

Defendant's Motion. As explained below and in the attached affidavit of Plaintiffs' counsel, Laurie J. Rust, Plaintiffs require the opportunity to conduct discovery regarding several matters in order to respond more fully to Defendant's Motion.

II. BACKGROUND AND STATEMENT OF FACTS

Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet. Today, copyright infringers use various online media distribution systems to download (reproduce) and unlawfully disseminate (distribute) to others billions of perfect digital copies of Plaintiffs' copyrighted sound recordings each month. The United States Supreme Court has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005). As a direct result of piracy over these P2P networks, Plaintiffs have sustained and continue to sustain devastating financial losses.

In an effort to protect their copyrights from online infringement, Plaintiffs, through their trade association the Recording Industry Association of America ("RIAA"), have engaged the MediaSentry Business Unit of Safenet, Inc., formerly MediaSentry, Inc. ("MediaSentry") to assist them in locating individuals infringing their copyrights over P2P networks and to gather evidence of their infringement. *See* Decl. of Elizabeth Hardwick at ¶3, attached as Exhibit A hereto. To perform this task, MediaSentry searches peer-to-peer networks for individuals distributing infringing files for download and gathers evidence concerning that infringement. *Id.* When MediaSentry finds such a file, it may download the file. *Id.* at ¶5. As part of that downloading process, MediaSentry, like any other peer-to-peer user, receives basic information about the individual from whom the work is being downloaded. *Id.* That information includes,

among other things, the Internet Protocol (“IP”) address the individual used to connect to the Internet. *Id.*

Using a feature of the peer-to-peer software available to any user, MediaSentry also captures a list of all of the files that the individual is distributing to others for download. *Id.* at ¶5. MediaSentry collects this information in two forms. First, MediaSentry takes screen shots, which are actual pictures of the screens that MediaSentry or any other user of the peer-to-peer network can see when reviewing the files being distributed by the infringer. Second, MediaSentry captures as a text file of the contents of the individual’s “shared” folder that includes the name and size of each file in the folder as well as additional information (called “metadata”) about each file. *Id.* Metadata may include a wide range of information about a particular digital music file including, for example, the identification of the person or group that originally copied the music file and began disseminating it to others. *Id.*

MediaSentry’s process for identifying potential infringers and gathering evidence of infringement has multiple fail-safes to ensure that the information gathered is accurate. MediaSentry takes numerous steps to check and double-check the IP address of the potential infringer. *Id.* at ¶8.

On August 10, 2004 at approximately 12:49 a.m. EDT, MediaSentry detected an individual using the KaZaA file sharing program (“KaZaA”) to engage in the distribution of 816 digital audio files, many of them Plaintiffs’ copyrighted sound recordings. *Id.* at ¶9. This person used the username “sublimeguy14@KaZaA” and connected to the Internet at IP address 68.227.185.38. *Id.* Attached as Exhibit B (also Exhibit B to Plaintiffs’ Complaint) is a true and correct copy of a compilation of computer screen shots captured by MediaSentry on August 10,

2004 showing the list of files that the computer connected to KaZaA with the IP address of 68.227.185.38 was distributing, for free, to other KaZaA users. *Id.*

Plaintiffs then filed a “Doe” lawsuit and served a Rule 45 subpoena on Cox Communications, Inc. (“Cox”), which is the Internet Service Provider that was responsible for assigning to its customers the block of IP addresses that included the 68.227.185.38 IP address on August 10, 2004. *See* Declaration of Laurie J. Rust at ¶2, attached as Exhibit C hereto. In response to Plaintiffs’ Rule 45 Subpoena, Cox identified J. Tenenbaum as the person to whom the 24.175.59.240 IP address was assigned on June 10, 2004. *See* Rust Decl. at ¶3. In addition, Cox identified two email addresses assigned to the holder of that Internet account. One of those email addresses, (*sublimeguy14@cox.net*), matches the username of the KaZaA account used to infringe Plaintiffs’ copyrighted sound recordings (*sublimeguy14@KaZaA*). Attached as Exhibit D hereto is a true and correct copy of Cox’s subpoena response.

In 2005, Plaintiffs sent a letter to J. Tenenbaum in an effort to resolve their copyright infringement claims without filing a lawsuit. *Id.* at ¶4. On October 4, 2005, attorney Karuna Ojanen contacted Plaintiffs’ representative on behalf of Mr. Tenenbaum. *Id.* at ¶4. Ms. Ojanen informed Plaintiffs’ representative that Mr. Tenenbaum’s college-aged child, who had been home for the summer, was responsible for the infringement at issue. *Id.* at ¶4.

On August 7, 2007, Plaintiffs filed the instant action for damages and injunctive relief against Mr. Tenenbaum’s son, Joel Tenenbaum (“Defendant”). Defendant was served with the Summons and Complaint on August 17, 2007, and filed his Answer on September 1, 2007. Since that time, Plaintiffs have attempted unsuccessfully to negotiate a settlement with Defendant. *See* Rust Decl. at ¶ 6. To date, no Scheduling Order has been issued and no discovery has been taken in this case. Per the Court’s October 24, 2007 requirement that the

parties attend a status conference prior to propounding discovery, Plaintiffs are not permitted to serve Defendant written discovery requests until after the January 29, 2008 status conference.

On November 23, 2007, Defendant filed his Motion for Summary Judgment. The sole bases for Defendant's Motion are his assertions that Plaintiffs' have not established distribution of their copyrighted sound recordings and that individuals "too numerous to recall and recount" had access to his computer. *See* Motion at 13; Aff. of Joel Tenenabum. Defendant's Motion should be denied because, among other things, Plaintiffs have clear evidence that infringement occurred and that Defendant is responsible. In addition, nowhere in his Motion nor Affidavit does Defendant deny infringing Plaintiffs' copyrighted sound recordings. *See* Motion; Aff. of Joel Tenenabum. Instead, Defendant suggests that someone else may be responsible, but offers no information that would implicate anyone other than himself. *Id.* Because Plaintiffs have significant evidence of Defendant's infringement, and because Defendant does not deny the infringement, his Rule 56 Motion should be denied.

Alternatively, Plaintiffs require the opportunity of discovery to respond further to Defendant's Motion. Plaintiffs cannot present further affidavits in opposition to Defendant's motion without having an opportunity to depose Defendant, his parents, who, through their attorney, identified Defendant as the individual responsible for the infringement at issue, and any other individuals Defendant contends may have information concerning the infringement alleged in this case. Because Plaintiffs cannot respond to Defendant's Motion without this discovery, in the event the Court declines to deny Defendant's Motion outright, Plaintiffs ask that the Court order a continuance of at least 120 days from the date of the Court's ruling to allow Plaintiffs to conduct discovery and to file a brief and further affidavits in opposition to Defendant's Motion.

III. ARGUMENT

A. Defendant's Motion For Summary Judgment Should Be Denied.

1. Defendant Has Failed To Establish That He Is Entitled To Judgment As A Matter Of Law.

A party seeking summary judgment under Rule 56 must “show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

A party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Carmona v. Toledo*, 215 F.3d 124, 132 (1st Cir. 2000) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). In order to analyze a summary judgment motion properly, a court must review what facts are “material” and what issues are “genuine.” *Doering Equip. Co. v. Telelect, Inc.*, 1992 U.S. Dist. LEXIS 9630 (D. Mass. 1992). To identify which facts are material, a court must analyze the relevant substantive law at issue in the case. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Brennan v. Hendrigan*, 888 F.2d 189, 191 (1st Cir. 1989)). In *Anderson*, the United States Supreme Court explained that material facts are dispositive facts, ones that “might affect the outcome of the suit under the governing law.” *Doering Equip.*, 1992 U.S. Dist. LEXIS 9630 at *5 (citing *Anderson*, 477 U.S. at 248). An issue is “genuine” if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Id.* The non-movant is entitled to all reasonable inferences that can be drawn in its favor from the evidence on record. *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, 436 N.E.2d 139, *cert. denied*, 459 U.S. 970 (1982); *Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 206 (1st Cir. 2006) (vacating the district court’s award of summary judgment because genuine issues of material fact existed in the case and because better evidence was readily available at trial). Where a moving

party fails to meet its burden of showing the absence of a genuine issue of material fact, the motion should be denied. *See United States Steel v. M. DeMatteo Constr. Co.*, 315 F.3d 43, 52 (1st Cir. 2002).

In addition, “[u]nsubstantiated assertions, improbable inferences, and unsupported speculation” are not competent summary judgment evidence. *Galloza v. Foy*, 389 F.3d 26, 28 (1st Cir. 2004) (citing *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)). Where a motion for summary judgment is not supported by any developed arguments or citation to legal authority, courts will not grant summary judgment. *See, e.g., Kiman v. N.H. Dep’t of Corr.*, 451 F.3d 274, 282 (1st Cir. 2006) (“Neither party may rely on conclusory allegations or unsubstantiated denials . . . to demonstrate either the existence or absence of an issue of fact”).

Here, Defendant’s Motion for Summary judgment fails to cite any substantive, as opposed to procedural, legal authority to show that he is entitled to judgment as a matter of law. Defendant does nothing more than cite a litany of procedural rules and standards upon which he contends his Motion should be decided. Indeed, the Motion relies solely on Defendant’s incorrect assertion that Plaintiffs could not offer any evidence of distribution of their copyrighted sound recordings and Defendant’s suggestion that someone else may be responsible for the infringement at issue. *See Motion; Aff. of Joel Tenenabum*. Without any citation to the substantive legal authority underlying Plaintiffs’ claim, Defendant’s purported factual assertions are meaningless, and he has failed to demonstrate that he is entitled to judgment as a matter of law. For this reason alone, Defendant’s Motion should be denied. *See Kiman*, 451 F.3d at 282.

2. Plaintiffs Have Evidence Of Infringement Against Defendant And Plaintiffs' Evidence Precludes Summary Judgment.

Summary judgment is warranted only when “there is no genuine issue as to any material fact.” Fed. R. Civ. P. 56(c). Here, not only has Defendant failed to meet his burden to show that he is entitled to judgment as a matter of law, but Plaintiffs have evidence of infringement against Defendant that precludes summary judgment.

The Copyright Act grants the copyright owner of a sound recording the exclusive rights to, among other things, “reproduce the copyrighted work in copies or phonorecords” and “distribute copies or phonorecords of the copyrighted work to the public.”

17 U.S.C. § 106(1), (3). In order to prevail in this action, Plaintiffs must prove only: (1) that they own the copyrights in the sound recordings; and (2) that Defendant copied or distributed those sound recordings. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”). Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: “ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant.” 4 M. & D. Nimmer, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2002) (“NIMMER”). Copyright infringement is a strict liability offense. Accordingly, a plaintiff need not demonstrate an intent to infringe, or even knowledge of infringement, in order to prove copyright infringement. *See, e.g., Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) (“Copyright infringement actions . . . require no showing of intent to infringe.”).

In a case with facts similar to those in this case, a court denied the defendant’s motion for summary judgment on a claim of copyright infringement because the plaintiffs had offered

evidence “sufficient to raise a genuine issue of material fact whether [the defendant] committed the alleged copyright infringement.” See *Warner Bros. Records Inc. v. Duarte*, No. SA-06-CA-615-OG, slip op. at 4 (W.D. Tex. May 2, 2007) (Memorandum and Recommendation by Magistrate Judge) (attached as Exhibit E hereto); see also *Warner Bros. Records Inc. v. Duarte*, No. SA-06-CA-615-OG, slip op. at 1-2 (W.D. Tex. June 6, 2007) (Order Accepting Magistrate Judge’s Recommendation) (attached as Exhibit F hereto). In *Duarte*, the plaintiffs submitted declarations from representatives of MediaSentry and the plaintiffs (similar to those submitted by Plaintiffs here) connecting the infringement of the plaintiffs’ copyrighted sound recordings to the defendant. *Duarte*, May 2, 2007, slip op. at 3-4 (Exhibit E). The court held that the plaintiffs’ evidence created genuine issues of material fact that precluded summary judgment and denied the defendant’s motion. *Id.* at 4; see also *Duarte*, June 6, 2007, slip op. at 1-2 (Exhibit F).

Here, Defendant does not challenge that Plaintiffs own or control the exclusive rights in the copyrights to the sound recordings at issue. Instead, he contends that Plaintiffs have not - and could not - offer evidence of distribution of their copyrighted sound recordings and that several other individuals may be responsible. See Motion and Tenenbaum Aff. Plaintiffs’ evidence, however, directly contradicts Defendant’s contentions. Specifically, Plaintiffs’ evidence shows that an individual with the user name “sublimeguy14@KaZaA” connected to the Internet at IP address 68.227.185.38 on August 10, 2004 and was distributing 816 audio files, many of them Plaintiffs’ copyrighted sound recordings, to other KaZaA users. See Hardwick Decl. at ¶ 9. Further, there is an obvious match between the KaZaA username (*sublimeguy14@KaZaA*) and the Cox email address (*sublimeguy14@cox.net*). Moreover, Defendant’s parents, through their attorney, identified Defendant as the individual responsible for the infringement at issue. See Rust Decl. at ¶ 9. The unauthorized distribution or

reproduction of Plaintiffs' copyrighted sound recordings constitutes copyright infringement, and Plaintiffs' evidence of such conduct by Defendant precludes summary judgment against Plaintiffs. *See Duarte*, May 2, 2007, slip op. at 3-4 (Exhibit E).

Moreover, Defendant's contention that no distribution of Plaintiffs' copyrighted sound recordings occurred is simply incorrect. In his Motion, Defendant claims that "[a] quick review of Exhibit A and B attached to the Complaint specifically show on those documents themselves that no file sharing took place." Motion at 12. While the screenshots shown in Exhibit B do state "not sharing any files," these screen shots show the files that were being distributed from Defendant's shared folder as seen by Plaintiffs' investigator, MediaSentry, and the statement refers to the fact that MediaSentry, the viewer, was not sharing any files. *See Hardwick Decl.* at ¶ 9. As a matter of basic logic, MediaSentry was able to view and download music files from Defendant's computer only because those music files were being distributed by Defendant, whose computer was connected to the Internet at IP address 68.227.185.38. If the music files were not being distributed by Defendant, they could not have been downloaded by MediaSentry.

B. In The Alternative, Plaintiffs Should Be Entitled To A Continuance Under Rule 56(f) To Conduct Discovery Necessary To Respond Further To Defendant's Motion.

In the event the Court declines to deny Defendant's Motion outright, Plaintiffs move for a continuance of 120 days from the date of the Court's ruling to permit Plaintiffs to conduct the discovery necessary to respond further to Defendant's Motion. Plaintiffs further ask that, upon completion of the necessary discovery, Plaintiffs be allowed to file a brief and affidavits in opposition to Defendant's Motion.

Rule 56(f) provides that:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a

continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (“Rule 56(f) . . . allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.”). The purpose of Rule 56(f) is to prevent a party from being “railroaded” by a premature motion for summary judgment. *Celotex*, 477 U.S. at 326; *Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (“The general principle of Rule 56(f) is that ‘summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.’”) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, (1986)). A continuance under Rule 56(f) is appropriate when a party shows it “has had insufficient time for discovery or . . . the relevant facts are in the exclusive control of the opposing party.” *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136 (5th Cir. 1987).

As the discovery period in this matter has not yet opened, Plaintiffs have not served Defendant with written discovery, including requests for admissions under Rule 36, interrogatories under Rule 33, and requests for production under Rule 34. *See Rust Decl.* at ¶ 2.

In order to respond to Defendant’s Motion, Plaintiffs require the Court’s consent to serve written discovery requests on Defendant and for Defendant to submit responses to all of Plaintiffs’ written discovery requests. *Id.* at ¶ 4. Plaintiffs also require the opportunity to depose Defendant and others who have information relevant to the claims of this lawsuit. *Id.* Finally, Plaintiffs intend to conduct a forensic inspection of the computer used to connect to the Internet through Cox on August 10, 2004, as provided under Fed. R. Civ. P. 34(a), to inspect the computer for evidence of the infringement alleged in Plaintiffs’ Complaint. *Id.* ¶ 5. Plaintiffs

require this discovery to test the assertions in Defendant's affidavit and obtain information regarding Defendant's use of the computer used to infringe Plaintiffs' copyrights. *Id.* at ¶ 6. Plaintiffs believe that such discovery will yield further evidence of Defendant's infringement of Plaintiffs' copyrights. *Id.* Knowledge of these facts rests outside Plaintiffs' control, and Plaintiffs must be accorded the opportunity to obtain this discovery. *Id.* at ¶ 7.; *see also Union Carbide*, 823 F.2d at 136.

IV. CONCLUSION

For the reasons stated above, Plaintiffs ask that Defendant's Motion for Summary Judgment be denied. In the alternative, Plaintiffs request a continuance under Rule 56(f) of at least 120 days from the date of the Court's ruling in order to obtain discovery necessary to respond further to Defendant's Motion and to file a brief and affidavits in opposition to Defendant's Motion.

Respectfully submitted,

/s/ John R. Bauer

John R. Bauer, BBO# 630742
Nancy M. Cremins, BBO # 658932
ROBINSON & COLE LLP
One Boston Place
Boston, MA 02108-4404
Main Phone: (617) 557-5900
Main Fax: (617) 557-5999

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2008, this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to defendant Joel Tenenbaum.

/s/ John R. Bauer

John R. Bauer