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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS, INC., ET AL.,

Plaintiffs,

-against-

MP3BOARD, INC.,

Defendant.

00 Civ. 4660 (SHS)

OPINION & ORDER

87358

SIDNEY H. STEIN, U.S. District Judge.

Plaintiffs, several leading record companies, have sued MP3Board, Inc. for contributory and vicarious copyright infringement, 17 U.S.C. §§101 et seq., and state law unfair competition. The record companies allege that MP3Board operates an Internet site which provides users with links to pirated copies of the record companies' copyrighted musical recordings, thereby facilitating the users' infringement of the record companies' copyrights. MP3Board has instituted a third-party claim against the Recording Industry Association of America ("RIAA"), a trade association of record companies, for tortious interference and knowing material misrepresentation of infringement in violation of the Digital Millennium Copyright Act ("DMCA"), stemming from the RIAA's sending copyright infringement notices to MP3Board's Internet Service Providers ("ISPs").

The record companies have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, seeking an order finding MP3Board liable for contributory and vicarious copyright infringement and unfair competition. MP3Board has moved for summary judgment on the grounds that its activities are protected by the First Amendment to the United States Constitution, and has alternatively moved for partial summary judgment on each of the counts of the complaint for a

variety of reasons and on the grounds that the record companies have failed to show damages. The RIAA has also moved for summary judgment with respect to MP3Board's third party claims against it.

The record companies' motion for summary judgment is denied because material issues of fact exist regarding whether any direct infringement occurred with the aid of the MP3Board site. MP3Board's motion for summary judgment is denied because its activities are not protected by the First Amendment and because material issues of fact exist regarding whether MP3Board has engaged in contributory or vicarious copyright infringement. The RIAA's motion for summary judgment is granted because its actions were justified and it did not materially misrepresent that links to infringing material were posted on the MP3Board site.

OVERVIEW

Several major record companies have brought suit against MP3Board for operating a Web site, located at <http://www.mp3board.com>, which provides Internet users with resources enabling them to locate sound recording files from publicly available Web sites. Such audio files can be created by using computer software to digitally copy an audio recording directly onto a computer's hard drive, compressing the digital information via a technology such as MP3 in order to allow for more efficient storage and transmission of the file over the Internet. The record companies have alleged that many of the audio files which can be located with the assistance of MP3Board's Web site are pirated copies of the record companies' copyrighted works.

During the relevant time period, no music files were located on the MP3Board Web site; rather, the Web site featured an automated search engine that searched for, aggregated and organized links to media files on the Web, and provided a tutorial offering users instruction in how

to locate and download such files. (MP3Board's Objections to Pls.' Resp. Ex. A; Eli Mapstead Dep. at 118, 227, 304, 308; Mathewson Dep. at 79-80; Pls.' Exs. 24, 25, 35, 36; Am. Answer ¶ 41.) MP3Board additionally solicited users to post links on the MP3Board site to other sites containing audio files and provided a link to a third party named Freedrive where users could store audio files online. (MP3Board's Objections to Pls.' Resp. Ex. A; Pls.' Exs. 8, 9, 10; Am. Answer ¶ 39.) The MP3Board site also featured a message board which allowed users to post questions or song requests to be replied to by other users or MP3Board staff. (MP3Board's Objections to Pls.' Resp. Ex. A.) In response to users' posted requests, MP3Board personnel personally searched for links to songs and posted the links on the message board, solicited other users to provide the requested works, and obtained and posted passwords to enable users to access certain music files. (Eli Mapstead Dep. at 199-200, 202-03, 205-06, 342; Mathewson Dep. at 52; MP3Board's Objections to Pls.' Resp. Exs. A, B; Am. Answer ¶ 41; Pls.' Ex. 22.)

On October 27, 1999, the RIAA, acting on behalf of its member record companies, served a subpoena and notice letter to AboveNet Communications, Inc., the ISP that connected MP3Board's Web site to the Internet. The letter identified artists whose work was being allegedly infringed and requested that AboveNet remove or disable access to the MP3Board site or MP3Board's links to infringing works. (Creighton Decl. ¶ 7 and Ex. A; McDevitt Decl. ¶ 4; McDevitt Dep. at 8-10.) AboveNet did not substantially interrupt MP3Board's service as a result of this letter, and MP3Board suffered no injury. (Eli Mapstead RIAA Dep. at 26, 27; see also Lars Mapstead RIAA Dep. at 385-86.) MP3Board did not dismantle access to any links to the identified artists' works. (Noah Mapstead Dep. at 175-77, 194-98.)

On April 18, 2000, the RIAA sent a notice to Metromedia Fiber Network, Inc., AboveNet's

corporate successor. (Creighton Decl. ¶ 8.) Like the October 1999 notice, the April 2000 notice also named representative artists whose works were allegedly being infringed and requested that Metromedia remove MP3Board site or the infringing links from its system. (Creighton Decl. Ex. B.) Moreover, the letter warned Metromedia that failure to comply could subject it to liability pursuant to the DMCA. (Creighton Decl. Ex. B.) In response, Metromedia disabled Internet access to the MP3Board Web site beginning on April 19, 2000. (Eli Mapstead RIAA Dep. at 37-38, 40.) MP3Board requested that Metromedia restore its service, and Metromedia replied that it would only restore MP3Board's service if MP3Board supplied a counter notification in accordance with the DMCA. On April 21, 2000, MP3Board supplied a counter notification to Metromedia asserting that it had removed the infringing material identified in the RIAA's notice. (Lars Mapstead RIAA Dep. at 498; Knowles Decl. Ex. K.) Metromedia restored MP3Board's Internet connectivity on May 5, 2000. (Eli Mapstead RIAA Dep. at 197.)

On May 25, 2000, the RIAA wrote directly to MP3Board and demanded that MP3Board remove all infringing links from its site by June 2, 2000, naming twenty-one artists and twenty-two song titles which were representative of the titles being infringed, and also attaching printouts of screen shots of MP3Board's Web site on which the RIAA identified 662 links which the RIAA believed to lead to material infringing upon the record companies' copyrights. (Pls.' Ex. 36, Ex. C.) MP3Board failed to dismantle access to any of the identified links in response to this letter. (Noah Mapstead Dep. at 175-77, 194-98.) On June 23, 2000, the record companies filed suit against MP3Board in the Southern District of New York.

DISCUSSION

Summary judgment may be granted “only when the moving party demonstrates that ‘there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” Allen v. Coughlin, 64 F.3d 77, 79 (2d Cir. 1995) (quoting Fed. R. Civ. P. 56(c)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Court must “view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor, and may grant summary judgment only when ‘no reasonable trier of fact could find in favor of the nonmoving party.’” Allen, 64 F.3d at 79 (citation omitted) (quoting Lund's, Inc. v. Chemical Bank, 870 F.2d 840, 844 (2d Cir. 1989)).

Once the moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party must come forward with specific facts to show there is a factual question that must be resolved at trial. Fed. R. Civ. P. 56(e); see also Legal Aid Soc’y v. City of New York, 114 F. Supp. 2d 204 (S.D.N.Y. 2000). A nonmoving party must produce evidence in the record and “may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible.” Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993). In short, a nonmoving party must “do more than simply show there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

I. The Record Companies’ Motion for Summary Judgment is Denied Because Issues of Material Fact Exist Regarding Whether the Record Companies’ Copyrights Were Infringed by MP3Board’s Users.

In order to establish liability for contributory or vicarious copyright infringement, a plaintiff must first prove that direct infringement of its works occurred by showing that it owned a valid

copyright and unauthorized infringement of its protected material occurred. See Sony Corp. of Amer. v. Universal City Studios, 464 U.S. 417, 434 (1984); Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Rogers v. Koons, 960 F.2d 301, 306 (2d Cir. 1992). The record companies' ownership of the sound recordings at issue has not been disputed. (Plts.' Rule 56.1 Stmt. ¶¶ 23-24.) The RIAA has also confirmed that the 58 files listed in the complaint as available through MP3Board's Web site constituted unauthorized copies of the copyrighted recordings. (Creighton Reply Decl. ¶ 8.)

However, the record companies have failed to prove that any direct infringement resulted from MP3Board's operations. Pursuant to 17 U.S.C. § 501(a), infringement occurs when one of the exclusive rights granted to copyright holders by 17 U.S.C. § 106 is violated. See A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001). While the structure of MP3Board's site and the scale of the operation certainly give rise to a strong statistical inference that MP3Board users downloaded files containing copyrighted music in violation of the record companies' reproduction rights under Section 106(1), the record companies have failed to eliminate all genuine issues of material fact.

MP3Board freely acknowledges the possibility that infringement is conducted with the aid of its site. MP3Board has stated that it "is generally aware that some of the music files ... may contain infringing material," and it admits that it "allows" and "generally encourages" site visitors to download music files, thus promoting the "highly effective facilitation of access to popular music." (Am. Answer ¶¶ 2, 3, 40, 52.) "MP3Board acknowledges that users may use its systems for purposes of infringement." (MP3Board's Statement of Material Facts in Opp'n to Pls.' Mot. for Summ. J. ¶ 56 (emphasis in original).) MP3Board's principals also testified that they were aware

that some of MP3Board's links connected to copyrighted works, and they assumed that those unauthorized copies were downloaded by users of the service through those links. (Eli Mapstead Dep. at 313, 316; Lars Mapstead Dep. at 249.). One principal admitted that it was "particularly likely" that MP3Board's users have used links on MP3Board's Web site to download full-length copies of major record labels' songs. (Noah Mapstead Dep. at 107.) There is also evidence that MP3Board personally assisted users in obtaining particular songs that the users requested, see Section II(A)(1) infra, and a finder of fact could certainly infer that it is likely that those users subsequently downloaded the songs they had requested. However, the record companies have not eliminated all issues of material fact by setting forth any direct evidence of infringement, such as user logs or other technical data showing the downloading of copyrighted and unauthorized files. At the summary judgment stage, the record companies cannot rely solely upon circumstantial evidence and admissions by MP3Board officers that it is statistically "likely" that direct infringement occurred.

Additionally, while the record companies and the RIAA have conclusively established that links to unauthorized infringing files were posted on the MP3Board Web site by describing how the RIAA investigators followed the links on the MP3Board Web site and determined that they lead to audio files that infringed upon plaintiffs' copyrights, (Creighton Decl. ¶ 10; McDevitt Decl. ¶ 5), to show the unlawful "distribution" of a copyrighted work pursuant to 17 U.S.C. § 106(3) the record companies must show that an unlawful copy was disseminated "to the public." Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997) (internal quotations omitted). "Infringement of the distribution right requires an actual dissemination of ... copies." National Car Rental Sys. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 434 (8th Cir. 1993) (citing 2

Nimmer on Copyright § 8.11[A], at 8-124.1); see also Napster, 239 F.3d at 1014. While a copyright holder may not be required to prove particular instances of use by the public when the proof is impossible to produce because the infringer has not kept records of public use, see Hotaling, 118 F.3d at 204, in the present case there has been no showing that the record companies did not have access to such data. Accordingly, the record companies' motion for summary judgment regarding contributory and vicarious copyright infringement and unfair competition is denied.

II. MP3Board's Motion for Summary Judgment is Denied Because Issues of Material Fact Exist Regarding Whether MP3Board is Liable for Contributory Copyright Infringement, Vicarious Infringement, and Unfair Competition.

A. Issues of Material Fact Exist Regarding Whether MP3Board is Liable for Contributory Copyright Infringement.

"A party 'who, with knowledge of ... infringing activity ... materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer.'" Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 693, 706 (2d Cir. 1998) (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)); see also Ex-Tixz, Inc. v. Hit Tix, Inc., 919 F. Supp. 728, 732 (S.D.N.Y. 1996). In order to carry its burden, MP3Board must demonstrate the absence of material facts regarding (1) the noninfringing conduct of MP3Board's users, (2) MP3Board's lack of material contribution to that infringement, or (3) MP3Board's lack of knowledge of the infringing activity. MP3Board has failed to demonstrate the absence of material facts with respect to any of the elements. As an initial matter, for the reasons set forth in Section I, supra, material facts exist regarding the first element of direct infringement; while the record companies did not eliminate all issues of material fact, they showed statements by MP3Board's officers and circumstantial evidence regarding MP3Board's Web site which suffice to defeat summary judgment against them on the issue of direct infringement.

1. Issues of Material Fact Exist Regarding Whether MP3Board Materially Contributed to Any Infringement.

MP3Board cannot obtain summary judgment on the contributory infringement claim on the grounds that no material issues of fact exist regarding MP3Board's material contribution to any infringement. Liability for contributory infringement exists if the defendant engages in "personal conduct that encourages or assists the infringement." Matthew Bender, 158 F.3d at 706. Merely supplying the "'means' to accomplish an infringing activity" cannot give rise to the imposition of liability for contributory copyright infringement. Sony, 464 U.S. at 436; see also Napster, 239 F.3d at 1020-21. "Participation in the infringement must be substantial. The ... assistance must bear a direct relationship to the infringing acts, and the contributory infringer must have acted in concert with the direct infringer." ZVI Livnat v. Shai Bar Lavi, No. 96 Civ. 4967, 1998 WL 43221, at *3 (S.D.N.Y. Feb. 2, 1998) (internal quotation marks and citations omitted). MP3Board argues that the record companies have not shown that MP3Board substantially participated in any infringement. MP3Board styles itself a "passive" tool, contending that "[a]ny participation by MP3Board in its users' infringement is tangential to their direct downloading from a third-party website." (MP3Board Mem. in Opp'n at 14, 15.)

However, there is sufficient evidence from which a factfinder could determine that MP3Board engaged in an overall course of conduct which materially contributed to copyright infringement. The MP3Board site featured a search engine: an automated system devoted to searching for, aggregating and organizing links. (MP3Board's Objections to Pls.' Resp. Ex. A.) The site also solicited third parties to post links to sites containing audio files. (MP3Board's Objections to Pls.' Resp. Ex. A; Pls.' Exs. 8, 9, 10; Am. Answer ¶ 39.) MP3Board provided a link to a third party named Freedrive where users could store audio files online. (MP3Board's

Objections to Pls.' Resp. Ex. A.) MP3Board offered new users "getting started" information and a tutorial containing instructions on how to locate and download audio files via MP3Board -- actually using one of the record companies' copyrighted recordings as an example. (Eli Mapstead Dep. at 118, 227, 304, 308; Mathewson Dep. at 79-80; Pls.' Exs. 24, 25, 35, 36; Am. Answer ¶ 41.)

The site also contained a message board which allowed users to post questions to be answered by other users or MP3Board staff. (MP3Board's Objections to Pls.' Resp. Ex. A.) Significantly, when individual users posted messages on the message board requesting particular songs which they could not find links to on the MP3Board site, MP3Board personnel personally searched for links to the requested song files and posted the links on the message board. (Eli Mapstead Dep. at 202-03, 205-06; Mathewson Dep. at 52; MP3Board's Objections to Pls.' Resp. Ex. B; Am. Answer ¶ 41.) When one MP3Board employee could not find any links to one particular work, he solicited users to provide the work. (Pls.' Ex. 22.) MP3Board also obtained and posted passwords to enable users to access certain music files. (Eli Mapstead Dep. at 199-200, 342.)

Thus, based upon all the foregoing facts, genuine issues of material fact exist regarding whether MP3Board materially contributed to infringement. Not only could a jury find that MP3Board provided the facilities to promote infringing activity, see, e.g., Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 261, 264 (9th Cir. 1996); Sega Enters. v. Maphia, 857 F. Supp. 679, 687 (N.D. Cal. 1994); Sega Enters. Ltd. v. Sabella, No. 93 Civ. 4260, 1996 WL 780560, at *8 (N.D. Cal. Dec. 18, 1996), but also that it directly assisted users in locating and downloading infringing files, see Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999). Viewed in totality, the record companies have introduced evidence that raises a material issue of fact regarding whether MP3Board's active role in facilitating its users' copying

constituted substantial material participation in infringement.

2. Issues of Material Fact Exist Regarding Whether MP3Board Knew that Infringing Activity Was Taking Place.

A defendant must possess either actual or constructive knowledge of the infringing activity to be found contributorily liable. See ZVI Livnat, 1998 WL 43221, at *3; see also Napster, 239 F.3d at 1020 (requiring that the secondary infringer "know or have reason to know" of direct infringement). Issues of fact exist regarding MP3Board's constructive knowledge as well as whether MP3Board obtained actual knowledge of infringement occurring via its site.

a. Issues of Material Fact Exist Concerning Whether MP3Board Possessed Constructive Knowledge of Infringing Activity.

As an initial matter, it is axiomatic that without any knowledge of infringing activity, a defendant cannot be found strictly liable for contributory infringement simply for providing a technology that may allow others to exchange copyrighted material. A court may not impute constructive knowledge of infringement to a defendant "merely because ... [a] technology may be used to infringe plaintiffs' copyrights," where the system is "capable of commercially significant noninfringing uses." Napster, 239 F.3d at 1020-21 (citing Sony, 464 U.S. at 436, 442-43). In Sony, the U.S. Supreme Court refused to permit liability to be imposed upon Sony for providing customers with equipment (the Betamax video cassette recorder) with "constructive knowledge ... that their customers may use that equipment to make unauthorized copies of copyrighted material." Sony, 464 U.S. at 439. Rather, a plaintiff must actually show the defendant knew that infringing activity was taking place instead of simply relying on the technology's potential. At this stage of the litigation, material facts exist regarding whether the Court can impute constructive knowledge to MP3Board based upon its technology's capabilities; the parties have not set forth sufficient facts for the Court to determine whether MP3Board's activities are covered by the Sony doctrine and whether

MP3Board's Web site is "capable of commercially significant noninfringing uses."

However, the record companies have introduced direct evidence that MP3Board should have known of any infringement. There is evidence from which a jury could find that MP3Board possessed constructive knowledge of infringement, despite the fact that this case does not share the same strong indicia of constructive knowledge as in the cases cited by the record companies. See Fonovisa, 76 F.3d at 261; Napster, 114 F. Supp. 2d at 919; Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513, 514 (N.D. Ohio 1997) (the defendant had an active screening procedure by which the defendant's employees personally viewed all files posted on the bulletin board service); Maphia, 857 F. Supp. at 683 ("the uploading and downloading of unauthorized copies of Sega's copyrighted video games is particularly known to defendant"); Sabella, 1996 WL 780560, at *8 (the defendant, the operator of the bulletin board service, read the user log containing files labeled as Sega Genesis games several times a day, advertised copiers which played unauthorized copies of Sega games, gave downloading privileges to customers that bought copiers, and offered a gift award that would enable users to 'get started right away with [their] collection of games"). Nor does the operating of an audio file search engine have "no other imaginable [noninfringing] use," thus inevitably suggesting infringement to a rational person. RSO Records, Inc. v. Peri, 596 F. Supp. 849 (S.D.N.Y. 1984) (where the defendant was engaged in photographing the packaging of copyrighted records and tapes).

The record companies contend that evidence of MP3Board's knowledge can be found in the fact that MP3Board created 16 genre categories on its site, such as "Pop" and "Classical," in which link contributors could display their posted links, and one of these categories was entitled "Legal MP3s." (Eli Mapstead Dep. at 153.) The record companies urge that the category heading "Legal MP3s" constitutes evidence that MP3Board recognized that the other categories contained MP3s

which were not legal. MP3Board responds that the genre heading "Legal MP3s" does not constitute an admission as to the contents of the other genres, particularly because Epitonic, a third-party MP3 supplier, specifically requested the title "Legal MP3" to describe the category, which contained exclusively Epitonic content. (Eli Mapstead Dep. at 105; Lars Mapstead Dep. at 128.) The record companies also argue that a substantial number of the posted links themselves promoted their illegal nature, as the posters of the links gave themselves such names as "SUPERILLEGAL MP3z," "FREE ILLEGAL MP3 FILES DIRECT DOWNLOAD," "FREE FAST ILLEGAL MP3 DIRECT DOWNLOAD," "The BIGGEST Archive of ILLEGAL MP3 FLZ," "100% ILLEGAL FAST DOWNLOADS," "a HUGE Archive of Illegal MP3 Files!!" and "any song you want." (Pls.' Ex. 23.) MP3Board contends in response that there is no evidence that it monitored the posting of links, and it has stated that it does not investigate the links, and perceived the names of the posters to be the site-owners' efforts to boost traffic on their sites by means of attention-getting methods. (Lars Mapstead Decl. ¶ 11; Lars Mapstead Dep. at 129.)

Nonetheless, the above-stated facts, combined with the fact that MP3Board's principals acknowledged a statistical possibility that some of the links found on MP3Board's Web site went to copyrighted works and that users had downloaded unauthorized copies of copyrighted sound recordings through the links, (Lars Mapstead Dep. at 249, 451; Eli Mapstead Dep. at 313, 355; Noah Mapstead Dep. at 107), give rise to triable issues of fact regarding whether MP3Board possessed constructive knowledge of the infringing nature of links.

b. Issues of Material Fact Exist Regarding Whether MP3Board Acquired Actual Knowledge of Infringement.

There is also much stronger evidence that MP3Board acquired actual knowledge of infringement from a notice that the RIAA sent to MP3Board pursuant to the DMCA. In order for a

notice to be considered effective pursuant to the DMCA, it must provide "identification of the reference or link, to material or activity claimed to be infringing ... and information reasonably sufficient to permit the service provider to locate that reference or link." 17 U.S.C. § 512(d)(1)(C)(3). The RIAA sent notification letters on October 27, 1999 and April 18, 2000 to MP3Board's ISPs, who forwarded copies of the letters to MP3Board, and also sent a notification letter on May 25, 2000 directly to MP3Board. While the letters dated October 27, 1999 and April 18, 2000 fell short of the DMCA's standard in providing MP3Board with knowledge of infringement, the letter dated May 25, 2000 did provide MP3Board with sufficient knowledge.

The letter from the RIAA to AboveNet dated October 27, 1999 failed to put MP3Board on notice of any infringement. It stated that the MP3Board site:

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 belief that the above-described activity is not authorized by the copyright owner, its agent, or the law.

(Pls.' Ex. 34.) By solely listing artists' names, and neglecting to specify any infringing links or even particular songs, the letter did not include "identification of the reference or link, to material or activity claimed to be infringing ... and information reasonably sufficient to permit the service provider to locate that reference or link." 17 U.S.C. § 512(d)(1)(C)(3).

The record companies' citation to the Fourth Circuit's decision in ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 622 (4th Cir. 2001), cannot save this letter. ALS Scan set forth that "[w]hen 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 622. The plaintiff in ALS Scan alerted the defendant to infringement in

sufficient detail when it

(1) identified two sites created for the sole purpose of publishing ALS Scan's copyrighted works, (2) asserted that virtually all the images at the two sites were [ALS Scan's] copyrighted material, ... (3) referred RemarQ to two web addresses where RemarQ could find pictures of ALS Scan's models and obtain ALS Scan's copyright information ... [and (4)] noted that material at the site could be identified as ALS Scan's material because the material included ALS Scan's 'name and/or copyright symbol next to it.'

Id.

However, by merely listed ten artists in the October 27 letter, the RIAA fell short of "substantially compl[ying] with the notification requirement." Id. The citation to a handful of performers does not constitute a representative list of infringing material, and certainly did not provide information reasonably sufficient to enable MP3Board to locate the particular infringing works. Therefore, MP3Board's failure to delete links to sites containing music files of the enumerated artists in response to the October 1999 letter, (Lars Mapstead Dep. at 399), cannot give rise to any liability. C.f. Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1374 (N.D. Cal. 1995) (where a bulletin board service operator cannot reasonably verify a claim of infringement due to the copyright holder's failure to provide the necessary documentation to show that there is likely infringement, the operator's lack of knowledge is reasonable and there is no liability for contributory infringement for allowing the continued distribution of the works).

The email from the RIAA to Metromedia dated April 18, 2000, and subsequently forwarded to MP3Board, similarly stated that the MP3Board site:

is offering direct links to files on other Internet sites containing full-length sound 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. We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law.

(Pls.' Ex. 35.) This email, nearly identical in form to the October 27, 1999 letter, similarly failed to put MP3Board on notice of any infringement because it listed solely artists' names, and neglected to specify any links or even particular songs.

However, in contrast with the earlier letters, the letter from the RIAA to MP3Board dated May 25, 2000 substantially complied with the DMCA notification requirements. The letter not only named particular artists along with specified songs, but was accompanied by printouts of screen shots of MP3Board's Web site, on which the RIAA highlighted and placed an asterisk next to 662 links which the RIAA believed to infringe upon the record companies' copyrights. (Pls.'s Ex. 36, Ex. C.) Despite the fact that the RIAA did not provide MP3Board with the specific Universal Resource Locators ("URLs") of the pages to which the links connected, the RIAA provided MP3Board with the pages on MP3Board's own site where the links appeared. (Pls.'s Ex. 36, Ex. C.) Overall, the letter and its attachments identified the material or activity claimed to be infringing and provided information reasonably sufficient to permit MP3Board to locate the links and thus complied with the DMCA. See 17 U.S.C. § 512(d)(1)(C)(3); ALS Scan, 239 F.3d at 622; see also Napster, 239 F.3d at 1021-22 & n.6; Fonovisa, 76 F.3d at 261, 264; Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th Cir. 1994); Napster, 114 F. Supp. 2d at 918.

MP3Board failed to dismantle access to any of the identified links in response to these letters. (Noah Mapstead Dep. at 175-77, 194-98.) MP3Board's argument, that it was not required to disable access to or even investigate the links because the RIAA did not submit the links in electronic form or accompanied with the URLs of the pages to which the links connected, are baseless and not grounded in the text of the DMCA or any judicial interpretation of that statute. Despite the fact that the RIAA did not provide MP3Board with specific URLs, it provided MP3Board with the pages on MP3Board's own site where the links appeared, thus identifying the

links to material or activity claimed to be infringing and information reasonably sufficient to permit MP3Board to locate the links. Therefore, because issues of material fact exist regarding whether MP3Board materially contributed to infringing activity and had acquired knowledge of the infringement, summary judgment in favor of MP3Board with respect to the claim of contributory copyright infringement is denied.

B. Issues of Material Fact Exist Regarding Whether MP3Board is Liable for Vicarious Infringement.

A company may be found vicariously liable for copyright infringement if it has the right and ability to supervise infringing activity and also has a direct financial interest in that activity. See Gershwin Publ'g, 443 F.2d at 1162. Vicarious liability, "commonly imposed upon publishers, printers, and vendors of copyrighted materials," is appropriate where a company is "in a position to police the conduct of the 'primary' infringer." Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963) (citations omitted).

As an initial matter, although the record companies correctly state that, in general, vicarious infringement is a tort of strict liability and hence the vicarious infringer need not possess knowledge of the infringement, the record companies do not address the additional limitations upon copyright infringement liability relating to online material provided by the DCMA – albeit an affirmative defense only vaguely raised in MP3Board's answer. Nonetheless, the DMCA provides that a service provider:

shall not be liable ... for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider does not have actual knowledge that the material or activity is infringing [or] in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent.

17 U.S.C. § 512(d)(1). There are material issues of fact as to whether MP3Board qualifies as a “service provider” entitled to the “safe harbor” protections of section 512(d). MP3Board contends that it is a “traditional search engine,” (Def.’s Statement of Material Facts ¶ 20), while plaintiffs contend that MP3Board provides a host of services not provided by traditional search engines, (Pls.’ Resp. to Def.’s Statement of Material Facts ¶20). Even if MP3Board meets the definition of a “service provider” it must still surmount the other hurdles of section 512 – a proposition of doubtful certainty – to qualify for the liability limitations the statute affords. Notably, the statute limits liability rather than providing a complete exemption. See 17 U.S.C. §512(d); see also Perfect 10, Inc. v. Cybernet Ventures, Inc., No. CV 01-2595, 2002 U.S. Dist. LEXIS 7333, at *77 (C.D. Cal. Apr. 22, 2002); 3 Nimmer on Copyright § 12B.01[C][2], at 12B-18. Moreover, because there are material issues of fact regarding MP3Board’s knowledge of the infringing activity – another factor weighed in the availability of the “safe harbor” provision – MP3Board cannot obtain summary judgment pursuant to the defense of lack of knowledge. See 17 U.S.C. §512(d); see also Section II(A)(2), supra.

I. Issues of Material Fact Exist Regarding Whether MP3Board Had the Right and the Ability to Supervise the Infringing Activities.

The record companies have introduced evidence showing that MP3Board possessed the right and the ability to supervise its users and the information displayed on its site. A defendant’s “ability to block infringers’ access to a particular environment for any reason” constitutes proof of its right and ability to supervise, and control the infringing activities. Napster, 239 F.3d at 1023; see also Fonovisa, 76 F.3d at 262-63 (a swap-meet operator could exclude vendors for any reason); Shapiro, 316 F.2d at 306-08. The facts have shown that MP3Board had the right and ability to police those who posted links to the site, as well as the ability to delete the links themselves from

being displayed to users.

While there is no evidence that MP3Board could control which links were initially found by its automated procedures, MP3Board could delete links from its database and thus prevent them from being displayed in response to user queries. (Lars Mapstead Dep. at 338, 488-89.) Moreover, MP3Board had stated a policy of restricting users from posting certain types of links, such as those linking to pornography, hate, and hacker and "warez" (illegally copied and distributed commercial software) sites, and did in fact remove offending links from the site and banned repeat offenders of MP3Board's rules from posting any additional links. (Lars Mapstead Dep. at 338; Eli Mapstead Dep. at 328-31, 408-08.) Thus, there is evidence that MP3Board had the right and ability to remove links to infringing works and bar the participation of users who transmitted those infringing files. See Napster, 239 F.3d at 1024; see also Fonovisa, 76 F.3d at 260, 262.

2. Issues of Material Fact Exist Regarding Whether MP3Board Possessed a Direct Financial Interest in the Infringing Activities.

The record companies have also introduced evidence indicating that MP3Board possessed a direct financial interest in the exchange of infringing files. Infringement which increases a defendant's user base or otherwise acts as a draw for customers constitutes a direct financial interest. See Napster, 239 F.3d 1023; Fonovisa, 76 F.3d at 262-64 (financial benefit exists where "infringing performances enhance the attractiveness of a venue"); Shapiro, 316 F.2d at 307. MP3Board's principals testified that the revenue MP3Board received from banner advertisements on the site was directly tied to the number of users who were exposed to those ads. (Lars Mapstead Dep. at 173, 219, 507-08; Eli Mapstead Dep. at 383; Eli Mapstead RIAA Dep. at 87.) Furthermore, the RIAA's letter dated May 25, 2000 set forth that an extremely high proportion of the links on MP3Board's site went to infringing works. (Pls.'s Ex. 36, Ex. C.) The MP3Board site is

exclusively and consciously devoted to locating audio files, and its financial interest in the locating and copying of music files is thus far more substantial and direct than the general interest, content neutral search engines with which MP3 wishes to compare itself. A jury could certainly find that MP3Board possessed a direct financial interest in infringing activities.

C. Issues of Material Fact Exist Regarding Whether MP3Board Is Liable for Unfair Competition.

The record companies have also sued MP3Board for unfair competition pursuant to New York common law with respect to the record companies' pre-1972 sound recordings, which are not subject to federal statutory copyright protection. See 17 U.S.C. § 301(c); Firma Melodiya v. ZYX Music, GmbH, 882 F. Supp. 1306, 1316 (S.D.N.Y. 1995). Summary judgment on this claim in favor of MP3Board is also denied.

In New York, an unfair competition claim may be grounded in the appropriation of the exclusive property of the plaintiff by the defendant. See H.L. Hayden Co. v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1025 (2d Cir. 1989). Pursuant to New York common law, "[a]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." Roy Export Co. v. CBS, 672 F.2d 1095, 1105 (2d Cir. 1982). Due to the legal overlap between the New York tort of unfair competition based upon misappropriation and federal copyright infringement, see Kregos v. Associated Press, 3 F.3d 656, 666 (2d Cir. 1993), summary judgment in favor of MP3Board is denied for the reasons stated above denying summary judgment on the copyright infringement claims.

D. Summary Judgment is Denied with Respect to MP3Board's Argument That Its Activities Are Entitled to First Amendment Protection.

MP3Board's argument that its activities are protected by the First Amendment to the U.S.

Constitution is without merit. The U.S. Court of Appeals for the Second Circuit has held that "the fair use doctrine encompasses all claims of first amendment in the copyright field." New Era Pubs. Int'l. ApS v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989); see also 17 U.S.C. § 107; Napster, 239 F.3d at 1028 (rejecting Napster's asserted free speech right to publish a "directory" in the form of a music file search index because Napster's users were not fair users); Nihon Keizai Shimbun v. Comline Business Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999) ("First Amendment concerns are protected by and coextensive with the fair use doctrine"); Netcom, 923 F. Supp. at 1258 (stating that the Copyright Act balances First Amendment concerns with the rights of copyright holders).

In its summary judgment papers, MP3Board has not asserted that the activities in question constitute "fair use" and therefore do not violate plaintiffs' copyrights. Moreover, even if it had, the evidence indicates that such a claim would fail. In analyzing the defense of "fair use," the Copyright Act specifies four factors that must be considered:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. Other relevant factors may also be considered in order to apply the test in light of the overall purposes of the Copyright Act. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985); Sony, 464 U.S. at 448, 454.

Assuming plaintiffs' allegations to be true, all four mandatory factors weigh against a finding of fair use in the present case. Regarding the first factor, "the purpose and character of the use," the purpose of MP3Board and its users was commercial, as they were allegedly "profit[ing] from the exploitation of the copyrighted work without paying the customary prices." Harper &

Row, 471 U.S. at 562. Moreover, the copied works were simply retransmitted, not transformed. See Napster, 239 F.3d at 1015. Regarding the second factor, "the nature of the copyrighted work," the published creative sound recordings copied are "close to the core of intended copyright protection," and, conversely, far removed from the more factual or descriptive type of work that is more amenable to fair use. See UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351-52 (S.D.N.Y. 2000) (citations omitted). Regarding the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," plaintiffs contend that entireties of copyrighted works were infringed rather than small portions. Regarding the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," the alleged activities of MP3Board and its users on their face could harm the market for the original works. See Napster, 239 F.3d at 1017. Thus, because all four factors weigh against a finding of fair use, and there are no other relevant factors apparent, MP3Board's motion for summary judgment based upon the theory that its activities are protected by the First Amendment is denied.

E. Issues of Material Fact Exist Regarding Damages.

MP3Board briefly argues that the record companies have not shown that they have suffered actual damages, or that MP3Board obtained any profits as a result of any infringement. MP3Board is correct: the amount of damages has not been litigated or established at this juncture. However, MP3Board also summarily -- and incorrectly -- argues that the record companies cannot prove statutory damages. The Copyright Act permits a copyright owner to elect to recover an award of statutory damages simply upon a showing of infringement. 17 U.S.C. § 504(c). Should the record companies establish copyright infringement, they may elect to pursue an award of statutory damages.

III. The RIAA's Motion for Summary Judgment with Respect to MP3Board's Claims Against the RIAA Is Granted.

MP3Board has asserted two claims against the RIAA stemming from the RIAA's notices of copyright infringement sent to MP3Board's ISPs: (a) knowing material misrepresentation of infringement in violation of the DMCA, and (b) tortious interference with contractual relations and prospective economic advantage. The RIAA is entitled to summary judgment on those claims.

On October 27, 1999, the RIAA served a subpoena and DMCA notice letter to AboveNet that identified representative artists and requested AboveNet's "immediate assistance in stopping this unauthorized activity. Specifically, we request that you remove the site, delete the infringing links or that you disable access to this site or the infringing links being offered via your system." (Creighton Decl. ¶ 7 and Ex. A; McDevitt Decl. ¶ 4; McDevitt Dep. at 8-10.) However, the October 27, 1999 letter caused at most a very short-term interruption in MP3Board's service and, by MP3Board's own statements, no injury to MP3Board. (Eli Mapstead RIAA Dep. at 26-27; Lars Mapstead RIAA Dep. at 385-86.)

On April 18, 2000, the RIAA sent a second DMCA notice to Metromedia, identifying a URL of an MP3Board page, naming representative artists whose works were allegedly being infringed, and requesting Metromedia's

immediate assistance in stopping this unauthorized activity. Specifically, we request that you remove the site or the infringing links from your system and that you inform the site operator of the illegality of his or her conduct.

You should understand that this letter constitutes notice to you that this site operator may be liable for the infringing activity occurring 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.

(Creighton Decl. ¶ 8 and Ex. B.) In response to this letter, Metromedia disabled Internet access to the MP3Board Web site beginning April 19, 2000 and did not restore service until May 5, 2000.

(Eli Mapstead RIAA Dep. at 37-38, 40, 197.) As an initial matter, because MP3Board was only damaged by the April 18, 2000 notice, only that notice is potentially actionable.

A. The RIAA Is Entitled to Summary Judgment with Respect to MP3Board's Claim of "Knowing Material Misrepresentation of Infringement" in Violation of the DMCA.

MP3Board asserts that the RIAA's notice contained knowing and material misrepresentation.

Pursuant to 17 U.S.C. § 512(f),

Any person who knowingly materially misrepresents ... that material or activity is infringing ... shall be liable for any damages ... incurred by the alleged infringer ... who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing.

As set forth in Section II(A)(2)(b), supra, the RIAA's letter dated April 18, 2000 did not constitute an effective notification to MP3Board pursuant to the DMCA because it listed solely artists' names, and neglected to specify any links or even particular songs. For the same reasons, the letter did not substantially comply with the notification requirements for Metromedia, as it did not provide location information reasonably sufficient to permit Metromedia to locate the material pursuant to 17 U.S.C. § 512(c)(3)(A). See ALS Scan, 239 F.3d at 625; see also Netcom, 907 F. Supp. at 1374.

The April 2000 letter was simply not specific enough to provide adequate notice. Although the DMCA permits a copyright owner to identify a "representative" list of works, 17 U.S.C. § 512(c)(3)(A)(ii), in this case, a bare list of musical artists whose songs were allegedly linked to did not constitute a representative list of works, or notice equivalent to a list of representative works that can be easily identified by the service provider. See ALS Scan, 239 F.3d at 625. While the DMCA only requires that a copyright owner need only comply "substantially" with the prescribed format, the RIAA's April notice fell short of even that standard. 17 U.S.C. § 512(c)(3)(A); see also ALS

Scan, 239 F.3d at 625. The RIAA cannot shift the DMCA's duty to identify infringing material from the copyright holders or their agents to ISPs, which is what the April 18, 2000 letter seeks to do.

Nonetheless, liability cannot be incurred by the RIAA pursuant to Section 512(f) for merely sending a letter that constitutes insufficient notification; rather, the DMCA standard is whether the copyright owner's agent "knowingly materially misrepresents ... that material or activity is infringing." There is no evidence that the RIAA incorrectly stated that MP3Board was "offering direct links to files on other Internet sites containing full-length sound recordings for other users to download, including songs by [the listed] artists." The sole evidence of any misrepresentation in this notice consists of the fact that Eli Mapstead stated that he later found one link on the MP3Board site leading to a song by one of the listed artists that was authorized to be on the Internet. (Eli Mapstead Dep. at 481-87.) However, the presence of one authorized song file does not constitute a material misrepresentation in light of the facts of this case. Moreover, MP3Board's claim must fail because there is no evidence that any misrepresentation by the RIAA was made knowingly.

MP3Board also contends that the RIAA's notification constituted "knowing material misrepresentation" because it improperly threatened a suit for money damages against a service provider that was immune from suit pursuant to 17 U.S.C. § 512(a). However, Section 512 only penalizes copyright holders for knowingly materially misrepresenting "that material or activity is infringing." It does not provide a cause of action for knowingly materially misrepresenting that a service provider may be liable for hosting certain material.

In addition, MP3Board appears to seek liability for vagueness in the RIAA's notice, and the possibility that vagueness may have induced Metromedia to take the entire MP3Board site offline because Metromedia could not reasonably ascertain which of MP3Board's activities constituted

infringing activity. However, vagueness does not constitute a material misrepresentation "that material or activity is infringing" pursuant to Section 512(f). MP3Board stretches Section 512 beyond its breaking point.

B. The RIAA Is Entitled to Summary Judgment with Respect to MP3Board's Claims of Tortious Interference with Contractual Relations and Prospective Economic Advantage.

MP3Board contends in its third claim for relief that when the RIAA caused Metromedia to disrupt MP3Board's service, the RIAA thereby tortiously interfered with MP3Board's contracts with Metromedia as well as MP3Board's expectation of prospective economic advantage from future visitors to its site. (Am. Countercl. ¶¶ 80-81.) By applying the New York choice of law rules, see Arochem Int'l Inc. v. Buirkle, 968 F.2d 266, 269 (2d Cir. 1993), the Court finds that California tort law applies in this matter; California has the greater interest in the litigation of this issue due to the fact that MP3Board is located in California and its contractual relationship with another California corporation was allegedly interfered with in California.

The elements of intentional interference with contractual relations are (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of this contract; (3) intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the relationship; and (5) resulting damage. Quelimane Co. v. Stewart Title Guar. Co., 960 P.2d 513, 530 (Cal. 1998).

The RIAA contends that MP3Board cannot assert a claim for tortious interference with contract because MP3Board never had a contract with Metromedia, but only had an arrangement with Lars Mapstead's company, Cyberzine, which in turn had a preexisting relationship with AboveNet (later Metromedia). (Noah Mapstead RIAA Dep. at 17-23; Lars Mapstead RIAA Dep. at 33, 407-08.) However, because there is evidence that the contract or a later modification of it was

made expressly for MP3Board's benefit -- for example, AboveNet/Metromedia assigned a static IP address to MP3Board and agreed to serve as the contact for MP3Board in connection with MP3Board's registration with Network Systems, Inc., (Mapstead Decl. in Opp'n to RIAA's Mot. For Summ. J. ¶¶ 2, 4-5), -- at this juncture the Court cannot conclude that there was no valid contract with AboveNet/Metromedia that MP3Board could enforce as a third party beneficiary.

The RIAA also contends that the letter to Metromedia on April 18, 2000 was a simple pre-litigation demand letter. However, to assert the litigation privilege -- an affirmative defense -- the RIAA must prove that its statements were made in good faith contemplating a suit. See Sade Shoe Co. v. Oschin & Snyder, 162 Cal. App. 3d 1174, 1180, 209 Cal. Rptr. 124 (1984); Aronson v. Kinsella, 58 Cal. App. 4th 254, 263-65, 68 Cal. Rptr. 2d 305 (1997); see also Matsushita Electronics Corp. v. Loral Corp., 974 F. Supp. 345, 354-55 (S.D.N.Y. 1997). Material issues of fact exist regarding whether the RIAA contemplated filing a suit against Metromedia in "good faith and on serious consideration." Aronson, 58 Cal. App. 4th at 266; 68 Cal. Rptr. 2d 305.

Nonetheless, no material issues of fact exist regarding the RIAA's justification for its actions. Pursuant to California state law, justification is an affirmative defense to a charge of tortious interference with contract. See Echazabal v. Chevron U.S.A., Inc., 221 F.3d 1347 (9th Cir. 2000) (unpublished); Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158, 1165 (Cal. 1984) (overruled on other grounds). Seeking to protect a copyright by alerting a third party that the copyright is being infringed constitutes a justification defense to that claim. See, e.g., Shapiro & Son Bedspread Corp. v. Royal Mills Assoc., 764 F.2d 69, 75 (2d Cir. 1985); Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp., 878 F. Supp. 804, 818 (D. Md. 1995) (notifying customers of an alleged copyright infringement in good faith is justified and does not constitute tortious interference with contractual relations). There have been no material issues of

fact raised regarding whether the RIAA acted in good faith in notifying Metromedia of the infringement. Accordingly, the RIAA cannot be subjected to liability for tortious interference with contract and summary judgment should issue in its favor on this claim.

The elements in California of the tort of intentional interference with prospective economic advantage are (1) the existence of a prospective economic relationship containing the probability of future economic rewards for the plaintiff; (2) the defendant's knowledge of this relationship; (3) intentional acts designed to disrupt the relationship; (4) actual causation; and (5) proximate damages. PMC, Inc. v. Saban Entm't, Inc., 52 Cal. Rptr. 2d 877, 886 (1996). The tort, which is also called interference with prospective economic relations, "imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." Settimo Assocs. v. Environ Sys., Inc., 17 Cal. Rptr. 2d 757, 758 (1993).

Because the general wrong inherent in intentional interference with prospective economic advantage is the interference with a business opportunity through methods which are not within the privilege of fair competition, a plaintiff must also prove that the defendant "engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 751 (Cal. 1995). For tortious interference with prospective economic advantage, a plaintiff must prove that the defendant's conduct was not privileged; the defendant does not need to prove privilege as an affirmative defense. See Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Square Venture Partners, 60 Cal. Rptr. 2d 830, 839 (1997). As set forth above, the RIAA was justified in sending Metromedia the April 18 notification of infringement and no liability can lie for tortious interference with prospective economic advantage.

Moreover, MP3Board has not shown the additional element of wrongful conduct required for a claim of intentional interference with prospective economic advantage. See Della Penna, 902 P.2d

at 751. While threatening to litigate against a party who is known to be immune from suit -- as MP3Board alleges -- may sufficiently constitute wrongful conduct, see PMC, 52 Cal. Rptr. 2d at 891; see also Matsushita, 974 F. Supp. at 354, MP3Board's claim that Metromedia was known to be immune from suit pursuant to 17 U.S.C. § 512(a) has no support. There is no evidence showing that the RIAA believed that Metromedia was engaged in "transitory digital network communications," pursuant to Section 512(a), which deals with the transient storage of material in the course of transmitting, routing or providing connections.

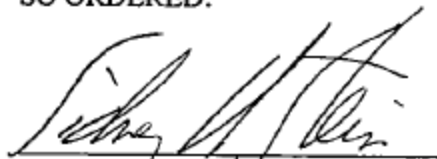
Rather, by all outward appearances Metromedia was hosting MP3Board's site on its network, leaving the RIAA to conclude that Metromedia was not merely transmitting, routing or providing connections for infringing material but that infringing activities were being conducted on Metromedia's system at MP3Board's direction. Pursuant to Section 512(c), entitled "information residing on systems or networks at direction of users," a service provider is "liable for monetary relief ... for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider," unless the service provider does not have knowledge or reason to know of infringing activity and fails to expeditiously to remove or disable access to the infringing material. 17 U.S.C. § 512(c)(1). Absent a showing that Metromedia was immune from liability pursuant to Section 512(a), and that the RIAA knew that Metromedia was immune, liability cannot be grounded on the RIAA's statement that Metromedia could be liable for hosting MP3Board's activities if Metromedia knew of MP3Board's infringement but failed to disable access. MP3Board has pointed to no evidence whatsoever in support of its claim that the RIAA threatened legal action against a party that it knew to be immune from liability and therefore the RIAA is entitled to summary judgment on this claim.

CONCLUSION

For the reasons stated forth above, the record companies' motion for summary judgment is denied, MP3Board's motion for summary judgment is denied, and the RIAA's motion for summary judgment is granted.

Dated: New York, New York
August 28, 2002

SO ORDERED:



Sidney H. Stein, U.S.D.J.