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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF ARIZONA

13 Atlantic Recording Corporation, et al.

14 Plaintiffs,

15 vs.

16 Pamela And Jeffrey Howell,

17 Defendants.

Case No.: 2:06-cv-02076-PHX-NVW

**PLAINTIFFS' MOTION FOR
TERMINATING SANCTIONS
AGAINST DEFENDANT BASED ON
DEFENDANT'S SPOILIATION OF
MATERIAL EVIDENCE**

[Oral Argument Requested]

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20 Plaintiffs respectfully move this Court under the Court's inherent authority to
21 manage proceedings before it for terminating sanctions against Defendant based on
22 Defendant's willful spoliation of material evidence.

23 **MEMORANDUM AND POINTS OF AUTHORITIES**

24 Plaintiffs brought this lawsuit against Defendant seeking redress for the
25 infringement of their copyrighted sound recordings ("Sound Recordings") under the
26 Copyright Act, 17 U.S.C. §§ 101 *et seq.* Plaintiffs allege that Defendant used the KaZaA
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1 file-sharing program on the FastTrack peer-to-peer (“P2P”) network to download
2 Plaintiffs’ Sound Recordings and to distribute them to other users of the network.

3 As demonstrated below, Defendant intentionally destroyed material evidence on
4 his computer hard drive after he had been warned, twice, of his obligation to preserve
5 such evidence. Defendant engaged in at least four separate acts of evidence destruction
6 during the course of this lawsuit. First, after receiving Plaintiffs’ Complaint, Defendant
7 intentionally uninstalled the KaZaA program and deleted all files in his KaZaA shared
8 folder. Second, after Plaintiffs requested copies of relevant music files on his computer,
9 Defendant reformatted his computer hard drive. Third, Defendant also downloaded and
10 used a file wiping program for the express purpose of permanently removing all traces of
11 KaZaA from his computer. Finally, Defendant then destroyed the logs of his file-wiping
12 activity.

13 Defendant’s intentional spoliation of computer evidence significantly prejudices
14 Plaintiffs because it puts the most relevant evidence of their claim permanently beyond
15 their reach. Although Plaintiffs have evidence of infringement by Defendant, Defendant
16 denies responsibility for downloading the Sound Recordings, for putting them in his
17 KaZaA shared folder, and for distributing them to others. Defendant claims that the
18 recordings were stored in his “My Music” folder and that they were shared with other
19 KaZaA users because of some alleged malfunction with the KaZaA program.

20 The best way to test Defendant’s denials and assertions is to examine his computer
21 hard drive. Such an examination would reveal many material facts, including what sound
22 recordings are on the computer, where they are stored, when they were put there, whether
23 they were being shared with other users, and whether there was any KaZaA malfunction.
24 Defendant’s deliberate destruction of the KaZaA program and all files that were in his
25 KaZaA shared folder has permanently put this evidence beyond Plaintiffs’ reach and
26 crippled Plaintiffs’ ability to challenge Defendant’s claims and denials. The destruction
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1 of evidence in this case was no mistake, as Defendant is a sophisticated computer user
2 with substantial knowledge regarding computer maintenance and operation.

3 The most severe sanctions are reserved for cases just like this one, where
4 Defendant knew he had an obligation to preserve computer evidence, ignored that
5 obligation, and deliberately removed critical evidence from his hard drive during the
6 course of the litigation. The imposition of any sanction short of default would reward
7 Defendant for his malfeasance and would not deter others from similar misconduct in the
8 future.

9 **BACKGROUND**

10 **I. Defendant was found sharing Plaintiffs' copyrighted works on the Internet.**

11 On January 30, 2006, at approximately 1:52 a.m. EST, MediaSentry, a company
12 retained by Plaintiffs, discovered a user at Internet Protocol ("IP") address 68.110.64.47
13 using the KaZaA file sharing program on the FastTrack P2P network to share 2,329
14 digital audio files, many of which belong to Plaintiffs, including Plaintiffs' 52 Sound
15 Recordings at issue. The individual's username was "jeepkiller@KaZaA." Pursuant to a
16 Rule 45 subpoena, Defendant's Internet Service Provider, Cox Communications, Inc.,
17 identified Defendant's ex-wife, Pamela Howell, as the individual to whom IP address
18 68.110.64.47 was registered on January 30, 2006 at approximately 1:52 a.m. EST.

19 **II. Defendant had full knowledge of his duty to preserve evidence on his 20 computer hard drive before Plaintiffs brought this lawsuit.**

21 On June 21, 2006, Plaintiffs sent a letter to Defendant's then wife, Pamela Howell,
22 advising her that she had been sued for copyright infringement but had not yet been
23 named as a defendant. (Letter of June 21, 2006 at 1, Ex. A hereto.) Defendant read this
24 letter and understood that Plaintiffs' claims concerned illegal downloading. (Howell
25 Dep. at 193:7 to 194:19, Ex. B hereto.) The June 21, 2006 letter expressly advised
26 Defendant of the duty to preserve evidence:
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1 Now that you are aware that a lawsuit has been filed against you, *there is*
2 *an obligation for you to preserve evidence* that relates to the claims against
3 you. In this case, that means, at a minimum, *the entire library of*
4 *recordings* that you have made available for distribution as well as any
5 recordings you have downloaded, *need to be maintained as evidence.*
6 *Further you should not attempt to delete the peer-to-peer programs from*
7 *your system . . .*

6 (Ex. A at 2, emphasis added.)

7 After attempting unsuccessfully to resolve the matter, Plaintiffs filed their
8 Complaint against Defendants for copyright infringement on August 16, 2006.¹ Plaintiffs
9 served the Complaint on Defendant along with a document entitled “Notice to
10 Defendant.” Defendant read this Notice, which again warned him of his duty “*to*
11 *preserve evidence*” and specifically cautioned him against “*attempt[ing] to delete the*
12 *peer-to-peer programs*” from his computer. (Howell Dep. at 137:19 to 138:13, 372:3-18,
13 Ex. B; Notice to Defendant, Ex. C hereto.) After reading these warnings, Defendant
14 understood that he was required to preserve the evidence on his computer and that such
15 evidence was important to the case. (Howell Dep. at 195:13-17, 231:24 to 232:8, 232:25
16 to 233:5, 349:19-24, Ex. B.) Defendant filed his Answer on October 4, 2006. Defendant
17 is a sophisticated computer user with substantial knowledge regarding computer
18 maintenance and operation. (*See, e.g.*, Howell Dep. at 16:7 to 27:9, 40:17 to 41:17, 127:3
19 to 128:19, 270:16 to 271:18, Ex. B.)

20 **III. With full knowledge of his duty to preserve evidence on his computer,**
21 **Defendant deliberately removed significant amounts of data from the hard**
22 **drive on several occasions while the lawsuit was pending.**

23 After receiving notice of Plaintiffs’ claims and being informed of his obligation to
24 preserve evidence, twice, Defendant intentionally uninstalled the KaZaA program from

25 ¹ Plaintiffs initially joined Pamela Howell to this lawsuit but recently learned that
26 Defendant and Pamela Howell have divorced and are in the process of seeking a
27 stipulated dismissal of their claims against her as issues concerning marital property
28 under Arizona state law are no longer present.

1 his computer. (Howell Dep. at 105:12-25, 138:11-25, 195:13-17, 347:18 to 351:25,
2 Ex. B.) Defendant also removed all of the files from his shared folder. (*Id.*) Defendant
3 removed both the KaZaA program and the files in his shared folder with full knowledge
4 of his duty to preserve evidence. (*Id.*)

5 As part of their discovery, Plaintiffs sought a forensic examination of Defendant's
6 computer hard drive and asked Defendant to produce copies of any files from his KaZaA
7 shared folder. Specifically, in written discovery dated December 26, 2006, Plaintiffs
8 asked Defendant to produce, among other things:

9 **REQUEST FOR PRODUCTION NO. 6:**

10 A complete printout of YOUR screen shots depicting any publicly
11 accessible folder on the COMPUTER, listing all SOUND RECORDINGS
12 currently stored in those folders.

13 **REQUEST FOR PRODUCTION NO. 13:**

14 An electronic copy of each of the files identified in Exhibit B to the
15 Complaint.

16 **REQUEST FOR PRODUCTION NO. 15:**

17 An electronic copy of the entire share folder utilized or created in
18 connection with any ONLINE MEDIA DISTRIBUTION SYSTEM.

19 (Pls.' Req. for Prod. Nos. 6, 13, 15, Ex. D hereto.)

20 On February 21, 2007, Plaintiffs sent Defendant a Rule 34 request to conduct a
21 forensic examination of Defendant's computer. (Pls.' Rule 34 Req., Ex. E hereto.)
22 Defendant refused this request in a pleading to the Court dated March 21, 2007. (*See*
23 Doc. No. 24.)

24 After the Court ordered Defendant to produce his computer, Plaintiffs conducted a
25 forensic examination of the hard drive. The forensic examination revealed not only that
26 Defendant had uninstalled the KaZaA program and removed all files from the shared
27 folder, but that Defendant also intentionally reinstalled the computer operating system
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1 and downloaded and used a file wiping program on the hard drive during the course of
2 the lawsuit. (Jacobson Report ¶¶ 27-29, Ex. F hereto.)

3 Specifically, the forensic examination shows that Defendant reinstalled the
4 operating system on his computer on January 2, 2007, within weeks of receiving
5 Plaintiffs' requests for copies of certain files on his computer. (Jacobson Report ¶ 27,
6 Ex. F; Pls.' Req. for Prod. Nos. 6, 13, 15, Ex D.) Reinstalling the operating system
7 causes files to be deleted from the hard drive. (Jacobson Report ¶ 27, Ex. F.)

8 In addition, Defendant downloaded the Aevita Wipe and Delete wiping software
9 ("Aevita") to his computer in November of 2006, just one month after Defendant filed his
10 Answer, and used the program for the express purpose of removing all traces of KaZaA
11 from his computer.² Defendant last used the Aevita wiping program on March 20, 2007,
12 just one month after Plaintiffs had formally requested a forensic examination of his
13 computer and just weeks before his April 4, 2007 deposition, to which Defendant said
14 that he anticipated bringing his computer. (Jacobson Report ¶ 29, Ex. F; Rule 34 Request,
15 Ex. E; Howell Dep. at 105:17-25, 353:5 to 354:20, Ex. B.) The Aevita wiping program
16 was stored in a folder titled "JH" on Defendant's hard drive. (Jacobson Report ¶ 29,
17 Ex. F.)

18 According to the Aevita website, Aevita is a file "shredder" program that allows
19 the user to target specific files and folders for permanent removal from the hard drive:
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21 Aevita Wipe & Delete is a reliable and *ultra-fast shredder* that will help
22 you *securely erase any file or folder without any chances for its*
23 *recovery* . . .the program can erase and file or folder by overwriting it
24 several times, thus *rendering it completely unrecoverable even for the*
25 *most sophisticated recovery software.*

26 ² In addition to the factual citation in this motion, Plaintiffs completed the
27 continuation of Defendant's deposition on July 31, 2008 and will supplement this motion
28 with additional factual support once they have a copy of the deposition transcript.

1 (See www.aevita.com/file/delete, Ex. G hereto, emphasis added.) Software of this type is
2 not generally used for routine computer care and maintenance. (Jacobson Report ¶ 29,
3 Ex. F.) The Aevita software creates a log of all files and/or folders erased during its use.
4 (Ex. G at 1.) Such log files were removed from Defendant’s computer, however, before
5 it was produced to Plaintiffs for inspection. (Jacobson Report ¶ 29, Ex. F.) Defendant
6 was the only person who knew about the log files and the only person who could have
7 removed them.

8 ARGUMENT AND AUTHORITIES

9 I. Standard of Review.

10 “Spoliation is the destruction or significant alteration of evidence, or the failure to
11 preserve property for another's use as evidence in pending or reasonably foreseeable
12 litigation.” *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The
13 district courts possess inherent authority to sanction litigants for the spoliation of
14 evidence. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Leon v. IDX Systems,*
15 *Inc.*, 464 F.3d 951, 959 (9th Cir. 2006). This authority has been reinforced and enhanced
16 by Rule 37, which reads, in pertinent part:

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18 If a party . . . fails to obey an order to provide or permit
19 discovery... the court in which the action is pending may
20 make such orders in regard to the failure as are just, and
among others the following:

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22 (C) An order . . . *rendering a judgment by default against*
23 *the disobedient party.*

24 F.R.C.P. 37(b)(2)(C) (emphasis added).

25 “District courts have wide latitude in controlling discovery,” and their decisions
26 regarding discovery are reviewed for an abuse of discretion. *Goddard v. United States*
27 *Dist. Court*, 528 F.3d 652, 655 (9th Cir. 2008) (citations omitted). In the Ninth Circuit

1 the imposition of sanctions is left to the broad discretion of the district courts to make
2 “evidentiary rulings conducive to the conduct of a fair and orderly trial.” *Unigard Sec.*
3 *Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *see also*
4 *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“A federal trial court has the
5 inherent discretionary power to make appropriate evidentiary rulings in response to the
6 destruction or spoliation of relevant evidence.”) Sanctions for discovery abuses include
7 judgment by default against the offending party. *Thompson v. Hous. Auth. of City of Los*
8 *Angels*, 782 F.2d 829, 831 (9th Cir. 1986).

9 Where a party has engaged in the willful destruction of evidence, courts have not
10 hesitated to impose the harshest of sanctions, including entry of judgment against the
11 offending party. *See, e.g., National Hockey League v. Metropolitan Hockey Club*, 427
12 U.S. 639, 643 (1976) (affirming trial court’s entry of default judgment against defendant
13 that failed timely to answer interrogatories as ordered by the Court). Courts in this
14 Circuit have regularly entered default judgment against defendants who engage in bad
15 faith conduct. *See Professional Seminar Consultants, Inc. v. Sino Am. Tech. Exchange*
16 *Council, Inc.*, 727 F.2d 1470, 1474 (9th Cir. 1984) (affirming entry of default judgment
17 as a sanction for the production of falsified documents); *Cabnetware, Inc. v. Sullivan*,
18 1991 U.S. Dist. LEXIS 20329, at *10-12 (E.D. Cal. July 15, 1991) (granting motion for
19 default judgment against defendant who destroyed computer source code necessary to
20 proving plaintiff’s copyright infringement case); *William T. Thompson Co. v. General*
21 *Nutrition Corp.*, 593 F. Supp. 1443, 1451 (C.D. Cal. 1984) (entering default judgment
22 where defendant’s destruction of electronic records was willful and deprived plaintiff of
23 opportunity to present critical evidence).

24 A finding of willfulness or bad faith will support the entry of a default judgment.
25 *See Professional Seminar Consultants, Inc.*, 727 F.2d at 1474. “A party’s destruction of
26 evidence qualifies as willful spoliation if the party has some ‘notice that the documents
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1 were *potentially* relevant to the litigation before they were destroyed.” *Leon*, 464 F.3d
2 at 959 (citation omitted). Although courts consider a number of factors in determining
3 whether to impose terminating sanctions against a party, the most significant are the
4 presence of bad faith, the prejudice to the other party, and the availability of lesser
5 sanctions. *See Leon*, 464 F.3d at 958-61

6 **II. Entry of default is the only appropriate sanction for Defendant’s deliberate**
7 **and bad faith destruction of material evidence.**

8 Defendant’s bad faith destruction of computer evidence calls for the exercise of
9 this Court’s inherent authority to enter default judgment against him on the question of
10 liability for copyright infringement. Defendant destroyed computer evidence necessary
11 to Plaintiffs’ case after he was put on notice of his duty to preserve such evidence. He
12 also engaged in further destruction of evidence after Plaintiffs requested that he make his
13 computer available for forensic examination, and again only days before his deposition to
14 which he anticipated brining his computer for examination by Plaintiffs.

15 **A. Defendant acted in bad faith.**

16 The intentional destruction of evidence after knowledge of the obligation to
17 preserve such evidence constitutes bad faith. *See Leon*, 464 F.3d at 953 (affirming a
18 finding of bad faith and willfulness where a party knew he was under a duty to preserve
19 all data on his laptop, but intentionally deleted many files and then wrote a program to
20 write over deleted documents). Likewise, the “failure to preserve property for another’s
21 use as evidence” also constitutes spoliation. *Zubulake v. UBS Warburg LLC*, 229 F.R.D.
22 422, 430 (S.D.N.Y. 2004).

23 In *Arista Records LLC v. Tschirhart*, 241 F.R.D. 462 (W.D. Tex. 2006), a P2P
24 infringement case substantially similar to this one, the court granted the plaintiffs’ motion
25 for terminating sanctions against the defendant for the deliberate destruction of computer
26 evidence. In reaching its decision, the court noted that “the best proof” of online
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1 copyright infringement “would be to examine [defendant’s] computer hard drive which
2 would show, among other things, the existence of any P2P file-sharing programs and the
3 presence of plaintiffs’ copyrighted sound recordings.” *Id.* at 465. By removing files
4 from the computer, the defendant’s actions ensured that “evidence [that] goes to the very
5 heart of plaintiffs’ case” was made permanently irretrievable by Defendant. *Id.* The
6 court held that, “[b]y destroying the best evidence relating to the central issue in the case,
7 defendant has inflicted the ultimate prejudice upon plaintiffs” and “no lesser sanction will
8 adequately punish this behavior and adequately deter its repetition in other cases.” *Id.* at
9 465-466.

10 Plaintiffs submit that this case is on all fours with *Tschirhart*. Defendant here
11 intentionally destroyed material computer evidence after he knew he had an obligation to
12 preserve such evidence. Not only did Defendant delete the KaZaA program and the
13 contents of his shared folder, he then reinstalled his operating system and used an “*ultra-*
14 *fast shredder*” specifically designed to “*securely erase any file or folder without any*
15 *chances for its recovery.*” Defendant downloaded the Aveita wiping program to his
16 computer just one month after he filed his Answer, and used it on the computer after
17 Plaintiffs had made a formal request to inspect the hard drive. Not only did Defendant
18 use this software to destroy files, but he then removed the log files that would have
19 shown what files were deleted and when. Thus, not only did Defendant permanently
20 remove a significant amount of critical evidence from his computer with full knowledge
21 of his duty to preserve such evidence, but he also tried to covered up his own tracks.

22 In an attempt to excuse his intentional destruction of material evidence, Defendant
23 claims that he preserved relevant files by copying the contents of his shared folder to 10
24 DVDs, which he later produced to Plaintiffs. (Howell Depo. at 105:19-25; 349:19 to
25 350:15, Ex. B.) The forensic evidence, however, shows otherwise. First, the DVDs
26 produced by Defendant were not created as part of any ordinary Windows back up
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1 process, and contain no data regarding the original location of the files on the hard drive
2 or when the DVDs were made. (Jacobson Rep. ¶ 39, Ex. F.) As a sophisticated
3 computer user, Defendant knew that merely copying files would not preserve evidence.
4 Defendant knows what a true back up copy is. (Howell Dep. at 387:4 to 388:8, Ex. B.)
5 The DVDs he produced are not true back-up copies. (Jacobson Report ¶ 39, Ex. F.)
6 Second, the DVDs are not copies of Defendant's shared folder. They contain none of the
7 music files that were observed by MediaSentry on January 30, 2006. They do contain
8 pornography but the pornographic files on the DVDs produced by Defendant do not all
9 match the pornographic files that MediaSentry observed on January 30, 2006. (Jacobson
10 Report ¶ 37-38.) Thus, rather than exculpating him from responsibility, Defendant's
11 explanation and the DVDs he produced only provide further evidence of his bad faith.

12 **B. Defendant's destruction of evidence substantially prejudices Plaintiffs.**

13 Prejudice exists where the actions of one party impair the other's ability to go to
14 trial or threatens to interfere with the rightful decision of the case. *See State Farm Fire &*
15 *Cas. Co.*, 523 F. Supp. 2d at 997 (citation omitted). In the Ninth Circuit, "prejudice" is
16 an optional consideration in deciding whether default judgment is appropriate. *Halaco*
17 *Engineering Co. v. Costle*, 843 F.2d 376, 382 (9th Cir. 1988). A defendant's destruction
18 of relevant evidence is prejudicial to the plaintiff, especially where, as here, "issues of
19 intent and conduct have been raised on both sides and where conflicting oral testimony
20 may be offered by both parties." *William T. Thompson*, 593 F. Supp. at 1451.

21 Here, it is undisputed that Defendant had notice of the importance of the
22 information on his computer hard drive. The deliberate destruction of computer evidence
23 after such notice, by itself, compels the conclusion that such evidence supported
24 Plaintiffs' case. *See Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557
25 (N.D. Cal. 1987) ("Where one party wrongfully denies another the evidence necessary to
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1 establish a fact in dispute, the court must draw the strongest allowable inferences in favor
2 of the aggrieved party”).

3 Moreover, evidence on Defendant’s computer hard drive is critical where
4 Plaintiffs have evidence of infringing conduct by Defendant but Defendant denies
5 Plaintiffs’ allegations. Defendant claims that the music files in question were not in his
6 shared folder, that they were in his “My Music” folder, and that they were being shared
7 as a result of some KaZaA malfunction. The best way to test Defendant’s denials is by
8 looking at the contents of his computer hard drive, which, in this case, would ordinarily
9 show the KaZaA P2P program, the contents of the shared folder, and evidence regarding
10 when such files were placed in the shared folder. *See Tschirhart*, 241 F.R.D. at 465.
11 (*See also* Jacobson Report ¶ 34 and Exhibit C thereto, Ex. F, showing forensic evidence
12 of file creation dates for Defendant’s “My Music” folder.) Defendant, however, has
13 made that information permanently irretrievable and impossible to investigate or
14 examine. Defendant’s destruction of this evidence severely and irreparably prejudices
15 Plaintiffs’ ability to prove their case and to challenge Defendant’s claims and denials.
16 *See Tschirhart*, 241 F.R.D. at 465 (“By destroying the best evidence relating to the
17 central issue in the case, defendant has inflicted the ultimate prejudice upon Plaintiffs.”).

18 As a consequence of Defendant’s intentional removal of computer data, Plaintiffs
19 now must rely on what little information remains available on the hard drive. This
20 includes evidence that the files being shared from Defendant’s computer on January 30,
21 2006 were not in Defendant’s “My Music” folder on that date, and that the KaZaA shared
22 folder on Defendant’s computer did, in fact, contain .MP3 files. (Jacobson Report at
23 ¶¶ 33, 35.) This evidence flatly, and conclusively, contradicts Defendant’s bald assertion
24 that any .MP3 files being shared from his computer on January 30, 2006 were stored in
25 his “My Music” folder. That Plaintiffs are able to use what little information remains on
26 the hard drive to disprove this assertion by Defendant further demonstrates that the
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1 evidence Defendant targeted for destruction would have supported Plaintiffs' claims of
2 copyright infringement against him.

3 **C. Any sanction less than default would not be appropriate under the**
4 **circumstances.**

5 The intentional destruction of material evidence strikes at the heart of the judicial
6 process and warrants the harshest sanctions. Indeed, the most severe sanctions are
7 reserved for cases just like this one, where Defendant knew he had an obligation to
8 preserve computer evidence, ignored that obligation, and deliberately removed evidence
9 from his hard drive on several occasions before producing his computer to Plaintiffs for
10 inspection. *See William T. Thompson*, 593 F. Supp. at 1451 (finding default judgment to
11 be the only appropriate sanction where destruction of electronic records deprived plaintiff
12 "of access to the objective evidence it needed to build its case"); *Cabnetware*, 1991 U.S.
13 Dist. LEXIS 20329, at *10-12 (default judgment only appropriate sanction for
14 destruction of computer source code necessary to proving plaintiff's copyright
15 infringement case); *Tschirhart*, 241 F.R.D at 466 (holding that no sanction less than
16 default judgment would "adequately punish this behavior and adequately deter its
17 repetition in other cases").

18 Defendant in this case destroyed critical evidence after he was made aware of his
19 obligation to preserve evidence, and again after Plaintiffs requested that he produce his
20 computer to Plaintiffs for forensic inspection. To accomplish his objective, Defendant
21 used a program specifically designed to "*erase any file or folder without any chances*
22 *for its recovery.*" (Ex. G.) Such destruction of evidence makes a mockery of our judicial
23 system and should not be tolerated. The only way to deter such conduct is with the
24 harshest of sanctions. *See Computer Assoc. Int'l, Inc. v. American Fundware, Inc.*, 133
25 F.R.D. 166, 170 (D. Colo. 1990) ("Destruction of evidence cannot be countenanced in a
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1 justice system whose goal is to find the truth through honest and orderly production of
2 evidence under established discovery rules.”).

3 Moreover, a default sanction is required in this case not only to punish Defendant,
4 but also to deter others from engaging in the same type of inappropriate behavior. *See*
5 *National Hockey League*, 427 U.S. at 643; *see also Tschirhart*, 241 F.R.D. at 466 (“One
6 who anticipates that compliance with discovery rules and the resulting production of
7 damning evidence will produce an adverse judgment will not likely be deterred from
8 destroying that decisive evidence by any sanction less than the judgment she is thus
9 tempted to evade.”). Plaintiffs face massive infringement of their copyrights through
10 illegal online file-sharing and have brought this lawsuit and hundreds of others like it in
11 an effort to stem the tide of online piracy. The imposition of a lesser sanction would not
12 only reward Defendant for his misconduct in this case, but would encourage thousands of
13 other defendants to engage in the same misbehavior.

14 **D. In the alternative, Plaintiffs are entitled to a presumption that**
15 **Defendant used KaZaA to download and distribute Plaintiffs’ Sound**
16 **Recordings illegally.**

17 The spoliation of evidence raises a presumption that the destroyed evidence goes
18 to the merits of the case, and further, that such evidence was adverse to the party that
19 destroyed it. *Phoceeene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806
20 (9th Cir. 1982) (citations omitted).

21 Here, Defendant deliberately removed material information from his computer on
22 multiple occasions during the course of the lawsuit despite knowledge of his obligation to
23 preserve such evidence. Indeed, at the same time that Defendant was professing his
24 innocence to Plaintiffs, Defendant was intentionally destroying the very evidence that
25 would have allowed Plaintiffs to test his claims. A wealth of material evidence is now
26 gone because of Defendant, including evidence regarding the KaZaA program, the
27 location of the KaZaA program and the KaZaA shared folder on Defendant’s hard drive,
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1 the specific music and other files stored in the KaZaA shared folder, and when such files
2 were placed in the KaZaA shared folder. In the event the Court does not impose
3 terminating sanctions against Defendant for such conduct, Plaintiffs should be entitled, at
4 a minimum, to a presumption that Defendant used KaZaA to download Plaintiffs' Sound
5 Recordings to his shared folder, and to distribute Plaintiffs' Sound Recordings from his
6 shared folder to other users of the P2P network.

7
8 **CONCLUSION**

9 For all of these reasons, Plaintiffs request entry of default against Defendant on the
10 question of his liability for copyright infringement. Plaintiffs further request leave to
11 brief the Court concerning statutory damages, injunctive relief, and costs in the event the
12 Court orders terminating sanctions.

13 As an alternative to terminating sanctions, Plaintiffs request a presumption that
14 Defendant used KaZaA to download Plaintiffs' Sound Recordings to his shared folder,
15 and to distribute Plaintiffs' Sound Recordings to his shared folder to other users of the
16 P2P network.

17 Plaintiffs request such other relief as the Court deems just and necessary.

18 Respectfully submitted this 31st day of July 2008.

19 HOLME ROBERTS & OWEN, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on 31st July, 2008, I electronically transmitted the attached Notice of Appearance to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Fred von Lohmann
Electronic Frontier Foundation
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