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 8

9 UNITED STATES DISTRICT COURT  
 10 CENTRAL DISTRICT OF CALIFORNIA

11  
 12 UMG RECORDINGS, INC., a Delaware  
 corporation,

13 Plaintiff,

14 v.

15 TROY AUGUSTO d/b/a ROAST  
 16 BEAST MUSIC COLLECTABLES  
 AND ROASTBEASTMUSIC, an  
 17 individual; and DOES 1 through 10,  
 inclusive,

18 Defendants.  
 19

20 AND RELATED COUNTERCLAIM.  
 21  
 22  
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 24  
 25  
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 28

CASE NO. 2:07 CV 3106 SJO (AJWx)

The Honorable S. James Otero

**MEMORANDUM OF POINTS AND  
 AUTHORITIES OF UMG  
 RECORDINGS, INC., IN  
 OPPOSITION TO DEFENDANT  
 AND COUNTERCLAIMANT'S  
 MOTION FOR SUMMARY  
 JUDGMENT**

Date: May 5, 2008  
 Time: 10:00 a.m.  
 Ctrm: 880

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## INTRODUCTION

This lawsuit is not about ownership of the millions of phonorecords plaintiff and counter-defendant UMG Recordings, Inc. (“UMG”) *sells* to the public, but rather the relatively small number of promotional CDs made for a limited purpose and containing language licensing them for free to recipients involved in the music business. Thus, Augusto’s Harry Potter reference is misplaced and the “Pandora’s Box” he claims the Court will open if it rules in UMG’s favor is as fictional as Harry Potter. Although *promotional* records have been licensed for decades, Augusto cannot claim that UMG (nor any other record company) has ever purported to restrict transfer of *commercial* records after there was a first sale to the public.<sup>1</sup>

Augusto does not deny UMG’s ownership of the copyrights in issue or that he sold the UMG Promo CDs embodying those copyrighted sound recordings.<sup>2</sup> He relies solely on his first sale affirmative defense, but ignores that this defense applies only to transfers of ownership of copyrighted works and excludes “any person who has acquired possession ... by rental, lease, loan or otherwise.” 17 U.S.C. § 109(d). Even though the UMG Promo CDs were licensed to selected recipients, Augusto claims a first sale exists because promotional CDs are “gifts” pursuant to a postal statute designed for a different purpose or that UMG “abandoned” the very promotional CDs it notified the recipients still remained UMG’s property.

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<sup>1</sup> As in UMG’s previously filed motions, the general term “promotional CDs” is used to refer to all such CDs, and “UMG Promo CDs” specifically to the promotional CDs at issue. UMG is refiled herewith the declarations previously filed in support of its motions for summary judgment as they also support this opposition, together with a Second Declaration of Kathleen Strouse and the Declaration of Aaron Wais. Augusto’s motions, to some extent, mirror UMG’s previously filed motions and are mooted if the Court grants UMG’s motions.

<sup>2</sup> Eleven copyrights owned by UMG were infringed, representing 14 sound recordings, embodied in several UMG Promo CDs. UMG Statement of Genuine Issues and Additional Undisputed Facts (“SGI”) 1-2. The 26 promotional CDs Augusto refers to include duplicates. The discrepancy between the eight copyrights Augusto refers to and the eleven at issue results from the fact that only eight of the certificates were attached to the complaint, although all of the UMG Promo CDs were identified.

1 Augusto's motion on his counterclaim under Section 512(f) also should be  
 2 denied because UMG's notices to eBay accurately described Augusto's conduct as  
 3 infringing, and thus contain no "material misrepresentation." Additionally, UMG's  
 4 notices were sent pursuant to eBay's voluntary membership VeRO Program and not  
 5 the DMCA. Augusto's attempt to equate those notices to DMCA notices (required  
 6 to support a Section 512(f) claim) is unavailing for the basic reasons that they were  
 7 not sent to eBay's designated DMCA agent and expressly disavowed that the  
 8 DMCA applied. In any event, UMG cannot be liable because of its subjective good  
 9 faith belief that Augusto was infringing. Augusto ignores this controlling Ninth  
 10 Circuit Section 512(f) standard that requires "actual knowledge of  
 11 misrepresentation."

## 12 ARGUMENT

### 13 I. THE FIRST SALE DEFENSE DOES NOT APPLY TO THE UMG 14 PROMO CDS.

#### 15 A. The First Sale Defense Applies Only To Transfers Of Ownership, 16 Not To Licenses.

17 Augusto's citation to the first sale defense begins *and ends* with Section  
 18 109(a). Augusto omits the subsection that makes clear that the first sale defense is a  
 19 limited "privilege" that does not apply if a copyright owner licenses possession of  
 20 its copyrighted works, as here, rather than transfers ownership:

21 "[t]he privilege [ ] described by subsection [ ](a) [does]  
 22 not, unless authorized by the copyright owner, extend to  
 23 any person who has acquired possession of the copy or  
 24 phonorecord from the copyright owner, *by rental, lease,*  
 25 *loan, or otherwise, without acquiring ownership of it.*"

26 17 U.S.C. § 109(d) (emphasis added).

27 An owner of copyrighted works, like the owner of other property, may decide  
 28 whether to transfer ownership or only license possession of that property. Parfums



1 Givenchy, Inc. v. C & C Beauty Sales, Inc., 832 F. Supp. 1378, 1389 (C.D. Cal.  
2 1993) (“The distribution right under Section 106(3) includes the right to control not  
3 only the ‘sale or other transfer of ownership’ of copies or phonorecords, but also  
4 their disposition by ‘rental, lease, or lending’”). Copyright holders have sold  
5 millions of software copies to the public, received payment, parted permanently  
6 with possession to consumers, and nevertheless are deemed to have licensed copies  
7 of their software, not transferred ownership. See Wall Data Inc. v. Los Angeles  
8 County Sherriff’s Dept., 447 F.3d 769, 785 at n. 9 (9th Cir. 2006) (“Indeed, the first  
9 sale doctrine rarely applies in the software world because software is rarely ‘sold’”);  
10 see also, e.g., Adobe Sys. Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1089  
11 (N.D. Cal 2000) (“copyright owner does not forfeit his right of distribution by  
12 entering into a licensing agreement.”)

13 Unlike the software copies, the UMG Promo CDs at issue here are never sold,  
14 but are provided for free to limited recipients in the music business for the specific  
15 purpose of promotion. SGI 3-4. UMG notifies the recipients that UMG owns the  
16 Promo CDs and that they cannot be sold, including by explicit language on the CD  
17 and/or packaging, (SGI 5), such as:

18 “This CD is the property of the record company and is  
19 licensed for the intended recipient for personal use only.  
20 Acceptance of this CD shall constitute an agreement to  
21 comply with the terms of the license. Resale or transfer of  
22 possession is not allowed and may be punishable under  
23 federal and state laws.”<sup>3</sup> SGI 6.

24 As the Ninth Circuit recently recognized:

25  
26 <sup>3</sup> According to Augusto (August Mtn. at 13, n.6), two-thirds of the UMG Promo  
27 CDs at issue included this legend. The others included the shorter “Promotional Use  
28 Only – Not For Sale”. Augusto admits that the two versions have the same  
meaning. Augusto Statement of Undisputed Fact (“Augusto SUF”) 30. In fact, both  
versions negate ownership.

1 “Generally, if the copyright owner makes it clear that she  
2 or he is granting only a license to the copy of software and  
3 imposes significant restrictions on the purchaser’s ability  
4 to redistribute or transfer that copy, the purchaser is  
5 considered a licensee, not an owner, of the software.”

6 Wall Data, 447 F.3d at 785. Even Augusto admitted that the UMG Promo CDs  
7 clearly expressed restrictions on their redistribution or transfer. Augusto SUF 30.

8 **B. Augusto Did Not Own The UMG Promo CDs And Was Not**  
9 **Entitled To Sell Them.**

10 Although he claims to have purchased the UMG Promo CDs from retailers in  
11 the Los Angeles area or on eBay, Augusto could not (or would not) identify the  
12 source of any of the particular copies of the UMG Promo CDs he sold or their  
13 original recipients. SGI 7. Augusto’s claim that he “owned” the UMG Promo CDs  
14 because he bought them from unidentified third parties ignores that because UMG  
15 licensed them to the intended recipients, they could not be owned by Augusto or  
16 anyone he bought them from. One of the cases Augusto cites makes this clear.  
17 American Int’l Pictures, Inc. v. Foreman, 576 F.2d 661, 664 (5th Cir. 1978) (“even  
18 an unwitting purchaser who buys a copy in the secondary market can be held liable  
19 for infringement if the copy was not the subject of a first sale by the copyright  
20 holder.”). Augusto was hardly an “unwitting purchaser,” and despite his claim that  
21 he could sell the UMG Promo CDs because “possession is nine tenths of the law”  
22 (SGI 8), Augusto’s *possession* was not *ownership*. See H.R. Rep No. 94-1476 at 80  
23 (1975) (Section 109 does “not apply to someone who merely possesses a copy or  
24 phonorecord without having acquired ownership of it.”); S.O.S., Inc. v. Payday,  
25 Inc., 886 F. 2d 1081, 1088-89 & n.9 (9th Cir. 1989) (“[O]wner of a copy of software  
26 has certain rights under the Copyright Act which a mere possessor does not.”).  
27 Augusto’s evidence falls far short of proving *ownership* as a matter of law. He  
28 essentially concedes that the UMG Promo CDs were provided to selected

1 individuals in the music business, each contained a form of restrictive language and  
2 expressly retained ownership in UMG, and each was accepted by the recipient.  
3 SGI 3, 6, 10. Instead, Augusto relies on several disparate “facts” allegedly proving  
4 a transfer of ownership. Augusto Mtn. at 7-8. He cites no authority that these  
5 “facts” require or even suggest finding a transfer of ownership, and they do not.

6 Four of Augusto’s purported “facts” are, in effect, the single fact that UMG  
7 allegedly made no efforts to get back the UMG Promo CDs. *Id.* UMG does get  
8 back certain CDs as necessary. Undeliverable promotional CDs are returned to  
9 UMG. SGI 11. Recipients of UMG Promo CDs who do not accept the license  
10 terms are provided a return address to send them back to UMG. *Id.* As to the  
11 remainder, it would be logistically, administratively and practically burdensome and  
12 expensive, as well as unnecessary and time consuming for UMG to seek return of all  
13 copies of the UMG Promo CDs, when they may continue to be used by the  
14 recipients for their intended promotional purposes and when most recipients abide  
15 by the license. SGI 12. Also, UMG polices its promotional CDs in other ways,  
16 including notices to eBay and deleting from their lists those recipients who violate  
17 the license. SGI 13.

18 Moreover, there simply is no requirement that a license require the licensee to  
19 return licensed product. Many licenses, including software licenses, are “perpetual.”  
20 Valve Corp. v. Sierra Entertainment Inc., 431 F. Supp. 2d 1091, 1094 (W.D. Wash.  
21 2004) (asserting claim of infringement based on licensee exceeding scope of “a  
22 worldwide, perpetual license”); PlayMedia Systems, Inc. v. America Online, Inc.,  
23 171 F. Supp. 2d 1094, 1097 (C.D. Cal. 2001) (granting preliminary injunction to  
24 copyright owner against licensee exceeding scope of “an irrevocable, non-exclusive,  
25 paid fully, perpetual worldwide license”). Additionally, the failure to seek return of  
26 licensed product, even after a breach of the license, is not relevant to the issue of  
27 first sale. See Novell, Inc., v. Unicom Sales, Inc., 2004 WL 1839117, \*11 (N.D.  
28 Cal. August 17, 2004) (finding license of software: “The Court sees no reason why

1 Novell’s failure . . . to take steps to enforce the requirement in its Software License  
2 that the software be destroyed or returned if the license is breached ... should affect  
3 the transaction’s status as a license or sale.”).<sup>4</sup>

4 Next, Augusto asserts that the UMG Promo CDs are sent “unsolicited” to  
5 recipients (citing to UMG’s complaint which does not say that), and that UMG does  
6 not keep “permanent records” of recipients of the particular CDs. He does not state  
7 how, even if true, that converts an express license into a transfer of ownership.  
8 Moreover, the UMG Promo CDs are not sent to just anyone. UMG has records  
9 (produced to Augusto) and a complex system to control distribution of the Promo  
10 CDs. SGI 14. The Promo CDs are made in limited quantities and sent to a select  
11 group from UMG’s proprietary lists of individuals in the music business. SGI 15-  
12 17. UMG maintains these lists of individuals to whom Promo CDs are sent – some  
13 for a year, and some indefinitely. SGI 17. An attempt is made to delete from those  
14 lists recipients who violate the license, who no longer work in the music business  
15 and whose CDs are returned as undeliverable, and who decline to accept the Promo  
16 CDs. SGI 18. In any event, a lack of precise records is not a prerequisite to a  
17 license and does not serve to establish the first sale defense. In fact, it is Augusto  
18 who bears the burden of showing his source of the UMG Promo CDs he sold  
19 because “the defendant in such actions clearly has the particular knowledge of how  
20 possession of their particular copy was acquired, and should have the burden of  
21 providing this evidence to the court.” H.R. Rep. No. 94-1476 at 6, 8, 11. However,  
22 he claims he keeps no business records at all identifying his sources.<sup>5</sup> SGI 20.

23 \_\_\_\_\_  
24 <sup>4</sup> Augusto cites only two criminal copyright cases that allude to this issue. In  
25 United States v. Wise, 550 F.2d 1180, 1190-91 (9th Cir. 1977), the Court found  
26 most of the agreements in issue to be licenses. The one agreement that was not did  
27 not provide for retention of title in the copyright owner but rather “contemplates a  
28 sale of a film print to [recipient] at [recipient’s] election.” See United States v.  
Atherton, 561 F.2d 747, 750-51 (9th Cir. 1977) (construing similar language).

<sup>5</sup> Augusto does not refer to his burden of proof on the first sale defense. The  
criminal copyright cases he cites for other reasons, fn. 4 supra, state that in a  
criminal case the government has the burden of proving the absence of a first sale.

(...continued)

1 Augusto next relies on the facts that there is no indication on the promotional  
2 CD itself that the recipients are responsible for their loss or destruction and that  
3 UMG may not insure UMG Promo CDs in the possession of recipients. (The only  
4 UMG witness questioned by Augusto about this last issue testified only that she did  
5 not know if there was insurance. SGI 19.) However, that the recipient may *not* be  
6 responsible for loss or destruction (or more accurately that there is no statement on  
7 the CD to that effect), if it is relevant at all, is evidence of a license, not of  
8 ownership. See *SoftMan Products Co., LLC v. Adobe Systems, Inc.*, 171  
9 F. Supp. 2d 1075, 1085 (C.D. Cal. 2001) (cited by Augusto) (“The transfer of a  
10 product for consideration with a transfer of title and risk of loss generally constitutes  
11 a sale.”). Moreover, the Promo CDs have no value to UMG if not in the hands of  
12 recipients for their intended purpose. (UMG destroys Promo CDs that are returned.)  
13 In that context, the issues of insurance and risk of loss of a CD whose cost is  
14 nominal, but whose value lies in its use by specific licensees, are meaningless and  
15 have no bearing on ownership (and Augusto does not explain how they do).

16 Finally, Augusto is incorrect in asserting that “once [the Promo CDs] have  
17 been received, UMG has received full value for them.” As noted above, UMG  
18 receives value after the Promo CDs are received *and* remain in the hands of the  
19 intended recipients for use or potential use for promotional purposes. That “value”  
20 disappears if the license is violated and the Promo CD is given or sold to someone  
21 other than the intended recipient. Nothing in the license of the Promo CDs permits  
22 recipients to transfer them, whether or not (or even after) they have been used.

23 \_\_\_\_\_  
24 (...continued)

25 See *Atherton*, 561 F.2d at 751. However, in a civil copyright case, the burden is on  
26 the proponent of the first sale affirmative defense. 4 W. F. Patry, *Patry On*  
27 *Copyright* § 13.16 at 13-35 to 13-36 n. 3 (2007 ed.) (burden of proof in civil cases is  
28 on the defendant asserting the defense). Augusto bears the burden of tracing the  
particular copies he sold to a specific recipient and then of showing that despite the  
language on the CD and its acceptance, a transfer of ownership and not a license  
existed. See, e.g., *Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846  
F. Supp. 208, 212-13 (E.D.N.Y. 1994).

1 Augusto ultimately is forced to take the position that *all* promotional CDs  
2 provided by all record companies are gifts or abandoned property. As next  
3 discussed, these doctrines do not apply here.

4 **C. The UMG Promo CDs Were Not Gifts.**

5 Augusto cites briefly to the general proposition that a gift constitutes a first  
6 sale; however, he does not and cannot argue that the UMG Promo CDs, which  
7 remained “the property of the record company” and were provided for a limited  
8 purpose, are gifts under the traditional definition of “gift.” 13 B. Witkin, Summary  
9 of California Law, Personal Property, ch. XVIII, § 124 at 154 (10th ed. 2005) (In  
10 order for there to be a valid gift, there “must be an *intent* on the part of the donor,  
11 . . . to make an *unconditional* gift.”) (emphasis added). Instead, Augusto invokes  
12 the Postal Reorganization Act. 39 U.S.C. § 3009. That statute, however, was not  
13 intended to, and does not, cover the licensing for free to selected individuals of  
14 products for promotional purposes.

15 Section 3009 was designed to stop a practice of selling merchandise by  
16 sending it unordered to the public and then seeking payment. 39 U.S.C. § 3009(d)  
17 (“No mailer of any merchandise mailed in violation of subsection (a) of this section  
18 . . . shall mail to any recipient of such merchandise a bill for such merchandise or  
19 any dunning communications.”). The Ninth Circuit recognized “[t]he purpose of  
20 [§ 3009] was to ‘control the unconscionable practice of persons who ship unordered  
21 merchandise to consumers and then trick or bully them into paying for it.’”  
22 Kipperman v. Academy Life Ins. Co., 554 F.2d 377, 379 (9th Cir. 1977), citing  
23 116 Cong. Record at 22314 (June 30, 1970); see Blakemore v. Superior Court,  
24 129 Cal. App. 4th 36, 50 (2005) (Section 3009 designed to “prevent the practice of  
25 shipping unordered merchandise to consumers and then tricking them into paying  
26 for it.”); see also Federal Trade Commission, A Business Guide to the Trade  
27 Commission’s Mail or Telephone Order Merchandise Rule, cited by Augusto Mtn.

1 at 10 n.3 (“*in any approval or other sale* ... [i]t is unlawful to ... [t]ry to obtain  
2 payment for or the return of the unordered merchandise”) (emphasis in original).

3 In Blakemore, independent Avon sales representatives were shipped products  
4 they had not ordered and then were charged for them. 129 Cal. App. 4th at 43. The  
5 Court reviewed legislative history, precedent, California’s corresponding statute  
6 (Civil Code Section 1584.5), and the FTC’s orders and concluded that Section 3009  
7 did not prohibit this practice because Section 3009 “is addressed to the mailing of  
8 unordered merchandise by the *seller* to the *consumer* of that merchandise, not to  
9 parties who have contracted with each other to promote the sale of the same  
10 merchandise to third persons.” Blakemore, 129 Cal. App. 4th at 50-51 (emphasis  
11 added). The Court indicated that “[t]he state of California has such a statute,  
12 governing the unsolicited sending of goods or services (Civil Code § 1584.5), and it  
13 is similarly directed at sellers marketing products or services to consumers ... and  
14 the statute repeatedly refers to ‘the seller’ and the ‘consumer.’” Id. at 51.

15 The Court noted that the FTC applied Section 3009 in the same way: “the  
16 FTC, the agency responsible for enforcing section 3009, indicated in a consent order  
17 that a ‘recipient’ does not include a person or business establishment which does not  
18 purchase the merchandise for consumption.” Id. at 51, citing In re Commercial  
19 Lighting Products, Inc., 1980 WL 338972, 95 F.T.C. 750 (May 6, 1980) (FTC  
20 consent order). The Court concluded:

21 “In sum, section 3009 forbids the mailing of unordered  
22 merchandise by sellers to consumers, and was not intended  
23 to apply to independent jobbers or wholesalers or, as in  
24 this case, where a contractual relationship exists between  
25 the parties relating to the sale of the merchandise.”

26 Blakemore, 129 Cal. App. 4th at 52.

27 Augusto does not refer to these key cases. He merely claims that  
28 “promotional CDs qualify as ‘merchandise’ within the meaning of Section 3009,”

1 citing Great American Music Machine, Inc. v. Mid-South Record Pressing Co.,  
2 393 F. Supp. 877 (M.D. Tenn. 1975). In that case, Section 3009 applied only  
3 because 32,000 copies of the recording at issue were sent to a national sorority with  
4 a written request that \$5.00 be remitted to the seller. Id. at 884. Thus, the records  
5 were sent to “consumers” with a request for “payment” and without any reference to  
6 a license. The other case cited by Augusto also does not support his position. In  
7 Wisniewski v. Rodale, Inc., 510 F.3d 294, 295-96 (3d Cir. 2007), the alleged  
8 violation of Section 3009 was that the defendant sent books never ordered and  
9 demanded payment for them. (In its analysis, the Court stated that “§ 3009 does not  
10 explicitly declare any agreement to be void.” Id. at 306.) Other decisions under  
11 Section 3009 similarly deal with mailing unordered commercial merchandise *for*  
12 *sale* and then seeking payment from the consumer. See, e.g., Sanford v.  
13 Memberworks, Inc., 483 F.3d 956, 958 (9th Cir. 2007) (alleging unsolicited  
14 shipment of trial membership that automatically charged credit card \$6 per month  
15 violated 39 U.S.C. § 3009); Kashelkar v. Rubin & Rothman, 97 F. Supp. 2d 383,  
16 395 (S.D.N.Y. 2000) (violation of 39 U.S.C. § 3009 not pleaded because defendant  
17 “did not send Plaintiff any merchandise - it sent him an offer to open a line of credit,  
18 which he was free to accept or reject”).

19 Because the UMG Promo CDs were not “sold” to “consumers” (SGI 21), and  
20 contained an express license (SGI 6), neither the federal nor state statute applies.

21 **D. UMG Did Not Abandon the UMG Promo CDs.**

22 Augusto next contends, citing cases over 100 years old, that the UMG Promo  
23 CDs were abandoned. This argument fails because Augusto does not prove the  
24 requisite intent to abandon. See, e.g., Group Property, Inc. v. Bruce, 113 Cal.  
25 App. 2d 549, 559 (1952) (“Abandonment is governed by intention”); Moon v.  
26 Rollins, 36 Cal. 333, 338 (1868) (“[O]n a question of abandonment, the intention  
27 alone governs...”). Augusto bears the burden of “clearly prov[ing],” Alberti v.  
28 Jubb, 204 Cal. 325, 328 (1928), that UMG intended to abandon the UMG Promo



1 CDs by “declaration or by conduct,” Group Property, Inc., 113 Cal. App. 2d at 559  
2 (“Abandonment is never presumed, but must be made to appear affirmatively by the  
3 party relying thereon.”).

4 Augusto cannot meet this burden and has no plausible argument that UMG  
5 intended to abandon the UMG Promo CDs. That UMG did not intend to abandon  
6 the UMG Promo CDs is apparent from the entire course of conduct, including the  
7 express language on the CDs, which clearly reflects the opposite intention: “This  
8 CD is the property of the record company....” SGI 6. Further, that “[a]cceptance of  
9 this CD shall constitute an agreement to comply with the term of the license”  
10 (SGI 6), is contractual language inconsistent with abandonment. See Group  
11 Property, Inc., 113 Cal. App. 2d at 559 (“Here, clearly, there was no abandonment,  
12 but rather positive evidence of a prosecution to completion of the oral agreement.”)  
13 (internal quote marks and citations omitted).

14 The only support Augusto musters for his abandonment theory is, once again,  
15 restating in different ways the single fact that UMG did not request return of the  
16 UMG Promo CDs. The initial flaw in this argument is, as discussed above, a license  
17 may be perpetual. Moreover, abandonment “requires something more than mere  
18 ‘passivity.’” Wm. Wolff & Co. v. Canadian Pac. Ry. Co., 123 Cal. 535, 538 (1899).  
19 There “must be some clear and unmistakable affirmative act or series of acts  
20 indicating an intention to relinquish ownership.” 1 Cal. Jur. 3d, Abandonment, Lost,  
21 and Escheated Property § 14. These acts “must not be made by the abandoning  
22 party because of a duty, necessity, or utility to himself or herself, but, rather,  
23 because he or she no longer desires to possess the thing being abandoned.” Id. § 2.  
24 In addition, the owner must abandon the property “regardless and indifferent as to  
25 what may become of it in the future.” Moon, 36 Cal. at 338.

26 UMG’s actions and subsequent dealings show a clear intent to retain  
27 ownership and control over the UMG Promo CDs. Specifically, as noted, UMG  
28 expressly disavows any intent to abandon the UMG Promo CDs by retaining

1 ownership of them and entering into a license through language it places on the CD  
2 and/or its packaging. SGI 5-6; UMG sends each UMG Promo CD to a selected  
3 individual. SGI 3 & 16. See McLeran v. Benton, 43 Cal. 467, 476 (1872) (“There  
4 is no such thing as an abandonment to particular persons, or for a consideration.”);  
5 the UMG Promo CDs are sent to their recipients for a specific “utility,” for  
6 promotion, which has no time limit. SGI 4. See 1 Cal. Jur. 3d, Abandonment, Lost,  
7 and Escheated Property § 2; the UMG Promo CDs that are not deliverable or are  
8 refused are not left for possession by “the next comer, whoever he may be,” but are  
9 returned to UMG and destroyed. SGI 11. See Moon, 36 Cal. at 338; and UMG  
10 disavows any “indifference” as to what may become of the UMG Promo CDs by  
11 prohibiting their sale or transfer by the recipient and by policing sales of its  
12 promotional CDs. SGI 6, 13. See Moon, 36 Cal. at 338.

13 In sum, there is no evidence that UMG intended to abandon the UMG Promo  
14 CDs. In fact, by licensing them and retaining ownership, it unequivocally evidenced  
15 the opposite intent.

16 **E. The License Is Not a “Mere Label.”**

17 Augusto claims that “the presence of ... legends on the face of the CDs does  
18 not prevent title from passing.” Augusto Mtn. at 13. However, it is not the placing  
19 of language on UMG Promo CDs alone that creates the license; it is the language  
20 and the acceptance by recipients (some of whom choose not to accept but to return  
21 the promotional CDs. SGI 11). See, e.g., Register.com, Inc. v. Verio, Inc., 356 F.3d  
22 393, 403 (2d Cir. 2004) (“It is standard contract doctrine that when a benefit is  
23 offered subject to stated conditions, and the offeree makes a decision to take the  
24 benefit with knowledge of the terms of the offer, the taking constitutes an  
25 acceptance of the terms, which accordingly become binding on the offeree.”); see  
26 also Meridian Project Sys., Inc. v. Hardin Construction Co., LLC, 426 F. Supp. 2d  
27 1101, 1106-07 (E.D. Cal. 2006) (shrink wrap license enforceable; defendant had an  
28 opportunity to return software and never objected to terms). Augusto presents no

1 evidence to refute that a license was entered into by the original recipients who  
2 accepted the UMG Promo CDs. The only “fact” he argues, to the contrary once  
3 again is that UMG “permanently parted with possession.” As discussed above,  
4 parting with possession is not equivalent to parting with ownership, especially when  
5 ownership is expressly reserved. All licensors part with possession; some  
6 permanently.

7 None of the cases cited by Augusto supports his extreme position. In  
8 SoftMan Products Co., the only software case Augusto cites, the software copies  
9 were *sold* by Adobe, the copyright owner, to a distributor and were intended for  
10 resale. See 171 F. Supp. 2d at 1080. Instead of selling the software as a “bundle,”  
11 the plaintiff unbundled them and sold them individually. Id. When SoftMan sued  
12 Adobe, Adobe counterclaimed, claiming violation of its agreement limiting resale to  
13 the bundled software. Id. The district court’s rationale for finding a transfer of  
14 ownership rather than a license was

15 “The distributors pay full value for the merchandise and  
16 accept the risk that the software may be damaged or lost.  
17 The distributors also accept the risk that they will be  
18 unable to resell the product. The distributors then resell  
19 the product to other distributors in the secondary market.  
20 The secondary market and the ultimate consumer also pay  
21 full value for the product, and accept the risk that the  
22 product may be lost or damaged. This evidence suggests a  
23 transfer of title in the good. The transfer of a product for  
24 consideration with a transfer of title and risk of loss  
25 generally constitutes a sale.” Id. at 1085.

26 Further, in SoftMan Products Co., the end user license was not enforceable because,  
27 unlike here, consent could only be manifested after the user loaded the software and  
28 began the installation process. The defendant never attempted to load the software,

1 so could not consent. Id. at 1087. See Meridian Project Sys, 426 F. Supp. 2d at  
2 1106 n.5 (“In SoftMan, the court did not reach the issue of whether ‘shrinkwrap  
3 licenses’ were enforceable because the court found that the plaintiff never loaded the  
4 software, and thus never assented to the EULA.”); Novell, Inc., 2004 WL 1839117,  
5 \*11 (“In SoftMan ... the court found that a third party was not bound by the  
6 restrictions set forth in a shrink wrap agreement because it had never agreed to  
7 them.”); Adobe Systems, Inc. v. Stargate Software, Inc., 216 F. Supp. 2d 1051,  
8 1058-59 (N.D. Cal. 2002) (disagreeing with SoftMan Products Co.).<sup>6</sup>

9 The other cases cited by Augusto also are inapposite. In Independent News  
10 Co., Inc. v. Williams, 293 F.2d 510 (3d Cir. 1961), the purported restrictions were  
11 inapplicable because “[t]he distributor, [plaintiff] Independent, pursuant to a written  
12 contract, *sells* the comics to the wholesaler ... The wholesaler then *sells* them to the  
13 various retail outlets.” (emphasis added). In RCA Mfg. Co., Inc. v. Whiteman, 114  
14 F.2d 86 (2d Cir. 1940), the owner of a common law copyright in recordings could  
15 not restrict the use of records containing the recordings after the common law  
16 copyright expired, at which time the owner possessed no rights at all in the records.  
17 Even Augusto’s two secondary authorities acknowledge UMG’s position:

18 “Courts, commentators, and the Copyright Office have  
19 thus accepted the software publishers’ argument that since  
20 they only license their software, and do not sell it, they  
21 retain ownership of the software, with the consequence  
22 that sections 109(a) and 117(a) of the Copyright Act,  
23 which by their own terms confer rights only on the  
24 ‘owner’ of software, are unavailable to the acquirers of  
25 their software.” J. A. Rothchild, The Incredible Shrinking

26 <sup>6</sup> The Ninth Circuit, in confirming the general principle that the first sale doctrine  
27 “rarely applies to software because software is rarely ‘sold,’” chose to cite and quote  
28 Stargate Software (finding a license), not SoftMan Products Co. (finding a sale).  
Wall Data, 447 F.3d at 785, n. 9.

1 First Sale Rule: Are Software Resale Limits Lawful?, 57

2 Rutgers L. Rev. 1, 28 (2004).<sup>7</sup>

3 See also J. Liu, Owning Digital Copies: Copyright Law and the Incidents of Copy  
4 Ownership, 42 Wm. & Mary L. Rev. 1245, 1289 (2001) (“This [first sale] right  
5 attaches only if one has acquired title in the copy. ... Several federal courts have  
6 held that the first sale doctrine does not apply to software users who have licensed  
7 the software because they have not acquired title to a particular copy.”).

8 **II. UMG DID NOT VIOLATE SECTION 512(F) AND IS NOT LIABLE**  
9 **ON THE COUNTERCLAIM.**

10 As a threshold matter, Augusto’s counterclaim alleging that UMG is liable  
11 under Section 512(f) necessarily fails if UMG’s motion for partial summary  
12 judgment on liability is granted because Augusto then could not prove any  
13 misrepresentation in UMG’s notices. Additionally, in order to prevail, Augusto  
14 must show that (1) UMG sent *DMCA takedown notices* to eBay, and (2) they  
15 contained knowing material misrepresentations. Neither is correct.

16 **A. UMG’s Notices Were Not DMCA Notices.**

17 A Section 512(f) claim must be based on notices “under this section” (i.e.,  
18 DMCA notices). 17 U.S.C. § 512(f). Copyright owners are not required to serve  
19 DMCA notices to protect their rights. See 3 M. & D. Nimmer, Nimmer On  
20 Copyright, § 12B.04[A][3] at 12B-58 (2007 ed.). UMG’s notices were not DMCA  
21 notices but were sent pursuant to eBay’s voluntary membership VeRO Program.  
22 SGI 23. The notices disputed that the DMCA applied to eBay auctions.<sup>8</sup> SGI 24.

23 \_\_\_\_\_  
24 <sup>7</sup> The article footnotes (at nn. 84, 85) numerous cases, law review articles, and the  
25 view of the Copyright Office as reflected in U.S. Copyright Office, DMCA Section  
26 104, Report 105 (Aug. 2001): “Libraries are not able to use CD-ROMs donated to  
27 them because the donors are not owners of the CD-ROMs, only licensees, and thus  
28 lack the legal authority to transfer the copy of the work they possess.”

26 <sup>8</sup> While one district court has held that eBay is a “service provider,” Hendrickson  
27 v. eBay, Inc., 165 F.Supp. 2d 1082, 1088 (C.D. Cal. 2001), because UMG’s VERO  
28 notices expressly refused to invoke the DMCA, the Court does not need to address  
that issue here.

1           Moreover, contrary to Augusto’s assertion, the VeRO notices did not “include  
2 *every* statutory element set forth” in the DMCA takedown provisions (Augusto Mtn  
3 at 17) (emphasis in original). The notices were sent to the VeRO Program, not to  
4 eBay’s designated agent filed with the Copyright Office. SGI 25-26. Similarly,  
5 they were sent to the e-mail address for the VeRO Program, vero@ebay.com (SGI  
6 25), not to the one filed with the Copyright Office, registeredagent@ebay.com (SGI  
7 26) (since changed to copyright@ebay.com. SGI 27).<sup>9</sup> Thus, regardless of the  
8 content of the rest of the notice (mandated by the VeRO Program rules), the  
9 required element of notice to eBay’s registered DMCA agent was missing. 17  
10 U.S.C. § 512(c)(3)(A). As Augusto acknowledges, “where the notices fall short of  
11 the statutory requirements, ... service providers are entitled to ignore them”  
12 Augusto Mtn. at 17; see 3 M. & D. Nimmer, Nimmer On Copyright, § 12B.04  
13 [B][4] at 12B-63 (2007 ed.); see also S. Rep. No. 105-190 (1975), at 45 (“to count  
14 as an effective notification, the notification must be in writing and submitted to the  
15 service provider’s designated agent.”).

16           By disclaiming the applicability of the DMCA, UMG hardly could have  
17 wanted to “put eBay at risk of losing the DMCA safe harbor,” as Augusto  
18 speculates. Augusto Mtn. at 17. Rather, UMG did not intend to, and did not, invoke  
19 the DMCA based on any VeRO notice. As a result, UMG cannot be liable under  
20 Section 512(f).

21           **B. UMG Had A Good Faith Belief That Its Notices Did Not Contain**  
22           **Material Misrepresentations.**

23           Assuming (without conceding) that the VeRO notices constituted DMCA  
24 notices, Augusto cannot prevail because the notices were sent without actual  
25 knowledge of falsity, and, therefore, UMG had a subjective good faith belief that

26           <sup>9</sup> Augusto submits a page from eBay’s website instead of the official designation  
27 eBay filed in the Copyright Office (accessible online). Gratz Decl., Ex. 9. Even  
28 eBay’s website identifies the address for DMCA notice as copyright@ebay.com, not  
vero@ebay.com to which VeRO notices were directed. Id.

1 they were correct. Augusto attempts to skirt this reality by failing to cite the  
2 controlling Ninth Circuit authority specifying the standard for liability under  
3 Section 512(f), Motion Picture Ass’n of America, Inc. v. Rossi, 391 F.3d 1000 (9th  
4 Cir. 2004), in which the Court affirmed summary judgment of no liability because

5 “Congress included an expressly limited cause of action  
6 for improper infringement notifications, imposing liability  
7 only if the copyright owner’s notification is a knowing  
8 misrepresentation. *A copyright owner cannot be liable  
9 simply because an unknowing mistake is made, even if  
10 the copyright owner acted unreasonably in making the  
11 mistake.* See Section 512(f). Rather, there must be a  
12 demonstration of some *actual knowledge of  
13 misrepresentation on the part of the copyright owner.* . . .

14 Measuring compliance with the lesser ‘objective  
15 reasonableness’ standard would be inconsistent with  
16 Congress’s apparent intent that the statute protect potential  
17 violators from *subjectively* improper actions by copyright  
18 owners.” 391 F.3d at 1004-1005 (emphasis added).

19 See Dudnikov v. MGA Entertainment, Inc., 410 F. Supp. 2d 1010, 1020 (D. Colo.  
20 2005) (summary judgment of no Section 512(f) liability, following Rossi).

21 Augusto relies instead on Online Policy Group v. Diebold Election Systems,  
22 Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004), decided two months before Rossi. The  
23 Diebold objective standard that Augusto espouses *i.e.*, “ ‘knowingly’ means that a  
24 party actually knew, should have known if it acted with reasonable care or diligence,  
25 or would have had no substantial doubt had it been acting in good faith” (*id.* at  
26 1204), directly conflicts with the subjective Rossi standard. See 1 I. Ballon, E-  
27 Commerce and Internet Law, § 8.12[9][c-2] at 8-292 (2007 supp. ed.) (“In Rossi, the  
28 Ninth Circuit construed the scope of section 512(f) narrowly”), *id.* at 8-293 (“This

1 standard [in Diebold], however, is too strict in light of the Ninth Circuit's ruling in  
2 Rossi."). UMG clearly meets the Rossi lesser subjective good faith belief standard  
3 (and would even meet the discredited objective standard).

4 UMG submitted evidence from the person with 30 years experience in the  
5 music industry in charge of its content protection department that UMG did not  
6 engage in a knowing, material misrepresentation. This evidence, which Augusto  
7 essentially does not refute, included: (a) UMG formulated, adopted, and  
8 implemented, over several years, a procedure to carefully search for and limit its  
9 notices to eBay to promotional CDs and to exclude commercial CDs sold to the  
10 public; (b) UMG's notices were sent with respect to different sellers of promotional  
11 CDs, yet Augusto is the only one to sue claiming misrepresentation; (c) the language  
12 on UMG's promotional CDs was clear, certainly to the industry professionals to  
13 whom they were distributed, and provided that the CDs were not to be sold and that  
14 UMG retained ownership; (d) industry custom and practice, over decades, reflected  
15 the understanding that the sale of promotional CDs was unauthorized, and Augusto  
16 himself received notices of infringement from at least ten other copyright owners  
17 unrelated to UMG asserting that Augusto's sale of promotional CDs infringed their  
18 rights; (e) UMG's notices were sent only after it had a prima facie case of  
19 infringement (ownership and unauthorized distribution), and Augusto had not  
20 raised, let alone supported, the first sale defense on which he had the burden of  
21 proof; (f) UMG lacked an ulterior motive in objecting to the sale of promotional  
22 CDs (and Augusto does not posit one) whose sole purpose was use by the intended  
23 recipients and which UMG did not sell to the public; and (g) UMG's notices were  
24 sent with knowledge of a judgment consented to by Augusto in another case that  
25 expressly stated that the sale of promotional CDs owned by two other record labels  
26 over eBay violated the distribution right. SGI 28-34. Finally, in confirmation of  
27 UMG's good faith belief, eBay's website admonishes its sellers that the sale of



1 promotional CDs is “infringing” and “many copyright owners do enforce their  
2 rights.” SGI 35.

3         Against this, Augusto provides no probative “evidence,” let alone evidence  
4 sufficient to show, as a matter of law, actual knowledge of a material  
5 misrepresentation. See Dudnikov, 410 F. Supp. 2d at 1013 (“Because MGA has  
6 asserted that it had a good faith belief that the Plaintiffs’ auction was infringement,  
7 Plaintiffs have the burden of demonstrating material facts showing otherwise.”).  
8 Instead, Augusto contends that UMG never filed a copyright action for the sale of  
9 promotional CDs against anyone other than Augusto, without explaining how that  
10 serves to prove a knowing misrepresentation. A copyright holder need not sue all  
11 infringers (or, for that matter, any). See, e.g., Costello Pub. Co. v. Rotelle, 670 F.2d  
12 1035, 1043 (D.C. Cir. 1981). Augusto was a repeat infringer of UMG’s copyrights  
13 in promotional CDs and continued selling them after numerous notices. SGI 36.  
14 Nor was there any evidence that UMG “targeted” Augusto, as he claims (and, even  
15 if it did, that would not serve to show a knowing misrepresentation). Augusto Mtn.  
16 at 3. UMG searched eBay by artist name and song title. SGI 37. VeRO notices  
17 were sent to eBay sellers for all matching searches. SGI 38. If more notices were  
18 sent to Augusto, it was because he was a more frequent infringer.

19         Next, Augusto argues that there was a lack of “legal support” that he violated  
20 copyright law, because “no published opinion has found the sale of a promo CD to  
21 infringe copyright.” August Mtn. at 19. What he doesn’t state is that no published  
22 opinion has ever found the sale of a promotional CD *not* to infringe copyright.  
23 However, the weight of authority supports UMG’s position that Augusto infringed.  
24 As noted, so does eBay on its website. SGI 35. And Augusto so acknowledged in  
25 his consent judgment. SGI 34.

26         Moreover, “legal support” is not required for a subjective good faith belief.  
27 Apparently, neither the MPAA, in Rossi, nor MGA, in Dudnikov, submitted  
28 declarations arguing legal support. See Dudnikov, 410 F. Supp. at 1013 (rejecting

1 position that because defendant's agent was a lawyer trained in IP law, it should be  
2 held to a higher standard: "Plaintiffs have not presented any authority that supports  
3 applying a different standard than subjective good faith belief to lawyers trained in  
4 IP law."). Augusto himself did not have any "legal support" for declaring under  
5 penalty of perjury in his counter-notices his "good faith belief" that UMG was  
6 mistaken in its claims. SGI 39. Nor can the fact that UMG would not waive the  
7 attorney-client privilege be turned into a knowing, material misrepresentation. As  
8 Augusto's counsel acknowledged, sending a notice does not waive the attorney-  
9 client privilege. SGI 40. Indeed, Augusto was instructed not to disclose claimed  
10 privileged information when asked similar questions. SGI 39.

11 Finally, UMG's good faith belief is apparent by comparison to Augusto's  
12 claimed basis for his "good faith belief" that he was *not* infringing, as attested to in  
13 his counter-notices. He made that claim repeatedly even after reading eBay's  
14 description that "it is still an infringement to sell" promotional CDs (SGI 41), and  
15 after consenting to a judgment that his sale of promotional CDs constituted  
16 copyright infringement (SGI 34). If Augusto had a good faith belief on his flimsy  
17 evidence (and declared under penalty of perjury that he did), there can be no doubt  
18 that UMG did in asserting its claims.

## 19 CONCLUSION

20 For all of the reasons set forth herein and in UMG's previously filed motions,  
21 Augusto has failed to carry his burden on summary judgment and his motions  
22 should be denied.

23 DATED: April 21, 2008

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