

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELEKTRA ENTERTAINMENT GROUP INC., a : x
 Delaware corporation; VIRGIN RECORDS :
 AMERICA, INC., a California corporation; UMG :
 RECORDINGS, INC., a Delaware corporation; : Civil Action No.: 06 Civ. 11520 (SCR)
 BMG MUSIC, a New York general partnership; :
 and SONY BMG MUSIC ENTERTAINMENT, a :
 Delaware general partnership, :

 Plaintiffs, :

 -against- :

 MICHELLE SANTANGELO and ROBERT :
 SANTANGELO, JR., :

 Defendants. :
 :
 :
 x

**PLAINTIFFS' MEMORANDUM
OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Dated: December 22, 2008

Respectfully submitted,

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TABLE OF CONTENTS

BACKGROUND 1

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 3

ARGUMENT 8

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT UNDER RULE 56(c) BECAUSE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT. 8

 A. Standard of Review..... 8

 B. Summary Judgment Is Appropriate Because There Are No Issues of Material Fact Concerning Defendants' Infringement. 9

II. PLAINTIFFS OWN THE COPYRIGHTS TO THE COPYRIGHTED RECORDINGS AT ISSUE. 11

III. DEFENDANTS VIOLATED PLAINTIFFS' COPYRIGHTS BY REPRODUCING THE COPYRIGHTED RECORDINGS WITHOUT AUTHORIZATION. 11

IV. DEFENDANTS VIOLATED PLAINTIFFS' COPYRIGHTS BY DISTRIBUTING ALL 40 OF THE COPYRIGHTED RECORDINGS WITHOUT AUTHORIZATION. 13

 A. Defendants Distributed The Copyrighted Recordings In Violation Of The Copyright Act..... 14

 B. Defendants Also Made Plaintiffs' Copyrighted Recordings Available To Others On The File Sharing Network In Violation Of The Copyright Act..... 15

V. PLAINTIFFS ARE ENTITLED TO STATUTORY DAMAGES RESULTING FROM DEFENDANT'S COPYRIGHT INFRINGEMENT. 18

VI. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION UNDER SECTION 502 OF THE COPYRIGHT ACT 20

VII. PLAINTIFFS ARE ENTITLED TO COSTS OF SUIT 23

CONCLUSION..... 24

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).....11, 16, 18, 21

A&N Music Corp. v. Venezia, 733 F. Supp. 955 (E.D. Penn. 1990)23

Advance Magazine Publishers, Inc. v. Leach, 466 F. Supp. 2d 628 (D. Md. 2006).....17

In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003).....11, 14

Anderson, 2008 U.S. Dist. LEXIS 5365418

Arista Records, Inc. v. Beker Enters., 298 F. Supp. 2d 1310 (S.D. Fla. 2003).....21

Atari Inc. v. North American Philips Consumer Electronics Corp.,
672 F.2d 607 (7th Cir. 1982)21

Atlantic Recording Corp. v. Anderson, 2008 U.S. Dist. LEXIS 53654
(S.D. Tex. Mar. 12, 2008).....16

Atlantic Recording Corp. v. Burgess, No. 05CV3182 (S.D.N.Y. Feb. 15, 2006)20

Atlantic Recording Corp. v. Cappiello, No. 04CV4645 (DGT) (E.D.N.Y. Feb. 11, 2005)20

Autoskill Inc. v. Nat'l. Educ. Support Sys., 994 F.2d 1476 (10th Cir. 1993)20

BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005)11, 13, 16, 19, 22

CBS Broad., Inc. v. EchoStar Communs., Corp., 276 F. Supp. 2d 1237 (S.D. Fla. 2003)21

Cable/Home Commc'n Corp. v. Network Prods, Inc., 902 F.2d 829 (11th Cir. 1990).....18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)8

Chappell & Co. v. Frankel, 285 F. Supp. 798 (S.D.N.Y. 1968).....10

Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000).....9

Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc.,
259 F.3d 1186 (9th Cir. 2001)18, 19

Cross Keys Publ. Co. v. Wee, Inc., 921 F. Supp. 479 (W.D. Mich. 1995)23

Dister v. Continental Group, Inc., , 859 F.2d 1108 (2d Cir. 1988)8

Doro v. Sheet Metal Workers' Int'l Ass'n, 498 F.3d 152 (2d Cir. 2007)8

Elektra Entertainment Group Inc. v. Santangelo, Case No. 05-CV-2414 (CM).....2

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).....9

Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co., 807 F.2d 1110 (2d Cir. 1986).....10, 18

Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14 (2d Cir. N.Y. 1995).....13

Hamil Am., Inc. v. GFI, Inc., 193 F.3d 92 (2d Cir. 1999).....11

Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997).....16

Interscope Records v. Barbosa, Civ. No. 05-cv-5864 (DGT/RML)13

Lipton v. Nature Co., 71 F.3d 464 (2d Cir. 1995).....9

London-Sire Records Inc. v. Does 1-100, Case No. 04CV7735 (LAP).....2

MGM Studios Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).....12

Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008)13

Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. & N. W. Nexus, Inc., 983 F. Supp. 1167 (N.D. Ill. 1997)12

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).....15

Maverick Recording Co. v. Harper, Case No. 5:07-cv-026-XR (W.D. Tex. Aug. 7, 2008).....16

Maverick Recording Company v. De Rosa, Civ. No. 1:05-cv-5861 (DGT/RML)13

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 545 U.S. 913 (2005)1

Miroglio S.P.A. v. Conway Stores, Inc., 2008 U.S. Dist. LEXIS 81755 (S.D.N.Y. Oct. 15, 2008)13

Morley Music Co. v. Caf Continental, Inc., 777 F. Supp. 1579 (S.D. Fla. 1991).....21

Motown Record Co. v. Armendariz, 2005 U.S. Dist. LEXIS 32045 (W.D. Tex. Sept. 22, 2005).....20

Motown Record Co. v. DePietro, 2007 U.S. Dist. LEXIS 11626 (E.D. Pa. 2007).....16

New York Times Co. v. Tasini, 533 U.S. 483 (2001).....16

Ortiz-Gonzalez v. Fonovisa, 277 F.3d 59 (1st Cir. 2002).....20

Pacific & Southern Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984)20

Perfect 10, Inc. v. Google, Inc., 487 F.3d 701 (9th Cir. 2007).....14, 15, 18

Pinkham v. Sara Lee Corp., 983 F.2d 824 (8th Cir. 1992).....10

Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996).....23

RCA Records v. All-Fast Sys. Inc., 594 F. Supp. 335 (S.D.N.Y. 1984).....14

Reeve Music Co. v. Crest Records, Inc., 285 F.2d 546 (2d Cir. 1960).....10

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)21

Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120 (3d Cir. 1998).....15

Scotto v. Almenas, 143 F.3d 105 (2d Cir. 1998).....9

Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923 (N.D. Cal. 1996).....12

Sony BMG Music Entertainment v. Armas, 2005 U.S. Dist. LEXIS 11236
(D. Or. Apr. 18, 2005).....20

Sony BMG Music Entertainment v. Bell, Case No. A-04-CA-1055-SS
(W.D. Tex. June 6, 2006).....19

Sony BMG v. Carlin, No. 5:05-CV-00918-GLS-GHL (N.D.N.Y. Feb. 15, 2006).....20

Sony Music Corp. v. Scott, No. 03-CV-6886-BJS (S.D.N.Y. Feb. 18, 2005).....19

Sony Music Entertainment, Inc. v. Global Arts Productions, 45 F. Supp. 2d 1345
(S.D. Fla. 1999).....22

Sony Pictures Home Entm't, Inc. v. Lott, 471 F. Supp. 2d 716 (N.D. Tex. 2007).....12, 13, 14, 16

Ted Browne Music Co. v. Fowler, 290 F. 751 (2d Cir. 1923)10

Warner Bros. Records, Inc. v. Payne, 2006 U.S. Dist. LEXIS 65765
(W.D. Tex. July 17, 2006)14

STATUTES

17 U.S.C. § 106(1)8, 9, 11, 13, 14, 15
17 U.S.C. § 502.....8
17 U.S.C. § 502(a)20
17 U.S.C. § 503(b)21
17 U.S.C. § 504(c)8
17 U.S.C. § 504(c)(1).....18, 19

SECONDARY SOURCES

4-14 Nimmer § 14.0620
4 Nimmer § 13.08, at 13-27910
2 Nimmer § 8.08 [A][1], at 8-115.....12

Plaintiffs respectfully move under Rule 56(c) for summary judgment against Defendants Michelle Santangelo and Robert Santangelo, Jr. (collectively, "Defendants") on the grounds that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law. As demonstrated below, Defendant Robert Santangelo, Jr. downloaded and installed a peer-to-peer file sharing program on the Santangelo computer and both Defendants used a peer-to-peer file sharing program to download (copy) and upload (distribute) Plaintiffs' copyrighted sound recordings to other peer-to-peer users over the Internet. Although Defendants have infringed potentially hundreds of Plaintiffs' copyrighted sound recordings, Plaintiffs request an order finding that Defendants have infringed 40 of the copyrighted sound recordings ("Copyrighted Recordings") listed on Exhibit A to the Complaint (Doc. No. 1), awarding Plaintiffs minimum statutory damages of \$750 per infringed work for a total of \$30,000, and enjoining Defendants from further infringing Plaintiffs' copyrights.

BACKGROUND

Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet, through online media distribution systems (or "file sharing programs") such as KaZaA, iMesh, and LimeWire. The United States Supreme Court has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005). As a direct result of piracy over these file sharing networks, Plaintiffs have sustained and continue to sustain devastating financial losses and layoffs of thousands of employees in the music industry.

On April 11, 2004 at 12:15 a.m. EDT, a third party retained by Plaintiffs, MediaSentry, detected someone with the username "laxattack857@fileshare," at Internet Protocol ("IP")

address 24.45.58.150, using the iMesh online file sharing program on the FastTrack file sharing network to distribute Plaintiffs' copyrighted sound recordings. Approximately 1322 digital audio files were being distributed from a "shared" folder on this computer to millions of other users on the network. A significant number of these 1322 audio files were Plaintiffs' copyrighted sound recordings, including popular recordings by well-known artists, including Mariah Carey, Janet Jackson, and Guns N Roses. Using publicly available information regarding the assignment of IP addresses, MediaSentry determined that Cablevision Systems Corp. ("Cablevision") was the Internet Service Provider that had assigned IP address 24.45.58.150 to one of its customers on April 11, 2004.

With this information, Plaintiffs filed a "Doe" lawsuit and obtained an order for expedited discovery to determine the identity of the account holder. *London-Sire Records Inc. v. Does 1-100*, Case No. 04CV7735(LAP). In response to Plaintiffs' Rule 45 subpoena, Cablevision identified Patricia Santangelo as the person responsible for IP address 24.45.58.150 at the time of infringement. After attempting unsuccessfully to resolve the matter, Plaintiffs filed a lawsuit against Ms. Santangelo. *Elektra Entertainment Group Inc. v. Santangelo*, Case No. 05-CV-2414 (CM) (MDF). Ms. Santangelo denied any knowledge of the infringement. During the course of discovery, however, it became clear that her children, Defendants Michelle Santangelo and Robert Santangelo, Jr., and a neighbor friend of Defendant Robert Santangelo, Jr., Matthew Seckler, were responsible for the infringement. Based on this new information, Plaintiffs dismissed their lawsuit against Ms. Santangelo. Plaintiffs then tried to resolve the matter with the direct infringers. Mr. Seckler admitted to having engaged in the infringing behavior along with Defendant Robert Santangelo, Jr., and Mr. Seckler promptly settled the claims asserted against him. Plaintiffs, however, were not able to resolve their claims with Defendants Michelle

Santangelo and Robert Santangelo, Jr. Plaintiffs now move for summary judgment against both of them.

STATEMENT OF FACTS

Pursuant to Local Civil Rule 56.1(a), Plaintiffs have contemporaneously filed a Statement of Material Facts on Motion for Summary Judgment (“SOF”). The SOF contains references to relevant exhibits, copies of which are attached to Plaintiffs’ Memorandum. A version of the SOF without factual references appears below.

I. Defendants Used An Online Media Distribution System To Download And Distribute Plaintiffs’ Copyrighted Recordings.

1. On April 11, 2004 at 12:15 a.m. EDT, MediaSentry, detected an individual with the username “laxattack857@fileshare,” at Internet Protocol (“IP”) address 24.45.58.150, using the iMesh online file sharing program on the FastTrack file sharing network to distribute Plaintiffs’ copyrighted sound recordings. (SOF ¶ 1.) 1322 digital audio files were being distributed from a “shared” folder on this computer to millions of other users on the file sharing network. (SOF ¶ 1.) A list of the 1322 digital audio files is contained as Exhibit B to Plaintiffs’ Complaint. (SOF ¶ 1.) Cablevision Systems Corp. (“Cablevision”) was the Internet Service Provider that had assigned IP address 24.45.58.150 to one of its customers on April 11, 2004. (SOF ¶ 1.)

2. Cablevision identified Patricia Santangelo of 50 Fenmore Drive, Wappingers Falls, NY 12590 as the subscriber responsible for IP address 24.45.58.150 on April 11, 2004. (SOF ¶ 2.) Both Defendants Michelle Santangelo and Robert Santangelo, Jr. resided at 50 Fenmore Drive in Wappingers Falls, New York in April 2004. (SOF ¶ 2.)

3. The 1322 digital audio files on Exhibit B to the Complaint were being actively distributed to 2,999,953 other users on the FastTrack network at the time that MediaSentry detected this illegal activity. (SOF ¶ 3.)

4. On April 11, 2004, MediaSentry initiated the process of downloading all of the 1322 digital audio files stored in the shared folder on this computer. (SOF ¶ 4.) This process allowed MediaSentry to obtain the metadata of each file and to ensure that there was an actual file being distributed. (SOF ¶ 4.) Had it chosen to do so, MediaSentry could have downloaded complete copies of all of the audio files listed in the shared folder and shown on Exhibit B to the Complaint. (SOF ¶ 4.) As a matter of expediency, MediaSentry limited its downloading to a sample of the 1322 digital audio files. (SOF ¶ 4.) That sample included seven sound recordings. (SOF ¶ 4.) MediaSentry's System Log file shows the proof of Defendants' distribution of these seven sound recordings under the "laxattack857@fileshare" username. (SOF ¶ 4.)

5. Exhibit B to the Complaint contains screen shots showing the contents of Defendants' shared folder. (SOF ¶ 5.)

6. Plaintiffs are not proceeding on every sound recording that they own out of the 1322 audio files that Defendants were distributing. Rather, Plaintiffs have limited this case to proceeding on 40 of the copyrighted sound recordings described on Exhibit A to Plaintiffs' Complaint, which includes five of the sound recordings downloaded in full by MediaSentry on April 11, 2004: "Happy" on "A Place in the Sun" by "Lit"; "Nowhere Fast" on "Make Yourself" by "Incubus"; "Semi-Charmed Life" on "Third Eye Blind" by "Third Eye Blind"; "Can't Help Falling Love" on "Promises and Lies" by "UB40"; and "Breakout" on "There is Nothing Left To Lose" by "Foo Fighters." (SOF ¶ 6.)

7. Defendant Robert Santangelo, Jr. and his friend Mr. Seckler installed the KaZaA file sharing program on the Santangelo computer and created the “laxattack857” username.

(SOF ¶ 7.)

8. Both the iMesh and the KaZaA file sharing programs use the FastTrack peer-to-peer file sharing network, which allows users of the network share files with one another. (SOF ¶ 8.) KaZaA is one of the most popular file sharing programs using the FastTrack peer-to-peer file sharing network, and the name KaZaA is often used to refer to the applications running the Fasttrack protocol. (SOF ¶ 8.) The whole purpose behind peer-to-peer networks is to share files with other users. (SOF ¶ 8.)

9. The computer that connected to the Internet through Cablevision at 50 Fenmore Drive in Wappingers Falls, New York in April 2004 was located in a common family area of the Santangelo home. (SOF ¶ 9.) This computer was destroyed in a house fire in July 2004 and Defendants’ father, Robert Santangelo, Sr., later disposed of it. (SOF ¶ 9.)

10. Defendants used an online file sharing program to access the FastTrack file sharing network to download the sound recordings listed in Exhibit B to the Complaint (SOF ¶ 10), including 40 of the Copyrighted Recordings identified on Exhibit A to the Complaint.

11. Specifically, Defendant Robert Santangelo, Jr. used the KaZaA file sharing program and the “laxattack857” username to download music over the Internet. (SOF ¶ 11.) Mr. Seckler testified that he and Robert Santangelo, Jr. used the Santangelo computer two or three times a week to download and listen to music for approximately an hour at a time. (SOF ¶ 11.) Although Defendant Robert Santangelo, Jr. has at times baldly denied engaging in the infringement, he also testified that he had no facts to dispute Mr. Seckler’s sworn testimony that the two of them installed KaZaA and used it to download music over the Internet. (SOF ¶ 11.)

12. Defendant Michelle Santangelo recognized both KaZaA and iMesh as software programs she used to search for and listen to music on the Santangelo computer. (SOF ¶ 12.) Defendant Michelle Santangelo also recognized the iMesh shared folder captured by MediaSentry (Exhibit B to Plaintiffs' Complaint) as utilizing the same software interface and containing the same sound recordings as the media player she used to listen to music on the Santangelo computer. (SOF ¶ 12.)

13. Mr. Seckler testified that he witnessed Defendant Michelle Santangelo using KaZaA on the Santangelo computer to download and listen to music. (SOF ¶ 13.)

14. Defendant Michelle Santangelo also listened to all but one of the sound recordings listed on Exhibit A to the Complaint, although she could not remember one way or the other whether she listened to them on the computer. (SOF ¶ 14.)

15. The iMesh file sharing program cannot be used to listen to music that is stored on another computer in the iMesh network; in order to listen to music that was stored on another computer, the file must be downloaded to the user's computer. (SOF ¶ 15.)

16. MediaSentry also detected Plaintiffs' copyrighted sound recordings being distributed from the same IP address and under the user name "mich8621" from August 2003 to March 2004. (SOF ¶ 16.) Defendant Michelle Santangelo uses the "mich8621" user name and the user name references Michelle Santangelo's date of birth on August 21, 1986. (SOF ¶ 16.)

17. Similarly, Defendants distributed all 40 of the Copyrighted Recordings by placing them in the shared folder on the computer for others on the FastTrack file sharing network to download. (SOF ¶ 17.) Defendants distributed five of the Copyrighted Recordings on Exhibit A to MediaSentry, and Mr. Seckler testified that he had observed other users on the network downloading files from the Santangelo computer. (SOF ¶ 17.)

18. MediaSentry also detected Plaintiffs' copyrighted sound recordings being distributed from the same IP address assigned to the Santangelo household and under the same "laxattack857" username on 52 occasions from approximately September 2003 through May 2004. (SOF ¶ 18.) In an effort to inform and stop Defendants from infringing Plaintiffs' copyrights, MediaSentry sent text messages on these 52 occasions to the "laxattack857" username. (SOF ¶ 18.) MediaSentry also sent similar text messages to the "mich8621" username on 19 different occasions from August 2003 to March 2004. (SOF ¶ 18.)

II. Plaintiffs Own And Properly Registered The Copyrighted Recordings.

19. Plaintiffs are the owners or licensees of valid copyrights in the 40 Copyrighted Recordings. (SOF ¶ 19.)

20. Plaintiffs' copyright registration for these 40 Copyrighted Recordings was effective prior to the date Defendants were caught distributing them to other Internet users. (SOF ¶ 20.)

21. Plaintiffs also placed copyright notices on each of the compact disc containers and on the surface of each of the compact discs containing the 40 Copyrighted Recordings, as provided in Section 402 of the Copyright Act. (SOF ¶ 21.)

22. Defendants did not have Plaintiffs' authorization to copy, download, or distribute any of the 40 Copyrighted Recordings. (SOF ¶ 22.)

SUMMARY OF THE ARGUMENT

Plaintiffs' evidence shows that Plaintiffs own the copyrights to the 40 Copyrighted Recordings and that Defendants violated Plaintiffs' reproduction and distribution rights. Defendants violated Plaintiffs' rights in these recordings by using the KaZaA and iMesh file sharing programs to download the Copyrighted Recordings and to distribute the Copyrighted Recordings to other users on the FastTrack network over the Internet. Based on Defendants'

infringement of Plaintiffs' reproduction and distribution rights under 17 U.S.C. § 106(1) and (3), Plaintiffs are entitled to an award of statutory damages under 17 U.S.C. § 504(c) and injunctive relief under 17 U.S.C. § 502. Although Defendants were illegally distributing hundreds of sound recordings – the majority of which are Plaintiffs' copyrighted sound recordings – as a matter of equity, Plaintiffs have decided to pursue claims on only 40 of these recordings. Therefore, Plaintiffs request an Order finding that Defendants have infringed 40 of the copyrighted sound recordings listed in Exhibit A to the Complaint, awarding Plaintiffs minimum statutory damages of \$750 per infringed work (in the total amount of \$30,000), and enjoining Defendants from further infringing Plaintiffs' copyrights as prayed for in Plaintiffs' Complaint.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT UNDER RULE 56(c) BECAUSE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

A. Standard of Review.

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Doro v. Sheet Metal Workers' Int'l Ass'n*, 498 F.3d 152, 155 (2d Cir. 2007). The moving party bears the burden of demonstrating that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has met its burden, the non-moving party must “go beyond the pleadings” and designate specific facts to support or defend each element of the cause of action, showing there is a genuine issue for trial. *Id.* at 324. The nonmovant may only defeat a summary judgment motion by demonstrating, through submissions of concrete evidence, that “a reasonable juror could return a verdict in [that party's] favor.” *Dister v. Continental Group, Inc.*,

859 F.2d 1108, 1114 (2d Cir. 1988) (quotation omitted); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) ([T]he “non-moving party may not rely on conclusory allegations or unsubstantiated speculation.”).

B. Summary Judgment Is Appropriate Because There Are No Issues of Material Fact Concerning Defendants' Infringement.

The Copyright Act grants the copyright owner of a sound recording the exclusive rights to, among other things, “reproduce the copyrighted work in copies or phonorecords” and “distribute copies or phonorecords of the copyrighted work to the public.” 17 U.S.C. § 106(1), (3). In order to prevail, Plaintiffs must prove (1) that they own the copyrights in the sound recordings and (2) that Defendants copied or distributed those sound recordings. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); *see also Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) (“A successful claim of copyright infringement pursuant to the Copyright Act, 17 U.S.C. § 501 et seq., requires proof that (1) the plaintiff had a valid copyright in the work allegedly infringed and (2) the defendant infringed the plaintiff’s copyright by copying protected elements of the plaintiff’s work.”). “Reduced to most fundamental terms, there are only two elements necessary to the plaintiff’s case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant.” 4 M. & D. Nimmer, *Nimmer on Copyright* § 13.01, at 13-5 & n.4 (2002) (“Nimmer”).

Copyright infringement is a strict liability offense; Plaintiffs need not demonstrate Defendant’s intent to infringe, or even knowledge of infringement, in order to prove copyright infringement. *See, e.g., Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) (“Copyright infringement actions, like those for patent infringement, ordinarily require no showing of intent to infringe.”); *Lipton*, 71 F.3d at 471 (intent to infringe is not required under

the Copyright Act); *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) (“The defendant’s intent is simply not relevant [to show liability for copyright infringement]: The defendant is liable even for ‘innocent’ or ‘accidental’ infringements.”); *Fitzgerald Publ’g Co., Inc. v. Baylor Publ’g Co.*, 807 F.2d 1110, 1113 (2d Cir. 1986); 4 Nimmer § 13.08, at 13-279 (“In actions for statutory copyright infringement, the innocent intent of the defendant will not constitute a defense to a finding of liability.”).

Finally, “[c]ourts have long recognized that infringement of a copyright is a tort, and all persons concerned therein are jointly and severally liable as such joint tort-feasors.” *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923). Where two defendants infringe a plaintiff’s copyright, both defendants are liable for direct copyright infringement. *See, e.g., Reeve Music Co. v. Crest Records, Inc.*, 285 F.2d 546, 548 (2d Cir. 1960) (finding defendants jointly and severally liable for copyright infringement because, “whether or not the separate act performed by each defendant constitutes ‘manufacture,’ the two defendants, acting in concert, ‘manufactured’ the infringing discs”); *Chappell & Co. v. Frankel*, 285 F. Supp. 798, 800-01 (S.D.N.Y. 1968) (holding defendant jointly and severally liable because he had “caused the whole process of infringement”).

Summary judgment is required here because there is no genuine issue as to any material fact: Plaintiffs own valid copyrights in the Copyrighted Recordings for which recovery is sought and Defendants used an online media distribution system to reproduce and/or distribute the Copyrighted Recordings without Plaintiffs’ authorization. Thus, Plaintiffs are entitled to judgment as a matter of law on their copyright claims.

II. PLAINTIFFS OWN THE COPYRIGHTS TO THE COPYRIGHTED RECORDINGS AT ISSUE.

Plaintiffs seek summary judgment for Defendants' infringement of Plaintiffs' copyrights in the 40 Copyrighted Recordings listed in Exhibit A to Plaintiffs' Complaint. Plaintiffs are the owners or licensees of valid copyrights in these 40 Copyrighted Recordings. (SOF ¶ 19.) The Copyrighted Recordings have all been registered with the U.S. Copyright Office and the copyright registration for each of the Copyrighted Recordings was effective prior to the date on which Defendant was observed infringing them. (SOF ¶ 20.) Defendant Michelle Santangelo further admits that she has no evidence to dispute the validity of Plaintiffs' ownership of the Copyrighted Recordings listed in Exhibit A. (SOF ¶ 19.) Consequently, there is no genuine issue of fact as to the ownership or validity of Plaintiffs' copyrights in the 40 Copyrighted Recordings. *See Hamil Am., Inc. v. GFI, Inc.*, 193 F.3d 92, 98 (2d Cir. 1999) ("A certificate of registration from the United States Register of Copyrights constitutes prima facie evidence of the valid ownership of a copyright").

Thus, Plaintiffs have established the first element of their infringement claim.

III. DEFENDANTS VIOLATED PLAINTIFFS' COPYRIGHTS BY REPRODUCING THE COPYRIGHTED RECORDINGS WITHOUT AUTHORIZATION.

Downloading copyrighted sound recordings on a peer-to-peer network without authorization of the copyright holder constitutes an unlawful reproduction of the work in violation of the Copyright Act. 17 U.S.C. § 106(1); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (affirming summary judgment against the defendant who had used KaZaA to download copyrighted sound recordings over the Internet); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) ("[M]aking . . . a digital copy of [copyrighted] music . . . infringes copyright."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.");

MGM Studios Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1034-35 (C.D. Cal. 2003) (holding that users who download copyrighted music violate the copyright owner's exclusive reproduction right); *see also Sony Pictures Home Entm't, Inc. v. Lott*, 471 F. Supp. 2d 716, 722 (N.D. Tex. 2007) (citing *Aimster* and *Napster* regarding unauthorized downloading of copyrighted files as violating reproduction rights).¹

Here, Defendants used an online file sharing program to access the FastTrack file sharing network to download the sound recordings listed in Exhibit B to the Complaint, including specifically the 40 Copyrighted Recordings identified on Exhibit A to the Complaint. (SOF ¶¶ 7-8, 10-16.) Specifically, Defendant Robert Santangelo, Jr. used the KaZaA file sharing program and the "laxattack857" username to download music over the Internet, including the 40 sound recordings at issue in this case. (SOF ¶ 11.) Although Defendant Robert Santangelo, Jr. has at times baldly denied engaging in the infringement, he also testified that he had no facts to dispute Mr. Seckler's sworn testimony that he and Robert Santangelo, Jr. installed KaZaA and used it to download music over the Internet. (*Id.*) Defendant Michelle Santangelo used both the KaZaA and iMesh programs to download music over the Internet, and she identified the sound recordings listed in the iMesh shared folder captured by MediaSentry (Exhibit B to the Complaint) as being the media player she used to listen to music on the computer. (SOF ¶ 12.) Defendant Michelle Santangelo also listened to all but one of the sound recordings listed on

¹ *See also Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. & N. W. Nexus, Inc.*, 983 F. Supp. 1167, 1173 (N.D. Ill. 1997) (holding reproduction rights infringed where web page administrator copied copyrighted clip art onto hard drive of web service provider's computer and, from there, copied the clip art onto defendant's web page); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 931-32 (N.D. Cal. 1996) (holding infringing copies made each time Sega computer program files uploaded to or downloaded from computer bulletin board service); 2 Nimmer § 8.08 [A][1], at 8-115 ("[T]he input of a work into a computer results in the making of a copy, and hence . . . such unauthorized input infringes the copyright owner's reproduction right.").

Exhibit A to the Complaint, although she could not remember one way or the other whether she listened to them on the computer. (SOF ¶ 14.) This constitutes an unlawful reproduction of Plaintiffs' Copyrighted Recordings in violation of 17 U.S.C. § 106(1). *See, e.g., Gonzalez*, 430 F.3d at 893 (upholding summary judgment where the defendant downloaded copyrighted sound recordings over the Internet); *Maverick Recording Company v. De Rosa*, Civ. No. 1:05-cv-5861 (DGT/RML), slip op. at 1 (E.D.N.Y. Apr. 23, 2007) (attached as Exhibit Q); *Interscope Records v. Barbosa*, Civ. No. 05-cv-5864 (DGT/RML), slip op. at 2 (E.D.N.Y. Aug. 15, 2007) (attached as Exhibit R).

In the face of Plaintiffs' overwhelming evidence, Defendant Robert Santangelo, Jr.'s bald denial of responsibility is not sufficient to create a genuine issue of material fact. *See Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. N.Y. 1995) (“[t]he party opposing summary judgment may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible . . . or upon the mere allegations or denials of the adverse party’s pleading” (internal citations and quotations removed)); *Miroglio S.P.A. v. Conway Stores, Inc.*, 2008 U.S. Dist. LEXIS 81755, at *4-5 (S.D.N.Y. Oct. 15, 2008) (affirming magistrate judge’s finding of summary judgment for plaintiff copyright owners); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 319 (2d Cir. 2008) (“[c]onclusory statements . . . are insufficient to create a genuine factual dispute”); *Lott*, 471 F. Supp. 2d at 721 (holding that the defendant’s conclusory statements and allegations did not raise a “genuine issue of material fact”).

IV. DEFENDANTS VIOLATED PLAINTIFFS’ COPYRIGHTS BY DISTRIBUTING ALL 40 OF THE COPYRIGHTED RECORDINGS WITHOUT AUTHORIZATION.

Defendants violated Plaintiffs’ right of distribution by distributing Plaintiffs’ Copyrighted Recordings to MediaSentry and by making Plaintiffs’ Copyrighted Recordings available for

distribution other users of the FastTrack network. As explained below, both actions violate Section 106(3) of the Copyright Act.

A. Defendants Distributed The Copyrighted Recordings In Violation Of The Copyright Act.

Section 106(3) of the Copyright Act grants a copyright owner the exclusive right to “distribute” copies of copyrighted works to the public by any means of transfer of ownership or by rental, lease or lending. 17 U.S.C. § 106(3). A person violates a copyright holder’s distribution right by making an actual, unauthorized distribution of a copyrighted work. *Perfect 10, Inc. v. Google, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007) (unauthorized “actual dissemination” of copyrighted work violates the distribution right in section 106(3)); *Aimster*, 334 F.3d at 647 (unauthorized “transfer” of copyrighted work violates distribution right). Here, it is undisputed that Defendants distributed Plaintiffs’ Copyrighted Recordings in violation of the Copyright Act.

First, Defendants distributed five of the Copyrighted Recordings listed on Exhibit A to Plaintiffs’ Complaint from the iMesh shared folder on their computer to MediaSentry. (SOF ¶¶ 1, 3-5, 7, 16-18.) The System Log file from Plaintiffs’ investigation shows the proof of Defendants’ distribution of these five sound recordings under the “laxattack857” username. (SOF ¶ 4.)

Second, Plaintiffs can also establish distribution of all 40 of Plaintiffs’ Copyrighted Recordings through circumstantial evidence. In fact, in these types of cases, circumstantial evidence is often necessary because online “piracy typically takes place behind closed doors and beyond the watchful eyes of a copyright holder.” *Warner Bros. Records, Inc. v. Payne*, 2006 U.S. Dist. LEXIS 65765, *10 (W.D. Tex. July 17, 2006); *see also Lott*, 471 F. Supp. 2d at 719, 722 (granting summary judgment on circumstantial evidence of infringement); *RCA Records v. All-Fast Sys. Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y. 1984) (actual copying by defendant for

plaintiffs' investigator established "a strong inference . . . that the [defendant] would and did do exactly the same copying for [others]"); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (genuine issue of fact requires more than a showing of "some metaphysical doubt as to the material facts"); *see also Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998) ("[S]ummary judgment is particularly appropriate where, notwithstanding issues of credibility, the nonmoving party has presented no evidence or inferences that would allow a reasonable mind to rule in its favor. In this situation, it may be said that the record as a whole points in one direction and the dispute is not 'genuine.'") (citing *Matsushita*, 475 U.S. at 586).

Here, the evidence shows that Defendants distributed all 40 Copyrighted Recordings that are the subject of Plaintiffs' motion for summary judgment. Specifically, MediaSentry initiated downloads of all of the digital audio files stored in Defendants' shared folder on April 11, 2004, including each of the 40 Copyrighted Recordings. (SOF ¶ 4.) MediaSentry also completed six of the downloads as a sample of the files that Defendants were distributing. (*Id.*) Moreover, all 40 of the Copyrighted Recordings were in Defendants' shared folder on the computer on April 11, 2004, and the whole purpose behind peer-to-peer networks is to share files with other users. (SOF ¶ 8.) Finally, Mr. Seckler saw that other users on the network were downloading files from the Santangelo computer. (SOF ¶ 17.) As a result, the record as a whole points in but one direction—*i.e.*, that Defendants distributed all 40 Copyrighted Recordings at issue in violation of Plaintiffs' exclusive distribution right.

B. Defendants Also Made Plaintiffs' Copyrighted Recordings Available To Others On The File Sharing Network In Violation Of The Copyright Act.

A person also violates a copyright holder's distribution right by making copyrighted sound recordings available to others on a peer-to-peer network without authorization from the

copyright holder. 17 U.S.C. § 106(3); *Perfect 10*, 487 F.3d at 718-19 (confirming that a defendant who makes actual files available for distribution, not just links to files, “distributes” them); *Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); *Gonzalez*, 430 F.3d at 889 (“[P]eople who post or download music files are primary infringers.”); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (holding that making unauthorized copies of works available for distribution to others violates the copyright holder’s distribution right); *Lott*, 471 F. Supp. 2d at 721-22 (granting summary judgment to plaintiff motion picture companies based on evidence that copyrighted motion pictures were made available for download); *Atlantic Recording Corp. v. Anderson*, 2008 U.S. Dist. LEXIS 53654, at *19 (S.D. Tex. Mar. 12, 2008) (“[M]aking 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).”); *Maverick Recording Co. v. Harper*, Case No. 5:07-cv-026-XR, slip op. at 10 (W.D. Tex. Aug. 7, 2008) (“The fact that the Recordings were available for download is sufficient to violate Plaintiffs’ exclusive rights of reproduction and distribution. It is not necessary to prove that all of the Recordings were actually downloaded; Plaintiffs need only prove that the Recordings were available for download due to Defendant’s actions.”) (attached as Exhibit S); *Motown Record Co. v. DePietro*, 2007 U.S. Dist. LEXIS 11626, *12-13, n.38 (E.D. Pa. 2007) (“A plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant ‘made available’ the copyrighted work.”).

By definition, a person who possesses the exclusive right to distribute works also possesses the exclusive right to make works available for copying by others. This is precisely

what the Supreme Court held in *New York Times Co. v. Tasini*, 533 U.S. 483, 488 (2001). In *Tasini*, several “Authors” sued “Print Publishers” (newspapers) and “Electronic Publishers” (including NEXIS) for making the Authors’ copyrighted articles available for download on online databases like NEXIS. *Id.* at 487. The Print Publishers had a license to “reproduce or distribute” the articles only as part of a compilation. *Id.* at 498. There was no allegation or proof of any actual transfer of files to the public in *Tasini*; rather, the Authors alleged only that the Publishers had “placed copies of the [articles] . . . into three databases” where they were “retrievable” by the public, and that the Authors’ distribution right had been infringed “by the inclusion of their articles in the databases.” *Id.* at 487. The Supreme Court agreed, and held that “the Electronic Publishers infringed the Authors’ copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors . . . [and] that the Print Publishers infringed the Authors’ copyrights by authorizing the Electronic Publishers *to place the Articles in the Databases . . .*” *Id.* at 506 (emphasis added); see also *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 637-38 (D. Md. 2006) (relying on *Tasini* and holding that an online publisher violated a copyright owner’s distribution right “by making available unauthorized copies of Plaintiff’s publications” online).

Here, Defendants used the iMesh and KaZaA file sharing programs to download music over the Internet and stored that music in their shared folder. Defendant Michelle Santangelo identified the sound recordings listed in the iMesh shared folder captured by MediaSentry (Exhibit B to the Complaint) as being the media player she used to listen to music on the computer. (SOF ¶ 12.) Defendant Michelle Santangelo also identified Exhibit B as the shared folder on the Santangelo computer. (*Id.*) All 1322 audio files in Defendants’ shared folder, including the 40 Copyrighted Recordings on Exhibit A to the Complaint, were being distributed

to other users on the FastTrack network. (SOF ¶ 1.) This distribution violates Plaintiffs' exclusive right of distribution under Section 106(3) of the Copyright Act. *See Perfect 10*, 487 F.3d at 718-19; *Napster*, 239 F.3d at 1014; *Anderson*, 2008 U.S. Dist. LEXIS 53654, at *19; *Harper*, Case No. 5:07-cv-026-XR, slip op. at 10 (Ex. S).

For all of these reasons, the Court should enter summary judgment with respect to all 40 Copyrighted Recordings listed on Exhibit A to the Complaint.

V. PLAINTIFFS ARE ENTITLED TO STATUTORY DAMAGES RESULTING FROM DEFENDANTS' COPYRIGHT INFRINGEMENT.

The Copyright Act provides that once copyright infringement has been established:

[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally.

17 U.S.C. § 504(c)(1). *See also Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1114 (2d Cir. 1986) (noting that upon proof of infringement, a copyright "owner may elect to recover – instead of actual damages and profits – statutory damages under § 504(c)(1) for those works whose copyrights were registered at the time the infringement occurred").

Here, having established Defendants' infringement of Plaintiffs' reproduction and distribution rights, Plaintiffs elect to recover such statutory damages under section 504(c)(1). Plaintiffs need not prove any actual damages in order to be entitled to an award of statutory damages. Plaintiffs may elect statutory damages "whether or not adequate evidence exists as to the actual damages incurred by plaintiffs or the profits gained by defendants." *Cable/Home*

Comme'n Corp. v. Network Prods, Inc., 902 F.2d 829, 850 (11th Cir. 1990) (citing Nimmer § 14.04[A]).²

The appropriate statutory damages for non-willful infringement range from a minimum of \$750 per work to a maximum of \$30,000 per work. See 17 U.S.C. § 504(c)(1). When, as in the present case, Plaintiffs elect statutory damages, they may not receive less than the minimum statutory damages amount specified in the Copyright Act for each infringed work. The Court is “constrained . . . by the specified maxima and minima” set forth in the Copyright Act. *Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (internal quotation marks and citation omitted); *Gonzales*, 430 F.3d at 893 (7th Cir. 2003); *De Rosa*, Civ. No. 1:05-cv-5861(DGT/RML), slip op. at 3 (Ex. Q); *Sony Music Corp. v. Scott*, No. 03-CV-6886-BJS, slip. op. at 2 (S.D.N.Y. Feb. 18, 2005) (attached as Exhibit T); *Lava Records, LLC et al. v. Ates et al.*, Case 3:05-cv-01314-RGJ-KLH (July 11, 2006, W.D. La.) (attached as Exhibit U).

Plaintiffs have proven that they own the copyrights in the Recordings and that Defendants infringed those copyrights. Because Plaintiffs have conclusively established their claim for copyright infringement against Defendants, they are entitled to an award of minimum statutory damages.

To facilitate a final disposition of this case on the instant Motion, Plaintiffs seek only the minimum amount of statutory damages prescribed by the Copyright Act: an award of \$750 for each of the 40 Copyrighted Recordings listed on Exhibit A for a total of \$30,000. Courts routinely award minimum statutory damages in these types of copyright cases, as they must,

² See also *Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (“A plaintiff may elect statutory damages regardless of the adequacy of the evidence offered as to his actual damages and the amount of defendant’s profits.”) (citing Nimmer § 14.04[A],14-44-45).

when granting a motion for summary judgment. *See, e.g., Gonzalez*, 888 F.3d at 893; *Ates*, Civ. No. 05-1314 (Ex. U); *Sony BMG Music Entertainment v. Bell*, Case No. A-04-CA-1055-SS (W.D. Tex. June 6, 2006) (attached as Exhibit V); *De Rosa*, Civ. No. 1:05-cv-5861(DGT/RML), slip op. at 1 (Ex. Q); *Barbosa*, Civ. No. 05-cv-5864 (DGT), slip op. at 2 (Ex. R). In addition, hundreds of courts throughout the country, including this Court, have awarded minimum statutory damages when ordering default judgment for Plaintiffs.³ Plaintiffs seek the same here in the summary judgment context, in the interests of efficiency and economy for both the Court and the parties. Accordingly, Plaintiffs are entitled to minimum statutory damages without presenting any evidence of damages, and further evidence of or discussion on damages sustained as a result of Defendant's copyright infringement is unnecessary in the instant case.

VI. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION UNDER SECTION 502 OF THE COPYRIGHT ACT.

The Copyright Act provides:

Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. § 502(a); *see also Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984). Injunctions are routinely issued pursuant to the mandate of Section 502, because “the public interest is the interest in upholding copyright protections.” *Autoskill Inc. v. Nat’l. Educ. Support Sys.*, 994 F.2d 1476, 1499 (10th Cir. 1993); 4-14 Nimmer § 14.06 (“[I]t is virtually

³ *See, e.g., Ortiz-Gonzalez v. Fonovisa*, 277 F.3d 59, 63-64 (1st Cir. 2002); *Sony BMG v. Carlin*, No. 5:05-CV-00918-GLS-GHL, slip op. at 1 (N.D.N.Y. Feb. 15, 2006) (attached as Exhibit W); *Atlantic Recording Corp. v. Burgess*, No. 05CV3182 RMB, slip op. at 1 (S.D.N.Y. Feb. 15, 2006) (attached as Exhibit X); *Motown Record Co. v. Armendariz*, 2005 U.S. Dist. LEXIS 32045, *5 (W.D. Tex. Sept. 22, 2005) (explaining that “[a]n award of statutory damages does not require an evidentiary hearing” because defendant’s default by itself establishes a basis for the requested statutory damages); *Sony BMG Music Entertainment v. Armas*, 2005 U.S. Dist. LEXIS 11236, at *9 (D. Or. Apr. 18, 2005); *Atlantic Recording Corp. v. Cappiello*, No. 04CV4645, slip op. at 1 (DGT) (E.D.N.Y. Feb. 11, 2005) (attached as Exhibit Y).

axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing misappropriation of the skills, creative energies, and resources which are invested in the protected work”); *Scott*, No. 03-CV-6886-BJS, slip. op. at 4 (Ex. T). Further, “the balance weighs strongly in favor of Plaintiffs where all that is requested is that Defendant comply with the Copyright Act.” *Ates*, No. 05-1314, slip op. at 8 (Ex. U)

Plaintiffs respectfully submit that, as a matter of law, they are also entitled to a permanent injunction against Defendants. In this case, the entry of an injunction is “necessary to preserve the integrity of the copyright laws which seek to encourage individual efforts and creativity by granting valuable enforceable rights.” *Atari Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 620 (7th Cir. 1982) (preliminary injunction); *Morley Music Co. v. Café Continental, Inc.*, 777 F. Supp. 1579, 1583 (S.D. Fla. 1991) (“A Plaintiff is entitled to a permanent injunction in a copyright action when liability has been established and where there is a threat of continuing violations”). As copyright holders, Plaintiffs are entitled to avoid the irreparable damage that will occur if Defendants (and others like them) continue to infringe upon Plaintiffs’ copyrights. Irreparable harm is presumed in copyright infringement actions. *CBS Broad., Inc. v. EchoStar Communs., Corp.*, 276 F. Supp. 2d 1237, 1255 (S.D. Fla. 2003). Once irreparable injury is presumed, injunctive relief is appropriate because damages alone are not an adequate remedy. Thus, as in *Napster*, an injunction in this case “is not only warranted but required.” *Napster*, 239 F.3d at 1027. Indeed, such injunctions are “regularly issued” because of the strong public interest in copyright protections. *Arista Records, Inc. v. Beker Enters.*, 298 F. Supp. 2d 1310, 1314 (S.D. Fla. 2003).⁴

⁴ Additionally, pursuant to the equitable powers provided under 17 U.S.C. § 503(b) (2000), this Court has the power to order the destruction of all infringing copies in Defendant’s

The scope and history of Defendants' infringement more than warrant the requested injunction. Absent an injunction, there is nothing to stop Defendants from downloading and distributing more of Plaintiffs' copyrighted sound recordings through an online media distribution system. Injunctive relief therefore is required to prevent further irreparable harm.

Accordingly, Plaintiffs seek entry of an injunction, as requested in the Complaint.

(Compl. ¶ 21.) Specifically, Plaintiffs ask for an injunction providing:

Defendants shall be and hereby are enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, to distribute (*i.e.*, upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendants also shall destroy all copies of Plaintiffs' Recordings that Defendants have downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendants' possession, custody, or control.

(Compl. at 7.) Just as courts throughout the country (including courts in this jurisdiction) have awarded minimum statutory damages when ordering default judgment for Plaintiffs, *see supra* Part V, they have also adopted Plaintiffs' language regarding injunctive relief. *See id.*

In light of the massive scope and nature of Defendants' infringement, the public interest, and the need to protect Plaintiffs' copyrighted works, the requested injunction prohibits infringement of all copyrighted sound recordings owned by Plaintiffs. Broad injunctions such as this are regularly entered in copyright infringement cases. *See, e.g., Gonzalez*, 430 F.3d at 893 (affirming lower court's injunction preventing the defendant from further infringement of

possession as part of a final order or decree. *See Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992).

Plaintiffs' copyrighted sound recordings); *Sony Music Entertainment, Inc. v. Global Arts Productions*, 45 F. Supp. 2d 1345, 1347-48 (S.D. Fla. 1999) (enjoining defendants from infringing any of the copyrighted works owned by Plaintiff, including, but not limited to, those listed in the complaint).

For the same reasons, and because Plaintiffs continually create new works – works that would be vulnerable to infringement and require litigation if the injunction were limited to existing works – the requested injunction follows standard practice in copyright cases by covering works to be created in the future. *See Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (“The weight of authority supports the extension of injunctive relief to future works.”). The injunction would not, of course, prohibit Defendant from utilizing the Internet for legitimate, noninfringing purposes.

VII. PLAINTIFFS ARE ENTITLED TO COSTS OF SUIT.

Finally, Section 505 of the Copyright Act expressly authorizes recovery of “full costs,” because an award of costs would “(1) deter future copyright infringement; (2) ensure that all holders of copyrights which have been infringed will have equal access to the court to protect their works; and (3) penalize the losing party and compensate the prevailing party.” *A&N Music Corp. v. Venezia*, 733 F. Supp. 955, 959 (E.D. Penn. 1990); *see also Cross Keys Publ. Co. v. Wee, Inc.*, 921 F. Supp. 479, 481-82 (W.D. Mich. 1995). Though Plaintiffs have incurred significant costs and attorneys' fees in this matter, Plaintiffs request an award of \$350 as costs of this suit. (*See* Doc. No. 1.)

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court grant summary judgment in their favor and against Defendants Michelle Santangelo and Robert Santangelo, Jr. on Plaintiffs' claim for copyright infringement regarding 40 of Plaintiffs' copyrighted sound recordings listed in Exhibit A to the Complaint. Plaintiffs respectfully request that the Court award Plaintiffs minimum statutory damages in the amount of \$30,000, injunctive relief as prayed for in the Complaint, costs in the amount of \$420, and such further relief as the Court deems just and proper.

Dated: December 22, 2008

By: 

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELEKTRA ENTERTAINMENT GROUP INC., a
Delaware corporation; VIRGIN RECORDS
AMERICA, INC., a California corporation; UMG
RECORDINGS, INC., a Delaware corporation;
BMG MUSIC, a New York general partnership;
and SONY BMG MUSIC ENTERTAINMENT, a
Delaware general partnership,

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Civil Action No.: 06 Civ. 11520 (SCR)

**DECLARATION OF
ANDREW KEMPE**

Plaintiffs,

-against-

MICHELLE SANTANGELO and ROBERT
SANTANGELO, JR.,

Defendants.

I, Andrew Kempe, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the Manager of Technical Account Services for the MediaSentry Business Unit of Safenet, Inc., formerly MediaSentry, Inc. (“MediaSentry”). I have personal knowledge of all of the matters discussed in this Declaration except as where stated on information and belief. As to such facts, I believe them to be true.

2. MediaSentry is one of the principal providers of online anti-piracy services worldwide. It specializes in providing services to detect and prevent unauthorized distribution of music, films, software, and other content on the Internet.

3. MediaSentry has been engaged by the Recording Industry Association of America (“RIAA”) on behalf of the Plaintiffs to assist them in locating individuals infringing their copyrights over peer-to-peer networks and gathering evidence of their infringement. To perform

this task, MediaSentry searches peer-to-peer networks for individuals distributing infringing files for download and gathers evidence concerning that infringement.

4. MediaSentry searches peer-to-peer networks, looking for users distributing files that appear to be digital copies of sound recordings whose copyrights are owned by the RIAA's member record companies. When MediaSentry finds such a file, it may download the file. As part of that downloading process, MediaSentry, like any other peer-to-peer user, receives basic information about the user from whom the work is being downloaded. That information includes, among other things, the Internet Protocol ("IP") address of the user.

5. MediaSentry also seeks to determine what other files the individual is distributing to others for download. iMesh and other file-copying programs permit users to share all of the files in their shared folders, and they may contain a feature that permits users to browse the entire shared folder of another user. When available, MediaSentry invokes this feature of a peer-to-peer program, just as any other user could do, and is able to determine whether the individual user is merely distributing one or two music files or whether the user is distributing hundreds or even thousands of music files.

6. Again using a feature of the peer-to-peer software available to any user, MediaSentry can then capture a complete list of all of the files that the user is distributing to others for download. MediaSentry collects this information in two forms. First, MediaSentry takes screen shots, which are actual pictures of the screens that MediaSentry or any other user of the peer-to-peer network can see when reviewing the files being distributed. Second, MediaSentry captures as a text file all of the contents of the user's shared directory, such as the names of each file and the size of each file, as well as additional information (called "metadata") about each file. Metadata may include a wide range of information about a file. Metadata, for

example, can include information such as identification of the person or group that originally copied the file and began disseminating it unlawfully. MediaSentry does nothing to create this text file; it exists on the user's hard drive and is distributed by the user to anyone to whom the user distributes files.

7. MediaSentry's process for identifying potential infringers and gathering evidence of infringement has multiple fail-safes to ensure that the information gathered is accurate. MediaSentry takes numerous steps to check and double-check the IP address of the potential infringer to prevent misidentification.

8. In gathering evidence of infringement, MediaSentry does not do anything that any user of a peer-to-peer network cannot do and does not obtain any information that is not available to anyone who logs onto a peer-to-peer network. Thus, when MediaSentry searches for sound recordings on the peer-to-peer network, views the files that each peer-to-peer user is disseminating to others, obtains the IP address and screen name of each user, and downloads copyrighted works distributed by each user, it is using functionalities that are built into the peer-to-peer protocols that each user has chosen to use to upload and download (or copy) music.

9. MediaSentry followed the procedures outlined above with respect to the evidence that it gathered in this case. Specifically, on April 11, 2004, at approximately 12:15 a.m., Eastern Standard Time, MediaSentry detected the username "laxattack857@fileshare" logged into the iMesh file-sharing service at IP address 24.45.58.150 engaged in the distribution of Plaintiffs' copyrighted sound recordings. This individual was distributing 1322 digital audio files—many of them Plaintiffs' copyrighted sound recordings—from a "shared" folder on the computer connected to the Internet through IP address 24.45.58.150 to millions of other users of the file-sharing network. MediaSentry initiated the download of every one of these 1322 digital

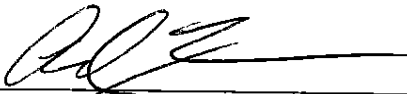
audio files to verify that the files actually existed on the user's hard drive, and also downloaded complete copies of seven of the digital music files that this individual was distributing to other users on the network. Attached as Exhibit A to Plaintiffs' Complaint is a list of sound recordings including six of the sound recordings downloaded by MediaSentry. Had it chosen to do so, MediaSentry could have downloaded additional sound recordings, including the other sound recordings on Exhibit A to Plaintiffs' Complaint, being distributed from Defendant's computer.

10. MediaSentry captured a complete list of all files being distributed from this computer. Attached as Exhibit A hereto is a true and correct copy of a text file captured by MediaSentry on April 11, 2004, showing the list of 1322 audio files that this computer was distributing to others for download. Attached as Exhibit B to Plaintiffs' Complaint is a true and correct copy of a compilation of screen shots captured by MediaSentry on April 11, 2004 which also shows the list of 1322 audio files that this computer was distributing to others for download.

11. Using publicly available information regarding the assignment of IP addresses, MediaSentry determined that Cablevision Systems Corp. was the Internet Service Provider that had assigned IP address 24.45.58.150 to one of its customers on April 11, 2004.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3rd day of December 2008.



Andrew Kempe

EXHIBIT B

ELEKTRA ENTERTAINMENT GROUP INC., et al v. Santangelo
SD - NY Case Number: 7:06-cv-11520

Declaration and Expert Report

Dr. Doug Jacobson, Ph.D., CFCE

Ph.D. Computer Engineering
Certified Forensic Computer Examiner
International Association of Computer Investigative Specialists

Qualifications & Prior Testimony

- 1) I am employed as a Professor of Electrical and Computer Engineering at Iowa State University and as the Director of the Iowa State University Information Assurance Center. I also have an appointment with the Iowa State University police department where I aid in computer forensics.
- 2) In addition, I am the Chief Technical Officer and founder of Palisade Systems, a high-tech computer security company that specializes in network monitoring and filtering technologies.
- 3) My employment with Iowa State University began in 1982 as a computer programmer. I completed my Ph.D. in Computer Engineering with a focus in computer networking in December 1985. In January 1986, I was hired by the Department of Electrical and Computer Engineering as an Assistant Professor to teach and research in the area of computer networks. Since that time, I have taught over 25 classes in computer networks at both the undergraduate and graduate level. I have received over 5 million dollars in funding for my research and have written several articles and made numerous presentations on the topic.
- 4) In 1995, I created and taught one of the first computer security classes at Iowa State University and in the country. Under my guidance, in 1999, Iowa State University was recognized by the National Security Agency as a center of excellence. And in 2000, the Iowa State University Information Assurance Center was created. I am its first and only director. I am a Certified Forensics Computer Examiner. My Curriculum Vitae is attached as Exhibit (A)
- 5) On September 9th 2003, I testified in front of the U.S. Senate Judiciary Committee on the uses of peer-to-peer protocols.
- 6) On February 23 2007, I gave a deposition in the case UMG Recordings v. Marie Lindor, Case No. 05-cv-1095 (E.D.N.Y.).
- 7) On October 1 & 2 2007, I testified at the trial in the case of Virgin Records v. Jammie Thomas, Case No. 06-cv-1497 (D. Minn.).

Prior Experience

- 8) I have been teaching computer networking since 1986 and written papers and performed research on computer networks.
- 9) I have given over 50 presentations on computer security and networks at conferences, workshops, and various meetings.
- 10) I hold two patents in the area of computer network security and have won two R&D 100 awards for technologies I developed at Palisade Systems. One of these technologies is designed to detect and block peer-to-peer network protocols in addition to over 100 other network protocols.
- 11) I have assisted the Iowa State University Police department on several computer cases including cases using peer-to-peer networks to distribute pirated software and child pornography.
- 12) One of my graduate students, under my supervision and guidance, developed a system that monitors peer-to-peer networks and other forms of file-sharing for child pornography.
- 13) My rate for analysis and testimony is \$200.00 per hour. Additional expenses relating to analysis, testimony, and travel are reimbursed at the incurred costs.

Description of Technologies Involved

- 14) This case involves copyright infringement using computers connected to the Internet and involves the identification of the computers using their IP addresses. How IP addresses are used in the Internet, how IP addresses are assigned within the Internet, and how IP addresses and computers are identified is described below.

The Internet and Addressing

The Internet is a collection of interconnected computers or network devices. In order to be able to deliver traffic from one computer or network device to another, each computer or network device must have a unique address within the Internet. The unique address is called the Internet Protocol (IP) address. This is analogous to the postal system where each mail drop has a unique address.

Each computer or network device is connected to a network which is administered by an organization like a business, internet service provider, college or university. Each network, in turn, is analogous to a zip code.

Information is transported through the Internet in small chunks called packets. Each packet traverses the Internet and is reassembled by the destination machine. Each packet contains both the source and destination IP addresses. The source address is analogous to the return address on a letter and the destination IP address is analogous to the send to address on a letter.

IP Address Assignment

Every computer or network device directly connected to the Internet must have a unique IP address. To ensure each IP address is unique, a block of IP addresses is allocated to an organization such as an Internet Service Provider, business, college or university. The IP address allocation is done in a highly structured manner with each set of IP addresses (a network) allocated by a single centralized authority. Each organization is then responsible for allocating the addresses to individual devices.

There are two allocation methods for the devices connected to the Internet. The first allocation method provides the device with a static IP address and requires the user of the device to provide the IP address to the device during configuration. The owner of the network typically will provide the user of the device with the address information. This method is often used in businesses and colleges or universities. Two devices cannot effectively function if they are directly connected to the Internet simultaneously with the same IP address.

The second method involves dynamic addressing. With this method the device asks the network provider for an IP address when it wishes to use the network. The device will send a request, and the network provider will respond back with a packet that contains an IP address. The IP address is often allocated for a short period of time, and the device must request a renewal from the network provider. This method is called DHCP and is commonly used by Internet Service Providers (ISPs). The network provider will maintain a log of address allocations. As in the static case, two devices cannot effectively function if they are directly connected to the Internet simultaneously with the same IP address.

- 15) This case involves illegal file distribution using peer-to-peer networks. Peer-to-peer networks are a method used to distribute files from a user's computer to other users on the internet. They can also be used to obtain files from other users. Peer-to-peer networks are often used to distribute copyrighted material like songs and movies. In addition, peer-to-peer networks are also used to distribute other files including pornography, child pornography, computer virus, and data files. A more detailed explanation of peer-to-peer network is included below.

Peer-to-Peer Networks

The basic idea behind peer-to-peer networks is to allow people to connect to each other and distribute files or other information. Unlike the World Wide Web (web sites) where data is stored on central web services and users connect to a central web server to download information from the web site, peer-to-peer networks allow users to connect to each other and transfer files directly from user to user. The users of peer-to-peer networks typically do not know each other nor do they have any relationship outside the peer-to-peer network. The users of the peer-to-peer network often think they are anonymous when they distribute files. In reality, they can be identified using the IP address. The IP address of the computer offering the files for distribution can be captured by a user during a

search or a file transfer. That IP address can be associated with an organization such as, an ISP, business, college or university which can identify the user by the IP address.

Peer-to-peer networks are designed to facilitate the searching and transfer of data. Two basic types of peer-to-peer networks are decentralized and semi-decentralized.

With the decentralized peer-to-peer network, every computer that is part of the network has its own list of files that are offered for distribution, and each computer is connected to a small number of other computers (neighbors). Each neighbor is connected to a small number of computers and so on. When a user wishes to search for a file, a request is sent to each neighbor and each neighbor sends the request to the next neighbor and so on. If a computer gets the request and has a match, it will send a message back to the requester telling them it has the file(s) and providing them with information about the file(s).

The semi-decentralized peer-to-peer network uses a central index server that contains an index of files that are offered for distribution by the users of the network. The files themselves are still stored on the user's computer and not on the central server. Files are transferred directly from one user to another user. In addition, users can connect directly to each other like in the decentralized peer-to-peer networks. The central server makes searching more efficient. The semi-decentralized model can have more than one central server interconnected in their own peer-to-peer network. Benefits of this model include speeding up searches and distributing the work load. This also provides redundancy so that if one server node quits, the other nodes can still function and the network is still usable.

iMesh

iMesh is a popular semi-decentralized based peer-to-peer software program. iMesh uses a protocol referred to as Fasttrack to create the semi-decentralized peer-to-peer network. When iMesh is installed, it creates a folder called the "shared folder" on the user's computer that is used to store files that are downloaded from other users and for distribution to other users. By default this shared folder is located in the iMesh program directory. iMesh also provides the ability for the user to set up additional sharing folders that are used to share files with other iMesh users. When a user starts iMesh, they are connected to a central index server (super node) and iMesh offers or advertises the files they have available for distribution.

Distributing files first requires that the user must put the file into a shared folder. Information about the files within these shared folders is uploaded to the index server and can be downloaded by other users of the iMesh network. This is analogous to putting a list of copyrighted music you have available in a public

place and telling everyone they are welcome to stop by your house and pick up a copy of the song.

When files are distributed, there is a set of identifiers that are used to tie the files back to the user. These identifiers include the IP address of the client distributing the files, the name of the file, file size and the content hash. In addition, there are file descriptors that provide information like the artist name, album name, and description field. This information is used in the search process. The description field is used to provide a description of the files and is part of the iMesh system. This field is not part of the original data stored on a CD, but rather is added by users who put files into the iMesh shared folder(s). This field is sometimes employed by the user who made the copy or "ripped" the original copyrighted material to brand the file with their name or handle (a fake name). The content hash is a mathematical function that is used to identify files that are the same. This allows the user to search for the file if the original download fails or to increase the transfer speed.

To find a file the user submits a query to the super node. The super node looks in its database for the file(s) that match the search parameters. If one or more of the users connected to the super node has the files(s) that match the request, then the super node returns the IP address(s) and the file description(s) of all matches. Super nodes send queries between each other thus expanding the number of users the file can be distributed to. Users may also connect directly between each other, so if a user finds a file on another user's machine he or she may then query the machine directly to see what other files are offered for distribution.

iMesh cannot be used to listen to music that is stored on another computer in the iMesh network. In order to listen to or preview music that was stored on another computer, the file has to be downloaded to the user's computer.

In addition to iMesh, there are several other applications that use the Fasttrack protocol. These applications include KaZaA, Grokster, and iSwipe. These applications are available on computers using Microsoft Windows, Apple OS, and Linux. Since these applications use the Fasttrack protocol, users with one application can share files with users using another application. The name KaZaA is often used to refer to the applications running the Fasttrack protocol.

Materials Considered

- 16) I have reviewed the underlining investigative data for the Santangelo case. This includes all of the data supplied by MediaSentry. I also have reviewed information supplied by Defendant's Internet Service Provider (ISP) CSC Holdings, Inc. Below is a list of the materials I considered in developing my conclusions.
- a) MediaSentry Screenshots
 - b) MediaSentry Systemlog
 - c) MediaSentry UserLog (compressed)
 - d) MediaSentry UserLog
 - e) MediaSentry Download Logs
 - f) Certificate of Registration
 - g) MediaSentry Trace
 - h) CSC Holdings, Inc. subpoena response
 - i) MediaSentry IM log
 - j) Depositions of Robert Santangelo Jr.
 - k) Deposition of Patricia Santangelo
 - l) Depositions of Michele Santangelo
 - m) Deposition of Mathew Seckler

Conclusions

- 17) I will testify to the procedures used and results obtained by MediaSentry coupled with the information supplied by Defendant's ISP, to demonstrate the Defendants' Internet account and computer were used to download and upload Copyrighted music from the Internet using the Fasttrack (iMesh) peer-to-peer network.
- 18) I will testify that MediaSentry found over 1600 files shared on a computer, using a program that accesses the Fasttrack network, based on the screenshots. The user id is "laxattack857@fileshare", which indicates the Defendant used iMesh to access the Fasttrack network.
- 19) I will testify that the MediaSentry IM log file shows two user names (laxattack857@fileshare and mich8621@fileshare) using the same IP address (25.45.58.150) during the same time period, which indicates that the two user names shared the same computer.
- 20) I will testify that MediaSentry downloaded 8 songs as shown in Systemlog and the MediaSentry download logs and that these songs are copyrighted as shown in the Certificates of Registration.
- 21) I will testify that the information from MediaSentry (Systemlog, UserLog, UserLog (compressed), and the Download Logs) indicates that the computer with IP address 24.45.58.150 distributed 1322 audio and music files, most of them are copyrighted music files, using the IMesh program on 4-11-2004 starting at or around 11:48:19 AM EDT.
- 22) I will testify that the information from MediaSentry provided in the MediaSentry trace shows that CSC Holdings, Inc. is the Internet provider for the computer with

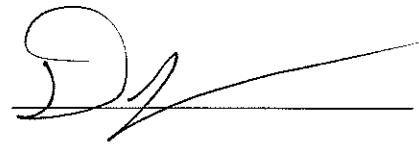
the IP address of 24.45.58.150 on 4-11-2004 at 11:48:19 AM EDT, during which time the 1322 audio and music files were being distributed using the iMesh program.

- 23) I will testify that the subpoena response from CSC Holdings, Inc. identifies Patricia Santangelo (mother of Robert and Michelle) as the subscriber of record for the IP address 24.45.58.150 on 4-11-2004 at 12:15:09 PM EDT.
- 24) I will testify, based on all of the information provided that, the computer that had the IP address of 24.45.58.150 on 4-11-2004 at 11:48:19 AM EDT was registered to the Patricia Santangelo and that the said computer was used to distribute copyrighted music.
- 25) I will testify that, based on the MediaSentry UserLog, the music found on the Defendants' computer was downloaded from other users on the Internet.
- 26) I will testify that, based on the depositions of Michelle Santangelo that she has the email address mich8621@aol.com and that she testified she used software on the computer that allowed her to search for and listen to music.
- 27) I will testify that, based on the deposition of Mathew Seckler that he and Robert Jr. Santangelo installed and configured the KaZaA file sharing program on the computer in the Santangelo house. They set up KaZaA with the username of "laxattack857" and they searched for downloaded songs together.
- 28) I will testify that, based on the deposition of Mathew Seckler that Michelle Santangelo used KaZaA on the computer in her house.
- 29) I will testify, based on the depositions of Michelle Santangelo that she identified screenshots of the KaZaA and iMesh applications and the shared folder and that she indicated they were on the computer in the Santangelo house and that she searched and listened to sound recordings using the applications. She also testified that she listened to the songs found in the shared folder of the computer that was captured by MediaSentry on 11/24/2004.
- 30) I reserve the right to review additional discovery materials, as they are made available for my review, and use any of the material considered as exhibits in my testimony.

Attachments:

Doug Jacobson – Curriculum Vitae – Exhibit (A)

I declare under penalty of perjury and the laws of the United States that foregoing is true and correct. Executed this 28 day of February, 2008, at 11 AM

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line and a diagonal stroke extending to the right.

Dr. Doug Jacobson

EXHIBIT C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELEKTRA ENTERTAINMENT GROUP INC., VIRGIN
RECORDS AMERICA, INC., UMG RECORDINGS, INC.,
BMG MUSIC, and SONY BMG MUSIC ENTERTAINMENT,

Plaintiffs,

vs. No. 05 Civ 2414

PATRICIA SANTANGELO,

Defendant.

DEPOSITION OF ROBERT SANTANGELO
White Plains, New York
Tuesday, April 11, 2006

Reported by:
Alison M. Pisciotta
JOB NO. 183104B

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April 11, 2006

1:30 p.m.

Deposition of ROBERT SANTANGELO,
held at the Southern District Court,
300 Quarropas Street, White Plains, New
York, pursuant to Notice, before Alison
M. Pisciotta, a Notary Public of the
State of New York.

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A P P E A R A N C E S:

HOLME ROBERTS & OWEN, LLP
Attorneys for Plaintiffs
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203
BY: RICHARD L. GABRIEL, ESQ.

JORDAN D. GLASS, ESQ.
Attorney for Defendant
P.O. Box 274
Hartsdale, New York 10530-0274

ALSO PRESENT: Matthew J. Oppenheim

1 R. Santangelo

2 R O B E R T S A N T A N G E L O, called
3 as a witness, having been duly sworn by a
4 Notary Public, was examined and testified as
5 follows:

6 EXAMINATION BY

7 MR. GABRIEL:

8 Q Please state your name and address
9 for the record.

10 A Bobby Santangelo. 10-81 Route 376,
11 Wappingers Falls, New York 12590.

12 Q Good afternoon, Mr. Santangelo.

13 MR. GABRIEL: Off the record.

14 (Discussion off the record.)

15 Q Good afternoon to you, Mr.
16 Santangelo.

17 A Good afternoon.

18 Q We met just a minute ago. I will
19 tell you again on the record my name is Rich
20 Gabriel. I represent the record companies in
21 the lawsuit that brings us here today. You
22 just stated a moment ago on the record your
23 address. Do you live with your mom or
24 someplace else?

25 A With my mom.

1 R. Santangelo

2 Q Have you ever had your deposition
3 taken before?

4 A No.

5 Q Have you ever testified in a trial
6 before?

7 A No.

8 Q Has there ever been a time in your
9 life where you did not live with your mom?

10 A Yes.

11 Q When was that?

12 A Over the summer. This past summer.

13 Q Did you live with your dad?

14 A Yes.

15 Q Where was that?

16 A 14 Peter Lane, Wappingers Falls.

17 Q Wappingers Falls?

18 A Yes.

19 Q Let me tell you what we are going to
20 do today so you and I are on the same page as
21 far as deposition ground rules. Obviously I
22 will be asking you some questions. It's very
23 important that you hear the question I ask
24 you and that you are comfortable that you
25 understood it. So if for any reason you

EXHIBIT D

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELEKTRA ENTERTAINMENT GROUP INC., VIRGIN
RECORDS AMERICA, INC., UMG RECORDINGS, INC.,
BMG MUSIC, and SONY BMG MUSIC ENTERTAINMENT,

Plaintiffs,

vs. No. 05 Civ 2414

PATRICIA SANTANGELO,

Defendant.

DEPOSITION OF MICHELE SANTANGELO
White Plains, New York
Tuesday, April 11, 2006

Reported by:
Alison M. Pisciotta
JOB NO. 183104C

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April 11, 2006

3:00 p.m.

Deposition of MICHELE SANTANGELO,
held at the Southern District Court,
300 Quarropas Street, White Plains, New
York, pursuant to Notice, before Alison
M. Pisciotta, a Notary Public of the
State of New York.

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A P P E A R A N C E S:

HOLME ROBERTS & OWEN, LLP

Attorneys for Plaintiffs

1700 Lincoln Street, Suite 4100

Denver, Colorado 80203

BY: RICHARD L. GABRIEL, ESQ.

JORDAN D. GLASS, ESQ.

Attorney for Defendant

P.O. Box 274

Hartsdale, New York 10530-0274

ALSO PRESENT: Matthew J. Oppenheim

1 M. Santangelo

2 MICHELE SANTANGELO,
3 called as a witness, having been duly sworn
4 by a Notary Public, was examined and
5 testified as follows:

6 EXAMINATION

7 BY MR. GABRIEL:

8 Q Please state your name and address
9 for the record.

10 A Michele Santangelo. 10-81 Route 376,
11 Wappingers Falls, New York 12590.

12 Q Good afternoon, Miss Santangelo. We
13 met just a moment ago. I will say on the
14 record my name is Rich Gabriel. I represent
15 the record companies in the lawsuit that
16 brings us here today.

17 Do you currently live with your mom?

18 A No.

19 Q Are you in school now?

20 A Yes.

21 Q Do you live, is it an apartment, dorm
22 or --

23 A It's just a rental house.

24 Q How long have you been in that rental
25 house?

1 M. Santangelo

2 A Six months.

3 Q Up to that time did you live with
4 your mom?

5 A No, last year I was away at
6 St. John's.

7 Q At school?

8 A Yes.

9 Q In the last five years other than the
10 time you were at school have you lived with
11 your mom?

12 A Yes.

13 Q Have you ever had your deposition
14 taken before?

15 A No.

16 Q Have you ever testified in any court
17 proceeding?

18 A No.

19 Q Let me tell you what we are going to
20 do today so you and I are on the same page.
21 Obviously I will be asking you questions.
22 Hopefully you will be answering them.
23 Therefore it's very important that you hear
24 and that you are comfortable, that you
25 understood the questions that I ask you. If

1 M. Santangelo

2 Mr. Glass to prepare for the deposition?

3 A Once.

4 Q How long was the conversation?

5 A I don't remember, like 20 minutes.

6 Q It wasn't a very long conversation?

7 A No.

8 Q Miss Santangelo, what is your birth
9 date?

10 A August 21, 1996.

11 Q 1986?

12 A Uh-huh.

13 Q Yes?

14 A Yes, sorry.

15 Q That's my example of reminding you to
16 answer verbally. Have you been known by any
17 other names or any nicknames, any pet names?

18 A No. Michy.

19 Q Michy, that's an example.

20 A Only my grandmother calls me that.

21 Q Michy. Any other names?

22 A Just Michele.

23 Q Have you used either e-mail or
24 instant messaging?

25 A Yes.

1 M. Santangelo

2 Q Have you had can you tell me all of
3 the e-mail addresses that you have used for
4 you personally?

5 A MMS, I don't even remember that one
6 so I can't give you that one.

7 Q MMS, those are your initials?

8 A Yes. Mich 8621@AOL.com. Then my
9 Marist, Michele.Santangelol@Maristedu.

10 Q Any other ones you can remember?

11 A No.

12 Q Have you used any -- how about any --
13 are you familiar with AIM, instant messaging
14 program?

15 A Yes.

16 Q Did you use the same names for your
17 instant messaging with AIM?

18 A Yes. I do it on AOL so.

19 Q You said the MMS one you didn't
20 specifically remember. Do you still use the
21 Mich 8621 at AOL still at home?

22 A Yes.

23 Q Then you have -- are you at Marist
24 College now?

25 A Yes.

1 M. Santangelo

2 Q Did you type in the Mich 8621, was
3 that the name you used?

4 A Yes, that's my AOL screen name.

5 Q What would that screen look like,
6 would it just ask you for a screen name?

7 A Yes.

8 Q At some point did you have to
9 register that screen name, how did that work?

10 A No, I never registered my screen
11 name.

12 Q Forgive me if I asked this before.
13 You said I think, did I ask you whether you
14 heard of a program called KaZaa?

15 A What's the question?

16 Q I can't remember if I asked before.
17 Are you familiar with a program called KaZaa?

18 A Yes.

19 Q Again, forgive me if I already asked
20 these questions, I can't remember. What do
21 you know about KaZaa?

22 A Just that it was media player you can
23 listen to music.

24 Q Was that the media player you used?

25 A I don't remember.

1 M. Santangelo

2 A No, I just -- I don't know if we ever
3 had a discussion. She put it out there that
4 it wasn't good to talk to strangers.

5 Q We are almost done.

6 A Okay.

7 Q Miss Santangelo, I'm showing you what
8 we marked as Exhibit 1 to your deposition. I
9 would like you to flip through this document
10 and tell me whether any of these pages look
11 familiar to you.

12 A This, this page but that's what all
13 of music downloaders look at that.

14 Q You are looking at the second page of
15 Exhibit 1, right?

16 A Yes. The second page and the fifth
17 page.

18 Q The second page of Exhibit 1 is, tell
19 me again what you said, that's when you would
20 kind of doing this, finding the music that's
21 what it looked like?

22 A Yes.

23 Q Then you said the fifth page?

24 A Yes. Isn't the fifth page and the
25 second page the same?

1 M. Santangelo

2 Q It's possible. Not quite. At the
3 bottom of the fifth page you will see a file
4 path, file size, some additional --

5 A Okay.

6 Q This page looks familiar to you, you
7 have seen this on your computer?

8 A The fifth page?

9 Q Second or fifth page.

10 A Yes.

11 Q That's the screen you saw on the
12 computer in your house on 2004?

13 A Yes.

14 Q That's how you would go about
15 searching for the music you talked about
16 before?

17 A Yes.

18 Q Would you press -- if you look at the
19 second page -- actually let me let you
20 finish. Tell me if any other pages look
21 familiar.

22 A Wait. This page. I don't know what
23 page it is. The third to the last. The
24 search page.

25 Q Third to the last page, the one has a

1 M. Santangelo

2 Q Did you ever press the what's up
3 button?

4 A No.

5 Q You have told me the pages you
6 recognize?

7 A Uh-huh.

8 Q Yes?

9 A Yes.

10 (Michele's Exhibit 2, Document,
11 marked for identification, as of this
12 date.)

13 Q I'm showing you what we marked as
14 Exhibit 2 to your deposition. Do you
15 recognize any of the pages in this exhibit?

16 A The same pages -- well, not the same
17 pages but like the same kind of screen.

18 Q These actually have page numbers at
19 the bottom.

20 A 24.

21 Q Let me catch up to you.

22 A I'm going backwards, sorry.

23 Q No problem. You have seen page 24,
24 Exhibit 2?

25 A Yes.

1 M. Santangelo

2 Q That was also on your computer,
3 correct?

4 A I don't know if it was that exact
5 thing.

6 Q You saw something very similar to
7 this on your 2004 --

8 A This one and this one. It was one of
9 them, I don't know which one.

10 Q That's my question. You have told me
11 you have seen the first one, did you also see
12 this one?

13 A Yes.

14 Q So you saw both of them at some point
15 in time?

16 A Yes.

17 Q On the computer in your house,
18 correct?

19 A Yes, they all look the same to me,
20 really.

21 Q You do remember seeing page 24?

22 A I remember seeing like the set up. I
23 don't know what it was.

24 Q Other pages that you recognize?

25 A Are you asking me if like I recognize

1 M. Santangelo

2 Q You said you have seen a box and you
3 are not sure if you saw KaZaa on there.

4 That's what you said?

5 A Yes.

6 Q Now, did you search for music with a
7 box that looked like page 24?

8 A Yes.

9 Q You do the same way there is one
10 called a search box that is kind of
11 highlighted there?

12 A Yes.

13 Q You would kind do the search, press
14 search and look for songs that way?

15 A Yes. But I can't tell you that it
16 said KaZaa on the top of it.

17 Q Understand. Thank you. Running out
18 of time. I'm going to fly through there
19 pretty quickly. I'm going to ask you to look
20 at what we marked in your brother's
21 deposition Robert Santangelo Junior
22 Exhibit 1. Do you recognize or have you seen
23 anything that looks like that document?

24 A Yes.

25 Q Is that something that you have seen

1 M. Santangelo

2 on the 2004 computer?

3 A This was the media player. Well, I
4 can't tell you that said that on the top of
5 it. This was media player.

6 Q Would you have to open up something
7 to see this?

8 A What do you mean?

9 Q When you press on my library is this
10 what you would see? How would you get to
11 this screen? You said you have seen this
12 before.

13 A Yes, I guess it was the library. I'm
14 not sure.

15 Q So you saw this list of Laxattack 857
16 before?

17 A I have never seen this part of it.
18 Like I have seen names and this is what it --
19 I can't tell you if those are the names I
20 have seen.

21 Q But you do -- you have seen -- have
22 you seen a list about this long on the
23 computer or did you see a list kind of this
24 long in the computer in your home in about
25 2004?

1 M. Santangelo

2 A Yes.

3 Q If you wanted to listen to music
4 would you just click on one of these and
5 listen?

6 A Yes.

7 Q Let me, Miss Santangelo, ask you
8 about a couple of specific songs. If I could
9 ask you, do you listen, have you listened on
10 the computer to the artist called Lit?

11 A Yes.

12 Q Are you familiar with any of their
13 songs?

14 A I have their CDs.

15 Q Have you listened to a song called
16 Happy?

17 A Yes.

18 Q On the computer?

19 A Oh, I can't tell you if I listened to
20 it on the computer.

21 Q You mentioned Incubus. Have you
22 listened to a song Nowhere Fast on the
23 computer?

24 A I don't remember.

25 Q How about familiar with the group

1 M. Santangelo

2 Third Eye Blind?

3 A Yes.

4 Q Is that a group you listen to?

5 A Yes.

6 Q Have you heard of their song

7 Semi-Charmed Life?

8 A Yes.

9 Q Have you listened to that on the
10 computer?

11 A I can't tell you.

12 Q Are you familiar with the group UB
13 40?

14 A Yes.

15 Q That a group you listen to as well?

16 A Not really.

17 Q Have you ever listened to their songs
18 Can't Help Falling in Love?

19 A Yes, I have listened to it. I can't
20 tell you if I listened to it on the computer.

21 Q Are you familiar with a group called
22 God Smack?

23 A Yes.

24 Q Have you heard their song Whatever?

25 A Yes.

1 M. Santangelo

2 Q Have you listened to that on the
3 computer?

4 A I can't tell you that.

5 Q You listened to that group?

6 A Not really.

7 Q But you have heard their songs?

8 A Yes.

9 Q How about familiar with the group Foo
10 Fighters?

11 A Yes.

12 Q Do you listen to their music?

13 A Yes.

14 Q Have you heard a son called Break
15 Out?

16 A Yes.

17 Q Have you heard that on the computer?

18 A I can't tell you.

19 Q Let me show you what was marked
20 previously Exhibit 2 to Robert Juniors
21 deposition. Document that's a list of songs.
22 Can you tell me, read down the list, Miss
23 Santangelo, whether you have listened to
24 these songs before?

25 A Have I listened to these songs

1 M. Santangelo

2 before?

3 Q Tell me which ones you have listened
4 to before. If it's easier to --

5 A Do you mean on the computer, because
6 I can't, I don't remember that.

7 Q Sorry. Just tell me first if you
8 have listened to any of them in any place.

9 A I don't know what this Men at Work
10 is. Yes, I have listened.

11 Q Other than Men at Work, you have
12 heard all these songs and groups?

13 A Yes.

14 Q Do you know whether you have listened
15 to any of them on the computer?

16 A No, I can't tell you.

17 Q You can't say one way or the other,
18 right?

19 A No.

20 Q Did you ever receive any instant
21 messages while you were in this program,
22 these music programs?

23 A No.

24 Q Did you ever see any instant messages
25 from the recording industry?

EXHIBIT E

SystemLog

4/11/2004 11:48:19 AM EDT (-0400 GMT) Initializing analysis of user
laxattack857@fileshare (NodeID: 115011800)
4/11/2004 11:48:19 AM EDT (-0400 GMT) Rule Name: Hubcap
4/11/2004 11:48:19 AM EDT (-0400 GMT) System Build Version: 3256
4/11/2004 11:48:19 AM EDT (-0400 GMT) Scanner Name: CMH05 (agent ID 79)
4/11/2004 11:48:19 AM EDT (-0400 GMT) Total Audio: 1322
4/11/2004 11:48:19 AM EDT (-0400 GMT) Total Video: 2
4/11/2004 11:48:19 AM EDT (-0400 GMT) Total Software: 0
4/11/2004 11:48:19 AM EDT (-0400 GMT) Total Documents: 0
4/11/2004 11:48:19 AM EDT (-0400 GMT) Total Files: 1641
4/11/2004 11:48:19 AM EDT (-0400 GMT)

Downloads Completed

4/11/2004 12:04:43 PM EDT (-0400 GMT) CMH05 Successfully downloaded Matchbox
20 - Real World.mp3 (BA3ADCE6753579CCAF5D9CDDBBEEB735)
4/11/2004 12:13:47 PM EDT (-0400 GMT) CMH05 Successfully downloaded Lionel
Richie & Diana Ross - Endless Love.mp3 (9E85C00304D208CB1C99B3042B7F6515)
4/11/2004 12:15:12 PM EDT (-0400 GMT) CMH05 Successfully downloaded Lit -
Happy In The Meantime - supermp3s.mp3 (A25A1D24B8AD491FD5C97F140FE3827E)
4/11/2004 1:13:14 PM EDT (-0400 GMT) CMH05 Successfully downloaded UB40 -
Can't Help Falling in Love.mp3 (0A78AF91F9832686E0FB03D908AF9DD8)
4/11/2004 1:18:56 PM EDT (-0400 GMT) CMH05 Successfully downloaded Godsmack
- Whatever.mp3 (AB060C6A9108CFFD4DA420362E80A48A)
4/11/2004 1:19:26 PM EDT (-0400 GMT) CMH05 Successfully downloaded Third Eye
Blind - Semicharmed Life.mp3 (C92A94F1F91AC609B39F0E8209E933CD)
4/11/2004 1:23:13 PM EDT (-0400 GMT) CMH05 Successfully downloaded Foo
Fighters - Breakout.mp3 (88A8DBBC1A1FDCA4ED5316908AC4912A)
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Successfully downloaded Incubus -
Nowhere Fast.mp3 (6D97B17C7F15969CF78BFC60522D77BE)

Handshake Acknowledgements

4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Handshake acknowledgement
received on 4/11/2004 12:15:09 PM for file Lit - Happy In The Meantime -
supermp3s.mp3
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Handshake acknowledgement
received on 4/11/2004 1:12:43 PM for file Incubus - Nowhere Fast.mp3
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Handshake acknowledgement
received on 4/11/2004 1:12:56 PM for file Third Eye Blind - Semicharmed Life.mp3
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Handshake acknowledgement
received on 4/11/2004 1:11:09 PM for file UB40 - Can't Help Falling in Love.mp3
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Handshake acknowledgement
received on 4/11/2004 12:14:25 PM for file Godsmack - Whatever.mp3
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Handshake acknowledgement
received on 4/11/2004 12:12:21 PM for file Lionel Richie & Diana Ross - Endless
Love.mp3
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Handshake acknowledgement
received on 4/11/2004 12:55:58 PM for file Foo Fighters - Breakout.mp3

4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Downloads complete.
4/11/2004 1:35:13 PM EDT (-0400 GMT) CMH05 Shutting down FastTrack.

Downloads Logged

4/11/2004 1:37:31 PM EDT (-0400 GMT) CMH05 Logging Lit - Happy In The
Meantime - supermp3s.mp3...
MSMQ successfully posted message
4/11/2004 1:37:34 PM EDT (-0400 GMT) CMH05 Logging Incubus - Nowhere
Fast.mp3...
MSMQ successfully posted message
4/11/2004 1:37:34 PM EDT (-0400 GMT) CMH05 Logging Third Eye Blind -
Semicharmed Life.mp3...
MSMQ successfully posted message
4/11/2004 1:37:34 PM EDT (-0400 GMT) CMH05 Logging UB40 - Can't Help Falling
in Love.mp3...
MSMQ successfully posted message
4/11/2004 1:37:34 PM EDT (-0400 GMT) CMH05 Logging Godsmack -
whatever.mp3...
MSMQ successfully posted message

```
SystemLog
4/11/2004 1:37:34 PM EDT (-0400 GMT) CMH05 Logging Lionel Richie & Diana
Ross - Endless Love.mp3...
      MSMQ successfully posted message
4/11/2004 1:37:34 PM EDT (-0400 GMT) CMH05 Logging Foo Fighters -
Breakout.mp3...
      MSMQ successfully posted message
4/11/2004 1:37:35 PM EDT (-0400 GMT) CMH05 Status: Success
```


EXHIBIT F

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELEKTRA ENTERTAINMENT)
GROUP, INC., a Delaware)
Corporation; VIRGIN)
RECORDS AMERICA, INC., a)
California corporation;)
UMG RECORDINGS, INC., a)
Delaware corporation; BMG)
MUSIC, a New York general)
Partnership; and SONY BMG)
MUSIC ENTERTAINMENT, a)
Delaware general)
Partnership,)

Plaintiffs,)

vs.) No. 05CIV2414

PATRICIA SANTANGELO,)
Defendant.)

DEPOSITION OF MATTHEW SECKLER
Scarsdale, New York
Friday, June 16, 2006

Reported by:
NICOLE AMENEIROS, RPR
JOB NO. 185329

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June 16, 2006

11:38 a.m.

Deposition of MATTHEW SECKLER, held
at the offices of Getman Lyder &
Scalise, LLP, 670 White Plains Road,
Scarsdale, New York, pursuant to Notice,
before NICOLE AMENEIROS, a Notary Public
of the State of New York.

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A P P E A R A N C E S:

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670 White Plains Road - Suite 325

Scarsdale, New York 10583

BY: JAMES K. LYDER, ESQ.

ALSO PRESENT:

JAMES SECKLER

1 Seckler

2 A. I guess that's what it was.

3 Q. All right.

4 A. I don't remember.

5 Q. And you said "me and Bobby." Is
6 that Robert Santangelo, Jr.?

7 A. Yeah.

8 Q. Okay.

9 A. Yeah.

10 Q. It's Bobby Santangelo?

11 A. Yeah.

12 Q. All right. And it's the guy who's
13 about a year younger than you?

14 A. Yes.

15 Q. Not the father?

16 A. Yes.

17 Q. All right. Tell me about that.
18 You said -- I gather you and Bob -- we'll
19 call him Bobby Santangelo, and we'll mean
20 Robert Santangelo, Jr., okay?

21 A. All right.

22 Q. I gather you and Bobby set up a
23 Kazaa account together?

24 A. Yes.

25 Q. Okay. When did that happen?

1 Seckler

2 A. Like two to three years ago.

3 Q. Okay.

4 A. A while ago.

5 Q. And why don't you explain the
6 circumstances. Were you over his house and
7 you decided to do it? Tell me what happened.

8 A. We went over to his house. We just
9 set up an account, and then that's it.

10 Q. Okay.

11 A. At his house.

12 Q. Whose idea was it?

13 A. I don't remember.

14 Q. Okay. Did you know about Kazaa
15 before?

16 A. Not really.

17 Q. All right. Was he the one who told
18 you about Kazaa?

19 A. I don't know how we found out about
20 it.

21 Q. Okay. Were you guys just messing
22 around?

23 A. Yeah, just --

24 Q. All right. Was anyone else there
25 with you when you did it?

1 Seckler

2 A. I don't think so.

3 Q. Okay. So you and Bobby are there
4 at his computer?

5 A. Yes.

6 Q. All right. And then somehow you
7 figured out about this program Kazaa, right?

8 A. Uhm-hum.

9 Q. Yes?

10 A. Yes.

11 Q. Okay. And you don't remember
12 specifically how you knew about it; is that
13 true?

14 A. Yes, that's true.

15 Q. All right. And so you all decided
16 to -- the two of you together downloaded this
17 Kazaa program?

18 A. Yes.

19 Q. All right. And that was on -- it
20 was only one computer at the Santangelo
21 house?

22 A. I believe, yes.

23 Q. All right. And then at that time
24 did you download some music, or what did you
25 do?

1 Seckler

2 song?

3 A. Yeah.

4 Q. All right. And then what happened?

5 A. The results came up.

6 Q. All right.

7 A. And we clicked on it.

8 Q. So would you get a number of

9 different --

10 A. Yeah.

11 Q. The same song comes up a number of
12 times, right?

13 A. Yes.

14 Q. And then you clicked on one of them
15 to see if it would download?

16 A. Yes.

17 Q. And then you listened to it I take
18 it?

19 A. Yes.

20 Q. Okay. And was -- when you set up
21 that account to the best your knowledge it
22 was laxattack857?

23 A. Yes.

24 Q. And do you remember having any
25 discussions with Bobby Santangelo about what

1 Seckler

2 work? Did you download on Kazaa and other
3 games and other stuff?

4 A. Yeah, play games.

5 Q. You describe for me what you guys
6 did.

7 MR. JAMES SECKLER: What games did
8 you play?

9 A. Like Shockwave, play some games I
10 guess.

11 Q. All right. And did you from time
12 to time also download music, search for music
13 using this Kazaa program?

14 A. Yeah, but, like, not a lot. If we
15 heard a song we liked we downloaded it.

16 Q. Okay.

17 A. But it was not just, like, me.

18 Q. And tell me about that. You said
19 not just you. Sometimes it was him?

20 A. Yeah. Like, I'm not just going to
21 go download stuff on his computer. I have to
22 ask him and stuff, see if it's all right, beg
23 permission.

24 Q. Okay. So whenever you were there
25 if you would hear -- you heard a song you

1 Seckler

2 liked and you were going to download --

3 A. Yeah, we -- go.

4 Q. Go.

5 A. We both agreed on a certain song, I
6 mean, download it.

7 Q. So you would do it together?

8 A. Yes.

9 Q. All right. And you would not have
10 done it yourself without asking him?

11 A. No.

12 Q. All right. So if he -- I'll
13 represent to you he testified that there were
14 times you were listening to music on the
15 computer and he was somewhere else in the
16 house?

17 A. That was music in the library
18 already.

19 Q. All right. So, and the Kazaa
20 library?

21 A. Yes.

22 Q. All right. So there were times
23 when you would be there and truthfully you
24 would be sitting at the computer and you
25 might pull up a song that was already in the

1 Seckler

2 share file?

3 A. Yes.

4 Q. But you're saying you would not
5 download a new song without his permission?

6 A. Him or, like, another family
7 member.

8 Q. All right. Were there other family
9 members there at the computer with you when
10 you were there?

11 A. Just Michelle really.

12 Q. Okay. And so sometimes -- and when
13 Michelle was there was Bobby also there?

14 A. Like, sometimes it would be Bobby,
15 both of them, sometimes it would be just her.

16 Q. All right. And when she was there
17 were there times when you and she were
18 listening to music or downloading music on
19 the Kazaa program?

20 A. No, I was seeing what she was doing
21 because she likes totally different music
22 than me. I was seeing what she listened to.

23 Q. All right. So, now, when she was
24 listening to music was she on the Kazaa
25 program to your knowledge? I don't want you

1 Seckler

2 to guess.

3 A. Yes, when she was listening to
4 music, yeah.

5 Q. And you can see on the screen that
6 it looked like a Kazaa program?

7 A. Yes.

8 Q. Okay. And so this was in the -- a
9 case where you were -- it wasn't the same as
10 when you were with Bobby? This was a case,
11 if I'm understanding you, Michelle was
12 working on the computer and you happen to be
13 there looking over her shoulder?

14 A. Yes.

15 Q. Is that true?

16 A. Yes.

17 Q. All right. And if I'm
18 understanding, you did not -- you would not
19 ask Michelle, hey, can I download a song that
20 was -- that's what you do with Bobby, but
21 when Michelle was there you would just be
22 watching her?

23 A. Yes.

24 Q. Okay.

25 A. Yes.

1 Seckler

2 A. She could have, yes.

3 Q. Or she could have been listening to
4 something in the shared folder?

5 A. Yes.

6 Q. Do you know?

7 A. I do not know.

8 Q. And when Michelle was on there, and
9 I think this is consistent with Michelle, you
10 did see Michelle sometimes listening out of
11 the share folder?

12 A. Yes.

13 Q. Okay. Michelle testified the same
14 way.

15 All right. Any other family
16 members you saw using -- listening to music
17 from the computer?

18 A. No.

19 Q. All right. Can you estimate,
20 Mr. Seckler, about how many times you were
21 over -- how many times a week before they
22 moved away would you be there listening to
23 music on the computer either from the shared
24 folder on Kazaa or downloading?

25 A. Probably like two to three times a

1 Seckler

2 week.

3 Q. All right. And when you did -- and
4 was Bobby always there when you did, did
5 that?

6 A. What? Listen to music?

7 Q. Yeah.

8 A. Or at his house?

9 Q. Yeah. Thank you. Listening to
10 music. Let me back up to make sure we're
11 tracking. I want to make sure you understand
12 the question I asked.

13 A. Okay.

14 Q. You said, I think, you'd be over a
15 couple times a week at his house sometimes
16 playing games on the computer, doing other
17 things. I was being more specific. How many
18 times would you be there where you were
19 either listening to music on Kazaa or
20 downloading music on Kazaa? Would you do it
21 pretty much each time you were there for some
22 period of time?

23 A. Yeah. I mean, either listening to
24 music -- yeah, listening to music.

25 Q. Or downloading music?

1 Seckler

2 A. Yeah.

3 Q. I recognize you may spend a fair
4 amount of time in that particular day. About
5 how many -- how long in terms of hours or was
6 it about an hour out of the day you would be
7 there listening to music or downloading?

8 A. How long listening to music or be
9 in his house?

10 Q. Listening to music.

11 A. Listening to music probably about
12 like an hour or so.

13 Q. All right.

14 A. Probably just like hang out and
15 just listen -- put the music on.

16 Q. And you take it off the shared
17 folder --

18 A. Yes.

19 Q. -- in Kazaa?

20 And then, all right. Out of --
21 about how many times -- you say about, you
22 know, an hour out of each day for the two or
23 three times a week you'd be listening to
24 music. How often -- how much of that hour
25 would you actually download songs? Was it

1 Seckler

2 music, you know.

3 Q. All right.

4 A. I mean, when I was there we would
5 listen to music when we were just, like,
6 hanging out, so I assume he would do it if he
7 had other friends over or if it was just his
8 friends.

9 Q. And he knew what the screen name
10 was?

11 A. Yeah, we both set it up.

12 Q. And you're talking -- I'm sorry.
13 Did you want to --

14 A. I actually didn't remember it until
15 you guys said it. We just through a screen
16 name in there. I didn't even really realize.

17 Q. And the reason I think --
18 understand why I'm asking these questions.
19 I'm trying to figure out how 1200 songs got
20 on there in this time.

21 A. Yeah.

22 Q. Do you know whether -- you say
23 there were times when Bobby would say to you,
24 for example, hey, listen to this one I just
25 downloaded or anything like that? Did that

1 Seckler

2 happen from time to time or ever?

3 A. Yeah, yes.

4 Q. Okay. So you have some basis for
5 saying that Bobby did this on his own?

6 A. Oh, yeah, sometimes.

7 Q. Did Michelle -- what was your
8 relationship with Michelle? I mean, you knew
9 her because she was your neighbor?

10 A. Yeah.

11 Q. Were you friends or just kind of
12 knew each other?

13 A. Yeah, I knew her as Bobby's sister.

14 Q. Okay. Did she ever tell you or say
15 in your presence that she was downloading
16 music using that laxattack875?

17 A. I'm pretty sure that was the only
18 name on the account. So you just set it up,
19 you put a thing in there, and that's the only
20 one you use.

21 Q. And I'll tell you there's another
22 screen name which is why I ask. It's
23 misc8621, M-I-S-C, 8621, which Michelle
24 verified is her AOL account name, that's why
25 I'm asking you.

1 Seckler

2 A. No.

3 Q. You do know that Bobby and Michelle
4 were listening to music off Kazaa?

5 A. Yes.

6 Q. And you do know they had downloaded
7 music on Kazaa?

8 A. Yes.

9 Q. All right. And, okay. You know or
10 remember, Mr. Seckler, that a couple of weeks
11 ago there was a technician who came and made
12 a mirror image of your computer?

13 A. Yes.

14 Q. You may not know what they did?

15 A. Yeah, they looked at it.

16 Q. I will tell you what they did, and
17 this is just called computer forensics. They
18 came and made a mirror image of your
19 computer. So we're not interested in
20 anything private, anything won't be used for
21 any purpose other than that case. We were
22 looking to see principally about laxattack857
23 frankly.

24 A. All right.

25 Q. I will tell you that what you say

1 Seckler

2 Q. Do you know, without guessing,
3 whether both Kazaa and Imesh were on the
4 Santangelo computer?

5 A. I only remember Kazaa.

6 Q. Okay. All right. And let's go
7 back for just a minute.

8 A. It's all the same stuff pretty
9 much.

10 Q. In other words, Kazaa and Imesh are
11 pretty much the same?

12 A. Yeah.

13 Q. And they work pretty much the same?
14 Is that right?

15 A. What?

16 Q. Yeah, that's good. You said it's
17 all pretty much the same stuff?

18 A. Yeah.

19 Q. You mean Imesh and Kazaa pretty
20 much work the same?

21 A. Yes.

22 Q. Okay. I'm just going to show you
23 the Imesh icon. You recognize that because
24 you've seen it before, correct?

25 A. Yes.

1 Seckler

2 Q. While you were on Kazaa or Imesh
3 either at this Santangelo home or yours did
4 you ever see an indication that someone was
5 downloading something from you?

6 A. Yes.

7 Q. Okay. Tell me what that would look
8 like.

9 A. It's at the bottom. It just used
10 to be like the same thing up top but it would
11 say -- I forget what it would say, but I
12 knew. I don't know how.

13 Q. Okay.

14 A. It said it somewhere.

15 Q. And did you see that at the
16 Santangelo home as well as yours?

17 A. I don't remember. I knew it was at
18 my home and then I got rid of it because I
19 figured it out.

20 Q. All right. Do you -- I don't want
21 you to guess. Do you believe that you saw it
22 at the Santangelo home as well?

23 A. I don't know.

24 Q. Did you ever do -- you personally,
25 either you personally or you and Bobby, take

1 Seckler

2 any action to stop somebody from downloading
3 music from you while you were on his
4 computer?

5 A. Yeah, yeah.

6 Q. What did you do?

7 A. You can cancel it.

8 Q. And did you do that on the
9 Santangelo computer?

10 A. Yeah, because we didn't -- I never
11 really learned how to do it until I put it on
12 my computer.

13 Q. And so you did -- from time to time
14 you would cancel somebody?

15 A. Yeah, if we download a song we
16 would cancel it so it would go faster.

17 Q. And you did that on the Santangelo
18 computer?

19 A. Uhm-hum.

20 Q. Yes?

21 A. Yes, I did it on my computer, so I
22 figured it out how to block it or stop it
23 completely.

24 Q. So you did know that people from
25 time to time were downloading?

1 Seckler

2 A. Yes.

3 Q. Were downloading from the
4 Santangelo computer?

5 A. Yes.

6 Q. Because you would from time to time
7 stop them?

8 A. Yes.

9 Q. Okay. And did you do the same at
10 your house at least until you knew how to
11 prevent it from the beginning?

12 A. Yeah.

13 Q. You would cancel when you saw it?

14 A. Yes.

15 MR. GABRIEL: All right. At this
16 point, Mr. Seckler, I have no further
17 questions.

18 THE WITNESS: All right.

19 MR. GABRIEL: My colleague does
20 have a chance to ask you any follow-ups
21 he wants to ask. I want to thank you
22 for your time today.

23 I want to thank you again, Jim, for
24 your courtesies and you, Mr. Seckler,
25 for your courtesies.

1 Seckler

2 A. Yes.

3 Q. When Mr. Gabriel asked you about
4 whether Michelle was using Kazaa at first you
5 seemed unsure, and I think the issue wasn't
6 -- was whether you were sure that she was in
7 fact using Kazaa as a downloading program?

8 A. All right.

9 Q. Can you tell me more about that,
10 what it is that you actually remember?

11 A. I just remember her listening to
12 music on the computer while she was --
13 whatever she was doing on the computer, and
14 then I saw her download from the site.

15 Q. Now, how do you know she was
16 downloading?

17 A. Because she was looking at the
18 songs.

19 Q. And so looking at the songs is
20 automatically the same as downloading?

21 A. No, but why would she be looking --
22 I thought she was looking at the songs and
23 she was downloading them.

24 Q. So you don't know for a fact that
25 she was downloading them?

1 Seckler

2 A. No.

3 Q. And you shrugged when Mr. Gabriel
4 asked you if she was on Kazaa. And I'm not
5 challenging your answer. I'm simply asking
6 that's a body language that's someone's not
7 sure?

8 A. Right, yeah.

9 Q. Were you sure she was on Kazaa?

10 A. I'm pretty sure, yes.

11 Q. What makes sure -- you are sure or
12 pretty sure that she was on Kazaa?

13 A. Because she used to just go on
14 Kazaa.

15 Q. Well --

16 A. I just remember she used to go on
17 Kazaa.

18 Q. How do you know she was on Kazaa as
19 opposed to another program?

20 A. I guess I don't.

21 Q. Okay. In answer to a follow-up
22 question at that point you said -- I believe
23 you said that you downloaded songs off the
24 radio?

25 A. No, no.

1 Seckler

2 MR. GABRIEL: I'll object to the
3 form. I don't think he did, but you can
4 ask him.

5 THE WITNESS: No.

6 Q. Okay. Well, at that point you
7 mentioned something about the radio. What --

8 A. I said if we heard songs on the
9 radio.

10 Q. Heard a song on the radio, okay.

11 What radio? I mean -- in other
12 words, is there a radio -- is it an on-line
13 radio? Is it a boom box radio?

14 A. Yeah, we heard songs on a radio,
15 wherever, the boom box, and then if we liked
16 the song we'd go and download.

17 Q. You're not referring to AOL radio?

18 A. No.

19 Q. Or on-line radio?

20 A. No.

21 Q. Is it possible to download songs
22 from the AOL radio?

23 A. I don't know.

24 Q. You said that at some point you
25 asked Bobby for permission for downloading;

1 Seckler

2 is that right?

3 A. Yeah, we used to, like, talk about
4 the songs, and if we both thought that we
5 liked them then we would download them.

6 Q. Okay. Was there something -- was
7 there a particular reason you asked
8 permission for downloading or did you
9 actually say --

10 A. Well, it's his computer. I thought
11 it would be polite to ask.

12 Q. Okay. And that was for
13 downloading, not listening?

14 A. Yes.

15 Q. So you could listen and not
16 download?

17 A. Yeah, yeah.

18 MR. GABRIEL: Object to the form.
19 Lack of foundation. I need to make
20 certain objections to preserve my
21 clients' rights.

22 THE WITNESS: Okay.

23 MR. GABRIEL: You can always answer
24 the question.

25 Q. Do you know if you or your parents

1 Seckler

2 Q. Okay. Now, in regard to the
3 installation of Kazaa -- first of all, have
4 you heard of Kazaa before you met Bobby?

5 A. What do you mean? Not really. We
6 just heard of it and we downloaded it
7 together.

8 Q. Okay. When you say you heard of it
9 together how -- what would have been the
10 circumstances under which that might have
11 happened?

12 A. I don't know. We just heard of it.

13 Q. Okay. Had you ever seen anyone
14 using Kazaa prior to setting up at Bobby's
15 house?

16 A. No, I don't think so.

17 Q. When you talked about leaving the
18 defaults in place, again, as we talked about
19 at the very beginning, you weren't sure in my
20 view by your body language --

21 A. Yeah.

22 Q. -- whether you had left them in
23 place, so I just want to take you through
24 them individually.

25 Do I understand correctly that when

EXHIBIT L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

..... x
ELEKTRA ENTERTAINMENT GROUP INC., a :
Delaware corporation; VIRGIN RECORDS :
AMERICA, INC., a California corporation; UMG :
RECORDINGS, INC., a Delaware corporation; :
BMG MUSIC, a New York general partnership; :
and SONY BMG MUSIC ENTERTAINMENT, a :
Delaware general partnership, • :

Civil Action No.: 06 Civ. 11520 (SCR)

Plaintiffs, :

**DECLARATION OF
JOAN CHO**

-against- :

MICHELLE SANTANGELO and ROBERT :
SANTANGELO, JR., :

Defendants. :

..... x

I, JoAn Cho, pursuant to 28 U.S.C. § 1746, declare the following to be true and correct to the best of my knowledge:

1. I am Senior Director – Litigation Counsel, Business and Legal Affairs for Universal Music Group (“Universal”). My responsibilities include working on behalf of Universal-affiliated entities, including UMG Recordings, Inc. (“UMG, Inc.”). I have possession, custody and/or control of the business records of UMG, Inc. If called and sworn as a witness I could competently testify to the facts contained herein.

2. I am knowledgeable about UMG, Inc.’s copyrights and licensing practices and am familiar with UMG, Inc.’s business relationships. I am also knowledgeable about UMG, Inc.’s policy, custom and practice of providing copyright notices.

3. UMG, Inc. is engaged in the creation, manufacture, distribution and/or sale of sound recordings. In connection with this business, UMG, Inc. generally enters into contracts

with musical performers whereby UMG, Inc. either owns the copyrights in sound recordings featuring those performers or has exclusive rights under copyright (e.g. reproduction and/or distribution rights) in sound recordings featuring those performers (the “UMG Recordings”).

4. Attached to this Declaration as Exhibit 1 is a spreadsheet listing all of the UMG Recordings for which recovery is being sought in this action. Exhibit 1 shows the artist, song title, album title and the copyright registration number (SR#) for each UMG Recording.

5. The UMG Recordings in question have been registered with the U.S. Copyright Office. UMG, Inc.’s copyright registration for each of the UMG Recordings was effective prior to the date on which Defendant was observed infringing them.

6. UMG, Inc. has not granted Defendant authorization to upload, download, copy or distribute the UMG Recordings.


7. It is UMG, Inc.’s policy, custom and practice to provide copyright notices for sound recordings for which it either owns the copyrights in the sound recordings or has exclusive rights under copyright (e.g., reproduction and/or distribution rights) in the sound recordings. It is UMG, Inc.’s policy, custom and practice that each such notice conform to the requirements of section 402(b) and (c) of the Copyright Act. Specifically, it is UMG, Inc.’s policy, custom and practice to provide for all UMG Recordings a copyright notice that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. It is UMG, Inc.’s policy, custom and practice to place the copyright notice on the surface of the phonorecord¹ and/or on the phonorecord label or container.

¹ The term “phonorecord” is used as defined by section 101 of the Copyright Act, and includes, but is not limited to, compact discs.

8. The UMG Recordings on Exhibit 1 as currently distributed by UMG have copyright notices pursuant to section 402(b) and (c) of the Copyright Act. Specifically, each work contains a copyright notice that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. Further, for each work the copyright notice was placed on the surface of the phonorecord and/or on the phonorecord label or container.

9. Pursuant to UMG, Inc.’s policy, custom and practice of providing copyright notices, prior releases of these recordings should have had a copyright notice consisting of: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. That notice would have been placed on the surface of the phonorecord and/or on the phonorecord label or container.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 4th day of December, 2008 at Santa Monica, California.



JoAn Cho

Exhibit 1
UMG Recordings, Inc.'s Copyrighted Sound Recordings

Copyright Plaintiff	Artist	Song Title	Album Title	SR	Registration Date
UMG Recordings, Inc.	DMX	Party Up	...And Then There Was X	279-017	4/12/2000
UMG Recordings, Inc.	Guns N Roses	Sweet Child O' Mine	Appetite for Destruction	85-358	11/9/1987
UMG Recordings, Inc.	Ludacris	Stick Em Up	Back For the First Time	289-433	11/16/2000
UMG Recordings, Inc.	Nelly	Ride Wit Me	Country Grammar	281-782	7/11/2000
UMG Recordings, Inc.	Nirvana	All Apologies	In Utero	172-276	9/20/1993
UMG Recordings, Inc.	K-Ci & Jojo	All My Life	Love Always	238-754	8/12/1997
UMG Recordings, Inc.	Hanson	MMMBop	Middle Of Nowhere	238-338	7/29/1997
UMG Recordings, Inc.	Nelly	Nellyville	Nellyville	315-537	8/13/2002
UMG Recordings, Inc.	Nirvana	Lithium	Nevermind	135-335	10/31/1991
UMG Recordings, Inc.	New Found Glory	My Friends Over You	Sticks and Stones	308-874	6/5/2002
UMG Recordings, Inc.	Counting Crows	Colorblind	This Desert Life	271-316	12/22/1999
UMG Recordings, Inc.	Guns N Roses	November Rain	Use Your Illusion I	134-647	10/21/1991
UMG Recordings, Inc.	Weezer	Undone (The Sweater Song)	Weezer	187-644	5/27/1994
UMG Recordings, Inc.	Ludacris	Saturday (Ooh! Ooh!)	Word of Mouf	304-605	2/25/2002

EXHIBIT M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----		x
ELEKTRA ENTERTAINMENT GROUP INC., a	:	
Delaware corporation; VIRGIN RECORDS	:	
AMERICA, INC., a California corporation; UMG	:	
RECORDINGS, INC., a Delaware corporation;	:	
BMG MUSIC, a New York general partnership;	:	Civil Action No.: 06 Civ. 11520 (SCR)
and SONY BMG MUSIC ENTERTAINMENT, a	:	
Delaware general partnership,	:	
	:	DECLARATION OF
Plaintiffs,	:	ALASDAIR MCMULLAN
	:	
-against-	:	
	:	
MICHELLE SANTANGELO and ROBERT	:	
SANTANGELO, JR.,	:	
	:	
Defendants.	:	
	:	
-----		x

I, Alasdair McMullan, pursuant to 28 U.S.C. § 1746, declare the following to be true and correct to the best of my knowledge:

1. I am Executive Vice President of Legal Affairs for EMI Music North America ("EMI"). My responsibilities include working on behalf of EMI-affiliated entities, including Virgin Records America, Inc., which is a party to this action. I have possession, custody and/or control of EMI's business records. I have personal knowledge of the following facts and could, if called and sworn as a witness, competently testify thereto.

2. I am knowledgeable about EMI's copyrights and licensing practices and am familiar with EMI's business relationships. I am also knowledgeable about EMI's policy, custom and practice of providing notices of copyright.

3. EMI is engaged in the creation, manufacture, distribution and/or sale of sound recordings. In connection with this business, EMI generally enters into contracts with musical

performers whereby EMI either owns the copyrights in sound recordings featuring those performers or has exclusive rights under copyright (e.g. reproduction and/or distribution rights) in sound recordings featuring those performers (the “EMI Recordings”).

4. Attached to this Declaration as Exhibit 1 is a spreadsheet listing all of the EMI Recordings for which recovery is being sought in this action. Exhibit 1 shows the artist, song title, album title and the copyright registration number (SR#) for each EMI Recording.

5. The EMI Recordings in question have been registered with the U.S. Copyright Office. EMI’s copyright registration for each of the EMI Recordings was effective prior to the date on which Defendant was observed infringing them.

6. EMI has not granted Defendant authorization to upload, download, copy or distribute the EMI Recordings.

7. It is EMI’s policy, custom and practice to provide copyright notices for sound recordings for which it either owns the copyrights in the sound recordings or has exclusive rights under copyright (e.g., reproduction and/or distribution rights) in the sound recordings. It is EMI’s policy, custom and practice that each such notice conform to the requirements of section 402(b) and (c) of the Copyright Act. Specifically, it is EMI’s policy, custom and practice to provide for all EMI Recordings a copyright notice that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. It is EMI’s policy, custom and practice to place the copyright notice on the surface of the phonorecord¹ and/or on the phonorecord label or container.

¹ The term “phonorecord” is used as defined by section 101 of the Copyright Act, and includes, but is not limited to, compact discs.

8. The EMI Recordings on Exhibit 1 as currently distributed by EMI have copyright notices pursuant to section 402(b) and (c) of the Copyright Act. Specifically, each work contains a copyright notice that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. Further, for each work the copyright notice was placed on the surface of the phonorecord and/or on the phonorecord label or container.

9. Pursuant to EMI’s policy, custom and practice of providing copyright notices, prior releases of these recordings should have had a copyright notice consisting of: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. That notice would have been placed on the surface of the phonorecord and/or on the phonorecord label or container.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 5th day of December, 2008 at New York, New York.

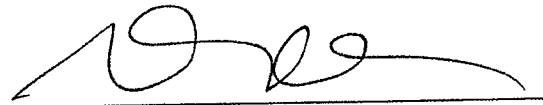

Alasdair McMullan

Exhibit 1
EMI Music North America's Copyrighted Sound Recordings

Copyright Plaintiff	Artist	Song Title	Album Title	SR	Registration Date
Virgin Records America, Inc.	UB40	Can't Help Falling Love	Promises and Lies	186-039	9/27/1993
Virgin Records America, Inc.	Janet Jackson	All for You	All for You	308-900	9/3/2002
Virgin Records America, Inc.	DiVinyls	I Touch Myself	DiVinyls	127-625	1/30/1991
Virgin Records America, Inc.	Janet Jackson	Together Again	The Velvet Rope	261-516	3/5/1999

EXHIBIT N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ELEKTRA ENTERTAINMENT GROUP INC., a :
Delaware corporation; VIRGIN RECORDS :
AMERICA, INC., a California corporation; UMG :
RECORDINGS, INC., a Delaware corporation; :
BMG MUSIC, a New York general partnership; : Civil Action No.: 06 Civ. 11520 (SCR)
and SONY BMG MUSIC ENTERTAINMENT, a :
Delaware general partnership, :
: **DECLARATION OF**
: **SILDA PALERM**
: **Plaintiffs,** :
: :
: -against- :
: :
MICHELLE SANTANGELO and ROBERT :
SANTANGELO, JR., :
: **Defendants.** :
: :
: :
----- X

I, Silda Palerm, pursuant to 28 U.S.C. § 1746, declare the following to be true and correct to the best of my knowledge:

1. I am Vice President and Senior Litigation Counsel for Warner Music Group Corp. My responsibilities include working on behalf of Warner Music Group Corp.-affiliated entities, including Elektra Entertainment Group, Inc. (collectively "Warner Music"). I have access to Warner Music's business records. I have personal knowledge of the following facts and could, if called and sworn as a witness, competently testify thereto.
2. I am knowledgeable about Warner Music's copyrights and licensing practices and am familiar with Warner Music's business relationships. I am also knowledgeable about Warner Music's policy, custom and practice of providing copyright notices.
3. Warner Music is engaged in the creation, manufacture, distribution and/or sale of sound recordings. In connection with this business, it is Warner Music's policy, custom and

practice to provide copyright notices for sound recordings for which it either owns the copyrights or has exclusive rights under copyright (e.g., reproduction and/or distribution rights) (the “Warner Recordings”).

4. Attached to this Declaration as Exhibit 1 is a spreadsheet listing all of the Warner Recordings for which recovery is being sought in this action. Exhibit 1 shows the artist, song title, album title and the copyright registration number (SR#) for each Warner Recording.

5. The Warner Recordings in question have been registered with the U.S. Copyright Office. Warner Music’s copyright registrations for the Warner Recordings were effective prior to the date on which Defendant was observed infringing such Warner Recordings.

6. Warner Music has not granted Defendant authorization to upload, download, copy or distribute the Warner Recordings.

7. It is Warner Music’s policy, custom and practice to provide copyright notices for sound recordings for which it either owns the copyrights or has exclusive rights under copyright (e.g., reproduction and/or distribution rights) in the sound recordings. It is Warner Music’s policy, custom and practice that each such notice conform to the requirements of section 402(b) and (c) of the Copyright Act. Specifically, it is Warner Music’s policy, custom and practice to provide for all Warner Recordings a copyright notice that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. It is Warner Music’s policy, custom and practice to place the copyright notice on the surface of the phonorecord¹ and/or on the phonorecord label or container.

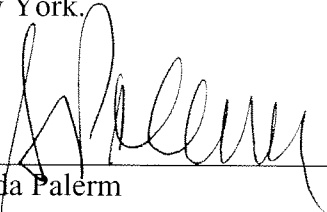
¹ The term “phonorecord” is used as defined by section 101 of the Copyright Act, and includes, but is not limited to, compact discs.

8. The Warner Recordings on Exhibit 1 as currently distributed by Warner Music have copyright notices pursuant to section 402(b) and (c) of the Copyright Act. Specifically, the works contain copyright notices that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. Further, the copyright notices were placed on the surface of the phonorecord and/or on the phonorecord label or container.

9. Pursuant to Warner Music’s policy, custom and practice, of providing copyright notices, prior releases of these recordings should have had a copyright notice consisting of: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. That notice would have been placed on the surface of the phonorecord and/or on the phonorecord label or container.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this

8th day of December, 2008 at New York, New York.



Silca Palerm

Exhibit 1
Warner Entities Copyrights

Copyright Claimant	Copyright Plaintiff	Artist	Song Title	Album Title	SR	Registration Date
Elektra Entertainment Group	Elektra Entertainment Group Inc.	Third Eye Blind	Semi-Charmed Life	Third Eye Blind	188-673	7/17/1997
Elektra Entertainment	Elektra Entertainment Group Inc.	Tracy Chapman	Give Me One Reason	New Beginning	188-489	8/17/1996

EXHIBIT O

3. Sony BMG is engaged in the creation, manufacture, distribution and/or sale of sound recordings. In connection with this business, Sony BMG generally enters into contracts with musical performers whereby Sony BMG either owns the copyrights in sound recordings featuring those performers or has exclusive rights under copyright (e.g. reproduction and/or distribution rights) in sound recordings featuring those performers (the “Sony BMG Recordings”).

4. Attached to this Declaration as Exhibit 1 is a spreadsheet listing all of the Sony BMG Recordings for which recovery is being sought in this action. Exhibit 1 shows the artist, song title, album title and the copyright registration number (SR#) for each Sony BMG Recording.

5. The Sony BMG Recordings in question have been registered with the U.S. Copyright Office. Sony BMG’s copyright registration for each of the SONY BMG Recordings was effective prior to the date on which Defendant was observed infringing them.

6. Sony BMG has not granted Defendant authorization to upload, download, copy or distribute the Sony BMG Recordings.

7. It is Sony BMG’s policy, custom and practice to provide copyright notices for sound recordings for which it either owns the copyrights in the sound recordings or has exclusive rights under copyright (e.g., reproduction and/or distribution rights) in the sound recordings. It is Sony BMG’s policy, custom and practice that each such notice conform to the requirements of section 402(b) and (c) of the Copyright Act. Specifically, it is Sony BMG’s policy, custom and practice to provide for all Sony BMG Recordings a copyright notice that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. It is Sony BMG’s

policy, custom and practice to place the copyright notice on the surface of the phonorecord¹ and/or on the phonorecord label or container.

8. The Sony BMG Recordings on Exhibit 1 as currently distributed by Sony BMG have copyright notices pursuant to section 402(b) and (c) of the Copyright Act. Specifically, each work contains a copyright notice that consists of the following three elements: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. Further, for each work the copyright notice was placed on the surface of the phonorecord and/or on the phonorecord label or container.

9. Pursuant to Sony BMG’s policy, custom and practice of providing copyright notices, prior releases of these recordings should have had a copyright notice consisting of: (1) the symbol “©”; (2) the year of publication of the sound recording; and (3) the name of the owner of copyright in the sound recording. That notice would have been placed on the surface of the phonorecord and/or on the phonorecord label or container.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 10th day of December, 2008 at New York, New York.



Jennifer L. Pariser

¹ The term “phonorecord” is used as defined by section 101 of the Copyright Act, and includes, but is not limited to, compact discs.

Exhibit 1
Sony BMG Music Entertainment's Copyrighted Sound Recordings

Copyright Claimant	Copyright Plaintiff	Artist	Song Title	Album Title	SR	Registration Date
BMG Entertainment	BMG Music SONY BMG MUSIC ENTERTAINMENT	Lit	Happy	A Place in the Sun	264-272	4/22/1999
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Incubus	Nowhere Fast	Make Yourself There is Nothing Left To Lose	278-818	3/14/2000
Roswell Records, Inc.	BMG Music SONY BMG MUSIC ENTERTAINMENT	Foo Fighters	Breakout	Americana	285-034	8/28/2000
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	The Offspring	Pretty Fly (For a White Guy)	Bat Out Of Hell	264-015	4/26/1999
CBS, Inc.	SONY BMG MUSIC ENTERTAINMENT	Meat Loaf	Bat Out Of Hell	Business As Usual	N46849	11/15/1977
CBS, Inc.	SONY BMG MUSIC ENTERTAINMENT	Men At Work	Down Under	Butterfly	35-328	6/1/1982
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Mariah Carey	Butterfly	Daydream	244-014	12/3/1997
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Mariah Carey	Fantasy	Good Charlotte	215-243	12/26/1995
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Good Charlotte	Little Things	It's About Time	288-305	11/13/2000
BMG Music	BMG Music SONY BMG MUSIC ENTERTAINMENT	SWV	I'm So Into You	Morning View	146-905	11/3/1992
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Incubus	Echo	Music Box	306-181	11/6/2001
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Mariah Carey	Hero	Rainbow	178-631	11/23/1993
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Mariah Carey	Heartbreaker	SCIENCE	276-595	3/14/2000
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Incubus	A Certain Shade of Green	Sweet Kisses	249-690	5/4/1998
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Jessica Simpson	I Wanna Love You Forever	Ten	276-117	3/14/2000
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Pearl Jam	Alive	The Writing's On The Wall	137-787	1/11/1992
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Destiny's Child	Bills, Bills, Bills	The Young and the Hopeless	268-936	9/21/1999
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Good Charlotte	Lifestyles of the Rich and Famous		309-099	11/26/2002

Exhibit 1
Sony BMG Music Entertainment's Copyrighted Sound Recordings

CBS, Inc.	SONY BMG MUSIC ENTERTAINMENT	Michael Jackson	Beat It	Thriller	41-965	1/27/1983
Sony Music Entertainment Inc.	SONY BMG MUSIC ENTERTAINMENT	Dixie Chicks	Wide Open Spaces	Wide Open Spaces	252-000	4/1/1998

EXHIBIT P

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELEKTRA ENTERTAINMENT GROUP, INC., a Delaware
corporation; VIRGIN RECORDS AMERICA, INC., a
California corporation; UMG RECORDINGS, INC.,
a Delaware corporation; BMG MUSIC, a New York
general partnership; and SON BMG MUSIC
ENTERTAINMENT, a Delaware general
partnership,

Plaintiffs,

Civil Action No.

vs.

7:06-cv-11520-SCR-MDF

ROBERT SANTANGELO, JR. and MICHELLE
SANTANGELO,
Defendants.

DEPOSITION OF MICHELLE SANTANGELO
White Plains, New York
Monday, January 7, 2008

Reported by:
NICOLE AMENEIROS, RPR

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January 7, 2008
9:19 a.m.

Deposition of MICHELLE SANTANGELO,
held at the offices of United States
Courthouse, 300 Quarropas Street, White
Plains, New York, pursuant to Notice,
before NICOLE AMENEIROS, a Notary Public
of the State of New York.

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A P P E A R A N C E S:

HOLME ROBERTS & OWEN, LLP

Attorneys for Plaintiffs

1700 Lincoln Street - Suite 4100

Denver, Colorado 80203

BY: RICHARD L. GABRIEL, ESQ.

JORDAN D. GLASS, P.C.

Attorneys for Defendants

7-11 Legion Drive

Valhalla, New York 10595

BY: JORDAN D. GLASS, ESQ.

1 Santangelo
2 answer. My objections don't impede you
3 from answering unless I say don't
4 answer.

5 THE WITNESS: Okay.

6 Q. Correct. Mr. Glass has to make
7 certain objections to preserve your rights if
8 there's a trial.

9 A. Okay.

10 Q. So that's what he's doing. Unless
11 he tells you not to answer you can answer.

12 So my question whether you deny
13 that my clients own the copyrights listed on
14 Exhibit A, Exhibit 1 here?

15 A. No.

16 Q. All right. And to be more specific
17 you have no facts that would lead you to
18 believe that my clients don't own those
19 copyrights; is that true?

20 MR. GLASS: Objection. You can
21 answer.

22 A. No.

23 Q. Okay.

24 A. Wait. Yes.

25 Q. We have a double negative and you

1 Santangelo
2 picked it up. Let me make sure you
3 personally have no facts that would lead you
4 to conclude my clients don't own the
5 copyrights, right?

6 A. No.

7 MR. GLASS: The objection was
8 carried to the next question.

9 (MS Exhibit 2, copyright
10 registration forms, marked for
11 identification, as of this date.)

12 Q. Ms. Santangelo, I'll show you what
13 we marked as Exhibit 2 to your deposition,
14 and I will represent to you that I believe
15 these to be the copyright registration forms
16 or copies of them for each of the records
17 that are in Exhibit 1 to your deposition.

18 A. Okay.

19 Q. And first question is, I want to
20 ask you whether you deny that the record
21 companies properly registered the sound
22 recordings that are at issue in this case?

23 MR. GLASS: Objection. You can
24 answer.

25 A. How would I know? I have no idea.

1 Santangelo
2 issue in this case? Do you personally have
3 any facts?

4 A. No.

5 Q. And similar question, this one will
6 relate to timing, I will represent to you
7 that the dates on the copyright registration
8 you'll see on the first page you'll see the
9 date effective date of registration; do you
10 see that?

11 A. Yes.

12 Q. Okay. I'll tell you that every
13 form in Exhibit 2 has a date on it?

14 A. Okay.

15 Q. Do you have any reason to doubt
16 that the registrations on all of the forms
17 are before April of 2004?

18 MR. GLASS: Objection. Again,
19 based upon the fact that she hasn't gone
20 through every page, based upon your
21 representation only you can answer.

22 A. What was the question? I'm sorry.

23 Q. Do you have any facts that would
24 lead you to believe that the registrations
25 were not filed before April of 2004?

1 Santangelo

2 A. No.

3 MR. GABRIEL: Okay.

4 (MS Exhibit 3, screen shots, marked
5 for identification, as of this date.)

6 Q. Ms. Santangelo, I'm showing you
7 what we've marked as Exhibit 3 to your
8 deposition in this case. For purposes of
9 clarity of the record I note that there's
10 also a sticker on here that shows Michelle
11 and a date of 4/12/06. The reason that's on
12 there is I wanted to be clear if we ever
13 refer to your prior deposition we would be
14 able to know that this was Exhibit 1 in your
15 prior deposition.

16 A. Okay.

17 Q. But it's Exhibit 3 in your
18 deposition today.

19 A. Okay.

20 Q. Is that clear to you?

21 A. Yes.

22 Q. Okay. That's why I left the other
23 sticker on there. We spent a lot of time
24 looking at this document in your last
25 deposition, and I won't kind of go through

EXHIBIT Q

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

MAVERICK RECORDING COMPANY, et
al.,

Plaintiffs,

-against-

ALICE DE ROSA

Defendant.

-----X

MEMORANDUM AND ORDER

Civil Action No.
CV-05-5861(DGT)

Trager, J:

Plaintiffs moved for summary judgment on January 26, 2007, pursuant to Rules 36(a) and 56(c) of the Federal Rules of Civil Procedure. Defendant failed to oppose the motion or to seek an extension of time in which to respond to Plaintiff's Requests of Admission. Plaintiffs' memorandum of law in support of its motion for summary judgment provides a sound basis on which to grant the motion for summary judgment. Accordingly, plaintiffs' motion for summary judgment is granted.

A determination of the amount statutory damages and costs as well as whether to grant injunctive relief are respectfully

referred to Magistrate Levy for a report and recommendation.

Dated: Brooklyn, New York
April 23, 2007

SO ORDERED:

/s/
David G. Trager
United States District Judge

EXHIBIT R

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

INTERSCOPE RECORDS, et al.,

Plaintiffs,

ORDER

-against-

Civil Action No.
CV-05-5864(DGT)

GILSA BARBOSA and PATRICK NIEDT

Defendants.

-----X

Trager, J:

Plaintiffs moved for summary judgment against pro se defendant Patrick Niedt ("defendant" or "Niedt") on February 27, 2007, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. In response to the motion, Niedt sent a letter to chambers on April 17, 2007, stating that the motion for summary judgment should be dismissed because Niedt already paid "a settlement payment . . . to plaintiff[s] on February 28, 2007." April 17, 2007 Letter by Niedt. Plaintiffs responded that the February 28, 2007 payment Niedt was referring to was a payment of sanctions for providing false and misleading statements during discovery, not for settlement. April 26, 2007 Letter in Response by Richard Guida. Plaintiffs then renewed their motion for summary judgment. Id.

In light of plaintiffs' clarification, Niedt was directed to file an opposition to plaintiffs' motion for summary judgment by

June 11, 2007. May 22, 2007 Order. To date, defendant has failed to oppose the motion or to seek an extension of time in which to respond.

Plaintiffs' memorandum of law in support of its motion for summary judgment provides a sound basis on which to grant the motion for summary judgment. Accordingly, plaintiffs' motion for summary judgment as to defendant Patrick Niedt is granted.

A determination of the amount statutory damages and costs, as well as whether to grant injunctive relief, are respectfully referred to Magistrate Levy for a report and recommendation.

Dated: Brooklyn, New York
August 14, 2007

SO ORDERED:

_____/s/
David G. Trager
United States District Judge

EXHIBIT S

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MAVERICK RECORDING COMPANY; §
UMG RECORDINGS, INC.; ARISTA §
RECORDS LLC; WARNER BROS. §
RECORDS, INC.; and SONY BMG MUSIC §
ENTERTAINMENT §

Plaintiffs,

Cause No. 5:07-CV-026-XR

VS.

WHITNEY HARPER,

Defendant.

ORDER

On this day, the Court considered Plaintiffs’ motion for summary judgment (Docket No. 48) and accompanying exhibits (Docket No. 49), as well as Defendant’s response (Docket No. 52) and Plaintiffs’ reply (Docket No. 54). Jurisdiction is proper under 28 U.S.C. § 1338(a) because the claims in this action arise out of the Copyright Act of 1976. After careful consideration, the Court grants Plaintiffs’ motion in part and denies the motion in part.

I. Procedural Background

On January 9, 2007, Plaintiffs Warner Brothers Records, Inc., Sony BMG Music Entertainment, Maverick Recording Company, UMG Recordings, Inc., and Arista Records LLC (collectively “Plaintiffs”) filed a petition against Steve Harper alleging the copying and distribution of music recordings in violation of the Copyright Act of 1976 (“Copyright Act”). (Docket No. 1). During discovery, on December 14, 2007, Plaintiffs filed a motion to amend the complaint to add

Whitney Harper (“Defendant”) as a defendant and dismiss Steve Harper, her father, from the suit. (Docket No. 33). The Court granted the motion on December 19, 2007, and Defendant was substituted for her father as a party to the suit. (Docket No. 34). Plaintiffs filed an amended complaint on December 27, 2007 to reflect the correct parties involved in the suit. (Docket No. 37). Defendant filed an answer to the complaint on February 13, 2008, followed by an amended answer filed with leave of the Court on February 27, 2008. (Docket Nos. 39, 44).

On May 12, 2008, Plaintiffs filed a motion for leave to file a second amended complaint; this motion was granted, and a second amended complaint was entered on June 9, 2008. (Docket Nos. 45, 51). The complaint requested an injunction ordering Defendant destroy all unlawful copies of Plaintiffs’ recordings and cease infringing Plaintiffs’ copyrights directly or indirectly. (Docket No. 51, at 4). Plaintiffs also requested statutory damages pursuant to 17 U.S.C. § 504, as well as costs and attorneys’ fees. (*Id.*, at 4-5). The June 2008 complaint is the live pleading in the case at this time.

On May 30, 2008, Plaintiffs filed a motion for summary judgment and an appendix of exhibits. (Docket Nos. 48, 49). Plaintiffs requested that the Court grant summary judgment awarding an injunction against Defendant to prevent her from further violating Plaintiffs’ copyrights. Additionally, Plaintiffs requested that the Court find that copyright infringement occurred with regard to thirty-nine of Plaintiffs’ recordings and award statutory minimum damages of \$750 per infringed work (total of \$28,500). (Docket No. 48, at 2). On June 10, 2008, Defendant filed a response in opposition to summary judgment, including objections to certain exhibits presented by Plaintiffs in support of their motion. (Docket No. 52). Plaintiffs filed a reply on July 3, 2008. (Docket No. 54).

II. Factual Background

Plaintiffs are recording companies that own or control rights to copyrights in sound recordings. (Docket No. 48, at 2). The sound recordings (collectively “Recordings”) at issue for purposes of summary judgment are as follows:¹

Copyright Holder	Artist	Song Title	Album Title	SR #
Maverick Recording Company	Michelle Branch	You Get Me	The Spirit Room	303-732
UMG Recordings, Inc.	Ja Rule	6 Feet Underground	Rule 3:36	270-080
Arista Records LLC	Avril Lavigne	I’m With You	Let Go	312-786
UMG Recordings, Inc.	Counting Crows	Hanging Around	This Desert Life	271-316
Warner Bros. Records Inc.	Faith Hill	Just to Hear You Say That You Love Me	Faith	253-752
Sony BMG Music Entertainment	Indigo Girls	Closer to Fine	Indigo Girls	101-524
UMG Recordings Inc.	Counting Crows	Mr. Jones	August and Everything After	172-267
UMG Recordings Inc.	Vanessa Carlton	Ordinary Day	Be Not Nobody	313-943
Warner Bros. Records Inc.	Faith Hill	Beautiful	Cry	321-377
Warner Bros. Records Inc.	Madonna	Die Another Day	Die Another Day (single)	314-662
Sony BMG Music Entertainment	Good Charlotte	Little Things	Good Charlotte	288-305
UMG Recordings, Inc.	Counting Crows	American Girls	Hard Candy	321-021
Sony BMG Music Entertainment	Jessica Simpson	Sweetest Sin	In This Skin	378-700
Sony BMG Music Entertainment	Jennifer Lopez	I’m Real (duet w/Ja Rule)	J. Lo.	293-297
UMG Recordings, Inc.	Musiq	Dontchange	Juslisen	308-859

¹In order to maintain consistency with the terms used in the pleadings and motions, the first six songs will be collectively referred to hereinafter as “Exhibit A.” The subsequent seventeen songs will be collectively referred to hereinafter as “Schedule 1.” The last sixteen songs will be collectively referred to hereinafter as “Exhibit C.” (Docket No. 48, at 2; Docket No. 51, at 7, 9-10).

Arista Records LLC	Dido	White Flag	Life for Rent	340-392
Sony BMG Music Entertainment	John Mayer	Love Song for No One	Room for Squares	305-049
Warner Bros. Records Inc.	Fleetwood Mac	Dreams	Rumours	N39857
UMG Recordings Inc.	The Police	Every Breath You Take	Synchronicity	44-862
Sony BMG Music Entertainment	Good Charlotte	Emotionless	The Young and the Hopeless	309-099
Sony BMG Music Entertainment	Jennifer Lopez feat. Styles/Jadakiss	Jenny From the Block	This is Me...Then	322-106
UMG Recordings Inc.	Hanson	Save Me	This Time Around	280-547
UMG Recordings Inc.	Diana Krall	Why Should I Care	Why Should I Care (single)	265-006
Arista Records LLC	Brooks & Dunn	Still in Love With You	Brand New Man	140-290
Arista Records LLC	Brooks & Dunn	She Used to be Mine	Hard Workin' Man	168-005
Arista Records LLC	Brooks & Dunn	My Maria	Borderline	218-735
Arista Records LLC	Phil Vassar	Just Another Day in Paradise	Phil Vassar	284-145
UMG Recordings, Inc.	Vanessa Carlton	A Thousand Miles	A Thousand Miles (single)	306-656
UMG Recordings, Inc.	Vanessa Carlton	Ordinary Day	Be Not Nobody	313-943
Sony BMG Music Entertainment	Howie Day	Collide	Stop All the World Now	349-701
UMG Recordings, Inc.	The Killers	Mr. Brightside	Hot Fuss	355-962
Warner Bros. Records Inc.	Green Day	American Idiot	American Idiot	362-125
Sony BMG Music Entertainment	Destiny's Child	Cater 2 U	Destiny Fulfilled	363-786
UMG Recordings, Inc.	Gwen Stefani	Hollaback Girl	Love.Angel.Music.Baby.	364-759
UMG Recordings, Inc.	3 Doors Down	Let Me Go	Seventeen Days	368-870
UMG Recordings, Inc.	Lifhouse	You and Me	Lifhouse	370-643
UMG Recordings, Inc.	Mariah Carey	We Belong Together	The Emancipation of Mimi	370-795
Sony BMG Music Entertainment	Anna Nalick	In My Head	Wreck of the Day	372-028
Sony BMG Music Entertainment	Frankie J	How to Deal	The One	377-949

On June 5, 2004, at 9:16 EDT, Plaintiffs' investigator, MediaSentry, detected an individual with the username "whitney@fileshare" at Internet Protocol ("IP") address 24.174.166.204 using an online file sharing program to distribute Plaintiffs' copyrighted sound recordings. (Docket No. 48, at 3). The individual was distributing 544 digital audio files from a "shared" folder on the computer to other individuals on the file sharing network. (*Id.*). MediaSentry determined that Time Warner Cable was the internet provider that had given this IP address to one of its customers. (*Id.*).

Plaintiffs filed a "Doe" lawsuit and obtained a court order for expedited discovery to determine the identity of the account holder with the IP address 24.174.166.204. *Priority Records LLC, et al. v. Does 1-175*, No. 05-CV-3173 (S.D.N.Y. Mar. 24, 2005). In response to Plaintiffs' subpoena, Time Warner Cable identified Steve Harper as the subscriber responsible for the IP address in question as of June 5, 2004. (Docket No. 48, at 3). Subsequent conversations between Plaintiffs and Steve Harper determined that Defendant Whitney Harper was allegedly responsible for downloading audio files onto the computer. (*Id.*).

As part of its investigation on June 5, 2004, MediaSentry downloaded complete copies of the six audio files listed in Exhibit A. (Docket No. 48, at 4). In addition, MediaSentry initiated downloads of all 544 audio files in the "shared" folder to ensure that actual audio files existed in all cases. (*Id.*, at 6). All files were downloaded through the iMesh file sharing program. (*Id.*). 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. (*Id.*). 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. (*Id.*).

On March 19, 2005, Windows was reinstalled on Defendant's computer. (Docket No. 48, at 7). 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. (*Id.*). Plaintiffs completed a forensic investigation of Defendant's computer, which revealed that iMesh was installed on the computer and accessed through the username "whitney." (*Id.*).

The forensic investigation also found file sharing programs KaZaA and LimeWire installed on the computer. (Docket No. 48, at 8). KaZaA had been removed from the computer prior to the March 19 reinstallation of Windows. (*Id.*, at 8). LimeWire was installed on the computer in July 2005. (*Id.*). 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. (Docket No. 49, Exhibit G). She testified that she did not copy these files from compact discs that she owned. (Docket No. 49, Exhibit H, at 41). 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. (*Id.*, at 68, 71, 81, 108). 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." (Docket No. 52, Affidavit of Whitney Harper).

Plaintiffs have produced registration certificates for each of the Recordings. (Docket No. 49, Exhibit J). Plaintiffs claim that the album cover of each recording contains a proper notice of copyright pursuant to 17 U.S.C. § 401. (Docket No. 51, at 3). Defendant did not have their

authorization to copy, download, or distribute any of the Recordings. (Docket No. 48, at 9). Plaintiffs further claim that Defendant had access to notice sufficient for her to know that her actions constituted infringement. (Docket No. 51, at 3).

III. Motion for Summary Judgment

In their motion for summary judgment, Plaintiffs contend that they have provided sufficient evidence to establish that Defendant violated their copyrights on each of the Recordings. (Docket No. 48, at 10). They request minimum statutory damages of \$750 for each Recording. (*Id.*). They also request an injunction to stop Defendant from further infringing their copyrights. (*Id.*).

In her response to the motion for summary judgment, Defendant contends that Plaintiffs have failed to prove that she intentionally infringed any copyrights. (Docket No. 52, at 6). She further contends that the summary judgment evidence, at the most, only establishes innocent infringement of the six recordings contained in Exhibit A because Plaintiffs have not proven that the other recordings were available for download. (*Id.*, at 9). In addition, Defendant challenges a number of exhibits included with Plaintiffs' motion, specifically declarations made by Plaintiffs' in-house attorneys, as inadmissible hearsay. (*Id.*, at 6).

IV. Standard of Review

In order to grant summary judgment, a court must determine that there is no genuine issue of material fact that would warrant further proceedings. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In evaluating a motion for summary judgment, all reasonable doubts about factual evidence are construed in the light most favorable to the non-moving party. *Id.* at 255.

V. Analysis

Evidentiary Challenges

Before proceeding to the evidence of infringement, the Court is first required to address Defendant's objection to the supplemental declaration and expert report of Dr. Doug Jacobson.² (Docket No. 49, Exhibit C (hereinafter "Jacobson Declaration"). The Jacobson Declaration presents Jacobson's conclusions based upon the MediaSentry investigation and subsequent forensic examination of the computer, as well as a discussion of the methods used in arriving at those conclusions. (*Id.*). Attached to the Jacobson Declaration is a list of audio files that were recovered from the computer as part of the 2005 forensic examination. (Jacobson Declaration, Exhibit B). Defendant contends that the Jacobson Declaration is unauthenticated and therefore not competent summary judgment evidence. (Docket No. 52, at 2).

As provided for in 28 U.S.C. § 1746, when authentication of the statement of a witness is required, the authentication is acceptable if it includes a statement, signed and dated by the witness, declaring under penalty of perjury the truth and correctness of the statement. 28 U.S.C. §1746(2). The Jacobson Declaration includes such a statement. (Jacobson Declaration at 10) ("I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct. Executed this 30 [sic] day of April, 2008, at 10:45 AM."). The Jacobson Declaration is not to be excluded on the basis of authentication.³ Defendant's objection in this regard is overruled.

²The Court notes that Defendant has also objected to Plaintiffs' summary judgment motion Exhibits A-B, D, and K-T. (Docket No. 52, at 2). However, since none of these Exhibits were considered by the Court in determining the merits of the motion for summary judgment, the Court elects not to rule on these objections.

³The Court notes that Defendant has not objected to Plaintiffs' summary judgment motion Exhibit E, the Declaration of Elizabeth Hardwick, and this Exhibit contains a substantively

Infringement of Copyrights

According to the Copyright Act, “[a]nyone who violates the exclusive rights of the copyright owner . . . is an infringer[.]” 17 U.S.C. § 501(a). To establish copyright infringement, a plaintiff must establish both ownership of the copyright to the work in question and actionable copying of the work. *Galiano v. Harrah’s Operating Co., Inc.*, 416 F.3d 411, 414 (5th Cir. 2005) (citing *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 367 (5th Cir. 2004)). Defendant does not challenge the fact that Plaintiffs are owners of the copyrights of the Recordings. Plaintiffs have presented the Court with copies of the copyright registration certificates for the Recordings. (Docket No. 48, Exhibit J). Presentation of these certificates establishes a prima facie case of copyright validity. *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 47 (5th Cir. 1995). Defendant has not challenged the validity of these certificates or Plaintiffs’ claim to own the copyrights in question. Therefore, the only remaining question is whether Plaintiffs have proven actionable copying of the Recordings.

Included among the exclusive rights of copyright holders are the rights to “reproduce the copyrighted work” and “distribute copies . . . of the copyrighted work.” 17 U.S.C. §§ 106(1), 106(3). Proof that a defendant either reproduced or distributed a copyrighted work without the permission of the copyright holder is sufficient to constitute infringement. *Peel & Co., Inc. v. Rug Market*, 238 F.3d 391, 394 (5th Cir. 2001). A defendant’s intent to infringe is irrelevant under the law as far as proving that actionable infringement took place. *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000).

Defendant argues that because MediaSentry only downloaded complete copies of the works

identical authentication statement. (Docket No. 48, Exhibit E, at 4).

contained in Exhibit A and did not download complete copies of any other works, she can be held liable for at most only six counts of infringement. (Docket No. 52, at 9). However, a complete download of a given work over a peer-to-peer network is not required for copyright infringement to occur. *See Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-651, 2006 WL 2844415, at *3 (W.D. Tex. July 17, 2006) (finding that the presence of an audio file on a list available in KaZaA may be sufficient to constitute copyright infringement); *see also Interscope Records v. Duty*, No. 05CV3744-PHX-FJM, 2006 WL 988086, at *2 (D. Ariz. Apr. 14, 2006) (“[T]he mere presence of copyrighted sound recordings in [defendant’s] share file may constitute infringement.”). The fact that the Recordings were available for download is sufficient to violate Plaintiffs’ exclusive rights of reproduction and distribution. It is not necessary to prove that all of the Recordings were actually downloaded; Plaintiffs need only prove that the Recordings were available for download due to Defendant’s actions.

In this case, there is no genuine issue of material fact as to the files listed in Exhibit A. All parties involved have accepted that Defendant violated Plaintiffs’ copyrights with regard to these six audio files. Plaintiffs are entitled to summary judgment on the six (6) recordings listed in Exhibit A.

With regards to the recordings contained in Schedule 1, Plaintiffs have introduced a declaration from Elizabeth Hardwick (“Hardwick”), a Project Manager for MediaSentry. (Docket No. 49, Exhibit E). In the declaration, Hardwick declares that Exhibit B attached to Plaintiffs’ complaint (“Exhibit B”) “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.” (*Id.*, at 3). Defendant has not objected to the admissibility of Hardwick’s declaration,

and Defendant has not brought forth credible summary judgment evidence refuting Hardwick's contention that all of the files listed in Exhibit B were available for download from her computer. Comparing the list of songs found at Exhibit B the list of songs from Schedule 1 for which Plaintiffs are requesting summary judgment with Exhibit B, the Court finds that all of the songs on Schedule 1 are present with one exception.⁴ (Docket No. 1, Exhibit B; Docket No. 51, Schedule 1). Therefore, Plaintiffs are entitled to summary judgment on sixteen (16) of the works listed in Schedule 1.

Regarding the recordings listed in Exhibit C, Plaintiffs have introduced the Jacobson Declaration including an exhibit of the audio files recovered from Defendant's computer during the 2005 forensic examination. (Jacobson Declaration, Exhibit B). As discussed above, the Jacobson Declaration is competent summary judgment evidence. The list included with the Jacobson Declaration includes all the recordings contained in Exhibit C. (*Id.*, at 2, 7, 8, 12, 16, 17, 19, 21, 28, 30, 42, 48). Defendant has introduced no evidence questioning the authenticity of this list or suggesting that the recordings contained in Exhibit C were not on the computer. Plaintiffs are therefore entitled to summary judgment on fifteen (15) of the recordings from Exhibit C.⁵

Damages

Plaintiffs request the statutory minimum damages of \$750 per work rather than a calculation

⁴Faith Hill's "Beautiful" (SR# 321-377) is not contained in the list at Exhibit B of the complaint. Therefore, the Court finds that there is still a genuine issue of material fact as to whether Defendant infringed the copyright on this work.

⁵Vanessa Carlton's "Ordinary Day" (SR# 313-943) is included on the list of recordings in both Schedule 1 and Exhibit C. Infringement is based upon the number of individual works infringed, not the number of infringements of a single work. *Mason v. Montgomery Data*, 967 F.2d 135, 144 n.11 (5th Cir. 1992) (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990)). Therefore, Defendant is only liable for infringement of this recording once.

of actual damages. (Docket No. 48, at 21). Defendant contends that due to her age—sixteen years old at the time of the infringement—and technological experience, she did not intentionally violate Plaintiffs’ copyrights and should therefore be considered at most an innocent infringer. (Docket No. 52, at 9).

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.” (Docket No. 52, at 12). 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.” (*Id.*, at 13). Plaintiffs contend that by complying with 17 U.S.C. § 402 and placing notices on each the 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. (Docket No. 54, at 4). This argument is not completely satisfactory. In this case, there were no compact discs with warnings.

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). Defendant, relying on *Electra Entertainment Group v. McDowell*, a case involving a thirteen-year-old girl, argues that her age and knowledge of technology alone should be sufficient to introduce a genuine issue of material fact as to innocent infringement. (Docket No. 52, at 8). The *McDowell* Court held that a genuine issue of material fact was present as to the defendant's access to the copyright notices. *See Electra Entertainment Group Inc. v. McDowell*, No. 4:06-CV-115 (CDL), 2007 WL 3286622, at *2 n.2 (M.D. Ga. Nov. 6, 2007).

Although proper notice was provided on the cover of each of the Recordings, a question remains as to whether Defendant knew the warnings on compact discs were applicable in this KaZaA setting. Defendant admitted that she owned compact discs. (Docket No. 49, Exhibit H, at 25). However, both in her affidavit and in her deposition, Defendant claimed 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. (Docket No 49, Exhibit G, at 2; Docket No. 49, Exhibit H, at 68, 71; Docket No. 52, at 13). She further claimed that prior to this lawsuit, she did not have any understanding of copyright infringement. (Docket No. 52, at 12).

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. *Anderson*, 477 U.S. at 255. Defendant has the burden of proving by a preponderance of the evidence that her actions constituted innocent

infringement. 17 U.S.C. § 502(c)(2). 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. The parties are ordered to advise the Court within ten days of this Order whether they will agree to a settlement of \$200 per infringed work or whether a trial on the issue of damages will be necessary.

Permanent Injunction

Plaintiffs request a permanent injunction to prevent Defendant from further infringing their copyrights. (Docket No. 48, at 23-27). Defendant has agreed to this injunction. (Docket No. 52, at 10). Under 17 U.S.C. § 502(a), any court having jurisdiction over copyright actions may issue permanent injunctions to prevent further copyright infringement. The Court will therefore enjoin Defendant from further file-sharing in accordance with the agreement of the parties.

VI. Conclusion

For the foregoing reasons, the Court ORDERS the following:

Plaintiffs' motion for summary judgment (Docket No. 48) is GRANTED in part and DENIED in part.

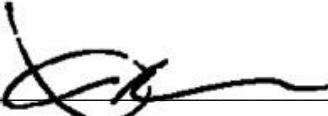
Plaintiffs' proposed injunction is GRANTED. Defendant shall be and hereby is ENJOINED from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, to distribute (*i.e.*, upload) any of Plaintiffs'

Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

The parties are ORDERED to advise the Court within ten (10) days of this Order whether they will agree to a settlement of \$200 per infringed work or whether a trial on the issue of damages will be required.

It is so ORDERED.

SIGNED this 7th day of August, 2008.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

EXHIBIT T

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SONY MUSIC ENTERTAINMENT INC., a
Delaware corporation, ELEKTRA
ENTERTAINMENT GROUP INC., a
Delaware corporation; UMG
RECORDINGS, INC., a Delaware
corporation; and ARISTA RECORDS, INC.,
a Delaware corporation,

Plaintiffs,

-against-

JAMES SCOTT,

Defendant.

COPY MAILED / FAXED TO:

COUNSEL FOR PLTFF(S): X

COUNSEL FOR DFT(S): _____

PLTFF PRO SE: _____

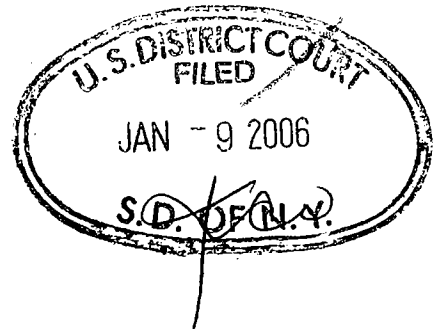
DFT. PRO SE: X

DATE: 1/5/05

BY: TH

03 Civ. 6886 (BSJ) (THK)

PROPOSED ORDER AWARDING
STATUTORY DAMAGES



BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

This case concerns Defendant's admitted use of an online media distribution system known as "Kazaa" to infringe Plaintiffs' copyrighted sound recordings. By Order dated February 18, 2005 (the "Order"), this Court granted Plaintiffs' motion for partial summary judgment, finding that Defendant's unauthorized reproduction and distribution of five of Plaintiffs' copyrighted works infringed two of Plaintiffs' rights and constituted copyright infringement as a matter of law, and enjoining Defendant from infringing Plaintiffs' copyrights again in the future (the detailed procedural history of the case is set forth in the Order). The Order was based upon certain facts deemed admitted by Magistrate Judge Katz as a sanction for Defendant's failure to comply with discovery orders, including: (1) Defendant used the Kazaa online media distribution system to download Plaintiffs' copyrighted recordings from the computers of other users to Defendant's own computer; (2) at the time of the downloading, Defendant knew the files were copyrighted and that Plaintiffs had

never authorized Defendant to download them; (3) in total, Defendant distributed 944 music files through the Kazaa system, making each of them available for downloading to millions of other Kazaa users; and (4) Defendant continued to engage in these infringing acts even after he received the Complaint in this action.

Plaintiffs have elected to recover an award of statutory damages pursuant to 17 U.S.C. § 504(c). Plaintiffs now move for summary judgment with respect to the amount of the statutory award for each of the five infringed works identified in Exhibit A to the Complaint. Because this Court finds that no genuine issue of material fact exists regarding Plaintiffs' entitlement to recover an award of \$4,000 for Defendant's "non-willful" infringement¹ of each of the five infringed works identified in Exhibit A to the Complaint (for a total award of \$20,000), for the reasons set forth below, the Plaintiffs' motion is granted.

DISCUSSION

Once copyright infringement has been established, the Copyright Act grants courts broad discretion to set the appropriate amount of the statutory award within a permissible range for "non-willful" infringement of a minimum of \$750 per work and a maximum of \$30,000 per work, "as the court considers just" 17 U.S.C. § 504(c)(1); see also National Football League v. PrimeTime 24 Joint Venture, 131 F.Supp.2d 458, 472 (S.D.N.Y.2001) ("It is well-established that district courts have broad discretion in setting the amount of statutory damages within the minimum and maximum amounts prescribed by the Copyright Act."). Plaintiffs do not need to prove any actual damages to be entitled to an award of statutory damages. See Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001) (plaintiff "may elect statutory damages regardless of the adequacy of the evidence offered as to his actual damages and the

¹ Plaintiffs have not sought a finding that Defendant's infringement was willful.

amount of defendant's profits") (citing Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.04[B], at 14.04[A], 14-44-45). No evidentiary hearing is required, because no genuine issue of material fact exists with respect to the Plaintiffs' entitlement to a statutory award in this amount. See Capitol Records, Inc. v. Lyons, 2004 WL 1732324, *3 (N.D. Tex. Aug 02, 2004) ("While it is true that the damages in this case are neither liquidated nor capable of mathematical calculation, it is not necessary for the Court to hold a hearing as long as it ensures that there is a basis for the damages specified in a default judgment.").²

Here, Plaintiffs elect to recover statutory damages for "non-willful" infringement and seek \$4,000 for each of five infringements, an amount which this Court finds is reasonable under the circumstances. Defendant's infringing conduct has subjected Plaintiffs' valuable copyrighted sound recordings to ongoing "viral" infringement. See, e.g., In re Aimster Copyright Litigation, 334 F.3d 643, 646-47 (7th Cir. 2003) ("the purchase of a single CD could be levered into the distribution within days or even hours of millions of identical, near-perfect (depending on the compression format used) copies of the music recorded on the CD"). The requested award is particularly appropriate because Plaintiffs seek only to recover for five infringements even though Defendant was distributing many more music files. Moreover, Defendant's extreme indifference to both the copyright law and the authority of this Court throughout this litigation, and the need for deterrence further justifies the requested award. See, e.g., Microsoft v. Wen, 2001 WL 1456654, at *6 (N.D. Cal. Nov. 13, 2001) ("[n]ominal damages in cases such as these not only fail to deter infringement, but also encourage disregard for discovery procedures") (awarding statutory damages of \$15,000 per work on summary judgment where defendants admitted factual allegations in complaint by default).

² Defendant has not requested a jury trial, and has waived his right to do so. See Fed. R. Civ. P. 38(d) ("[t]he failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury").

Although an award of \$4,000 per infringement is on the very low end of the statutory range for non-willful infringement, such an award is necessary so that Defendant will appreciate the unlawful nature of his actions. In addition, the use of online media distribution systems to commit copyright infringement is pervasive, and other users of such systems must understand that the copyright law applies with equal force to infringing Internet activity. See Universal City Studios v. Reimerdes, 111 F. Supp.2d 294, 344-45 (S.D.N.Y. 2000) (“the excitement of ready access to untold quantities of information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing”); Elektra Entertainment Group Inc. v. Bryant, 2004 WL 783123 at *5 (C.D. Cal. February 13, 2004) (noting that a heightened statutory damage award on default judgment for copyright infringement by individual Kazaa user would be “reasonably calculated to serve the Act’s deterrent purposes”); Broadcast Music, Inc. v. Entertainment Complex, Inc., 198 F.Supp.2d 1291, 1296 (N.D. Ala. 2002) (awarding statutory damages on motion for summary judgment in the amount of “\$3,909.09 for each of the 11 musical compositions whose copyrights Defendants were shown to have infringed, placing the award on the relatively low end of the \$750-to-\$30,000-per-work range permitted by the statute”).

For the forgoing reasons, Plaintiffs’ Motion for Summary Judgment on the Amount of Statutory Damages is granted. Pursuant to the Copyright Act, 17 U.S.C. § 504(c)(1), Defendant shall pay damages to Plaintiffs in the amount of \$4,000 for each of five infringements, for a total principal sum of \$20,000.

The Clerk of the Court is directed to close this case.

SO ORDERED:

DATED: 11/3/06

By: 

Barbara S. Jones
United States District Judge

EXHIBIT U

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ROBERT H. SHEPHERD, CLERK
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LAVA RECORDS, LLC, ET AL.

CIVIL ACTION NO. 05-1314

VERSUS

JUDGE ROBERT G. JAMES

JENNIFER ATEs, ET AL.

MAG. JUDGE KAREN L. HAYES

RULING

Pending before the Court is a Motion for Summary Judgment [Doc. No. 33] filed by Plaintiffs Lava Records, LLC; Atlantic Recording Corporation; UMG Recordings, Inc.; Warner Bros. Records Inc.; and Arista Records, LLC against Defendant Matthew Ates. Defendant has filed no opposition to the motion.

For the following reasons, Plaintiffs' Motion for Summary Judgment is GRANTED.

I. FACTS

The facts in this case are undisputed. Plaintiffs are engaged in the creation, manufacture, distribution and/or sale of sound recordings. In connection with their business, Plaintiffs generally enter into contracts with musical performers, so that Plaintiffs own the copyrights in the sound recordings featuring the performers or have exclusive reproduction and/or distribution rights under copyright in sound recordings featuring the performers.

Plaintiffs have identified and provided evidence that they own valid copyrights or have

the exclusive rights under copyright in twenty-five (25) registered sound recordings.¹

¹The sound recordings and their owners are as follows:

- (1) Atlantic Recording Corporation, owner of sound recording number 303-764 by artist Tracy Lawrence on the album *Lessons Learned*;
- (2) UMG Recordings, Inc., owner of sound recording number 278-184 by the artist George Strait on the album *Latest Greatest Strait Hits*;
- (3) Warner Bros. Records, Inc., owner of sound recording number 288-402 by the artist Linkin Park on the album *Hybrid Theory*;
- (4) Lava Records LLC, the owner of sound recording number 284-961 by artist Trans-Siberian Orchestra on the album *Beethoven's Last Night*;
- (5) Arista Records, LLC, the owner of sound recording number 138-302 by artist Alan Jackson on the album *Don't Rock the Jukebox*;
- (6) Arista Records, LLC, the owner of sound recording number 312-786 by artist Avril Lavigne on the album *Let Go*;
- (7) Warner Bros. Records Inc., the owner of sound recording number 52-319 by artist Van Halen on the album *1984 (MCMLXXXIV)*;
- (8) Arista Records LLC, the owner of sound recording number 302-233 by artist Adema on the album *Adema*;
- (9) UMG Recordings, Inc., the owner of sound recording number 85-358 by artist Guns N Roses on the album *Appetite for Destruction*;
- (10) UMG Recordings, Inc., the owner of sound recording number 293-376 by artist Godsmack on the album *Awake*;
- (11) Warner Bros. Records Inc., the owner of sound recording number 316-958 by artist Disturbed on the album *Believe*;
- (12) Warner Bros. Records Inc., the owner of sound recording number 135-276 by artist Red Hot Chili Peppers on the album *Blood Sugar Sex Magik*;
- (13) Warner Bros. Records Inc., the owner of sound recording number 174-922 by artist Red Hot Chili Peppers on the album *Californication*;
- (14) Warner Bros. Records Inc., the owner of sound recording number 246-538 by artist Goo Goo Dolls on the album *Dizzy Up the Girl*;
- (15) Atlantic Recording Corporation, the owner of sound recording number 24-682 by artist Phil Collins on the album *Face Value*;
- (16) Arista Records, LLC, the owner of sound recording number 147-716 by artist Alan Jackson on the album *Lot About Livin' (And a Little 'bout Love)*;
- (17) UMG Recordings, Inc., owner of sound recording number 78-741 by the artist George Strait on the album *Ocean Front Property*;
- (18) UMG Recordings, Inc., owner of sound recording number N8871 by the artist Lynyrd Skynyrd on the album *Pronounced Len'-nerd Skin'-nerd* (the song *Simple Man*);
- (19) UMG Recordings, Inc., owner of sound recording number N8871 by the artist Lynyrd Skynyrd on the album *Pronounced Len'-nerd Skin'-nerd* (the song *Free Bird*);
- (20) UMG Recordings, Inc., owner of sound recording number 146-421 by the artist George Strait on the album *Pure Country*;
- (21) Atlantic Recording Corporation, the owner of sound recording number 303-757 by the artist P.O.D. on the album *Satellite*;
- (22) UMG Recordings, Inc., owner of sound recording number 71-794 by the artist Bon Jovi on the

The copyrights to these sound recordings are registered with the United States Copyright Office.

Somewhere during the year 2000 or 2001, Defendant put an online media distribution system known as “KaZaA” on his mother’s computer. While he was in high school, between the years of 2000 or 2001 and 2004, Defendant used the program to download or copy the twenty-five identified sound recordings to his mother’s computer hard drive.² Defendant did not have Plaintiffs’ authorization to copy or distribute any of their sound recordings.

II. LAW AND ANALYSIS

A. Unopposed Motions for Summary Judgment

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of informing the court of the basis for its motion by identifying portions of the record which highlight the absence of genuine issues of material fact. *Topalian v. Ehrmann*, 954 F.2d 1125, 1132 (5th Cir. 1992). A fact is “material” if proof of its existence or nonexistence would affect the outcome of the lawsuit under applicable law in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material

-
- album *Slippery When Wet*;
 - (23) UMG Recordings, Inc., owner of sound recording number 277-407 by the artist 3 Doors Down on the album *The Better Life*;
 - (24) UMG Recordings, Inc., owner of sound recording number 107-674 by the Artist Vince Gill on the album *When I Call Your Name*; and
 - (25) UMG Recordings, Inc., owner of sound recording number 190-152 by the artist Vince Gill on the album *When Love Finds You*.

[Doc. No. 33-5, p. 1 & 33-6, p. 1].

²Plaintiffs contend that Defendant downloaded hundreds of sound recordings, but they only seek recovery on the basis of the twenty-five identified sound recordings.

fact is “genuine” if the evidence is such that a reasonable fact finder could render a verdict for the nonmoving party. *Id.* The moving party cannot satisfy its initial burden simply by setting forth conclusory statements that the nonmoving party has no evidence to prove its case. *Ashe v. Corley*, 992 F.2d 540, 543 (5th Cir. 1993).

If the moving party can meet the initial burden, the burden then shifts to the nonmoving party to establish the existence of a genuine issue of material fact for trial. *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). The nonmoving party must show more than “some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). “The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which the evidence supports his or her claim. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998)

A motion for summary judgment cannot be granted simply because there is no opposition, even if the failure to oppose it violates a local rule. *Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985). However, when a nonmovant fails to provide a response identifying the disputed issues of fact, the court may accept the movant’s description of the undisputed facts as prima facie evidence of its entitlement to judgment. *Eversley v. Mbank Dallas*, 843 F.2d 172, 173-74 (5th Cir. 1999); *NorDar Holdings, Inc. v. W. Sec. (USA) Ltd .*, No. 3:96-CV-0427-H, 1996 WL 39019, *2 (N.D. Tex. Dec. 18, 1996).

B. Copyright Infringement

The Copyright Act, 17 U.S.C. §§ 101, 106, 501-505 (2005), grants a copyright owner of a sound recording the exclusive rights to “reproduce the copyrighted work in copies or

phonorecords” and “distribute copies or phonorecords of the copyrighted work to the public.” 17 U.S.C. § 106(1) & (3).

In order to prevail on their copyright infringement claim, Plaintiffs must prove that (1) they own the copyrights in the sound recordings and (2) Defendant impermissibly copied those sound recordings or otherwise infringed upon their copyrights. *Quintanilla v. Texas Television Inc.* 139 F.3d 494, 500 (5th Cir. 1998) (citing *DSC Communications Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996)).

In this case, it is undisputed that Plaintiffs meet both requirements. Plaintiffs have provided summary judgment-appropriate evidence to show that they own the copyrights in the sound recordings in question, and Defendant has failed to rebut that evidence. Further, Defendant admitted in his deposition that he downloaded or copied the sound recordings without Plaintiffs’ permission. [Doc. No. 33-7]; *see, e.g., BMG Music v. Gonzalez*, 430 F.3d 888, 893 (7th Cir. 2005) (upholding summary judgment where the defendant admitted to downloading copyrighted sound recordings over the Internet); *In re: Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (“[M]aking . . . a digital copy of [copyrighted] music . . . infringes copyright.”); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (“Napster users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”).

Accordingly, there is no genuine issue of material fact for trial as to liability, and Plaintiffs are entitled to summary judgment in this matter.

C. Damages

Having found that Defendant is liable to Plaintiffs for copyright infringement, the Court

must also determine whether Plaintiffs have presented sufficient evidence to support their claim for damages as a matter of law.

With regard to damages, the Copyright Act provides as follows:

[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just.³ For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

17 U.S.C. § 504(c)(1).

In this case, Plaintiffs seek the minimum statutory damages of \$750.00 per work in lieu of actual damages and profits. *See Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 143 (5th Cir. 1992) (In cases involving multiple infringements and multiple infringed works, “the total number of ‘awards’ of statutory damages . . . that a plaintiff may recover in any given action depends on the number of works that are infringed . . . regardless of the number of infringements of those works.”).

If Plaintiffs sought more than the minimum statutory damages, then Defendant would be entitled to a jury trial on the amount. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).⁴ However, if, as in this case, Plaintiffs seek only the minimum statutory amount,

³The statute further provides increased penalties for a “willful” infringement, *see* 17 U.S.C. § 504(c)(2), but Plaintiffs do not contend that Defendant acted willfully, nor could they based on Defendant’s deposition testimony.

⁴In *Feltner*, the Supreme Court “discern[ed] no statutory right to a jury trial when a copyright owner elects to recover statutory damages,” but held that “the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.” *Id.* at 347-48.

then courts have routinely held that an award of \$750.00 per work is appropriately awarded by summary judgment. *See BMG Music v. Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005) (Discussing *Feltner* and explaining that “cases under 504(c) are normal civil actions subject to the normal allocation of functions between judge and jury. When there is a material dispute of fact to be resolved or discretion to be exercised in selecting a financial reward, then either side is entitled to a jury”; but where plaintiffs seek only the minimum statutory amount, then summary judgment “is permissible.”); *see also, e.g., Capitol Records v. Lyons*, No. Civ.A.3:03-CV-2018-L, 2004 WL 1732324 at *4 (N.D. Tex. Aug. 2, 2004)(Where defendant defaulted, his acts of infringement were deemed admitted and no hearing was necessary prior to an award of the minimum \$750.00 per work). This Court agrees and finds that Plaintiffs are entitled to an award of \$750.00 per work for a total statutory damage award in the amount of \$18,750.00.

D. Injunctive Relief

Plaintiffs further seek a permanent injunction against Defendant to ensure that he does not again engage in infringement of their copyrights and an order requiring him to delete all infringing materials from his mother’s computer.⁵

Pursuant to 17 U.S.C. § 502(a), the Court “may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” In determining whether to grant a request for permanent injunctive relief, the Court must consider “traditional equitable considerations.” *See eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837, 1840 (2006) (“Like the Patent Act, the Copyright Act provides that courts ‘may’ grant injunctive

⁵Plaintiffs state that they seek an order requiring Defendant to delete the infringing materials from “his computer,” but the evidence clearly provides that he downloaded the materials to his mother’s computer.

relief ‘on such terms as it may deem reasonable to prevent or restrain infringement of a copyright’ . . . And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.”).

The Court has considered the four-factor test approved by the Supreme Court for determining injunctive relief: (1) whether Plaintiffs would face irreparable injury if the injunction did not issue, (2) whether Plaintiffs have an adequate remedy at law, (3) whether granting the injunction is in the public interest, and (4) whether the balance of the hardships tips in Plaintiffs’ favor. *Id.* (The Supreme Court notes that the district court recited the traditional four-factor test in *Mercexchange, L.L.C. v. eBay, Inc.*, 275 F.Supp.2d 695, 711 (E.D. Va. 2003), but that neither the district nor appellate court properly applied the test). After consideration, the Court finds that a permanent injunction is appropriate because of the strong public interest in copyright protection; the need to prevent irreparable harm to Plaintiffs, which will not be remedied by a damage award that may or may not be collectible; and the need to deter future infringement by Defendant and others. *See BMG Music*, 430 F.3d 888 at 893 (“An injunction remains appropriate to ensure that the misconduct does not recur as soon as the case ends.”). The Court further notes that the balance weighs strongly in favor of Plaintiffs where all that is requested is that Defendant comply with the Copyright Act.

Accordingly, Plaintiffs are entitled to a permanent injunction as follows:

Defendant is permanently enjoined from directly or indirectly infringing Plaintiffs’ rights under federal or state law in the copyrighted sound recordings identified in this lawsuit and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) (“Plaintiffs’ recordings”), including without

limitation by using the Internet or any online media distribution system to reproduce or download any of Plaintiffs' recordings, to distribute or upload any of Plaintiffs' recordings, or to make any of Plaintiffs' recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant must also destroy all copies of Plaintiffs' recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

E. Costs

Plaintiffs also seek recovery of court costs in the amount of \$350.00 for filing fees and service of process. The Copyright Act provides for recovery of costs:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505; *see also A & N Music Corp. v. Venezia*, 733 F. Supp. 955, 959 (E.D. Penn. 1990) (Section 505 authorizes recovery of costs to "(1) deter future copyright infringement; (2) ensure that all holders of copyrights which have been infringed will have equal access to the court to protect their works; and (3) penalize the losing party and compensate the prevailing party.").

The Court finds that Plaintiffs have properly supported their request for reasonable court costs, and Defendant has not opposed their request. Thus, Plaintiffs are entitled to recover the amounts they seek.


III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment [Doc. No. 33] is GRANTED, and judgment is entered in favor of Plaintiffs and against Defendant. The Court

finds, as a matter of law, that Defendant Matthew Ates infringed Plaintiffs' copyrights in twenty-five (25) sound recordings in violation of the Copyright Act.

The Court further finds that statutory damages, injunctive relief, and costs should be ordered against Defendant. Defendant is required to pay statutory damages in the amount of \$750.00 per recording, for a total award in the amount of \$18,750.00, as well as Court costs in the amount of \$350.00. Defendant is also permanently enjoined as set forth above.

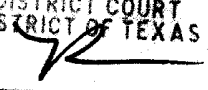
MONROE, LOUISIANA, this 11 day of July, 2006.



ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

EXHIBIT V

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2006 JUN -6 PM 12: 27
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY 
DEPUTY

SONY BMG MUSIC ENTERTAINMENT,
ATLANTIC RECORDING CORP., UMG
RECORDINGS, INC., CAPITAL RECORDINGS,
INC., BMG MUSIC, and ELEKTRA
ENTERTAINMENT GROUP, INC.,
Plaintiffs,

-vs-

Case No. A-04-CA-1055-SS

MONA BELL,
Defendant.

JUDGMENT

BE IT REMEMBERED on the 6th day of June 2006, the Court entered its order granting summary judgment on behalf of the Plaintiffs, and the Court enters the following:

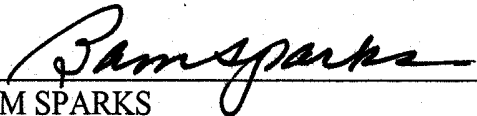
IT IS ORDERED, ADJUDGED, and DECREED that Plaintiffs' Amended Motion for Summary Judgment [#30] is GRANTED and Defendant Mona Bell shall pay Plaintiffs statutory damages of \$27,750.00 plus costs of suit, with interest accruing on said judgment at the rate of 5.03 percent per annum until paid, for which let execution issue against Defendant Mona Bell; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendant Mona Bell shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of



Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

SIGNED this the 6th day of June 2006.



SAM SPARKS
UNITED STATES DISTRICT JUDGE

EXHIBIT W

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; BMG MUSIC, a New York general partnership; WARNER BROS. RECORDS INC., a Delaware corporation; UMG RECORDINGS, INC., a Delaware corporation; CAPITOL RECORDS, INC., a Delaware corporation; and ATLANTIC RECORDING CORPORATION, a Delaware corporation,

Plaintiffs,

vs.

CHRISTOPHER CARLIN,

Defendant.

**[PROPOSED] DEFAULT
JUDGMENT AND PERMANENT
INJUNCTION**

Case No.: 5:05-CV-00918-GLS-GHL

Based upon Plaintiffs' Memorandum of Law for an Application For Default Judgment By The Court, and good cause appearing therefore, it is hereby Ordered and Adjudged that:

1. Plaintiffs seek the minimum statutory damages of \$750 per infringed work, as authorized under the Copyright Act (17 U.S.C. § 504(c)(1)), for each of the eleven sound recordings listed in Exhibit A to the Complaint. Accordingly, having been adjudged to be in default, Defendant shall pay damages to Plaintiffs for infringement of Plaintiffs' copyrights in the sound recordings listed in Exhibit A to the Complaint, in the total principal sum of Eight Thousand Two Hundred and Fifty Dollars (\$8,250.00).
2. Defendant shall further pay Plaintiffs' costs of suit herein in the amount of Two Hundred and Ninety Five Dollars (\$295.00).

3. Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the following copyrighted sound recordings:

- "Puttin' on the Ritz," on album "After Eight," by artist "Taco" (SR# 60-833);
- "Take On Me," on album "Hunting High and Low," by artist "A-Ha" (SR# 63-603);
- "Runnin' With the Devil," on album "Van Halen," by artist "Van Halen" (SR# 239);
- "Love Hurts," on album "Hair of the Dog," by artist "Nazareth" (SR# N23222);
- "Secret Garden," on album "Greatest Hits," by artist "Bruce Springsteen" (SR# 198-948);
- "You Need Me," on album "Mariah Carey," by artist "Mariah Carey" (SR# 118-408);
- "Sorry Seems To Be The Hardest Word," on album "To Be Continued," by artist "Elton John" (SR# 127-149);
- "Immortality," on album "Let's Talk About Love," by artist "Celine Dion" (SR# 248-109);
- "Another Brick in the Wall, Pt. 2," on album "The Wall," by artist "Pink Floyd" (SR# 14-787);
- "The Flyest," on album "Stillmatic," by artist "Nas" (SR# 305-698);
- "In The Air Tonight," on album "Face Value," by artist "Phil Collins" (SR# 24-682);

and in any other sound recording, whether now in existence or later created, that is owned or controlled by the Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

DATED: February 15, 2006

By: Gary L. Sharpe
~~Hon. Gary L. Sharpe~~
United States District Judge

EXHIBIT X

USDC SDNY
DOCUMENT
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DOC #:
DATE FILED: 2/15/06

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ATLANTIC RECORDING CORPORATION, a
Delaware corporation; SONY BMG MUSIC
ENTERTAINMENT, a Delaware general
partnership; ARISTA RECORDS LLC, a
Delaware limited liability company; and UMG
RECORDINGS, INC., a Delaware corporation,

Plaintiffs,

-against-

BARBARA BURGESS,

Defendant.

Civil Action No.: 05CV3182 (PKC)

PROPOSED DEFAULT JUDGMENT AND PERMANENT INJUNCTION

Based upon Plaintiffs' Application For Default Judgment By The Court, and good cause appearing therefor, it is hereby Ordered and Adjudged that:

1. Defendant shall pay damages to Plaintiffs for infringement of Plaintiffs' copyrights in the sound recordings listed in Exhibit A to the Complaint, in the total principal sum of Six Thousand Seven Hundred and Fifty Dollars (\$6,750.00).

2. Defendant shall pay Plaintiffs' costs of suit herein in the amount of Three Hundred Fifteen Dollars (\$315.00).

3. Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the following copyrighted sound recordings:

- "No Matter What They Say," on album "The Notorious K.I.M.," by artist "Lil' Kim" (SR# 286-624);

- "I'm Your Angel," on album "These Are Special Times," by artist "Celine Dion" (SR# 264-455);
- "Hate Me Now," on album "I Am," by artist "Nas" (SR# 175-149);
- "Red Light Special," on album "CrazySexyCool," by artist "TLC" (SR# 198-743);
- "Can U Help Me," on album "8701," by artist "Usher" (SR# 307-207);
- "I'm A Thug," on album "Thugs Are Us," by artist "Trick Daddy" (SR# 303-748);
- "Beauty Queen," on album "Welcome II Nextasy," by artist "Next" (SR# 284-980);
- "Beauty," on album "Enter the Dru," by artist "Dru Hill" (SR# 290-402);
- "Between You and Me," on album "Rule 3:36," by artist "Ja Rule" (SR# 270-080);

and in any other sound recording, whether now in existence or later created, that is owned or controlled by the Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

DATED: 2-14-06By: 

Hon. P. Kevin Castel
United States District Judge

EXHIBIT Y

- "Every Morning," on album "14:59," by artist "Sugar Ray" (SR# 262-149);
- "Girls Dem Sugar," on album "Art And Life," by artist "Beenie Man" (SR# 284-383);
- "Bootylicious," on album "Survivor," by artist "Destiny's Child" (SR# 289-199);
- "Rosa Parks," on album "Aquemini," by artist "Outkast" (SR# 264-092);
- "Father Figure," on album "Faith," by artist "George Michael" (SR# 92-432);
- "Tainted Love," on album "Non-Stop Erotic Cabaret," by artist "Soft Cell" (SR# 32-408);

and in any other sound recording, whether now in existence or later created, that is owned or controlled by the Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

DATED: 2/11/2005

By: s/David G. Trager
Hon. David G. Trager
United States District Judge