



six songs were downloaded, and that there is no competent summary judgment evidence to establish any of the remaining thirty-one claims of infringement.

In the August 7 Order, the Court found that with regard to damages, a fact issue exists as to whether Defendant was an innocent infringer.

Plaintiffs seek reconsideration of that portion of the August 7 Order, arguing that under 17 U.S.C. §402(d) if their notice of copyright appeared on the “‘published phonorecord’ to which a defendant in a copyright suit had access, then no weight shall be given to such a defendant’s interposition of a defense based upon innocent infringement of actual or statutory damages.” Further, Plaintiffs argue that they are entitled to the statutory \$750 per work and that no fact issues remain and judgment should be entered in their favor as a matter of law.

### **Factual Background**

A complete background was provided in the August 7 Order. This Order will only repeat facts relevant to the motions for reconsideration.

On June 5, 2004, Plaintiffs’ investigator, MediaSentry, detected an individual with the username “whiterney@fileshare” at Internet Protocol (“IP”) address 24.174.166.204 using an online file sharing program to distribute Plaintiffs’ copyrighted sound recordings. The individual was distributing 544 digital audio files from a “shared” folder on the computer to other individuals on the file sharing network. MediaSentry determined that Time Warner Cable was the internet provider that had given this IP address to one of its customers, Steve Harper. Subsequent conversations between Plaintiffs and Steve Harper determined that Defendant Whitney Harper was allegedly responsible for downloading audio files onto the computer.

As part of its investigation on June 5, 2004, MediaSentry downloaded complete copies of the

six audio files listed in Exhibit A. In addition, MediaSentry initiated downloads of all 544 audio files in the "shared" folder to ensure that actual audio files existed in all cases. All files were downloaded through the iMesh file sharing program. Defendant stated that she did not remember using iMesh on the computer; however, she did admit that she used KaZaA, a file sharing program that uses Fasttrack, the same peer-to-peer network as iMesh. MediaSentry captured metadata that showed the audio files listed in Exhibit A and Schedule 1 among the files available for download to other internet users from a shared folder on Defendant's computer.

On March 19, 2005, Windows was reinstalled on Defendant's computer. The reinstallation resulted in most of the 544 files discovered in the original investigation being overwritten; however, some remnants of these files remained after the reinstallation was completed. Plaintiffs completed a forensic investigation of Defendant's computer, which revealed that iMesh was installed on the computer and accessed through the username "whiterney."

The forensic investigation also found file sharing programs KaZaA and LimeWire installed on the computer. KaZaA had been removed from the computer prior to the March 19 reinstallation of Windows. LimeWire was installed on the computer in July 2005. The recordings contained in Exhibit C are audio files that were in one of the three shared folders used with the LimeWire file sharing program.

Defendant admitted that the Recordings may have been among audio files that she listened to on the computer. She testified that she did not copy these files from compact discs that she owned. During her deposition, Defendant testified that she used KaZaA to listen to sound recordings but did not know that she was downloading or distributing them. Defendant stated that she had "no reason to doubt" that her actions were "100% free and 100% legal" and that she believed programs like

KaZaA “to be similar to online radio stations.”

### **Infringement of Copyrights**

With regard to the recordings contained in Schedule 1, Plaintiffs introduced a declaration from Elizabeth Hardwick (“Hardwick”), a Project Manager for MediaSentry. In the declaration, Hardwick declares that a certain exhibit “is a true and correct copy of a compilation of screen shots captured by MediaSentry . . . showing the list of 544 audio files that this computer was distributing to others for download.”<sup>1</sup> Based on the summary judgment evidence, the Court found that Plaintiffs were entitled to summary judgment on sixteen (16) of the works listed in Schedule 1.

Regarding the recordings listed in Exhibit C, based on the summary judgment evidence, the Court found that Plaintiffs were entitled to summary judgment on fifteen (15) of the recordings from Exhibit C.

Defendant argues<sup>2</sup> that her allegedly “making available” the 31 songs in a shared file and allowing those files to be accessed by others does not constitute infringement. Relying upon *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp.2d 153 (D. Mass. 2008), Defendant argues that merely making copyrighted works available to the public is not enough evidence for summary judgment purposes to establish that an unauthorized copy of the works actually changed hands. The

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<sup>1</sup>Defendant did not object to the admissibility of Hardwick’s declaration, and Defendant did not bring any credible summary judgment evidence refuting Hardwick’s contention that all of the files listed in Exhibit B were available for download from her computer.

<sup>2</sup>In her motion for reconsideration Defendant for the first time raises objections to Exhibits A-D and N-T of Plaintiffs’ motion for summary judgment. Those objections should have been raised in response to the motion for summary judgment and are untimely. In addition, the objections to Exhibits N - T are without merit. These exhibits are copies of unpublished opinions issued by other federal courts. They may be non-binding on this court, but they are not objectionable. The objections are overruled.

Court in *London-Sire* recognized that there was a split of authority on this issue.<sup>3</sup> Although the Court in *London-Sire* acknowledged that “the statutory definition of publication can include offers to distribute” and that “sharing music files on a peer-to-peer network does, at least arguably, constitute an offer to distribute them,” it found that “publication” and “distribution” are not identical. *London-Sire*, 542 F. Supp. 2d at 168-169. The Court, however, in ruling on motions to quash subpoenas to internet service providers seeking the identities of certain IP addresses, went on to state the following:

But that does not mean that the plaintiffs' pleadings and evidence are insufficient. The Court can draw from the Complaint and the current record a reasonable inference in the plaintiffs' favor—that where the defendant has completed all the necessary steps for a public distribution, a reasonable fact-finder may infer that the distribution actually took place. As in *Hotaling*, the defendants have completed the necessary steps for distribution, albeit electronic: Per the plaintiffs' pleadings, each individual Doe defendant connected to the peer-to-peer network in such a way as to allow the public to make copies of the plaintiffs' copyrighted recordings. See Compl. at 5 (docket no. 07-cv-10834, document # 1). Through their investigator, the plaintiffs have produced evidence that the files were, in fact, available for download. They have also alleged that sound recordings are illegally copied on a large scale, supporting the inference that the defendants participated in the peer-to-peer network with the intent that other users could download from the defendants copies of the plaintiffs' copyrighted material. See Linares Decl. at 3-4, Ex. A to Pl. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5). At least at this stage of the proceedings, that is enough. The plaintiffs have pled an actual distribution and provided some concrete evidence to support their allegation.

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<sup>3</sup>Compare *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir.1997) (holding that making copyrighted material available is sufficient to constitute a distribution), and *Arista Records LLC v. Greubel*, 453 F. Supp.2d 961, 969-70 (N.D. Tex. 2006) (citing and following *Hotaling*), and *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA051, 2006 WL 2844415, at \*3-\*4 (W.D. Tex. July 17, 2006) (same), with *In re Napster, Inc. Copyright Litig.*, 377 F. Supp.2d 796, 802-05 (N.D. Cal. 2005) (criticizing *Hotaling* as being “contrary to the weight of [other] authorities” and “inconsistent with the text and legislative history of the Copyright Act of 1976”), and *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir.1993) (stating that infringement of the distribution right requires the actual dissemination of copies or phonorecords).

*London-Sire*, 542 F. Supp. 2d at 169. In this case, however, we are in the summary judgment context.

First, this Court notes that when granting the summary judgment initially, the Court reviewed Plaintiffs' allegations and summary judgment evidence that Defendant downloaded the songs in question, they were placed in a shared folder, and that she made the songs available to others.

Defendant's motion for reconsideration does not challenge Plaintiffs' allegations and evidence that Defendant did not copy any songs from properly purchased CDs onto her computer, and that she obtained the songs through the internet. Defendant makes no argument that she paid for any of these songs. Accordingly, the Court need not reconsider its previous ruling.

To the extent that the Court misconstrued Plaintiffs' motion for summary judgment and Plaintiffs only sought judgment on the basis of the "making available" theory, the Court rejects Defendant's argument that merely making copyrighted works available to the public is not enough evidence for summary judgment purposes to establish infringement.

Acknowledging that the Fifth Circuit has not yet ruled on this issue, this Court will follow those other courts that have found a "make available" right in 17 U.S.C. Section 106(3).<sup>4</sup>

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<sup>4</sup>*See, e.g., A & M Records, Inc. v. Napster Inc.*, 239 F.3d 1004, 1014 (9th Cir.2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."); *Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551 (S.D. Tex. 2008) ("Courts have concluded that availing unauthorized copies of sound recordings for download using an online file-sharing system (such as a peer-to-peer network, as is the case here) constitutes an offer to distribute those works, thereby violating a copyright owner's exclusive right to distribution. Stated differently, making copyrighted works available for download via a peer-to-peer network contemplates 'further distribution,' and thus constitutes a violation of the copyright owner's exclusive 'distribution' right under 17 U.S.C. § 106(3)... On these facts, it is self-evident that Defendant's actions in placing Plaintiffs' Copyrighted Recordings in a shared folder accessible to numerous other persons on KaZaA constituted a "distribution" for the

Defendant's motion for reconsideration is denied (docket no. 61).

### Damages

The damages provision of the Copyright Act provides that a plaintiff may elect to seek minimum damages of \$750 per work. 17 U.S.C. § 504(c)(1). However, it also provides that "where the infringer . . . was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200." 17 U.S.C. § 504(c)(2). The defendant has the burden to prove the lack of intent necessary for innocent infringement. *Id.*

As evidence of her "innocent" infringement, Defendant presents a signed affidavit stating that before the lawsuit, she "had no knowledge or understanding of file trading, online distribution networks or copyright infringement." In addition, Defendant stated that "Kazaa and similar products did not inform me that the materials available through their service were stolen or abused copyrighted material and I had no way of learning this information prior to this lawsuit."

Plaintiffs contend that by complying with 17 U.S.C. § 402 and placing notices on each of the

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purposes of Plaintiffs' copyright infringement claim against Defendant. Distributing copyrighted sound recordings without authorization through a peer-to-peer network such as KaZaA is a 'distribution' prohibited by the [C]opyright [A]ct."); *Capitol Records, Inc. v. Koyate*, 2008 WL 2857237 (N.D. Ind. 2008) ("Defendant acknowledges that Plaintiffs have never granted him the authority to copy, download, or make available Plaintiffs' nine sound recordings. Therefore, Defendant violated Plaintiffs' exclusive rights to reproduce and distribute the nine sound recordings as listed in Exhibit A, pursuant to 17 U.S.C. § 106(1), (3)."); *Atlantic Recording Corp. v. Howell*, 2007 WL 2409549 (D. Ariz. Aug. 20, 2007); *Motown Record Co., LP v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at \*3 n. 38 (E.D. Pa. Feb. 16, 2007) ("While neither the United States Supreme Court nor the Third Circuit Court of Appeals has confirmed a copyright holder's exclusive right to make the work available, the Court is convinced that 17 U.S.C. § 106 encompasses such a right . . ."); *Arista Records LLC v. Greubel*, 453 F. Supp.2d 961 (N.D. Tex. 2006) (discussing numerous cases wherein courts have found that making copyrighted works available to others violated the exclusive right of distribution).

containers and on the surface of the compact discs of the Recordings, they have provided notice such that Defendant could have learned that the Recordings were copyrighted.

The Copyright Act provides that “[I]f a notice of copyright . . . appears on the published phonorecord . . . to which a defendant had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement” unless the infringement was believed to be fair use. 17 U.S.C. § 402(d). Although the Fifth Circuit has not addressed this issue directly, the Seventh Circuit has found that an innocent infringer defense did not apply in a case where the defendant “readily could have learned, had she inquired, that the music was under copyright.” *BMG Music v. Gonzales*, 430 F.3d 888, 892 (7th Cir. 2005); *see also Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551 (S.D. Tex. Mar. 12, 2008) (rejecting innocent infringer defense because Anderson knowingly placed the songs into a shared folder that allowed for peer-to-peer sharing). As for the argument that one need only have access to some CD and see that the recording is subject to copyright, does little to establish that, as a matter of law, that an individual knew that she was accessing copyright material from an entity that did not have permission to distribute such material.

The Court remains convinced that a genuine issue of material fact is present. Although as stated above, Defendant infringed on Plaintiff’s copyright, Defendant claims that she believed using KaZaA and similar products to be akin to listening to radio over the internet and did not know that the Recordings were being either downloaded or distributed. At the summary judgment stage, all factual disputes must be construed in the light most favorable to the non-moving party - in this case, Defendant. Plaintiffs have not introduced any evidence to contradict that Defendant did not have an understanding of the nature of file-sharing programs and copyright sophisticated enough to have



reason to know that her actions infringed Plaintiffs' copyrights. Therefore, the Court finds that a fact issue exists as to whether Defendant was an innocent infringer.

**Conclusion**

Plaintiffs' motion for reconsideration is denied (docket no. 60).

Defendant's motion for reconsideration is denied (docket no. 61).

SIGNED this 16<sup>th</sup> day of September, 2008.



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XAVIER RODRIGUEZ

UNITED STATES DISTRICT JUDGE