

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

06 CV 3733 (DAB)

Plaintiffs,)

v.)

XM SATELLITE RADIO, INC.)

Defendant.)

**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

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PRELIMINARY STATEMENT

This case must be dismissed because of a statute plaintiffs do not even mention in the complaint, the Audio Home Recording Act of 1992 (the “AHRA”), 17 U.S.C. §§ 1001–1010. The AHRA was enacted to encourage the development of “digital audio recording devices” by prohibiting the filing of copyright infringement suits, such as this one, based on the manufacture, importation, distribution and use of such devices. The inno – an AHRA compliant radio/recorder distributed by defendant XM Satellite Radio Inc. (“XM”) – is a “digital audio recording device” within the meaning of the AHRA. Accordingly, the AHRA mandates dismissal of this action.

The AHRA strikes a legislative balance among three sets of interests: (1) the interest of consumers in using state of the art digital devices to record songs for their personal use; (2) the interest of the recording industry in preventing “serial” copying (making copies from copies) using digital recording devices; and (3) the interest of the consumer electronics industry in developing and marketing innovative personal recording devices without risk of infringement actions. The AHRA requires that every “digital audio recording device” prevent the making of serial digital copies and that royalty payments be made to the music industry for each such device; in return, the AHRA bars infringement claims based on the manufacture, importation, distribution or use of such a device.

The Recording Industry Association of America (“RIAA”) – counsel to plaintiffs in this case and the trade group that represents the recording industry – actively participated in the hearings concerning the AHRA and urged its enactment. Indeed, the RIAA touted the AHRA as a generic solution that by design would apply both to existing recording devices and recording devices of the future.

Although the inno fits squarely within this statutory scheme, the complaint ignores the AHRA and defies Congress' efforts to insure that the powerful recording industry would not be able to restrict the right of consumers to record songs that are broadcast over the radio or stifle innovation by chilling the development and use of the latest recording technologies.

Under the AHRA, XM and its subscribers have an absolute immunity from being sued for copyright infringement based on the use of the inno or other similar devices. Thus, even if plaintiffs' claims of copyright infringement had any merit – an assertion XM vigorously disputes – plaintiffs' infringement claims cannot stand.

In short, it is the plaintiffs who have violated the Copyright Act – by bringing an infringement action in the face of a clear statutory bar. Accordingly, XM asks this Court to dismiss the complaint in its entirety.

STATEMENT OF FACTS

Despite the innuendo, rhetoric and misrepresentations, the complaint alleges facts and relies on documents that demonstrate that plaintiffs are prohibited under the AHRA from bringing this lawsuit. Accordingly, for purposes of this motion as required by Fed. R. Civ. P. 12(b)(6), XM does not take issue with plaintiffs' factual errors. Rather, treating the facts alleged in the complaint as if they were true, XM moves to dismiss the complaint.

A. XM Satellite Radio Inc.

XM is the leading satellite radio broadcaster in the United States. Com. ¶ 21.¹

¹ As used in this memorandum, "Com. ¶ ___" refers to paragraphs of the complaint; "User Guide" refers to the inno User Guide; and "Product Guide" refers to the XM Consumer Electronics Show 2006 Product Guide. Copies of the complaint, User Guide and Product Guide are annexed to the Declaration of Celia Goldwag Barenholtz, dated July 17, 2006 ("Barenholtz Dec.") as Exs. 1-3, respectively.

Unlike a traditional AM/FM radio, which receives programming broadcast from a number of different radio stations, an XM radio receives only XM programming. Thus, while each channel on an XM radio provides a particular format of music, talk or sports content, all the channels received on an XM radio emanate from a single service – the XM satellite radio service. Com. ¶ 22; Product Guide at 10-12.²

XM broadcasts nearly 70 channels of 24 hour a day commercial-free music as well as channels dedicated to news and public affairs, talk, and sports. For example, XM broadcasts 7 channels dedicated to various types of “Country,” 13 channels that play “Rock,” 5 channels that play “Jazz & Blues,” 7 channels of “Hip Hop & Urban,” 3 channels of “Classical,” and 9 “Pop and Hits” channels. Com. ¶ 22. A full list of the channels available on XM radio can be found in the Product Guide at 10-11.

XM pays royalties to the plaintiffs for the right to broadcast their sound recordings to XM subscribers. *See, e.g.*, Com. ¶¶ 1-2, 5, 23 (citing 17 U.S.C. § 114(d)(2)). This payment is made under a license granted by statute in the Copyright Law. 17 U.S.C. § 114(d)(2).³

² In addition to channels which broadcast XM-generated audio content, XM also offers channels which rebroadcast content from other sources, such as CNN and Fox News. *See* Product Guide at 11-12. The Court may consider the Product Guide because it is integral to and incorporated by reference by the plaintiffs in the complaint. *See generally*, pp. 12-13, *infra*.

³ Congress created this statutory license at the same time that it granted an exclusive right with respect to the performance of sound recordings by means of a digital audio transmission because it wanted to ensure that digital broadcasters would be able to perform sound recordings in exchange for paying a royalty. *See generally* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 8.21, 8.22 (2006).

It should be noted that there are two kinds of § 114(d)(2) licenses. XM has a § 114(d)(2)(B) license because it is a “preexisting satellite digital audio radio service.” *See* Com. ¶ 23. The dispensation for preexisting satellite radio services reflects the enormous investment that they had to make to build their operations. *See* H.R. Rep. No. 105-796, at 80-81 (1998). For example, XM (under its former name) purchased a “spectrum” of the public airways at a Federal Communications Commission auction in 1997 for approximately \$90 million. Public Notice,

