

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

YANGAROO INC.,

Plaintiff,

Case No. 09-C-0462

-v-

**DESTINY MEDIA TECHNOLOGIES INC.,
DESTINY SOFTWARE PRODUCTIONS
INC. and MPE DISTRIBUTION INC.,**

Defendants.

**DEFENDANTS' STATEMENT OF PROPOSED MATERIAL FACTS PURSUANT
TO CIVIL L.R. 56(b)(1)(C).**

Defendants Destiny Media Technologies Inc. ("Destiny Media"), Destiny Software Productions Inc. ("Destiny Software") and MPE Distribution, Inc. ("MPE" and collectively with Destiny Media and Destiny Software, "Defendants"), by and through their undersigned attorneys, respectfully submit this Statement of Proposed Material Facts pursuant to Civil L.R. 56(b)(1)(C) as to which Defendants' content there is no genuine iss and that entitle Defendants to summary judgment as a matter of law.

STATEMENT OF PROPOSED MATERIAL FACTS:

1. Defendants operate from offices in Vancouver, British Columbia, Canada.

Defendants service accused of patent infringement by Plaintiff is called “Play MPE.”

Declaration of Steve Vestergaard, ¶ 3, Complaint of Yangaroo, Inc. dated May 5, 2009, ¶12.

2. Defendants operate the Play MPE as a service for their customers, typically music distributors, whereby the music distributor, in order to promote their music, can securely transmit their music in the form of digital data to Destiny’s file server computers which can then transmit the information to the computers of certain authorized recipients, typically radio station personnel. Declaration of Steve Vestergaard, ¶ 4; ¶ 8. Declaration of Ted Sabety, Exhibit 3, Pgs. 27, 29, 30, 47. (hereinafter referred to as “Sabety Exhibit 3”).

3. A Play MPE music distributor customer operates a copy of Destiny’s Play MPE Encoder software on their own computer to encode their music data files and to input the identity of authorized recipients for those data files, all of which are then transmitted as information over the Internet by the music distributor’s computer to Destiny’s server computers and stored there. Declaration of Steve Vestergaard, ¶ 5; Sabety, Exhibit 3, pg 23.

4. Defendants' Play MPE file server computers that operate to provide this secure music distribution service are located outside the United States. Plaintiffs admit that "The Destiny Play MPE servers are not located in the United States." Declaration of Steve Vestergaard, ¶6; Declaration of Ted Sabety, Exhibit 1.

5. Two of the steps in the claimed method of the '712 Patent at issue in this case call out as a claim limitation "in server" or "at server", respectively. These two steps, if performed at all by Defendants, would be performed outside the United States on Defendants' file server computers located outside the United States. Declaration of Ted Sabety, Exhibit 8; Sabety Exhibit 3, Pgs. 22, 24, 27, 29, 30-31, 35-36; Declaration of Ted Sabety, Exhibit 2, ¶ 14. (hereinafter referred to as "Sabety Exhibit 2").

6. An authorized recipient, when operating a copy of Defendants' Play MPE Player software on their own computer, can request that Defendants' file server computers transmit information representing a music data file to the recipient's computer. If certain conditions are satisfied (typically a calendar date range specified by the music distributor customer), the transmission of such information from Defendants' file server computers outside the United States to the authorized recipient's computer will take place. Declaration of Steve Vestergaard, ¶ 7.

7. Defendant's file server computers transmit information representing music data. The transmission of this data is not a physical form. Sabety Exhibit 3, Pg. 71, 76, 78; Sabety Exhibit 2, ¶ 23.

8. Defendants do not manufacture and ship a CD or other memory device. No physical CD or DVD or other memory device is delivered to the authorized recipient by Defendants as a result of using the Play MPE system. Sabety Exhibit 3, Pg. 38, 74; Sabety Exhibit 2, ¶ 23.

9. Defendants do not sell transmissions of the data representing the music. Rather, Defendants' business is to provide a secure data distribution service to its music distributor customers. Declaration of Steve Vestergaard, ¶ 8. Sabety Exhibit 3, Pg. 47.

10. Defendants do not sell or license out the computer software that operates the Play MPE service file server function. Declaration of Steve Vestergaard, ¶ 9.

11. Because the Play MPE Encoder does not directly communicate with any Play MPE Player except through Defendants' servers located outside the United States, Play MPE Encoder and Play MPE Player software tools do not operate independently as a "server" and therefore do not perform all of the steps of the claimed method. Sabety Exhibit 2, ¶ 16; Sabety Exhibit 3, Pgs. 22, 24, 31, 32; Declaration of Vestergaard, ¶ 5, ¶7.

12. Plaintiff has stated in its briefing papers opposing Defendants' motion to dismiss under Federal Rule 12(b)(6) that "No third party performs the steps of the claimed method." Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss, dated July 14, 2009, pg. 5.

Dated: February 12, 2010

Respectfully submitted,

By: /s/ Ted Sabety

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