

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; BMG MUSIC;
CAPITOL RECORDS, INC.; ELEKTRA
ENTERTAINMENT GROUP INC.;
INTERSCOPE RECORDS; LAFACE
RECORDS LLC; MOTOWN RECORD
COMPANY, L.P.; PRIORITY RECORDS LLC;
SONY BMG MUSIC ENTERTAINMENT;
UMG RECORDINGS, INC.; VIRGIN
RECORDS AMERICA, INC.; and
WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

LIME GROUP LLC; LIME WIRE LLC; MARK
GORTON; and GREG BILDSON, and M.J.G.
LIME WIRE FAMILY LIMITED
PARTNERSHIP

Defendants.

ECF Case

06 CV 5936 (GEL)

**DEFENDANTS MARK GORTON AND LIME GROUP LLC'S RESPONSE
TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Of counsel:

Lauren E. Handler
SDNY (LEH 6908)
PORZIO, BROMBERG &
NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962-1997
(973) 538-5146 (Facsimile)
(973) 889-4326 (Telephone)
lehandler@pbn.com

Charles S. Baker (CB1365)
Joseph D. Cohen (JC3017)
Susan K. Hellinger (SH8148)
PORTER & HEDGES, LLP
1000 Main Street, 36th Floor
Houston, TX 77002
(713) 226-6000 (Telephone)
(713) 228-1331 (Facsimile)
cbaker@porterhedges.com
jcohen@porterhedges.com
shellinger@porterhedges.com

Attorneys for Defendants

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
FACTUAL BACKGROUND	2
ARGUMENT AND AUTHORITIES	4
I. The Tertiary Defendants Are Entitled to the Protection of the <i>Sony/Betamax</i> Safe Harbor from Liability for Contributory and Vicarious Infringement	4
II. Plaintiffs’ Inducement of Infringement Claims and Contributory Copyright Infringement Claims Against the Tertiary Defendants Fail because They Lack a Legal Basis	4
III. Plaintiffs’ Inducement of Infringement Claims and Contributory Copyright Infringement Claims Against the Tertiary Defendants Fail because They Lack a Factual Basis	6
A. Plaintiffs fail to establish the essential elements of their inducement of infringements claims against the tertiary defendants	6
B. Plaintiffs fail to establish the essential elements of their contributory copyright infringement claims against the tertiary defendants	10
IV. Plaintiffs Fail to Establish the Essential Elements of Their Common Law Claims for Copyright Infringement and Unfair Competition as to Pre-1972 Recordings with Respect to the Tertiary Defendants	12
V. Summary Judgment on Plaintiffs’ Novel Theory Is Particularly Inappropriate	13
CONCLUSION	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Arista Records, Inc. v. Mp3Board, Inc.</i> , No. 00 CIV. 4660(SHS), 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002)	12-13
<i>Capitol Records, Inc. v. Naxos of Amer., Inc.</i> , 830 N.E.2d 250 (N.Y. Ct. App. 2005)	12
<i>Carofino v. Forester</i> , 450 F. Supp. 2d 257 (S.D.N.Y. 2006).....	13
<i>Demetriades v. Kaufmann</i> , 690 F. Supp. 289 (S.D.N.Y. 1988)	10
<i>Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971).....	10
<i>Heyman v. Commerce & Indus. Ins. Co.</i> , 524 F.2d 1317 (2d Cir. 1975).....	13
<i>In re Napster, Inc. Copyright Litig.</i> , 377 F. Supp. 2d 796 (N.D. Cal. 2005)	n.5
<i>Lauratex Textile Corp. v. Allton Knitting Mills Inc.</i> , 517 F. Supp. 900 (S.D.N.Y. 1981)	5
<i>Livnat v. Lavi</i> , No. 96 CIV. 4967(RWS), 1998 WL 43221 (S.D.N.Y. Feb. 2 1998).....	10
<i>Matthew Bender & Co. v. West Publ'g Co.</i> , 158 F.3d 693 (2d Cir. 1998).....	10
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> , 259 F. Supp. 2d 1029 (C.D. Cal. 2003), <i>aff'd</i> , 380 F.3d 1154 (9th Cir. 2004), <i>vacated on other grounds</i> , 545 U.S. 913 (2005)	11
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	7
<i>Roy Export Co. v. CBS</i> , 672 F.2d 1095 (2d Cir. 1982).....	13
<i>RSO Records, Inc. v. Peri</i> , 596 F. Supp. 849 (S.D.N.Y. 1984)	5

Sony Corp. of Amer. v. Universal City Studios, Inc.,
464 U.S. 417 (1984)4, 10, 11

MISCELLANEOUS

BLACK’S LAW DICTIONARY (8th ed. 2004)n.6

3 Melville B. Nimmer, David Nimmer, *Nimmer on Copyright* (1996)

Memorandum and Order, dated July 9, 2001, entered by the United States District Court for
the Northern District of California in *In re Napster, Inc. Copyright Litigation*, Nos. C 00-
1369 MHP and C 00-4725 MHP

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs seek a summary adjudication of their claims for inducement of copyright infringement, contributory copyright infringement, and their common law claims for copyright infringement and unfair competition against Defendants Lime Wire LLC (“LW”), Lime Group LLC (“LG”), and Mark Gorton (“Gorton”).¹ But as even a cursory reading of their Memorandum of Law in Support of Their Motion for Summary Judgment (“Plaintiffs’ Motion”) reveals, their claims, facts, and evidence – if any – relate only to LW. Although Plaintiffs disingenuously refer to the collective “Defendants” throughout their briefing, it is obvious that Plaintiffs are in fact referring only to LW in nearly all of those references. Plaintiffs’ unprecedented and attenuated claims against LG and Gorton (collectively, “the Tertiary Defendants”), as Plaintiffs’ Motion vividly demonstrates, are devoid of any legal or factual basis.

As set forth in the Tertiary Defendants’ Memorandum of Law in Support of Motion for Summary Judgment (“Tertiary Defendants’ Motion”), which along with the evidence cited therein is incorporated by reference herein in its entirety, Plaintiffs’ claims against the Tertiary Defendants are yet another chapter in Plaintiffs’ ongoing war against technologies that they cannot dominate. In the present skirmish, Plaintiffs attempt to stretch infringement liability beyond direct infringers and beyond secondary infringers, to those with some relation – no matter how slight – to an alleged secondary infringer. This, the law does not permit.

Plaintiffs’ novel “tertiary liability” theory, which seeks to hold these defendants liable for copyright infringement solely by virtue of their involvement with an entity that

¹ Plaintiffs also sought summary judgment against Defendant Greg Bildson (“Bildson”). Since the filing of their Motion, however, Plaintiffs have settled with Bildson in exchange for a broad release and favorable testimony from Bildson.

Plaintiffs contend is secondarily liable for infringement, represents a mighty – indeed, unprecedented – leap of liability. The record evidence – offered by *both* Plaintiffs and the Tertiary Defendants – demonstrates that the Tertiary Defendants have not had any involvement with, control over, or ability to control or supervise, the activities – infringing or not – of LimeWire users. Their only involvement has been with LW, not users of the LimeWire software. The law, however, does not allow liability to attach merely by virtue of a defendant’s service as an officer or role as a passive investor. Accepting Plaintiffs’ novel theory of tertiary liability would invalidate decades of law on both copyright infringement and common law theories of secondary liability.

FACTUAL BACKGROUND²

The Tertiary Defendants all have two things in common: (1) They all have some relationship to LW, the main defendant in this case, and (2) they all have no relationship to LW users.

Gorton founded LW, and is its former CEO and current Chairman. SoF ¶¶ 23, 24. He is not an employee of LW, and has never drawn a salary from LW. SoF ¶ 25.

LG is a separate company from LW that at one time owned 87 percent of LW. SoF ¶¶ 32, 41. In the past, LG has provided some very basic management services to LW and other companies, such as accounting and the maintenance of books and records. SoF ¶¶ 31, 38. LG, however, has always been a separate company from LW, with its own employees, books, and records. SoF ¶¶ 41, 42. LG has had no involvement in the

² A detailed factual background is in LW’s Memorandum of Law in Support of Partial Motion for Summary Judgment, and LW’s Response to Plaintiffs’ Motion for Partial Summary Judgment, which are incorporated in their entirety herein by reference, along with the evidence cited therein. Additional material facts are set forth in the Statement of Material Facts Pursuant to Local Rule 56.1(a) in Support of Defendants Greg Bildson, Mark Gorton, Lime Group LLC, and M.J.G. Lime Wire Family Limited Partnership’s Motion for Summary Judgment (“SoF”), which is incorporated in its entirety herein by reference, along with the evidence cited therein.

day-to-day management or operations of LW, nor has it ever been anything other than a silent investor in LW. SoF ¶ 35. LG had no role whatsoever in the development of the LimeWire software. SoF ¶ 47. Nor has LG participated in any significant management decision relating to the development of LimeWire or otherwise at LW. SoF ¶¶ 35, 47.

Not only do the Tertiary Defendants not make any material contribution to LW's business, none of them have ever assisted any person to commit copyright infringement, including any LimeWire user. SoF ¶¶ 17, 28, 48. Likewise, none of the Tertiary Defendants have ever had any involvement in what LimeWire users use the software for, nor do any of the Tertiary Defendants possess the right or ability to personally control what LimeWire users do with the software. SoF ¶¶ 18, 19, 27-29, 48. The Tertiary Defendants have no knowledge of what LimeWire users are searching for or downloading at any particular moment in time. SoF ¶¶ 22, 27-29.

The Tertiary Defendants' only connection to this lawsuit is their relationship and involvement with LW, not LimeWire users. Importantly, Plaintiffs do not contend that LW is a direct infringer – only a subset of LimeWire users are alleged to have directly infringed Plaintiffs' copyrights. *See* First Amended Complaint for Federal Copyright Infringement, Common Law Copyright Infringement, Unfair Competition, Conveyance Made with Intent to Defraud and Unjust Enrichment (“FAC”) at ¶¶ 66-102. There is no direct nexus between the Tertiary Defendants and the allegedly infringing conduct of some of LimeWire's users. Any connection between them is too remote to justify the unprecedented imposition of tertiary infringement liability on the Tertiary Defendants for LW's alleged secondary infringement liability. No controlling, or even compelling,

precedent exists to support expanding the concept of inducement, contributory, or vicarious liability to defendants such as these with faint connections to direct infringers.

ARGUMENT AND AUTHORITIES

I. THE TERTIARY DEFENDANTS ARE ENTITLED TO THE PROTECTION OF THE *SONY/BETAMAX* SAFE HARBOR FROM LIABILITY FOR CONTRIBUTORY AND VICARIOUS INFRINGEMENT

As set forth in LW's Motion for Partial Summary Judgment ("LW's Motion") and LW's Response to Plaintiffs' Motion for Partial Summary Judgment ("LW's Response"), LW is entitled to the protection of the safe harbor from liability for contributory copyright infringement that the Supreme Court established in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 422 (1984). This is because, as explained in detail in LW's Motion, the LimeWire software application is capable of substantial noninfringing use. The law, facts, and policies set forth in LW's Motion and LW's Response on the application of the *Sony/Betamax* safe harbor to this case apply with equal if not greater force to Plaintiffs' claims for contributory infringement against the Tertiary Defendants. Accordingly, the Tertiary Defendants adopt and incorporate LW's Motion and LW's Response, along with the evidence cited therein, in their entirety.

II. PLAINTIFFS' INDUCEMENT OF INFRINGEMENT CLAIMS AND CONTRIBUTORY COPYRIGHT INFRINGEMENT CLAIMS AGAINST THE TERTIARY DEFENDANTS FAIL BECAUSE THEY LACK A LEGAL BASIS

Plaintiffs' purported legal basis for imposing liability on the Tertiary Defendants for inducement of infringement and contributory copyright infringement³ is so weak that Plaintiffs' relegate it to a lone footnote:

³ Plaintiffs do not offer *any* legal basis for imposing liability on the Tertiary Defendants for common law copyright infringement and unfair competition. See Plaintiffs' Motion at 39-40.

Gorton and Bildson personally participated in acts that induced and contributed to infringement using the LimeWire client (*see, e.g.*, SOF ¶¶ 15-21, 154-155, 159-162, 271, 304, 322, 380, 473, 486) and thus are personally liable. *Cf. Lauratex Textile Corp. v. Allton Knitting Mills Inc.*, 517 F. Supp. 900, 904 (S.D.N.Y. 1981)); *see also RSO Records, Inc. v. Peri*, 596 F. Supp. 849 (S.D.N.Y. 1984) (individual defendants held liable for copyright infringement because they were personally involved in the infringing actions). Lime Group, which owned Lime Wire until right after the *Grokster* decision was announced (SOF ¶¶ 23-25, 28-29), also was directly responsible for acts that induced and contributed to infringement (*see e.g.* SOF ¶¶ 162-167, 198-203, 206-09), and thus is also liable.

Plaintiffs' Motion at 4 n.2.

It is of great significance that neither of the cases Plaintiffs rely on support the imposition of tertiary liability on individuals and entities whose only involvement was with an alleged secondary infringer, not a direct infringer. The *Lauratex* case involved a textile converter's claims against a *directly* infringing textile converter and its president. 517 F. Supp. at 902, 904 (finding president liable for infringement where "he prepared the design found here to be infringing, and sold fabric printed with that design," and "had control over and a financial interest in the infringing activity and because he personally participated in that activity"). Likewise, the *RSO Records* case concerned claims by the "producers, manufacturers, and distributors of some thirty-five copyrighted sound recordings" against two entities accused of *directly* infringing their copyrights and three individuals that were directly involved in the manufacture of the sound recordings. 596 F. Supp. at 851-52.

Plaintiffs do not cite a single case in which a court imposed tertiary infringement liability on an individual or entity that had no relation whatsoever to a direct infringer, and whose only involvement was with a party accused of secondary infringement liability. As pointed out in the Tertiary Defendants' Motion, at least one court has flatly

rejected this theory of tertiary liability. *See* Tertiary Defendants’ Motion at 1 n.1 (quoting Memorandum and Order, dated July 9, 2001 entered by the United States District Court for the Northern District of California in *In re Napster, Inc. Copyright Litig.*, Nos. C 00-1369 MHP and C 00-4725 MHP (describing Plaintiff’s request that the Court adopt a “tertiary theory” of liability for secondary infringement, finding “no support for this proposition,” and stating that “courts have consistently held that liability for contributory infringement requires substantial participation in a specific act of direct infringement.”)). *See also* Tertiary Defendants’ Motion at 6-8, 12-16, 18-19.

Plaintiffs fail to cite a single authority to support their request that this Court take the unprecedented step of imposing tertiary infringement liability on these defendants who undisputedly had no relationship with any direct infringer, and who undisputedly did not participate in any specific act of direct infringement. Accordingly, Plaintiffs’ Motion fails as a matter of law and should be denied.

III. PLAINTIFFS’ INDUCEMENT OF INFRINGEMENT CLAIMS AND CONTRIBUTORY COPYRIGHT INFRINGEMENT CLAIMS AGAINST THE TERTIARY DEFENDANTS FAIL BECAUSE THEY LACK A FACTUAL BASIS

Plaintiffs’ glaring legal shortcomings aside, Plaintiffs fail to conclusively establish the essential elements of their claims against the Tertiary Defendants with competent summary judgment evidence.

A. PLAINTIFFS FAIL TO ESTABLISH THE ESSENTIAL ELEMENTS OF THEIR INDUCEMENT OF INFRINGEMENT CLAIMS AGAINST THE TERTIARY DEFENDANTS.

Under the new theory of liability for inducing copyright infringement announced in *Grokster*, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster

infringement, is liable for the resulting acts of infringement by third parties.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005). To be liable under this theory, a defendant must have taken “active steps . . . to encourage direct infringement,” such as “advertising an infringing use, or instructing how to engage in an infringing use” that demonstrate “an affirmative intent that the product be used to infringe.” *Id.* at 915. In contrast, “mere knowledge of infringing potential or of actual infringing uses,” or “ordinary acts incident to product distribution, such as offering customers technical support or product updates,” will not support inducement liability, which must be based on “purposeful, culpable expression and conduct.” *Id.* at 937.

Plaintiffs cannot show that the Tertiary Defendants “distribute[d] a device with the object of promoting its use to infringe copyright,” the threshold element of their inducement claim. To the contrary, Plaintiffs’ Motion makes clear that *only* LW distributed the LimeWire software, arguing that “the record against Lime Wire, which distributes the LimeWire software, is at least as compelling as that in the *Grokster* case” Plaintiffs’ Motion at 9; *see id.* at n.8 (“Lime Wire distributes the LimeWire software via its own website”). Plaintiffs do not contend that the Tertiary Defendants distributed the LimeWire software, and indeed, there is no evidence in the record to establish that they did. Plaintiffs fail to establish this essential element of their inducement claims against the Tertiary Defendants. Consequently, those claims fail as a matter of law.

Plaintiffs similarly fail to conclusively establish that the Tertiary Defendants “have taken “active steps . . . to encourage direct infringement,” such as “advertising an infringing use, or instructing how to engage in an infringing use” that demonstrate “an affirmative intent that the product be used to infringe.” Although Plaintiffs intentionally

refer vaguely throughout their argument to “defendants,” they leave no doubt that it is LW’s purported conduct that forms the basis of their claims. As Plaintiffs describe at the start of their argument:

[T]he *record against Lime Wire* (which distributes the LimeWire software) is at least as compelling as that in the *Grokster* case and is replete with “unequivocal indications” that *Lime Wire* “acted with a purpose to cause copyright violations.” As *Lime Wire* knows full well, its customers use the LimeWire software almost exclusively to infringe, and on a vast scale; *Lime Wire* has aggressively targeted the known infringing userbases of Napster, Grokster, Morpheus and Kazaa; *Lime Wire’s* business model depends on massive infringing use of the LimeWire client; *Lime Wire* has failed to undertake genuine efforts to filter copyrighted materials from users’ downloads or otherwise reduce infringement; *Lime Wire* ensured that its technology had infringing capabilities; and *Lime Wire* assisted and did not discourage infringement by LimeWire’s users.

Plaintiffs’ Motion at 9 (emphasis added) (footnote and internal citations omitted). *See also* Plaintiffs’ Motion at 15-16 (similar litany of LW’s allegedly wrongful acts).

The inducement “evidence” Plaintiffs offer with respect to the Tertiary Defendants is sparse, at best. In fact, there is a complete absence of evidence pertaining to Lime Group, other than a passing reference to its ownership of a majority of LW’s stock at an earlier point in time. *See* Plaintiffs’ Motion at 4.

The inducement “evidence” Plaintiffs submit pertaining to Gorton boils down to a handful of references purportedly showing that he was aware that some of LimeWire’s users were direct infringers of Plaintiffs’ copyrights. *See, e.g.*, Plaintiffs’ Motion at 10-11 (“Gorton once labeled all of LimeWire’s users as infringers”); *id.* at 12 (statements relating to Gorton’s purported desire to promote LimeWire on college campuses); *id.* at 18 (Gorton stating that a common use of Gnutella is to share music files). There is a complete absence of competent summary judgment evidence (or any evidence, for that

matter) in Plaintiff's 22-page argument to conclusively establish that Gorton took "active steps . . . to encourage direct infringement."

Plaintiffs' repeated references to "defendants" is intentionally misleading, and is a transparent effort to gloss over their evidentiary deficiencies, a recurrent theme throughout their Motion.⁴ Even Plaintiffs get confused as to what they mean when they refer to "defendants" – for example, Plaintiffs argue that "[t]he massive and known scope of LimeWire's infringing uses provide the 'backdrop' to assess *defendants'* actions and strongly suggests that *defendants* intended the illegal use of *its* [*i.e.*, LW's] software." Plaintiffs' Motion at 10 (emphasis added).

Thus, where Plaintiffs lack proof, they resort to referring to "defendants," and sweeping, factually unsupported generalizations, such as "the undisputed facts confirm what everybody (certainly every teenager and college student) already knows: Lime Wire LLC's eponymous peer-to-peer ("P2P") software, Lime Wire, is good for one thing and used for one thing – massive infringement of sound recordings each and every day." Plaintiffs' Motion at 1; *see id.* ("These cases, and now Lime Wire, have rendered the infringing use of unlicensed P2Ps a matter of common knowledge."); *id.* at 9 ("As Lime Wire knows full well, its customers use the LimeWire software almost exclusively to infringe, and on a vast scale."). But proof of inducement in the air, so to speak, will not do. The Supreme Court requires evidence of "purposeful, culpable expression and conduct" before inducement liability can attach. Because Plaintiffs fail to conclusively establish the essential elements of their inducement claims against the Tertiary

⁴ The Tertiary Defendants adopt by reference and incorporate herein the specific evidentiary objections set forth in Defendants' Memorandum of Law in Support of Defendants' Objections to Plaintiffs' Exhibits to Their Motion for Partial Summary Judgment and Defendants' Motion to Strike Plaintiffs' Exhibits.

Defendants with competent summary judgment evidence, their request for summary judgment must be denied.

B. PLAINTIFFS FAIL TO ESTABLISH THE ESSENTIAL ELEMENTS OF THEIR CONTRIBUTORY COPYRIGHT INFRINGEMENT CLAIMS AGAINST THE TERTIARY DEFENDANTS.

Contributory infringement is “founded on the tort concept of enterprise liability.” *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988). “[A] party ‘who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another may be held liable as a ‘contributory infringer.’” *Matthew Bender & Co. 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)). “[K]nowledge and participation [are] the touchstones of contributory infringement.” *Demetriades*, 690 F. Supp. at 293.⁵

It is well established that an alleged contributory infringer “must make more than a ‘mere quantitative contribution’ to the primary infringement.” *Livnat v. Lavi*, No. 96 CIV. 4967(RWS), 1998 WL 43221, at *3 (S.D.N.Y. Feb. 2 1998) (citing *Gershwin*, 443 F.2d at 1162). The contribution must also “bear a direct relationship to the infringing acts, and the contributory infringer *must have acted in concert with* the direct infringer.” *Id.* (emphasis added) (citing 3 Melville B. Nimmer, David Nimmer, *Nimmer on Copyright*, § 12.04[A][2][a] at 12-75 (1996)). Participation in infringement sufficient to impose liability “may not consist of merely providing the ‘means to accomplish an infringing activity.’” *Livnat*, 1998 WL 43221, at *3 (quoting *Sony*, 464 U.S. at 435 n. 17). Material contribution is not present, for example, when the only contact between the

⁵ Of course, “proof of direct infringement by the primary infringer is a necessary precondition to establishing both contributory and vicarious liability under the Copyright Act.” *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 801 (N.D. Cal. 2005).

defendant and the primary infringer occurs at the time of sale. *See Sony*, 464 U.S. at 438. Subsequent minimal contact is also insufficient. For instance, providing technical assistance and other incidental services to alleged primary infringers is not a material contribution to the alleged infringement. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1042 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated on other grounds*, 545 U.S. 913 (2005) (stating “handful of isolated technical support e-mails” was not sufficient to create a fact issue on material contribution to infringement).

As with the “evidence” relating to their inducement claims against the Tertiary Defendants, Plaintiffs fail to establish the essential elements of their contributory infringement claims against the Tertiary Defendants with competent (or any) summary judgment evidence. Again, there is not a shred of evidence pertaining to Lime Group. *See* Plaintiffs’ Motion at 30-38. The few evidentiary citations pertaining to Gorton relate to his purported awareness of the *Napster* litigation and purported similarities between LimeWire and other peer-to-peer applications. Plaintiff’s Motion at 31. Plaintiffs have not submitted any evidence that any of the Tertiary Defendants assisted or materially contributed in any direct infringement by any LimeWire user. Moreover, the summary judgment evidence submitted by Gorton conclusively establishes that he *did not*, in fact, assist or materially contribute in any direct infringement. *See* Tertiary Defendants’ Motion at 9-12 and evidence cited therein, which is incorporated herein by reference in its entirety.

Plaintiffs have failed to conclusively establish the essential elements of their contributory infringement claims against the Tertiary Defendants. Consequently, Plaintiffs' request for summary judgment must be denied.

IV. PLAINTIFFS FAIL TO ESTABLISH THE ESSENTIAL ELEMENTS OF THEIR COMMON LAW CLAIMS FOR COPYRIGHT INFRINGEMENT AND UNFAIR COMPETITION AS TO PRE-1972 RECORDINGS WITH RESPECT TO THE TERTIARY DEFENDANTS

As set forth in the Tertiary Defendants' Motion, Plaintiffs' common law copyright infringement claim as to pre-1972 recordings fails as a matter of law because Plaintiffs fail to establish an essential element of that claim – namely, that the Tertiary Defendants made an “unauthorized reproduction of the work protected by the copyright.” *Capitol Records, Inc. v. Naxos of Amer., Inc.*, 830 N.E.2d 250, 266 (N.Y. Ct. App. 2005); *see* Tertiary Defendants' Motion at 20-21. Indeed, Plaintiffs offer *no* evidence relating to the Tertiary Defendants with respect to their common law copyright claim. *See* Plaintiffs' Motion at 39-40. The only evidence Plaintiffs offer is to show that they own the copyrights in the five pre-1972 recordings at issue, and that “there has been direct, unauthorized reproduction of those works using LimeWire.” *Id.* Just as Plaintiffs fail to show and do not allege that the Tertiary Defendants directly infringed any of Plaintiffs' copyrights under federal copyright law, Plaintiffs fail to establish that the Tertiary Defendants reproduced any of the Plaintiffs' pre-1972 recordings.

Plaintiffs' unfair competition claim against the Tertiary Defendants, which also requires an unauthorized distribution, similarly fails. Additionally, Plaintiffs fail to establish that any of the Tertiary Defendants took and used any of Plaintiffs' pre-1972 recordings in order “to compete against [Plaintiffs'] own use of the same property.” *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918, at

*12 (S.D.N.Y. Aug. 29, 2002) (quoting *Roy Export Co. v. CBS*, 672 F.2d 1095, 1105 (2d Cir. 1982)). Plaintiffs fail to offer any evidence that any of the Tertiary Defendants “compete”⁶ in any way with Plaintiffs. Their vague contention that “Lime Wire has positioned itself in the market for music distribution” is both unsupported by the record evidence and inapplicable to the Tertiary Defendants. See Plaintiffs’ Motion at 39-40. Plaintiffs fail to and cannot show that any of the Tertiary Defendants compete with Plaintiffs at all.

Apart from the fact that Plaintiffs fail to conclusively establish the essential elements of their common law claims for copyright infringement and unfair competition against the Tertiary Defendants, Plaintiffs do not cite a single authority to support or even suggest that tertiary liability can be imposed upon these defendants for Plaintiffs’ common law claims. The Court should deny Plaintiffs’ Motion.

V. SUMMARY JUDGMENT ON PLAINTIFFS’ NOVEL THEORY IS PARTICULARLY INAPPROPRIATE

Although summary judgment can be useful in eliminating unmeritorious claims, it is, nevertheless, a “drastic device since its prophylactic function, when exercised, cuts off a party’s right to present his case to the jury.” *Carofino v. Forester*, 450 F. Supp. 2d 257, 264 (S.D.N.Y. 2006) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975)). It is especially inappropriate in cases such as this one, where Plaintiffs are attempting to establish a new theory of liability or obtain an unprecedented extension of an existing theory of liability.

⁶ “Competition” is defined as “[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain *the same business* from third parties.” BLACK’S LAW DICTIONARY 302 (8th ed. 2004) (emphasis added).

As described in Section II, *supra*, Plaintiffs' Motion fails to establish a legal basis for the imposition of liability upon the Tertiary Defendants. In order to grant Plaintiffs' Motion with respect to the Tertiary Defendants, the Court would have to create a new theory of tertiary infringement liability. But even if the Court were inclined to create this new theory, it could not do so on this record, where the summary judgment evidence Plaintiffs offer to establish the Tertiary Defendants' liability for infringement pertains almost entirely to LW. Plaintiffs' Motion seeking summary judgment on their claims against the Tertiary Defendants should be denied in its entirety.

CONCLUSION

For all of the foregoing reasons, Defendants Lime Group LLC and Mark Gorton respectfully pray that this Court enter an order denying Plaintiffs' Motion for Partial Summary Judgment on Plaintiffs' claims against them for inducement of infringement, contributory copyright infringement, and common law copyright infringement and unfair competition as to pre-1972 recordings.

Dated: September 26, 2008.

Respectfully Submitted,

Of counsel:

Lauren E. Handler
SDNY (LEH 6908)
PORZIO, BROMBERG &
NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962-1997
(973) 538-5146 (Facsimile)
(973) 889-4326 (Telephone)
lehandler@pbn.com

/s/

Charles S. Baker (CB1365)
Joseph D. Cohen (JC3017)
Susan K. Hellinger (SH8148)
PORTER & HEDGES, LLP
1000 Main Street, 36th Floor
Houston, Texas 77002
(713) 226-6000 (Telephone)
(713) 228-1331 (Facsimile)
cbaker@porterhedges.com
jcohen@porterhedges.com
shellinger@porterhedges.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was filed by means of the Court's ECF system on the 26th day of September, 2008. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via email.

Katherine B. Forrest
Teena-Ann V. Sankoorikal
Cravath, Swaine & Moore, LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
(212) 474-3700 (fax)

Kenneth L. Doroshov
Karyn A. Temple
Recording Industry Association of America
1025 F Street, NW, 10th Floor
Washington, DC 20004
(202) 775-0101
(202) 775-7253 (fax)

Steven A. Hirsch
Keker & Van Nest, LLP
710 Sansome St.,
San Francisco, California 9411
(415) 391- 5400
(415) 397-7188 (fax)

/s/

Charles S. Baker

1387613