

FILED

MAY 11 2005

**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**IN RE NAPSTER, INC. COPYRIGHT
LITIGATION**

No. C MDL-00-1369 MHP

This Document Relates To:

UMG RECORDINGS, INC. et al.,

Plaintiffs,

No. C 04-1166 MHP

v.

HUMMER WINBLAD VENTURE PARTNERS et al.,

Defendants.

UMG RECORDINGS, INC. et al.,

Plaintiffs,

No. C 04-1351 MHP

v.

BERTELSMANN AG et al.,

Defendants.

JERRY LEIBER et al.,

Plaintiffs,

No. C 04-1671 MHP

v.

BERTELSMANN AG et al.,

Defendants.

**UNITED STATES DISTRICT COURT
For the Northern District of California**

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CAPITOL RECORDS, INC. et al.,
Plaintiffs,
v.
BERTELSMANN AG et. al.,
Defendants.

No. C 04-2121 MHP

MEMORANDUM & ORDER
Re: Defendants' Motion for Summary Judgment

On May 2, 2005, plaintiffs in the above-captioned actions moved for leave to file a supplemental memorandum in opposition to defendants' motion for summary judgment. The premise for plaintiffs' request for leave is the enactment of the Artists' Rights and Theft Prevention Act of 2005 ("the ART Act"), Pub. L. No. 109-9, which was signed into law on April 27, 2005. Section 103(a) of the ART Act imposes criminal liability on certain acts of willful copyright infringement, including the willful infringement of a copyrighted work that is "being prepared for commercial distribution." ART Act § 103(a)(1)(C). Specifically, the statute provides:

Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

....

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

Id. (amending 17 U.S.C. § 506(a)).

Among the issues raised by defendants' motion for summary judgment is whether the operator of a peer-to-peer Internet file-sharing service who maintains an index of downloadable files embodying copyrighted sound recording and musical compositions "distribute[s]" those works within the meaning of section 106(3) of the Copyright Act, 17 U.S.C. § 106(3). In opposing defendants' motion, plaintiffs have asserted that the posting of such a file-name index on the Internet makes copyrighted works "available" to members of the public and thus, if unauthorized, amounts to infringement of the copyright owners' distribution rights. Plaintiffs now argue that the "making . . .

1 available” language in section 103(a)(1)(C) of the ART Act supports this interpretation of section
2 106(3).

3 The court finds plaintiffs’ argument unpersuasive for a number of reasons. First, and most
4 importantly, the ART Act does not amend section 106(3) of the Copyright Act. If Congress wanted
5 to make clear that the distribution right was broad enough to encompass making a work available to
6 the public without proof of actual distribution, it is perfectly capable of doing so. Plaintiffs fails to
7 identify anything in the legislative history of the ART Act, much less the statute itself, that suggests
8 Congress’ intent to clarify section 106(3) in such a manner. Instead, plaintiffs suggest that their
9 “making available” interpretation of the distribution right is compelled by the fact the ART Act
10 imposes criminal liability on a class of infringing acts involving, *inter alia*, “the distribution of a
11 work being prepared for commercial distribution, by making it available on a computer network
12 accessible to members of the public.” ART Act § 103(a)(1)(C). Thus, according to plaintiffs,
13 Congress must have implicitly recognized that civil liability for copyright infringement should be at
14 least as broadly construed as the criminal offense defined by section 103(a)(1)(C).

15 Whatever the merits of this argument might be in the abstract, it is largely academic in light
16 of the actual language of the ART Act, which plaintiffs conveniently disregard. That language
17 makes clear that willful copyright infringement and “making [the infringed work] available on a
18 computer network” are separate elements of the criminal offense defined by section 103(a)(1)(C).
19 Thus, regardless of the manner in which a court interprets section 106(3) of the Copyright Act for the
20 purpose of finding copyright infringement, criminal liability under the ART Act cannot be imposed
21 unless such an act of infringement is proven beyond a reasonable doubt. This is hardly persuasive
22 evidence of what the words of section 106(3) mean in the context of a civil copyright infringement
23 action.

24 In any event, the court does not believe that the 109th Congress’ views would affect the
25 outcome of this action even if it had explicitly commented on the scope of the distribution right in
26 the course of enacting the ART Act. The Supreme Court has repeatedly emphasized that such
27 subsequent legislative history “is a hazardous basis for inferring the intent of an earlier Congress.”
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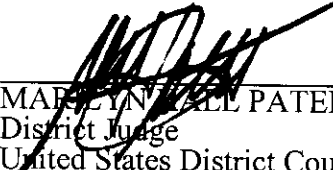
1 Jones v. United States, 526 U.S. 227, 238 (1999) (quoting Pension Benefit Guar. Corp. v. LTV
2 Corp., 496 U.S. 633, 650 (1990)) (internal quotation marks omitted); see also Sullivan v. Finkelstein,
3 496 U.S. 617, 632 (1990) (SCALIA, J., concurring) (observing that “[a]rguments based on
4 subsequent legislative history . . . should not be taken seriously”). That is certainly the case here. If
5 legislative history is to inform the court’s interpretation of the Copyright Act of 1976, it must reflect
6 the views of the members of Congress who enacted that statute into law. The opinions of members
7 of the 109th Congress are of little, if any, relevance to such an inquiry and need not be considered
8 seriously here.

9 Accordingly, plaintiffs’ motion for leave to file a supplemental memorandum in opposition to
10 defendants’ motion for summary judgment is hereby DENIED.

11 IT IS SO ORDERED.

12 Date:

13 *May 11, 2006*


14 MABELYN VALL PATEL
15 District Judge
16 United States District Court
17 Northern District of California

UNITED STATES DISTRICT COURT
For the Northern District of California

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