

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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**MOTOWN RECORD CO., LP, et al.,**  
**Plaintiffs,**

v.

**THERESA DePIETRO,**  
**Defendant.**

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**CIVIL NO. 04-CV-2246**

**MEMORANDUM OPINION & ORDER**

**RUFE, J.<sup>1</sup>**

**February 16, 2007**

This is one of many actions filed throughout the nation in which numerous record companies are seeking to protect their copyrighted sound recordings from illegal downloading and sharing over the Internet. Presently before the Court are the parties' Cross-Motions for Summary Judgment<sup>2</sup> and the oppositions thereto. After consideration of the parties' submissions and review of the relevant legal authorities, Defendant's Motion will be denied, and Plaintiffs' Motion will be dismissed without prejudice. The Court will, however, entertain a request for a hearing to make the necessary findings of fact and conclusions of law regarding Defendant's alleged destruction of integral evidence, before any further judgment is rendered.

**I. FACTUAL BACKGROUND**

Most of the underlying facts of this case are undisputed. On November 18, 2003, at

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<sup>1</sup> By Order of the Court dated July 14, 2004 [Doc. # 4], this case was referred to the Honorable Cynthia M. Rufe for monitoring and coordination of pre-trial matters. Accordingly, Judge Rufe addresses the parties' instant pre-trial dispositive motions. The case remains, however, on the trial calendar of the Judge to whom it was originally assigned at the time of filing, the Honorable Eduardo C. Robreno.

<sup>2</sup> The Court is being generous by categorizing Defendant's Request for Summary Judgment [Doc. # 47] as a motion for summary judgment under Federal Rule of Civil Procedure 56(b), but will treat the request as a motion, nonetheless, as Defendant is proceeding *pro se* in this matter.

7:07 a.m., while investigating copyright infringement by users of peer-to-peer file-sharing programs (“P2P programs”), Plaintiffs discovered that substantial copyright infringement was occurring at Internet protocol address (“IP address”) 216.15.109.54, through use of KaZaA.<sup>3</sup> At that time, the user at that IP address was distributing 1203 music files, including 31 sound recordings whose copyrights are owned by the Plaintiffs and are at issue in this action.<sup>4</sup> According to Plaintiffs, the user was detected using KaZaA to share copyrighted music files 32 times between November 5, 2003, and April 12, 2004.<sup>5</sup> Each time, the user was notified by instant message that he or she “appeared to be infringing Plaintiffs’ copyrights, that distributing or downloading copyrighted music on the internet without permission is illegal, and that by breaking the law the individual risked legal penalties.”<sup>6</sup>

Plaintiffs ascertained that RCN Corporation (“RCN”) was the Internet service provider (“ISP”) for the computer with IP address 216.15.109.54 on the date at issue.<sup>7</sup> Accordingly, they served a subpoena upon RCN requesting information related to that IP address. In response to the subpoena, RCN identified Theresa DePietro, 1121 Folsom Avenue, Prospect Park, Pennsylvania,

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<sup>3</sup> KaZaA is a P2P program, which is used to distribute files from one user’s computer to other users’ computers through the Internet. According to Plaintiffs, who have significant experience dealing with these programs, it is one of the most popular P2P programs used to illegally download and distribute copyrighted material. Pls.’ Mot. for Summ. J. [Doc. # 50] ¶ 5–6.

<sup>4</sup> *Id.* ¶ 7; Dr. Doug Jacobson Aff. & Expert Rep. [Ex. # 9] at 6. Citations to exhibits refer to the exhibits attached to Plaintiffs’ Motion for Summary Judgment, unless noted otherwise.

<sup>5</sup> Pls.’ Mot. for Summ. J. ¶ 8; Thomas Carpenter Aff. [Ex. # 11] ¶ 24.

<sup>6</sup> Pls.’ Mot. for Summ. J. ¶ 8; see also Carpenter Aff. ¶ 24; Text of Instant Message [Ex. # 12].

<sup>7</sup> Pls.’ Mot. for Summ. J. ¶ 9; Jacobson Aff. & Expert Rep. at 6.

as the subscriber of record for that IP address on November 18, 2003, at 7:07 a.m.<sup>8</sup>

On April 8, 2004, after Defendant was identified as the alleged infringer, Plaintiffs sent her a letter explaining, among other things, that a “Doe” lawsuit had been filed against her and that she was about to be named as a defendant.<sup>9</sup> That letter specifically explained the need to preserve evidence relating to the claims against Defendant.<sup>10</sup> After Plaintiffs’ settlement attempts with Defendant failed, they filed the instant action naming Theresa DiPietro as Defendant in May 2004, and served her in July 2004. Defendant subsequently answered the Complaint in August 2004.<sup>11</sup> Nonetheless, Defendant disposed of the computer allegedly used for the infringement by setting it out for trash collection in or around September 2004.<sup>12</sup> Defendant also disposed of the cable modem allegedly used for the infringement by returning it to RCN sometime in September or October 2004.<sup>13</sup>

Defendant’s refusal to cooperate with Plaintiffs has persisted throughout the discovery process. Defendant initially refused to provide any written discovery to Plaintiffs.<sup>14</sup> On at least two different occasions, Defendant refused to answer questions related to the case by asserting her Fifth Amendment privilege against self-incrimination, even though no criminal investigation or charges

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<sup>8</sup> Pls.’ Mot. for Summ. J. ¶ 9; Jacobson Aff. & Expert Rep. at 6; Simona E. LaPadat Aff. [Ex. # 14] ¶ 4; RCN’s Response to Subpoena [Ex. # 13], at 7.

<sup>9</sup> Pls.’ Mot. for Summ. J. ¶ 14.

<sup>10</sup> Id. ¶ 15; Letter from Patricia H. Benson, Esq. to Theresa DePietro (Apr. 8, 2004).

<sup>11</sup> Pls.’ Mot. for Summ. J. ¶ 16.

<sup>12</sup> Id. ¶ 17; Def.’s Resp. to Pls.’ Third Set of Interrogs. [Ex. # 21], at Interrog. Nos. 14 & 15.

<sup>13</sup> Pls.’ Mot. for Summ. J. ¶ 17; DePietro Dep. [Ex. # 17] 110:16–112:24, Oct. 4, 2005; Def.’s Resp. to Pls.’ Second Set of Reqs. for Produc. of Docs. & Things [Ex. # 22], at Interrog. No. 2.

<sup>14</sup> See Pls.’ Mot. to Compel Expert Discovery [Doc. # 38] at 2.

were pending against her.<sup>15</sup> These refusals to cooperate forced Plaintiffs to seek Orders from this Court compelling Plaintiff to provide written discovery and to be deposed.<sup>16</sup> Thereafter, Plaintiff was deposed a second time and submitted responses to previously issued interrogatories. During discovery, Defendant acknowledged that she was the only person who had access to her computer,<sup>17</sup> that her live-in boyfriend was the only other person in her apartment for any extended period of time,<sup>18</sup> and that she never used a wireless router or wireless service to connect to the Internet.<sup>19</sup>

In support of Defendant's position that someone other than she downloaded the music files at issue here, she submitted a report prepared by her purported expert, Joseph C. Magee, Jr., in December 2005. The first drafts of this report were contested by Plaintiffs for failure to comply with Federal Rule of Civil Procedure 26(b)(2).<sup>20</sup> Defendant has resubmitted a draft that she contends complies with the Rule, though Defendants continue to question the validity of the report and the conclusions offered within it.<sup>21</sup>

On June 15, 2006, after discovery concluded, Defendant made a request for summary

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<sup>15</sup> DePietro Dep. [Ex. # 15] 26:10–31:6, May 4, 2005; Def.'s Resp. to Interrogs. [Ex. # 16], at 1 (“Defendant Theresa DePietro is exercising her Fifth Amendment right by refusing to answer Plaintiff’s [sic] Interrogatories.”).

<sup>16</sup> Order Granting Mot. to Compel Expert Disc. [Doc. # 39], Feb. 9, 2006; Order Granting Mot. to Compel [Doc. # 30], Aug. 19, 2005; Order Granting Mot. to Compel [Doc. # 17], Apr. 1, 2005.

<sup>17</sup> DePietro Dep. 135:19–135:24, Oct. 4, 2005.

<sup>18</sup> DePietro Dep. 21:8–24, 22:22–25:1, May 4, 2005. Defendant's boyfriend, Nazareno Fioravanti, claims that he does not know what a computer is and that Defendant never had a computer during the time he has known her. Fioravanti Dep. [Ex. # 18] 19:14–15, 41:11–18, Aug. 2, 2005.

<sup>19</sup> DePietro Dep. 131:17–132:1, Oct. 4, 2005.

<sup>20</sup> Mot. to Strike Def.'s Expert Rep. & Preclude Def.'s Expert from Testifying [Doc. # 43].

<sup>21</sup> See Pls.' Mot. for Summ. J. at 11–12.

judgment.<sup>22</sup> Plaintiffs filed an opposition to Defendant's request on July 6, 2006.<sup>23</sup> On June 22, 2006, Plaintiffs filed their Motion for Summary Judgment.<sup>24</sup> In this Motion, Plaintiffs argued that, even if summary judgment were deemed inappropriate, the Court should sanction Defendant by entering default judgment against her for destroying integral evidence.<sup>25</sup> Defendant filed a bare-bones opposition to Plaintiffs' Motion on July 14, 2006.<sup>26</sup> In that Response, Defendant claimed that she never admitted that "she threw her computer away,"<sup>27</sup> despite the fact that she explicitly admitted that fact in responses to interrogatories and requests for production of documents and things.<sup>28</sup> While the Motion was under review, Plaintiffs sought leave of Court to file a late Reply brief to Defendant's opposition, which was granted, and Plaintiffs filed their Reply on February 2, 2007.<sup>29</sup> Without seeking leave of Court, Defendant filed a Sur-reply on February 15, 2007, in which she repeats her denials of liability and vehemently denies discarding her computer after receiving any letter from Plaintiffs or being named as Defendant in this action.<sup>30</sup> The Cross-Motions for Summary Judgment are now ready for review.

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<sup>22</sup> Def.'s Request for Summ. J. [Doc. # 47]. This submission is a one-paragraph, two-sentence demand for summary judgment without any statement of its basis or argument thereon.

<sup>23</sup> Pls.' Resp. to Def.'s Mot. for Summ. J. [Doc. # 53].

<sup>24</sup> Pls.' Mot. for Summ. J. [Doc. # 50].

<sup>25</sup> Id. at 12–18.

<sup>26</sup> Def.'s Request to Deny Pls.' Mot. for Summ. J. [Doc. # 54].

<sup>27</sup> Id. at 2, ¶ 4.

<sup>28</sup> Def.'s Resp. to Pls.' Third Set of Interrogs., at Interrog. Nos. 14 & 15; see Def.'s Resp. to Pls.' Second Set of Reqs. for Produc. of Docs. & Things, at Req. No. 1.

<sup>29</sup> Pls.' Reply to Resp. to Mot. for Summ. J. [Doc. # 57].

<sup>30</sup> Def.'s Sur-Reply [Doc. #58].

## II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Disposition upon motion for summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”<sup>31</sup> In this case, the Court is presented with cross-motions for summary judgment. The mere existence of cross-motions does not necessarily dictate that one motion will be granted and the other denied, thereby disposing of the case.<sup>32</sup> If issues of material fact exist, such that a reasonable jury could return a verdict for the non-moving party,<sup>33</sup> then summary judgment is not appropriate, and the case must be allowed to proceed to trial.<sup>34</sup>

## III. DISCUSSION

### A. Applicable Copyright Law

Under the Copyright Act, the owner of a valid copyright on a sound recording, such as a song, has the exclusive right to, among other things, “reproduce the copyrighted work in copies or phonorecords” and “distribute copies or phonorecords of the copyrighted work to the public.”<sup>35</sup> Accordingly, in order to prevail on a cause of action for copyright infringement, a plaintiff must prove: (1) that he or she owns the copyrights in the sound recordings allegedly downloaded and/or

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<sup>31</sup> Fed. R. Civ. P. 56(c).

<sup>32</sup> See Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968).

<sup>33</sup> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

<sup>34</sup> Rains, 402 F.2d at 245.

<sup>35</sup> 17 U.S.C. §§ 106(1) & 106(3) (2000).

distributed by the defendant; and (2) that the defendant actually “copied” those sound recordings.<sup>36</sup> Under the Copyright Act, “[c]opying refers to the act of infringing any of the exclusive rights that accrue to the owner of a valid copyright, as set forth at 17 U.S.C. § 106, including the right to distribute and reproduce copyrighted material.”<sup>37</sup> A plaintiff claiming infringement of the exclusive-distribution right can establish infringement by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant “made available” the copyrighted work.<sup>38</sup>

## **B. Defendant’s Motion for Summary Judgment**

Defendant’s Request for Summary Judgment demands dismissal with prejudice because “Plaintiff’s [sic] have no credible evidence that proves Defendant Theresa DePietro or Defendants [sic] computer to be the perpetrator of the alleged copyright infringement complaints outlined in this case.”<sup>39</sup> This one sentence constitutes the entire substance of the request. Defendant does not provide the Court with any evidence, in the form of affidavits, depositions, or otherwise, supporting her claim. Nor does she make any argument informing the Court of the rationale behind her bald assertion that there are no genuine issues of material fact. It is well-established that “a party

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<sup>36</sup> See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197, 206 (3d Cir. 2002).

<sup>37</sup> Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 207 (3d Cir. 2005). In this case, Plaintiffs move for summary judgment only on the basis of Defendant’s alleged infringement of their distribution rights, but reserve “all rights and claims as to Ms. DePietro’s violations of their exclusive rights of reproduction as to the Sound Recordings.” Pls.’ Mot. for Summ. J., at 8–9 n.1.

<sup>38</sup> While neither the United States Supreme Court nor the Third Circuit Court of Appeals has confirmed a copyright holder’s exclusive right to make the work available, the Court is convinced that 17 U.S.C. § 106 encompasses such a right based on its reading of the statute, the important decision in A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), and the opinion offered by the Register of Copyrights, Marybeth Peters, in a letter related to Congressional hearings on piracy of intellectual property on peer-to-peer networks, Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Rep. from the 28<sup>th</sup> Dist. of Cal. (Sept. 25, 2002) (“[M]aking [a work] available for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well as the production right.”).

<sup>39</sup> Def.’s Req. for Summ. J. [Doc. #47], at 1.

seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”<sup>40</sup> While the Court acknowledges that it should construe *pro se* filings liberally in the interests of justice, no amount of liberality will render Defendant’s Motion sufficient. Because Defendant has wholly failed to meet her initial burden of informing the Court of the basis for her request and identifying the evidence supporting her position, her Motion will be denied.<sup>41</sup>

### **C. Plaintiffs’ Motion for Summary Judgment**

Plaintiffs argue that they are entitled to summary judgment because they indisputably own the copyrights on the 31 sound recordings at issue in this case, and Defendant has not offered any evidence to rebut their allegations that she infringed those copyrights by distributing the sound recordings through the P2P program, KaZaA. At this stage of the litigation, however, the Court cannot agree.

It is clear and undisputed that Plaintiffs own now, and owned at the time of the alleged infringement, the copyrights on the 31 sound recordings at issue here. There are, however, genuine issues of material fact concerning whether or not Defendant has been misidentified as the infringing user. While a mere assertion of misidentification may not be sufficient to satisfy

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<sup>40</sup> Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

<sup>41</sup> Furthermore, even if Defendant had attempted to support her request with some argument and evidence, the Court would still deny the Motion. Plaintiffs have provided the Court with more than ample evidentiary support for a reasonable jury to find in their favor, such as the evidence linking an IP address assigned to Defendant on November 18, 2003, to the alleged infringement that occurred on that same date. That piece of evidence, in itself, is enough for Plaintiffs to survive Defendant’s Motion for Summary Judgment.

Defendant's burden to establish the existence of a genuine issue of material fact,<sup>42</sup> Defendant has also supplied the Court with a report from her purported expert. In this report, Defendant's expert offers several theories to explain that, even though Plaintiffs identified a user at Defendant's IP address as the infringer on November 18, 2003, it is possible that Defendant was not the infringing user. At the summary-judgment stage, the Court must accept this report in the light most favorable to Defendant. Doing so, in conjunction with Defendant's repeated denials that she downloaded or distributed the sound recordings at issue in this case,<sup>43</sup> creates a genuine issue of material fact. If Defendant can offer proof at trial that she may not have been the user identified by Plaintiffs, a reasonable jury could find that she is not liable for infringement.

The above analysis is not, however, dispositive as to Plaintiffs' Motion. Plaintiffs have been deprived of the opportunity to fully test, evaluate, and challenge the theories offered in Defendant's expert's report because the computer allegedly used in the infringement has not been made available to Plaintiffs for examination. According to Plaintiffs, and also according to Defendant's own admission, Defendant is responsible for that deprivation because she discarded the computer in or around September 2004 by placing it "out for weekly trash pick up."<sup>44</sup> It appears that this was done approximately five months after receiving the "Doe letter" informing her that she had been identified as an infringer and instructing her to preserve all related evidence, four months after

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<sup>42</sup> See Paramount Pictures Corp. v. Davis, 234 F.R.D. 102, 110 (E.D. Pa. 2005) (citing Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs, AFL-CIO, 982 F.2d 884, 892 (3d Cir. 1992)).

<sup>43</sup> See, e.g., Def.'s Sur-Reply, at 2-3.

<sup>44</sup> Pls.' Mot. for Summ. J. ¶ 17; Def.'s Resp. to Pls.' Third Set of Interrogs., at Interrog. Nos. 14 & 15. At the same time, Defendant claims that she was merely approximating when she discarded her computer. She points to her deposition testimony in which she stated that she discarded the computer "around then," but "don't hold me on that exact month." Def.'s Sur-Reply, at 4 (quoting DePietro Dep. [Ex. F. to Def.'s Sur-Reply] 97:1-2, Oct. 4, 2005).

the Complaint was filed in this case, two months after Defendant was served with the Complaint, and a month after Defendant filed her Answer to the Complaint. Moreover, Defendant disposed of the cable modem in use at the time of the alleged infringement by returning it to her provider, RCN, sometime in September or October 2004.<sup>45</sup> As Defendant's expert acknowledged at his deposition, if Plaintiffs had access to the computer and the modem, they could determine: (1) whether KaZaA had ever been downloaded to the computer;<sup>46</sup> (2) whether the MAC address of the computer and the modem matched the MAC address in RCN's logs;<sup>47</sup> (3) whether a virus or worm could be responsible for downloading music files to the computer without her knowledge;<sup>48</sup> and (4) whether Defendant had enabled the remote-desktop feature on her computer, which may have allowed a third party to access her computer remotely.<sup>49</sup> With this information, Plaintiffs may be able to prevail at the summary-judgment stage. Without it, there remain genuine issues of fact such that a reasonable jury could return a verdict in Defendant's favor.

In the face of these disputed facts, the Court does not believe that granting summary judgment is the appropriate remedy, even when the disputes exist only as a result of alleged spoliation. The Court must first determine whether Defendant discarded the computer and modem

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<sup>45</sup> Pls.' Mot. for Summ. J. ¶ 17; DePietro Dep. 110:16–112:24, Oct. 4, 2005; Def.'s Resp. to Pls.' Second Set of Reqs. for Produc. of Docs. & Things, at Interrog. No. 2.

<sup>46</sup> Magee Dep. [Ex. # 24] 11:24–12:15, May 22, 2006.

<sup>47</sup> Id. 18:2–19:2.

<sup>48</sup> Id. 42:7–43:16 (“Q: So let’s assume this happened to the defendant’s computer. If you had the computer and the hard drive you would have been able to determine it? A: Absolutely, 100 percent.”).

<sup>49</sup> Id. 62:15–63:12 (“Q: If we still had her hard drive today, we would be able to determine whether this feature had been enabled? A: Yes.”).

in bad faith and, if so, the appropriate sanction for such spoliation.<sup>50</sup> The Court will make the appropriate findings of fact and conclusions of law, but only after an appropriate motion is filed, to which Defendant will have the opportunity to respond, and the parties have an opportunity to be heard in Court. In the interim, the Court will dismiss Plaintiffs' Motion without prejudice. Plaintiffs will be permitted to renew their Motion at a later date, if appropriate.

#### IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment will be denied, and Plaintiffs' Motion for Summary Judgment will be dismissed without prejudice. Upon appropriate motion, the Court will hold a hearing to consider the spoliation issue.

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<sup>50</sup> The sanctions generally available after a finding of spoliation include: (1) dismissal of a claim or granting judgment in favor of a prejudiced party; (2) suppression of evidence; (3) an adverse inference, known as the spoliation inference; (4) fines; and (5) attorneys' fees and costs. Davis, 234 F.R.D. at 110-11. A particular sanction is not mandated by any rule of law, but rather, the decision is left to the discretion of the Court. Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994).

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**CIVIL NO. 04-CV-2246**

**ORDER**

**AND NOW**, this 16<sup>th</sup> day of February 2007, upon consideration of Plaintiffs' Motion for Summary Judgment [Doc. # 50], Defendant's Response thereto [Doc. # 54], Plaintiffs' Reply [Doc. # 57], and Defendant's Sur-reply [Doc. # 58], it is hereby **ORDERED** that Plaintiffs' Motion is **DISMISSED** without prejudice, and a renewed motion may be filed at a later date, in accordance with the Court's Memorandum Opinion.

It is **FURTHER ORDERED** that, upon consideration of Defendant's Motion for Summary Judgment [Doc. # 47] and Plaintiffs' Response thereto [Doc. # 53], Defendant's Motion is **DENIED** without prejudice.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**