* evidence of both the copyrightability of the Copyrighted Sound Recordings, and the validity of Plaintiffs' copyrights. See 17 U.S.C. § 410(c); see also Novelty Textile Mills, 558 F.2d at 1092 n.1.

2. The Listen4ever Site Infringes the Plaintiffs' Copyrights in the Copyrighted Sound Recordings

There can be no doubt that Listen4ever is liable for willfully infringing Plaintiffs' copyrights. As described in detail above, the Listen4ever Site enables users to connect to its central servers and encourages and enables them to download music from a single database

Listen4ever is also liable for vicarious copyright infringement for having the right and ability to supervise infringing copyright activities by Internet users, while having a direct financial interest in such activities. See A&M Records, Inc. v. Napster, Inc., 239 F.3d at 1022-24 (affirming district court's conclusion that plaintiffs had demonstrated a likelihood of success on the merits of the vicarious copyright infringement claim because it benefited financially from the increasing levels of infringing activity, and had the right and ability to supervise the activity by locating infringing files on the system and terminating users who place them there); see also Peer Int'l Corp. v. Luna Records, Inc., 887 F. Supp. 560, 565 (S.D.N.Y. 1995) (finding that company's president was vicariously liable for any copyright infringement committed by company because he had the right and ability to supervise company's activities and had a financial interest in the exploitation of copyrighted materials).

As described above, Listen4ever has tried to avoid liability under United States copyright law by using host servers located in China. (Creighton Decl., ¶¶ 11, 18-19.) However, Listen4ever is able to gain access to Internet users in the United States by using Defendants' routing services. (Farber Decl., ¶ 10.) Defendants' backbone routing services are the primary means by which the Listen4ever Site can reach and be reached by Internet users in the United States. (Farber Decl., ¶ 10.) On August 5 and August 6, 2002, RIAA notified Defendants of the infringing activity occurring on the Listen4ever Site. (Creighton Decl., ¶ 24.) Defendants indicated that they were unwilling to block communications to and from the Listen4ever Site traveling over their networks simply at the request of RIAA, but would comply with a Court-ordered injunction. (Creighton Decl., ¶ 24.)

B. Plaintiffs Will Suffer Irreparable Harm If The Court Does Not Grant The Requested Relief

Once a plaintiff has established a likelihood of success on the merits of a

copyright claim, irreparable injury is presumed. See, e.g., ABKCO Music, 96 F.3d at 66 (once a plaintiff demonstrates a *prima facie* case of copyright infringement, the court will presume irreparable harm); see also Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d at 339 (granting injunction to enjoin copyright infringement because defendant was unable to rebut the presumption of irreparable harm after plaintiff established likelihood of success on the merits). Thus, because Plaintiffs have established a likelihood of success of demonstrating that Listen4ever infringes Plaintiffs' copyrights, irreparable injury must be presumed.

Although Plaintiffs do not need to show irreparable injury once they have established a likelihood of success on the merits of its copyright claims, see, e.g., ABKCO Music, 96 F.3d at 66, there are a number of facts that establish that, regardless of the presumption, the Plaintiffs will be irreparably damaged unless access to the Listen4Ever Site is blocked by Defendants.

First, unchecked Internet piracy of the type engaged in by Listen4ever poses grave risks to the sale of sound recordings fixed in CDs and tapes and to the sale of sound recordings on the Internet, as well as the development of a legitimate online market for music. (Creighton Decl., ¶ 25.) Plaintiffs suffer tremendous levels of lost sales of albums and singles. The market for Plaintiffs' works is severely harmed when consumers are able to download for free through the Listen4ever Site the same sound recordings that Plaintiffs are offering to them for sale. (Creighton Decl., ¶ 25.) The erosion in sales is particularly acute when, as here, an album is available for free over the Internet before it is even released for sale to the public. (Creighton Decl., ¶ 25.) Even more damaging is the lesson that sites such as Listen4ever's teach to consumers – namely, that artists and record companies do not deserve to be compensated for their creative endeavors, and that creative works are free for the taking by anyone with an

Internet connection. (Creighton Decl., ¶ 26.)

Due to the loss of sales, Plaintiffs will not have the resources to invest in new talent. Plaintiffs have invested and continue to invest substantial sums of money, time, effort, and creative talent to discover and develop recording artists, and to create, manufacture, advertise, promote, sell, and license sound recordings embodying their performances. (Creighton Decl., ¶ 27.) In order to create sound recordings, Plaintiffs make payments to, among others, their recording artists, other musicians, producers, technicians, and other staff personnel, and various musicians' unions. (Creighton Decl., ¶ 27.) Plaintiffs and their recording artists are compensated for their creative efforts and monetary investments largely from the revenues attributable to the sale of phonorecords to the public and from license fees from the reproduction, distribution, digital performance, or other exploitation of sound recordings. (Creighton Decl., ¶ 27.) Absent such compensation, profits and motivation would be diverted away from recording artists and the record companies that record, manufacture, promote, and distribute their works. (Creighton Decl., ¶ 27.) The pool of resources available for finding and promoting new artists would shrink, and the quality, integrity, and diversity of musical recordings would suffer. (Creighton Decl., ¶ 27.) The ultimate result would be to diminish the public's access to a wide variety of high-quality musical recordings. (Creighton Decl., ¶ 27.)

The unchecked music piracy occurring daily on the Listen4ever Site would not be possible if Listen4ever were not able to utilize the network routing services Defendants provide. (Creighton Decl., ¶ 28.) Defendants' routing services are the primary means through which Listen4ever can reach and be reached by Internet users in the United States. (Creighton Decl., ¶ 28.)

C. The Balance Of Hardships Favors The Plaintiffs, And There Are Fair Grounds For Litigation

Because Plaintiffs have shown that they are likely to succeed on the merits, it is not necessary for the Court to consider whether the balance of hardships tips decidedly in favor of Plaintiffs and whether there are fair grounds for litigation. See ABKCO Music, 96 F.3d at 64 (to obtain a preliminary injunction plaintiff must establish either likelihood of success on the merits or fair grounds for litigation coupled with the balance of equities tipping decidedly in plaintiff's favor). Nevertheless, Plaintiffs can satisfy the alternate test as well.

As set forth above, at a minimum there are ample grounds for litigation in this case. It is also true that the balance of hardships tips decidedly in favor of Plaintiffs. As Plaintiffs have described above, if the Court does not order Defendants to block access to the Listen4ever Site, Plaintiffs will be irreparably injured. As explained below, Defendants would suffer little, if no, harm as a result of such a preliminary injunction.

D. Each Of The Four Factors Enumerated In § 512(j)(2) Weigh In Favor Of Issuing An Injunction Against Defendants To Block Access To The Listen4ever Site

Section 512(j)(2) of the Digital Millennium Copyright Act provides that the Court shall consider four factors when considering whether to grant an injunction under that section:

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

17 U.S.C. § 512(j)(2)(A)-(D). Each of these four factors weighs in favor of granting a preliminary injunction to block access to the Listen4Ever Site.

1. An Injunction to Block Access to the Listen4ever Site Would Not Significantly Burden Either Defendants or the Operation of Defendants' Systems or Networks

Defendants can prevent the infringement of the Plaintiffs' copyrighted works via the Listen4ever system and service in the United States by blocking access to Listen4ever's servers located in China. (Farber Decl., ¶ 11.) The processes by which Defendants can block access to the Listen4ever Site are simple and well understood technically by Defendants. (Farber Decl., ¶¶ 12-13.) Thus, an injunction ordering Defendants to block access to the Listen4ever Site would merely require Defendants to perform simple administrative and technical tasks, which would not place an undue burden on them or their networks. (Farber Decl., ¶ 13.)

2. Plaintiffs Will Suffer Serious and Irreparable Harm in the Digital Network Environment If Steps Are Not Taken to Prevent Infringement by Listen4ever

As discussed above, Plaintiffs will be irreparably damaged unless Defendants are ordered to block access to the Listen4ever Site. Listen4ever's infringement poses significant risks to the sale of sound recordings fixed in CDs and tapes and to the sale of sound recordings on the Internet. This loss of sales will diminish Plaintiffs' resources to compensate recording artists and develop new talent, thereby diminishing the public's access to a wide variety of high-quality musical recordings. (Creighton Decl., ¶ 27.) Further, Listen4ever's infringement hinders the development of a legitimate online market for music. (Creighton Decl., ¶ 25.) Finally, allowing such infringement by Listen4ever will teach consumers that artists do not

deserve to be compensated for their creative endeavors, and that creative works are free for the taking by anyone with an Internet connection. (Creighton Decl., ¶ 26.)

3. An Injunction to Block Access to the Listen4ever Site Would Be Technically Feasible and Effective, and Would Not Interfere with Access to Noninfringing Material at Other Online Locations

Defendants have the technological capability to significantly limit access to Plaintiffs' copyrighted works via the Listen4ever Site. (Farber Decl., ¶ 11.) By disabling the connections that allow users' computers in the United States to communicate with Listen4ever's servers in China, Defendants can significantly diminish the continued illegal copying and distribution of Plaintiffs' sound recordings. (Farber Decl., ¶ 11.) Defendants can arrange this blocking to ensure that only direct communications with Listen4ever's servers are blocked, and that communications with all other non-infringing websites whose traffic flows through Defendants' backbone routing network proceed unhindered. (Farber Decl., ¶ 11.)

4. A Less Burdensome and Comparably Effective Means of Preventing or Restraining Access to the Infringing Material is Not Available to Plaintiffs

As discussed above, Plaintiffs have attempted to persuade Listen4ever to cease and desist its infringing activities, but their efforts were fruitless. (Creighton Decl., ¶ 22.) In addition, Plaintiffs recently notified Defendants as to Listen4ever's infringing activities, but Defendants indicated that they would not block traffic to and from the Listen4ever Site without a court order. (Creighton Decl., ¶ 24.)

For all practical purposes, Plaintiffs would be unable to obtain appropriate relief by bringing an action against Listen4ever. Pursuant to the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, service of process on an entity in China must be done through the Chinese Central Authority and would take at least months to complete. During this delay, the irreparable harm to Plaintiffs would continue.

Moreover, even if Plaintiffs were able to get a judgment against Listen4ever in the United States, it is unclear whether it would effectively be enforced in China.

Thus, an injunction ordering Defendants to block access to the Listen4Ever Site by disabling the connections that allow users' computers in the United States to communicate with Listen4ever's servers in China is the least burdensome and most effective means of preventing access to the Listen4ever Site.

CONCLUSION

For all the foregoing reasons, the Plaintiffs respectfully request that the Court grant its motion for a preliminary injunction.

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