

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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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.,

Plaintiffs

- against -

06 Civ. 3733 (DAB)
MEMORANDUM & ORDER

XM SATELLITE RADIO, INC.,

Defendant.

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DEBORAH A. BATTIS, United States District Judge.

Above-named Plaintiffs (hereinafter "Plaintiffs" or "the Record Companies") bring this action against Defendant XM Satellite Radio, Inc. ("XM"). Plaintiffs allege XM operates a digital download subscription service that distributes Plaintiffs' copyrighted works without their authority. Plaintiffs contend this conduct violates federal and state copyright and unfair competition laws. Now before this Court is XM's motion to dismiss the Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs bring nine causes of action against Defendant XM. Count One alleges that XM directly infringes on the Record

Companies' exclusive distribution rights, in violation of sections 106(3) and 501 of the Copyright Act of 1976 ("the Copyright Act"). Count Two alleges that XM also violates 17 U.S.C. §§ 115, 501, which bar unauthorized digital phonorecord delivery. In Counts Three and Four, the Record Companies allege XM directly infringes upon their exclusive right to reproduce their copyrighted sound recordings: Count Three charges that this activity violates provisions of the Copyright Act which set forth exclusive reproduction rights for copyright owners, namely 17 U.S.C. §§ 106(1), 501. Count Four charges that XM violates its license, granted under 17 U.S.C. § 112(e)(1), to retain and use "ephemeral recordings" of Plaintiff's sound recordings. Counts Five and Six accuse XM of secondary infringement violations: In Count Five, Plaintiffs accuse XM of inducing copyright infringement. Count Six charges XM with contributory copyright infringement. In Count Seven, Plaintiffs allege that XM is guilty of vicarious copyright infringement. Counts Eight and Nine allege state law violations: Count Eight charges that XM's use of Plaintiffs' pre-1972 sound recordings violates New York state copyright common-law. Finally, Count Nine alleges XM violates New York's common-law bar on unfair competition.

Plaintiffs seek identical relief for each of their federal claims: declaratory relief, statutory or actual damages, reimbursement of costs incurred by Plaintiffs and a permanent injunction enjoining XM from infringing upon Plaintiffs' copyrights and exclusive rights under copyright. With respect to their state law claims, Plaintiffs seek declaratory relief, both compensatory and punitive damages, as well as a permanent injunction halting XM's unlawful conduct.

XM moves to dismiss Plaintiffs' federal claims, asserting statutory immunity from suit. XM maintains they are shielded from infringement actions by the provisions of 17 U.S.C. §§ 1001-1010, the Audio Home Recording Act of 1992 (hereinafter "AHRA"). Upon rejecting the federal claims, XM asks the Court to decline to exercise pendent jurisdiction, and to dismiss the remaining state claims.

For the reasons set forth below, XM's motion to dismiss is DENIED.

I. BACKGROUND¹

Plaintiffs are major record companies. The Record Companies bring this action alleging that they own, or own rights to, the

¹ The facts herein are as set forth in the Complaint. On a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court shall presume true all allegations in the Complaint.

majority of copyrighted sound recordings which are sold in the United States. (Complaint ["Compl."] ¶ 15.) The Record Companies are among the world's leading producers, manufacturers, distributors, sellers and licensors of sound recordings. (Id. ¶ 13.) As such, they offer for sale in the United States and throughout the world an array of phonorecords, including CDs, cassettes and digital audio files. (Id. ¶ 17.) The Record Companies earn revenue from these sales, and from authorizing others to sell and distribute their phonorecords online. (Id. ¶ 18.) The Record Companies also are paid statutorily prescribed royalties for licensing public performances, like XM radio broadcasts, and for the production of audio recording devices and copying media. (Id. ¶ 5, Pls.' Mem. Law at 11.)

Defendant XM is a licensed satellite radio broadcaster. XM broadcasts 160 channels, 67 of which feature 24-hour-a-day, commercial-free music programming. (Compl. ¶ 22.) The songs used in XM's music programming include the Record Companies' copyrighted recordings which, in turn, include some of the most successful recordings in the world. (Id. ¶ 7.) XM radio broadcasts can only be received by XM subscribers who use radio receivers capable of decrypting XM's broadcast signal. (Id. ¶

26.) Each XM radio receiver must be individually activated by XM. (Id.)

XM's subscriber base has increased dramatically since XM's inception. XM's subscriber rolls jumped from almost one million subscribers in 2003 to nearly six million subscribers in 2005; estimates indicate that in 2006 XM's subscription base spiked to nine million subscribers. (Id. ¶ 25.) XM earns revenue from subscription fees; XM listeners pay a monthly subscription fee of \$12.95 in exchange for their ability to receive XM service and programming on an XM compatible radio receiver. (Id. ¶ 27.)

Since April 2006, XM has made it possible for subscribers to hear broadcasts over special receivers marketed as "XM + MP3" players.² (Id. ¶ 26.) XM + MP3 players are different from ordinary XM radios because they do more than receive XM radio broadcasts. XM + MP3 players have three distinct features. Aside from receiving XM radio broadcasts, an XM + MP3 player allows a user to store MP3 files, which he or she already owned or acquired from outside sources.³ (Id. ¶ 38.) Additionally, XM + MP3 players permit subscribers to record, retain and library individually disaggregated and indexed audio files from XM

² XM markets three such devices. They are the "inno," the "Helix" and the "NeXus." (Compl. ¶¶ 29,30)

³ "An MPEG-1 Audio Layer 3 (commonly known as "MP3") is the most popular digital audio compression algorithm in use on the Internet, and the compression it provides makes an audio file 'smaller' by a factor of 12 to one without significantly reducing sound quality." Recording Industry Association of America, et al. v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1074 (1999).

broadcast performances; the Record Companies refer to this final feature as a "digital download delivery service" and this feature is the subject of this litigation. (Id. ¶ 6.)

All functionalities of an XM + MP3 player are controlled entirely by XM. (Id. ¶ 26.) For example, as with any XM radio receiver, after a consumer purchases an XM + MP3 player he/she must contact XM in order to activate the device and render it capable of decrypting XM broadcasts. (Id. ¶ 32.) XM can likewise deactivate any user's XM + MP3 player at any time. (Id.) XM can change the functionality of XM + MP3 players by sending software updates to users via the Internet. (Id.) XM is also capable of marking broadcast songs so that they can not be stored or saved. (Id. ¶ 34.) In sum, Plaintiffs allege, "XM retains complete and continuing end-to-end control over who is permitted to receive its signals, the content its subscribers receive, what subscribers can do with the content XM transmits to them, and whether and how long subscribers are allowed to keep their downloaded song files." (Id. ¶¶ 26, 32.)

In maintaining this end-to-end control over its product, XM provides several services specifically to XM + MP3 player users. First, while listening to XM programming, an XM + MP3 user can instantly record any song he or she hears at the touch of a

button. (Id. ¶ 37.) XM makes this utility more exploitable by allowing a short-term "buffered" copy of every broadcast song a user hears to be generated on the XM + MP3 player. (Id. ¶ 35.) This buffered copy is made on the XM + MP3 player regardless of user input. (Id.) As a result, a user can record and store in its entirety any broadcast song he or she hears, even if the user started listening to the song after it began to play. (Id. ¶ 37.)

Second, XM provides XM + MP3 users with playlists from blocks of broadcast programming which have been disaggregated into individual tracks. (Id. ¶ 36.) XM sends users these digital playlists with title and artist information included. (Id.) These playlists identify all songs broadcast over a particular channel and during a particular period of time. (Id.) Users can then scroll through a playlist and select which song(s) to store for future replay, and which to delete. (Id.) A consequence of this utility is that XM + MP3 users can hear and store individual songs without actually listening to XM broadcast programming. (Id.)

A third feature XM provides to XM + MP3 users is a search function, facilitated by so-called "ArtistSelect" and "TuneSelect" utilities. (Id. ¶ 37.) These utilities make it

easy for a user to find out when a requested song is being broadcast. (Id.) Listeners use "ArtistSelect" and "TuneSelect" by identifying artists or songs he or she wants to hear, and potentially download. (Id.) Once the request has been entered, XM acts as an alert service. (Id.) XM sends the listener immediate notice when his or her chosen artists or songs are played on any XM channel. (Id.) This alert allows the user to immediately switch channels and store the requested track onto his or her XM + MP3 player. (Id.)

Fourth, XM enables XM + MP3 users to regard tracks recorded off broadcast programming as interchangeable with other music files in its possession. (Id. ¶ 38.) With an XM + MP3 player, subscribers can store up to 50 hours of stored broadcast music, the approximate equivalent of 1,000 songs. (Id. ¶ 31.) Each of these songs is available for unlimited replay, for as long as the user maintains an XM subscription. (Id. ¶ 39.) XM provides users with a cable and software which permits them to also transfer music files from their personal computer onto the XM + MP3 player. (Id. ¶ 38.) These audio files can be used with any recorded material the user collects from XM broadcasts to create indexed music libraries and individualized playlists. (Id.)

As a result, from the user's perspective, there are two salient differences between broadcast-recorded music and audio files downloaded from an outside source. The first difference is that songs recorded from XM broadcasts cannot be owned by XM subscribers; they are effectively leased, and will only be operative as long as the user remains an XM subscriber. (Id. ¶¶ 31, 34). The second difference is that an XM + MP3 user doesn't pay per-song for music recorded from XM broadcasts, and pays instead the monthly satellite radio subscription fee. (Id. ¶ 39.) These differences notwithstanding, XM + MP3 users can record copies of songs which were only licensed to be used in satellite radio broadcasts, and then use them just as they would any other, purchased music download. As a result, the Record Companies aver, XM subscribers are spared the incentive non-subscribers have to buy authorized digital copies of songs for their private use. (Id. ¶ 40.)

II. DISCUSSION

Defendant XM moves to dismiss the Record Companies' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The basis for XM's argument for dismissal is that the Record Companies fail to plead facts which would discharge the

statutory immunity provided by the AHRA under 17 U.S.C. § 1008. The Record Companies argue that the AHRA does not immunize XM from suit for the conduct alleged in their Complaint.

A. Legal Standards

A motion to dismiss under Rule 12(b)(6) requires the district court to accept the factual allegations in the complaint as true and to make all reasonable inferences in the plaintiff's favor. Friedl v. City of New York, 210 F.3d 79, 83 (2d Cir. 2000) (citations omitted); Bolt Elec., Inc. v. City of New York, 53 F.3d 465, 469 (2d Cir. 1995). A court should grant dismissal only if, after considering plaintiff's allegations in this most generous light, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Walker v. City of New York, 974 F.2d 293, 298 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993); see also Cortex Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)), cert. denied, 503 U.S. 960 (1992). However, because a Rule 12(b)(6) motion determines the legal feasibility of a complaint, the court should not "assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v.

Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)
(quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).

"A motion to dismiss may be used to test whether a defendant has statutory immunity." Beyond Systems, Inc. v. Keynetics, Inc., 422 F.Supp.2d 523, 530 (D.Md. 2006) (citing Behrens v. Pelletier, 516 U.S. 299 (1996)). An immunity defense presented in a Rule 12(b)(6) motion must be based on facts appearing on the face of the complaint. McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004). However, an immunity defense raised in a motion to dismiss "must accept the more stringent standard applicable to this procedural route. Not only must the facts supporting the defense appear on the face of the complaint, but, as with all Rule 12(b)(6) motions, the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Id. (citations and internal quotations omitted). The Rule 12(b)(6) standard that the plaintiff is entitled to all reasonable inferences from the facts alleged in the complaint applies to those facts which support his claim, and also to those facts that defeat the immunity defense. Id.

B. Counts One through Seven: Alleged Infringing Conduct

XM alleges that the AHRA provides absolute immunity from suit for copyright infringement, barring Counts One through Seven of Plaintiffs' Complaint. (Def. Mem. Law at 2.) XM argues that it is shielded from liability for Plaintiffs' claims because it distributes the inno, the Helix and the NeXus, and because these XM + MP3 players are digital audio recording devices.⁴ (Def.'s Mem. Law at 1.) XM maintains that, because the AHRA bars copyright infringement actions which are based on the distribution of audio recording devices, the Record Companies' federal copyright claims must be dismissed. (Id.), See 17 U.S.C. § 1008. XM contends that its interpretation of the AHRA is supported by both the plain language and the legislative history of the statute. (Def. Mem. Law at 13-21.) The Record Companies counter that neither the plain language of the AHRA nor its

⁴ The parties to this case are in dispute over whether XM + MP3 players qualify as "digital audio recording devices" under the AHRA. The dispute turns principally on whether XM + MP3 players meet the statutory definition of such a device as that definition has been interpreted by the Ninth Circuit in Recording Industry Association of America, et al. v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999).

The Ninth Circuit case dealt with a device, the Rio, that could not transmit and could not record without the use of a computer, which is exempted under 17 U.S.C. 1001(5)(B). Therefore the facts are totally different from the facts here. XM + MP3 players do receive from transmission and permit copying without an external computer or computer hard drive. The fact that it can be connected to a computer to get non-XM music on the computer hard drive does not bring it within the ambit of the limitations of the Rio. According to Diamond, "a device falls within the [AHRA's] provisions if it can indirectly copy a digital music recording by making a copy from a transmission of that recording. Because the Rio cannot make copies from transmissions, but instead, can only make copies from a computer hard drive, it is not a digital audio recording device." Diamond, 180 F.3d at 1081. Accordingly, at this stage of the proceeding, relying on plain meaning statutory interpretation and the definition of a DARD contained in Diamond, until proven otherwise by means of discovery, the Court treats the inno, Helix and NeXus as DARDs.

legislative history supports a conclusion that XM is immunized from suit for the conduct alleged in their Complaint.

1. The Plain Language of the AHRA

The AHRA is comprised of Sections 1001 through 1010 of Title 17 of the United States Code, which covers the Copyright Act.

Section 1008 of the AHRA is entitled "Prohibition on *Certain* Infringement Actions" (emphasis added). This provision provides that:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device... or based on the noncommercial use by a consumer of such a device... for making digital music recordings or analog musical recordings.

XM argues that the plain language of the AHRA requires the Court to bar Plaintiffs' suit because the causes of action identified in the Complaint are based on XM's distribution of a digital audio recording device ("DARD"). In XM's view, because it is a distributor of the XM + MP3 player, "XM is immune from suit so long as the [XM + MP3 player] meets the requirements of the AHRA." (Def. Mem. Law at 13). Under XM's reading of the statute, if XM is a distributor of DARDs within the definition of the AHRA, there is no limit to the infringing conduct in which they may engage. According to XM, the merits of its dismissal motion

turn only on whether the inno, the Helix and the NeXus qualify as DARDs, and they do. (Id. at 14-17.)

Pursuant to the plain language of the AHRA, courts considering the immunity provisions of the AHRA have denied the shelter of Section 1008 when the machines at issue are not DARDs, within the meaning of the statute. See Recording Industry Association of American v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999); A & M Records, Inc., et al. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); In re Aimster Copyright Litigation, 252 F.Supp.2d 634 (N.D.Ill. 2002), affirmed by 334 F.3d 643 (7th Cir. 2003), cert denied in Deep v. Recording Industry of America, 540 U.S. 1107 (2004). However, this action presents the Court with an issue of first impression; there is no precedent to guide the Court's interpretation of the AHRA where, as here, a purported distributor of a DARD primarily and simultaneously operates as a satellite radio broadcaster.

At the outset, the Court finds untenable XM's assertion that Section 1008 of the AHRA offers a distributor⁵ of a DARD "absolute immunity" from copyright litigation. (Def. Mem. Law at 2.) XM is licensed to broadcast the music and is permitting recording outside of live, actual broadcast. While its license

⁵ The Court observes that Plaintiffs' Complaint does not explicitly allege that XM is a distributor of XM + MP3 players. However, the Complaint does allege facts which support that conclusion. (Comp. ¶ 29.)

would permit consumers to record from live broadcasts, that does not extend to permitting consumers to record the music, whether or not heard at the time of broadcast, for as long as they pay XM the monthly subscription fee. While the "Prohibition on Certain Infringement Actions" provided by Section 1008 may protect XM from suit for actions based on its distribution of a DARD, under a plain reading of the statute, that protection is not a wholesale, blanket protection for any and all conduct.

The protected use of a consumer to record music for noncommercial use does not contemplate the commercial recording by a broadcaster to be "leased" to the consumer for only as long as she pays the subscription fee to that broadcaster. The consumer does not own the recording; if the fee stops, so does the music.

XM claims that the Record Companies "argue that the AHRA does not apply to this case because it is not 'based on' the [XM + MP3 player]." (Def. Repl. Mem. Law at 5.) Actually, what the Plaintiffs make clear in their Complaint is that XM is acting without authorization as a commercial content delivery provider to those devices - not that XM is infringing on their copyrights by distributing a DARD. As the Record Companies plainly put it, "Section 1008 does not immunize a service such as XM + MP3 that

delivers permanent digital copies of sound recordings without permission from the copyright owners." (Pl. Repl. Mem. Law at 7-8.)

Plaintiffs rightly read that, under a plain language analysis of the AHRA, "A claim is 'based on' manufacture, importation or distribution of a [DARD] only where the acts of manufacturing, importing, or distributing the device is the conduct on which liability is premised." (Pl. Repl. Mem. Law at 10.) Put another way, XM is not being sued for actions taken in its capacity as a DARD distributor; therefore, XM is not immunized from this suit under the protection offered by the AHRA.

What the Complaint does allege is that, in providing services specific to users of XM + MP3 players, XM is acting outside the scope of its license for broadcast service - XM's only source of permission to use their recordings. (Compl. ¶ 1.) The Record Companies claim that by operating outside the authority of this statutory license, XM is violating their copyrights and unfair competition laws. Plaintiffs assert that XM's unauthorized use of their copyrighted material "encroaches directly and obviously on the digital download business,

undermining Plaintiffs' ability to distribute their copyrighted works through lawful legitimate services..." (Id. ¶ 3.)

The Record Companies consent to XM's use of their copyrighted material solely for the purposes of providing a digital satellite broadcasting service. This permission is granted pursuant to a licensing agreement, which is limited to the scope of the compulsory statutory license Congress granted in 17 U.S.C. § 114. (Id. ¶ 1.) Under Section 114 of the U.S. Copyright Act (the "Copyright Act"), XM and other pre-existing satellite radio service providers are permitted to perform sound recordings publicly by means of a subscription digital audio transmission. However, this permission is subject to a number of restrictions. 17 U.S.C. § 114(d)(2).

These restrictions serve to ensure that XM's satellite broadcasts operate like traditional radio broadcast providers. (Id. ¶ 24.) XM, for example, cannot provide an interactive service. 17 U.S.C. § 114(d)(2)(A)(i). Nor can XM publish its programming schedules prior to broadcast. 17 U.S.C. § 114(d)(2)(B)(ii). XM is also barred from playing songs from the same artist or album more frequently than specified within a three hour period. (Compl. ¶ 24.); 17 U.S.C. § 114(d)(2)(B)(i). By broadcasting and storing this copyrighted music on DARDs for

later recording by the consumer, XM is both a broadcaster and a distributor, but is only paying to be a broadcaster.

The Record Companies sufficiently allege that serving as a music distributor to XM + MP3 users gives XM added commercial benefit as a satellite radio broadcaster. As averred in their Complaint:

[t]he sound recordings owned by Plaintiffs and unlawfully distributed by Defendant include some of the most commercially successful recordings in the world. Defendant is thus seeking to capitalize upon the popularity of Plaintiffs' sound recordings in order to attract and retain the maximum number of XM subscribers.

(Compl. ¶ 7.) The Record Companies further claim that XM uses the XM + MP3 player to satisfy a known source of demand for copyright infringement, the market comprising digital music download services. See Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 545 U.S. 913 (2005).

Although XM does not explicitly refute Plaintiffs' claim that being able to deliver music content for storage on a DARD provides them with added commercial benefit, XM suggests that an XM + MP3 player is "much like a traditional radio/cassette player." (Def. Mem. Law at 10.) It is not. Traditionally, radio/cassette players have been used in the context of public radio broadcasts. Moreover, the only contact between

manufacturers of radio/cassette players and users traditionally has occurred at the point of sale. Id. at 438. It is manifestly apparent that the use of a radio/cassette player to record songs played over free radio does not threaten the market for copyrighted works as does the use of a recorder which stores songs from private radio broadcasts on a subscription fee basis. See e.g. Sony Corp. of America, et al. v. Universal City Studios, 464 U.S. 417 (1984) (finding a substantial likelihood that copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers).

Although XM subscribers might put XM + MP3 players to private use, the Record Companies' Complaint alleges that XM does not. Because "[c]ourts have properly rejected attempts by for profit users to stand in the shoes of their customers making non-profit or noncommercial uses," this Court recognizes that delivering music to XM + MP3 players confers XM with added commercial benefit. Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 192 F.Supp.2d 321, 333 (D.NJ. 2002) (quoting Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381,1389 (1996.) Finding that this conduct is not protected under the AHRA is consistent with the fundamental tenet

of copyright law that "all who derive value from a copyrighted work should pay for that use." Paul Goldstein Goldstein on Copyright § 7.7.2, at 7:158 (3d ed. 2005 and 2006 Supp.)

Moreover, the only way to enforce XM's rights and obligations under Section 114, while affording XM the protections of the AHRA, is to read the statute as the Court does under a plain language analysis: under the AHRA, XM is protected from suit based on actions taken in its capacity as a distributor of audio recording devices, but it is not immunized from suit based on its conduct as a satellite radio broadcaster, or from suit based on its actions as an XM + MP3 content delivery provider.

The question presented here is plain: whether the conduct alleged in the Record Companies' Complaint falls within the ambit of conduct protected by the AHRA. The Court finds that because of the unique circumstances of XM being both a broadcaster and a DARD distributor and its access to the copyrighted music results from its license to broadcast only, that the alleged conduct of XM in making that music available for consumers to record well beyond the time when broadcast, in violation of its broadcast license, is the basis of the Complaint, and being a distributor of a DARD is not. Thus the AHRA, on these facts, provides no protection to XM merely because they are distributors of a DARD.

2. Legislative History of the AHRA

As XM recognizes, where the language of a statute is not clear, courts must examine “the intent of Congress as revealed in the history and purposes of the statutory scheme.” (Def. Mem. Law at 17, quoting Marvel Characters, Inc. v. Simon, 310 F.3d 280, 290 (2d Cir. 2002).) However, the Court has determined that the meaning of the AHRA is plainly evident. Mindful of the admonition that “[r]esort to legislative history is only justified where the face of the Act is inescapably ambiguous,” the Court makes short shrift of XM’s argument that the legislative history of the AHRA supports dismissal of this suit. Garcia v. U.S., 469 U.S. 70, 76 n.3 (1984) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J. concurring)). See also Gottlieb v. Carnival Corp., 436 F.3d 335, 337-38 (2d Cir. 2006) (Observing that statutory analysis begins with text and plain meaning, turns to canons of statutory construction and then at last resort to legislative history.). Because the plain language of the AHRA is unambiguous, the Court declines to consider XM’s argument that reviewing the statute’s legislative history is either necessary or helpful.

Accordingly, XM's Motion to Dismiss the Record Companies' Complaint pursuant to the affirmative defense of immunity from suit under the AHRA is DENIED.

D. Counts Eight and Nine: Plaintiffs' State Law Infringement and Unfair Competition Claims

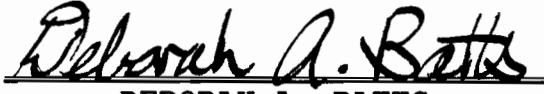
XM asks the Court to decline to exercise pendant jurisdiction over the Record Companies' remaining state law claims, as charged in Counts Eight and Nine, under 28 U.S.C. 1338(b). This request, however, presupposes that the Court grants dismissal of the Record Companies' federal question claims, as charged in Counts One through Seven of the Complaint. Because the Court has not dismissed Plaintiffs' federal law claims, it is inappropriate to consider this request.

III. CONCLUSION

For the foregoing reasons, this Court DENIES Defendant's Motion to Dismiss Plaintiffs' Complaint. Defendant shall file an Answer to Plaintiffs' Complaint within thirty (30) days of the date of this Order.

SO ORDERED.

Dated: New York, New York
January 19, 2007


DEBORAH A. BATTS
United States District Judge