

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
CAPITOL RECORDS, INC., et al.,)	
Plaintiffs,)	
v.)	
NOOR ALAUJAN,)	
Defendant.)	
_____)	
SONY BMG MUSIC ENTERTAINMENT,)	
et al., Plaintiffs,)	
v.)	
JOEL TENENBAUM,)	
Defendant.)	
_____)	

Civ. Act. No. 03-cv-11661-NG
(LEAD DOCKET NUMBER)

Civ. Act. No. 07-cv-11446-NG
(ORIGINAL DOCKET NUMBER)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT RE DEFENDANT’S FAIR USE DEFENSE**

Plaintiffs respectfully submit this memorandum of law in support of their motion under Rule 56(c) for summary judgment on Defendant’s affirmative defense of fair use. Defendant is a long-term, habitual user of peer-to-peer (“P2P”) file sharing networks. For nearly ten years, Defendant has been downloading and uploading copyrighted sound recordings without permission in order to avoid paying for them and to support the networks he uses. The list of P2P networks that Defendant has used over the years reads like an entry from a P2P encyclopedia: Napster, AudioGalaxy, iMesh, Morpheus, KaZaA, and LimeWire, among others.

In August 2004, Defendant was caught red-handed in the act of distributing over 800 music files on the KaZaA network. In September 2005, Defendant was put on notice that Plaintiffs intended to assert claims. Notwithstanding being caught and put on notice of his unlawful activity, Defendant persisted in his infringing behavior. Indeed, Defendant's Gateway computer contains evidence that Defendant was using the LimeWire file sharing program in February 2007, and possibly as late as May 2008, long after this case was filed, to distribute thousands of music files to other LimeWire users.

Although this case has been pending for more than two years, Defendant just recently claimed for the first time that his infringement of the 30 sound recordings at issue through KaZaA somehow constitutes "fair use" under the Copyright Act. Indeed, even after retaining counsel, it took Defendant's counsel seven months, and three motions to amend, to decide to assert a fair use defense. Ever since that time, this new defense has been, at best amorphous and, at worst, vaporous.

In arguments to the Court and in the reports of Defendant's purported experts, Defendant appeared to claim fair use on grounds that, according to Defendant, society benefits from increased access to music, P2P networks have a positive effect on the sale of sound recordings, and Defendant was entitled to download and distribute Plaintiffs' copyrighted sound recordings because Plaintiffs did not employ an optimal business model at the time he was caught infringing.

In his recent deposition on fair use issues, Defendant explained that his fair use defense also relies on factors such as how much music he later purchased, whether he discussed his downloads with friends, whether he downloaded a whole album or just one song off of an album, whether he profited from his distribution, his state of mind (*i.e.*, did he know whether it was

illegal), the extent to which he “identified” with a song, whether a song “expresses” who he is, and whether P2P use benefits “obscure” songs. (J. Tenenbaum Dep. Vol. II at 132:11 to 132:13, 133:9 to 133:18, 137:16 to 137:22, 143:1 to 144:3, 145:7 to 145:24, 147:14 to 147:17, 148:17 to 148:20, 150:5 to 150:9, 151:14 to 152:8, 162:5 to 162:14, **Exhibit I** to Pls.’ Appx.)

As demonstrated below, none of these “factors” make out a valid fair use defense. The fair use doctrine is intended to balance “ the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.” *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984). Neither Defendant’s downloading nor uploading of Plaintiffs’ recordings on KaZaA in any way facilitated the free flow of ideas, information, or commerce. Defendant downloaded complete copies of Plaintiffs’ sound recordings for free, and then distributed them to others without alteration. Whether he “identifies” with a song or not, Defendant added nothing creatively. He took copyrighted music without paying for it, kept it on his computer for his own benefit, and then distributed it to others without doing anything that could remotely be considered transformative. Defendant’s purpose was to avoid the cost of buying the music – which he concedes was widely available to him from legitimate sources, including both physical retailers and online sources. (J. Tenenbaum Dep. Vol. II at 122:14 to 122:20.) By downloading and distributing Plaintiffs’ copyrighted songs for free, Defendant undermined the very marketplace that encourages, fosters, and supports music.

No conceivable set of facts exists that would allow Defendant’s unlawful copying and distribution to be considered fair use, and every court to rule on the issue on facts nearly identical to those presented here has rejected any claim of fair use by infringers like Defendant. *See A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1019-29 (9th Cir. 2001) (“Napster users are not fair

users”); *BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005) (downloading copyrighted songs cannot be defended as fair use). Indeed, Defendant’s own legal consultants, well known copyleftists, have stated that the concept of fair use does not – and should not– encompass P2P file sharing, and that it is a disservice both to the concept of fair use and to copyright law in general to suggest that it could.¹

Given the unanimous case law rejecting fair use in the context of this case, the complete lack of any cogent theory or evidence from Defendant to support a fair use defense, and the unequivocal rejection of fair use as a defense in this case by Defendant’s own legal consultants, it is obvious that Defendant does not seek to advance any legitimate notion of fair use at all. Rather, Defendant’s belated fair use theory is nothing but a desperate attempt to present to the jury an argument for ignoring the clear law with respect to infringement and to avoid responsibility for his massive and continuous infringement of Plaintiffs’ copyrighted sound recordings. Because there are no disputed issues of material fact with respect to Defendant’s affirmative defense of fair use, Plaintiffs should be granted judgment on this defense as a matter of law.

¹ William “Terry” Fisher, professor of intellectual property law at Harvard Law School and faculty director of the Berkman Center for Internet and Society has stated: “I cannot, however, testify that Joel’s activity constitutes a fair use under current copyright law, because I don’t think it does,” and that, “In my view, the fair use doctrine has other, important functions in the copyright scheme . . . which would be impaired by twisting it to address this particular problem.” (March 29, 2009 email from W. Fisher to C. Nesson a pp. 4-5, **Exhibit M** to Pls.’ Appx.) Likewise, Lawrence Lessig, founder of Stanford Law School’s Center for Internet and Society has stated in no uncertain terms: “I am surprised if the intent is to fight this case as if what Joel did was not against the law. Of course it was against the law, and you do the law too much kindness by trying to pretend (or stretch) ‘fair use’ excuses what he did. It doesn’t.” (March 29, 2009 email from L. Lessig to C. Nesson at p. 7, **Exhibit M** to Pls.’ Appx.)

BACKGROUND

Plaintiffs are recording companies who own or control exclusive rights to copyrights in sound recordings. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and expanding problem of digital piracy over the Internet. *See* Lev Grossman, *It's All Free*, Time, May 5, 2003 (describing the unlawful dissemination of billions of copies of Plaintiffs' copyrighted sound recordings over peer-to-peer ("P2P") networks). The Supreme Court has characterized the magnitude of online piracy as "infringement on a gigantic scale." *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005).

On August 10, 2004, at 12:49 a.m. EDT, MediaSentry, a company retained by Plaintiffs, detected an individual with the username "sublimeguy14@KaZaA" at Internet Protocol ("IP") address 68.227.185.38 using the KaZaA online file sharing program to distribute Plaintiffs' copyrighted sound recordings. (Statement of Material Facts ("SOF") ¶ 1.) This person was distributing 816 digital audio files from a "shared" folder on his computer to millions of other users on the KaZaA network. (SOF ¶ 1.)

Exhibit B to Plaintiffs' Complaint is a series of screen shots showing the contents of the sublimeguy14@KaZaA shared folder on August 10, 2004. (SOF ¶ 2.) Plaintiffs' are pursuing claims on 30 of the sound recordings found on Exhibit B. (SOF ¶¶ 3, 6.) These recordings are listed in Plaintiffs' Second Amended Exhibit A and Plaintiffs' Second Amended Schedule 1. (SOF ¶ 3.)

On August 10, 2004, MediaSentry initiated the process of downloading each of the 816 digital audio files stored in the sublimeguy14@KaZaA shared folder and, had it chosen to do so, could have downloaded complete copies of any of the audio files listed in the shared folder. (SOF ¶ 5.) After completing the partial download of every audio file, MediaSentry downloaded complete copies of the 5 sound recordings listed on Plaintiffs' Second Amended Exhibit A as a

sample of what was being distributed by sublimeguy14@KaZaA. (SOF ¶ 6.) The metadata associated with the 816 digital audio files stored in the shared folder shows that the files were downloaded from other users on the Internet. (SOF ¶ 7.)

In response to a federal court subpoena, Cox Communications identified “J. Tenenbaum” as the subscriber of record responsible for IP address 68.227.185.38 on August 10, 2004 at 12:49 a.m. EDT. (SOF ¶ 8.) Defendant Joel Tenenbaum set up the KaZaA account on his computer and created the “sublimeguy14@KaZaA” username. (SOF ¶ 9.) The sublimeguy14@KaZaA shared folder, which is Exhibit B to Plaintiffs’ Complaint, is Defendant’s KaZaA shared folder. (SOF ¶ 10.) Defendant used the KaZaA program on his computer and the sublimeguy14@KaZaA user name to download songs from other KaZaA users on the Internet. (SOF ¶ 11.) Defendant understood that other users on KaZaA could download files from his shared folder and saw from the KaZaA “traffic tab” on his computer that other KaZaA users were downloading files from his KaZaA shared folder. (SOF ¶ 12.)

Defendant used Napster prior to using KaZaA and, when Napster was shut down, he switched to KaZaA because he continued to want a source for downloading music without paying for it. (SOF ¶ 14.) The whole purpose behind P2P networks such as KaZaA is to allow users to share files with other users for free. (SOF ¶ 15.) Having downloaded music for free, Defendant then regularly burned copies of the music he downloaded onto CDRs. In fact, just before going to college in 2002, Defendant burned between 50 and 600 of the songs that were in his KaZaA shared folder to homemade CDRs. (SOF ¶ 13.)

During the course of discovery, Plaintiffs conducted a forensic examination of another computer used by Defendant, the Gateway computer. (SOF ¶ 16.) This examination showed that Defendant used the LimeWire file sharing program on his Gateway computer starting in

February 2004, and that Defendant continued to use the program through February 2007, and possibly as late as May 2008, long after this case was filed, to distribute thousands of music files to other LimeWire users. (SOF ¶ 16.) In addition to Napster, KaZaA, and LimeWire, Defendant has used many other P2P file sharing programs to download and distribute sound recordings over the Internet, including Audio Galaxy, Morpheus, and iMesh. (SOF ¶ 17.)

The law is clear: Defendant's actions constitute copyright infringement. *See* 17 U.S.C. § 501 et seq.; *Grokster*, 545 U.S. at 920-23 (noting that users of peer-to-peer networks share copyrighted music and video files on an enormous scale and as such even the providers of those networks "concede infringement" by the individual users); *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. Ill. 2003) (people who post or download music files are primary infringers); *Gonzalez*, 430 F.3d at 891 (same); *Sony BMG Music Entm't v. Tenenbaum*, Case No. 07-cv-11446-NG, consolidated with Case No. 03-cv-11661-NG (D. Mass.), Minute Entry dated Jan. 29, 2008 (denying Defendant's motion to dismiss and holding that Plaintiffs' allegations of uploading and downloading copyrighted sound recordings state a claim for copyright infringement); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (holding that the record company plaintiffs' allegations state a claim for copyright infringement and denying the defendants' motion to quash).

Illegal online file sharing, like that Defendant has engaged in, has caused significant harm to the market for legitimate copies of Plaintiffs' works. (SOF ¶¶ 18-20.) In particular, it has caused a reduction in sales of legitimate copies of Plaintiffs' works and it has also harmed Plaintiffs' ability to develop a market for the legal distribution of their works on the Internet. (SOF ¶¶ 18-19.) The decline in the sound recording market applies not only to CDs and digital downloads. It also has caused harm to markets for online subscription services, digital streaming

services, mobile music, music videos, music kiosks, webcasting, satellite radio, digital audio broadcasting, podcasting, social networks, and audio and/or video-streaming. (SOF ¶ 20.) Indeed, any market where consumers are asked to pay money for their usage of music suffers from a potential substitution effect and is likely to be hindered or eliminated by file-sharing. (SOF ¶ 20.)

In an effort to escape responsibility for his conduct, Defendant has recently contended that his downloading and distribution of Plaintiffs' copyrighted works through KaZaA should somehow be considered fair use under the Copyright Act. As demonstrated below, however, none of Defendant's proffered "fair use" theories holds water, and none of his allegations, even if accepted as true, would support his fair use defense. Accordingly, Plaintiffs now respectfully move for summary judgment on Defendant's affirmative defense of fair use.

I. STANDARD OF REVIEW.

Summary judgment is appropriate when "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 judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 183 (D. Mass. 2007). Once the moving party demonstrates the "absence of evidence to support the nonmoving party's case," the burden of production shifts to the nonmovant." *Fitzgerald*, 491 F. Supp. 2d at 183 (citing *Dow v. United Brotherhood of Carpenters*, 1 F.3d 56, 58 (1st Cir. 1993)). The nonmovant must then "affirmatively point to specific facts that demonstrate the existence of an authentic dispute." *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995). "A fact is material if it has the potential of determining the outcome of the litigation." *Rodriguez-Rivera v. Federico Trilla Reg'l Hosp.*, 532 F.3d 28, 30 (1st Cir. 2008).

Fair use is an affirmative defense to a claim of copyright infringement. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994); *Harper & Row, Publr. v. Nation Enters.*, 471 U.S.

539, 561 (1985). As such, the defendant “carries the burden of proof as to all issues” regarding the fair use defense. *Amer. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 919 (2d Cir. 1994); *see also Bath Iron Works Corp. v. United States Dep’t of Labor*, 336 F.3d 51, 57 (1st Cir. 2003) (the defendant has the burden of proof with regard to his affirmative defenses).

It is also well-established that “[w]here the district court has found facts sufficient to evaluate each of the statutory factors considered in determining fair use, . . . [it] may [be] determine[d] as a matter of law whether the challenged use is a fair one. *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 796 (9th Cir. 1992); *accord Fisher v. Does*, 794 F.2d 432, 436 (9th Cir. 1986) (Because “the ultimate conclusions to be drawn from the admitted facts” relevant to fair use are “legal in nature, [a court] can make them without usurping the function of the jury.”). Where the parties’ disagreements are over the interpretation of facts relating to the defendant’s claim of fair use, summary judgment is appropriate. *Fitzgerald*, 491 F. Supp. 2d at 183.² Here, because there are no issues of material fact on the question of fair use, the Court should determine fair use as a matter of law.

II. SUMMARY JUDGMENT IS REQUIRED BECAUSE DEFENDANT CANNOT MEET HIS BURDEN OF PROOF ON FAIR USE.

The Copyright Act grants the copyright owner the exclusive rights “to reproduce the copyrighted work in copies” and to authorize others to reproduce the copyrighted work. By granting exclusive rights, the copyright protection under Section 106 “supplies the economic incentive to create and disseminate ideas.” *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1995); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

² Professor Barton Beebe’s “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005,” doesn’t mention a single jury case. *See esp.* Table 2 on page 569: “This supports the conventional wisdom that courts regularly resolve fair use issues at the summary judgment stage.” *Id.* at 569.

Section 107 of the Copyright Act provides that: “fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship or research, is not an infringement of copyright.” 17 U.S.C. § 107. In deciding fair use, the Copyright Act specifies four factors that must be considered and weighed together in light of the purpose of the Act: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) effect of use upon the potential market for or value of the copyrighted work. *Id.*; *Fitzgerald*, 491 F. Supp. 2d at 184; *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 141 (2d Cir. 1998).

Every one of these factors militates strongly against a finding of fair use in this case. Indeed, every court to rule on the question of fair use in the P2P context has rejected it as a defense to copyright infringement. *See Napster*, 239 F.3d at 1019-29 (“Napster users are not fair users”); *Gonzalez*, 430 F.3d at 891 (downloading copyrighted songs cannot be defended as fair use); *see also UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that downloading copyrighted recordings is not fair use, even if the downloader already owns one purchased copy); *United States v. Slater*, 348 F.3d 666, 669 (7th Cir. 2003) (“It is preposterous to think that Internet piracy is authorized by virtue of the fair use doctrine.”). Accordingly, summary judgment on fair use should be entered in favor of Plaintiffs.

A. Defendant’s Wholesale Downloading And Distribution Of Plaintiffs’ Copyrighted Sound Recordings Was Not For A Purpose Enumerated By Congress, Was Not Transformative, And Was Done Only For Defendant’s Personal, Private Gain.

Regarding the first factor, courts typically ask three questions to determine the purpose and character of the use. *Fitzgerald*, 491 F. Supp. 2d at 184. First, courts ask whether a

defendant's use of the copyrighted material falls into a category specifically identified by Congress in the copyright statute as especially important to copyright's ends: "criticism, comment, news reporting, teaching, [. . .] scholarship or research." *Id.* at 184 (citing 17 U.S.C. § 107). Second, "courts ask whether the defendant's use was 'productive' or 'transformative' - *i.e.* whether it added anything to the copyrighted work in its use, and thus is treatable more as a new work referencing the old than as an instance of strict copying." *Id.* Third, "courts ask whether the use was commercial - *i.e.* whether it primarily served defendant's private interests rather than the public interest in underlying copyright law." *Id.* (citing 17 U.S.C. § 107); *Arica Inst., Inc. v. Palmer*, 970 F. 2d 1067, 1077 (2d Cir. 1992); *see also* 17 U.S.C. § 101 (defining "financial gain" as the "expectation of receipt, of anything of value, including the receipt of other copyrighted works). These three questions are cumulative. *Fitzgerald*, 491 F. Supp. 2d at 184. Here, Defendant's downloading and distribution of Plaintiffs' copyrighted sound recordings over a P2P network fails all three inquiries.

1. Defendant's actions do not fall within any of the categories enumerated in the statute.

Defendant has not and cannot legitimately claim that his downloading and distribution of Plaintiffs' copyrighted sound recordings was done for purposes of "criticism, comment, news reporting, teaching [. . .] scholarship or research," and indeed Defendant has made no such claim. Any such argument would be wholly contrived given the facts of this case.

2. Defendant's use was not transformative.

Defendant's conduct was neither productive nor transformative, as he copied entire recordings from other KaZaA users into his shared folder without alteration, and then distributed those sound recordings to others. Creating a perfect digital copy by definition is not

transformative *See, e.g., Napster*, 239 F.3d at 1015 (“downloading MP3 files does not transform the copyrighted work”).³

Moreover, there is nothing transformative by virtue of downloading or uploading a particular set of sound recordings. In this respect, *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1389 (6th Cir. 1996), is instructive. In that case, the Sixth Circuit rejected the defense that the selection and arrangement of copyrighted materials in student “coursepacks” transforms the materials and constitutes fair use. *Id.* The court explained that “[i]f you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much -- even if you juxtapose them to excerpts from other works and package everything conveniently.” *Id.* Indeed, “[t]his kind of mechanical ‘transformation’ bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case.” *Id.*

Moreover, William “Terry” Fisher, a legal consultant that Defendant once considered calling as a witness in this case, has stated that Defendant’s behavior was not transformative “even in the broadest sense of that malleable term.” (*See* March 29, 2009 email from W. Fisher to C. Nesson at p. 5, **Exhibit M** to Pls.’ Appx.) This “total absence of transformativeness” precludes a finding of fair use. *See Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (defendant’s retransmission of unaltered radio broadcasts is not a fair use); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (the first factor

³ While Defendant claims he “transformed” some sound recordings by using re-mixing software, he acknowledges that he never did anything to change, alter, or add to the 30 sound recordings in this case. (SOF ¶ 21.) Moreover, Defendant’s argument that his infringement is fair use because the music moved or transformed him is patently absurd. Indeed, if this were the standard, all emotionally inspiring work would be up for grabs, whereas less inspiring works would be afforded less protection. As the standard is not what the recordings did to him, but what he did to the recordings, Defendant’s argument fails.

“weighs strongly against fair use” where the infringing “abstracts” are “for the most part direct translations of Nikkei articles; defendants added almost nothing new in their works”). Because neither the placement of sound recordings in a KaZaA shared folder nor the distribution of those recordings to others “transforms” the copyrighted material, the second inquiry favors Plaintiffs.⁴

3. Defendant’s use was commercial.

While Defendant has argued that his use was non-commercial, make no mistake about it, Defendant is a commercial infringer. In deciding whether a use is commercial, courts ask whether it “primarily served defendant’s private interests rather than the public interest in underlying copyright law.” *Fitzgerald*, 491 F. Supp. 2d at 184; *Arica Inst.*, 970 F. 2d at 1077. Under well-established Supreme Court precedent, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain’ but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Id.* (citing *Harper & Row*, 471 U.S. at 562; *Amer. Geophysical Union*, 802 F. Supp. at 14-16 (when copying is for the purpose of making multiple copies of the original, and thereby saving users the expense of purchasing authorized copies, it is not fair use)).

Moreover, Section 101 defines “financial gain” as the “expectation of receipt, of anything of value, including the receipt of other copyrighted works.” 17 U.S.C. § 101. Clearly, a person who engages in “file-sharing” does so with the expectation of receiving copyrighted works in return, and, thus, does so for financial gain. In *Napster*, the Ninth Circuit held that the file

⁴ Plaintiffs recognize that this Court has previously ruled that there may be some creative or self-expressive aspects to downloading music or making it available to others, which requires minimal First Amendment protection. *London-Sire Records*, 542 F. Supp. 2d at 163. That analysis has no application in the fair use context, where such conduct has categorically been rejected as unfair. Indeed, in *London-Sire*, the Court held that “the fact that there is a First Amendment value associated with sharing music over a peer-to-peer network does not insulate the defendants from liability.” *Id.* Rather, it merely “entitles them to some scrutiny of a discovery request.” *Id.*

trading by Napster users constituted a “commercial use” for purposes of the fair use analysis. 239 F.3d at 1015 (“Repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”).

Applying this standard, Defendant’s use of Plaintiffs’ copyrighted sound recordings was commercial. Defendant’s use was entirely self-serving, a way for him to get music for free and feed the networks that he relied on for that purpose. Not only has Defendant obtained hundreds, or thousands, of works without paying for them, thus rendering him a commercial infringer as defined above, he has also distributed those works to others free of charge. These actions have two different commercial impacts: (1) Defendant obtains a commercially released work without paying for it, and (2) the record companies are denied sales both to Defendant and to everyone to whom he distributed. *Id.*

Defendant’s argument that he is a non-commercial user “barely pass[es] the straight-face test.” *See Slater*, 348 F.3d at 669 (use was not noncommercial for purposes of fair use analysis where members engaged in a “barter form of payment” to receive commercially available software). The fact that Defendant never sold recordings or made money does not render him a non-commercial user. As noted above, “financial gain” includes exactly the conduct at issue – the expectation of receiving recordings in exchange for those he has offered. *See* 17 U.S.C. § 101. Further, “in weighing whether the purpose was for “profit,” “monetary gain is not the sole criterion . . . particularly in [a] . . . setting [where] profit is ill-measured in dollars.” *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000) (religious group “profited” by copying religious work without paying for it); *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (holding that a professor’s verbatim copying of an academic work was not fair use, in part because “the profit/nonprofit distinction is context specific, not

dollar dominated” and a professor can “profit” by gaining recognition among his peers and authorship credit); *see also Slater*, 348 F.3d 666, 669 (barter system is not noncommercial); *Television Digest, Inc. v. United States Tel. Ass’n*, 841 F. Supp. 5, 9-10 (D.D.C. 1993) (non-profit trade association’s duplication and distribution of copyrighted newsletter held not a non-commercial use); *Marobie-FL, Inc. v. Nat’l Assoc. of Fire Equip. Distribs.*, 993 F. Supp. 1167, 1175 (N.D. Ill. 1997) (Even where a defendant “is a non-profit organization and do[es] not receive any compensation for placing the [copyrighted material] on its Web page its conduct may still be considered commercial.”). Applying this principle to the P2P context in the *Gonzalez* case, Judge Easterbrook rejected a defendant’s claim that her use of KaZaA to download sound recordings was a non-profit use. *Gonzalez*, 430 F.3d at 891.

Moreover, Defendant’s claim that, as a non-commercial infringer, he is entitled to a presumption of fair use is without factual or legal support. First, as established above, Defendant’s use is commercial. Second, the case on which Defendant relies, *Sony Corp. of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), did not declare a presumption of fair use in favor of noncommercial users; rather, *Sony* established a presumption against fair use with respect to commercial activities. *Id.* Not only does Harvard Law Professor and Berkman Center co-Founder Fisher reject Defendant’s interpretation of *Sony*, (*see* March 29, 2009 email from W. Fisher to C. Nesson at pp. 5-7, **Exhibit M**), but the court in *Capitol Records, Inc. v. Jammie Thomas*, Case No. 06-CV-1497-MJD/RLE, slip op. at 23 (D. Minn. June 11, 2009) (**Exhibit N** to Pls.’ Appx.), recently rejected it as well. *See also Worldwide Church of God*, 227 F.3d at 1117 (“While the fact that a publication is commercial tends to weigh against fair use, the absence of a commercial use merely eliminates the presumption of unfairness.”) (citation omitted).

In summary, the fact that Defendant was not engaged in any activity enumerated in the statute, the complete lack of transformativeness of Defendant's copying and distribution, and the commercial nature of his infringing activities, all compel a finding against Defendant.

Accordingly, the first factor, the purpose and character of use, decisively favors Plaintiffs.

B. Plaintiffs' Sound Recordings Reflect Creative And Original Expression.

As in other cases involving sound recordings, "[t]he creative recordings here being copied are 'close[] to the core of intended copyright protection,' and, conversely, far removed from the more factual or descriptive work more amenable to fair use.'" See *UMG Recordings*, 92 F. Supp. 2d at 351 (S.D.N.Y. 2000) (citing *Campbell*, 510 U.S. at 586); *Napster*, 239 F.3d at 1016 ("plaintiffs' 'copyrighted musical compositions and sound recordings are creative in nature . . . which cuts against a finding of fair use under the second factor'") (citation omitted); *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 657 (6th Cir. 2004) (sound recordings are creative works). Accordingly, this factor weighs strongly against Defendant.

C. Defendant's Wholesale Copying And Distribution Of Entire Works Could Not Be More Substantial.

The third factor concerns "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). Copying the entirety of the copyrighted works typically negates a claim for fair use. See *Infinity Broadcast*, 150 F.3d at 109 (quoting 3 Nimmer on Copyright § 13.05[A][3]) ("generally, it may not constitute a fair use if the entire work is reproduced"); *Fitzgerald*, 491 F. Supp. 2d at 188 ("What matters is whether the alleged infringer used the 'heart' of the material; in other words, superficial editing or cropping does not impact the Court's consideration"); *Princeton Univ. Press*, 99 F.3d at 1389 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1122 (1990) ("The larger the volume . . . of what is taken, the greater the affront to the interests of the copyright owner, and

the less likely that a taking will qualify as a fair use.”); *Napster*, 239 F.3d at 1016 (“File transfer necessarily ‘involves copying the entirety of the copyrighted work.’”).

Here, Defendant engaged in the wholesale copying and distribution of complete copies of Plaintiffs’ copyrighted works from his KaZaA shared folder. (SOF ¶¶ 1-12, 22.) Indeed, Defendant admits that every time he downloaded a recording, it was his intent to download the entire recording. (SOF ¶ 22.) This factor, too, weighs heavily against Defendant.

D. Illegal File Sharing Has Had A Substantially Negative Impact On The Market For Plaintiffs’ Copyrighted Works.

“The fourth factor, the effect of the use upon the market for or value of the copyrighted work, ‘is undoubtedly the single most important element of fair use.’” *Los Angeles News Service v. Tullio*, 973 F.2d 791, 798 (9th Cir. 1992) (quoting *Harper & Row*, 471 U.S. at 566). “To negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’” *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp.*, 464 U.S. at 451); *Lotus Dev. Corp. v. Borland Int’l Inc.*, 831 F. Supp. 223, 243 (D. Mass. 1993). The potential market can mean either an immediate or a delayed market and can include any harm to potential derivative works. *See Campbell*, 510 U.S. at 593 n.23.

Here, the negative effect of online copyright infringement on the market for Plaintiffs’ works is undeniable. In particular, illegal online file sharing like that Defendant has engaged in has caused reduced sales of legitimate copies of Plaintiffs’ works and has harmed Plaintiffs’ ability to develop a market for the legal distribution of their works on the Internet. (SOF ¶¶ 18-20.) Indeed, sales of sound recordings have decreased since the inception of P2P piracy. (SOF ¶ 18.) Despite the fact that the Plaintiff record companies offer their sound recordings in multiple formats, including CD and digital downloads, sales continue to decline because many

P2P users simply prefer the free black market alternative as a substitute for paying. (SOF ¶ 18.) *See also Slater*, 348 F.3d at 669 (“we think [the harmful effect of Internet piracy on the potential market for the copyrighted work] is fairly obvious”). Even Defendant’s own proffered expert, John Palfrey, agrees that illegal P2P file sharing has likely caused a decline in the music industry to the tune of billions of dollars. (Palfrey Dep. at 65:9 to 65:14, **Exhibit L** to Pls.’ Appx.) Similarly, Defendant’s consultant, Terry Fisher, has stated that “[i]t’s not credible to argue that widespread P2P filesharing has not and will not give rise to ‘some meaningful likelihood of future harm’ to the revenues of the holders of copyrights in sound recordings and musical works.” (March 29, 2009 email from W. Fisher to C. Nesson, **Exhibit M** to Pls.’ Appx.)

In *Napster*, the Ninth Circuit held that illegal file-sharing like that Defendant has engaged in here harms the market for copyrighted sound recordings in at least two ways: (1) it reduces sales and (2) it harms the copyright holder’s ability to enter the digital market for downloads. *Napster*, 239 F.3d at 1016. The Department of Justice, too, has determined that online media distribution systems are “one of the greatest emerging threats to intellectual property ownership.” Report of the Department of Justice’s Task Force on Intellectual Property, *available at* <http://www.cybercrime.gov/IPTaskForceReport.pdf> at 39 (October 2004).

Similarly, in *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1169 (W.D.N.Y. 1982), the court rejected the defendant’s claim that its wholesale videotaping and copying of the plaintiffs’ educational videos was fair use. The court held that the plaintiffs had entered into various licensing agreements with educational institutions, which would become “both meaningless and worthless if [the defendant] can freely videotape and copy their works from the airways.” *Id.* at 1169-70. The court noted that is “totally unreasonable” to think institutions would pay for licensing agreements or legitimate copies when the same works can be

copied with the proper equipment for free. *Id.* at 1169. The cumulative effect of the defendant's massive videotape copying would be no market for the plaintiffs' works. *Id.* at 1169-70.

Indeed, courts routinely reject fair use theories, like Defendant's, which would expand fair use to effectively destroy any expectation of copyright protection. In *Harper & Row*, the Supreme Court denied fair use and held that:

Absent [copyright] protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use "news report" of the book.

471 U.S. at 557.

Similarly, in *Chicago Board of Education v. Substance, Inc.*, 354 F.3d 624, 630 (7th Cir. 2003), the Seventh Circuit rejected the defendant's fair use defense to his copying and distribution of copyrighted standardized tests. The court noted that "[i]f ever a 'floodgates' argument had persuasive force, therefore, it is in this case. [. . .] If Schmidt wins this case, it is goodbye to standardized tests in the Chicago public school system." *Id.*

Finally, in *Fitzgerald*, this Court held

If the Court finds that CBS's use was fair use, then all of these media uses - and uses like them in the future - would also be fair use, destroying the only potential market that exists for the photographs. It is hard to imagine that freelance photojournalists would continue to seek out and capture difficult to achieve pictures if they could not expect to collect any licensing fees. This is exactly the kind of situation that copyright is meant to impact - where unrestricted use would likely dry up the source.

491 F. Supp. 2d at 189.

Each of these cases is illustrative. Here, if Defendant's infringement were deemed fair use, such a pronouncement would destroy the markets for copyrighted sound recordings. "This is exactly the kind of situation that copyright is meant to impact." *See id.*

For all of these reasons, all four statutory factors weigh heavily against any finding of fair use in this case.

III. Defendant's Proffered Experts Offer No Evidence To Support A Fair Use Defense.

Defendant's two proffered experts, John Palfrey and Janis Pouwelse, do not offer any admissible evidence regarding fair use. For his part, John Palfrey does not purport to offer any evidence regarding the statutory factors. (Palfrey Dep. at 68:13-15, 69:4-6, **Exhibit L** to Pls.' Appx.) Indeed, Mr. Palfrey categorically refuses to take a position on whether Defendant's infringement is protected by fair use. He is not even aware of any of the facts in this case. (*Id.* at 71:19-21, 72:10-13.) Mr. Palfrey did, however, opine that the use of P2P networks to upload and download copyrighted sound recordings is generally illegal and generally not subject to fair use. (*Id.* at 59:16 to 63:22; 70:6 to 74:21.)

For his part, Dr. Pouwelse is a computer scientist; he has no training or expertise in economics, market analysis, or business issues. (Pouwelse Dep. Vol. I at 117:5 to 118:11, 171:6 to 171:10, 177:16 to 177:19, **Exhibit O** to Pls.' Appx.) Thus, any opinions he may offer concerning market harm or business models is not admissible under *Daubert* and cannot be considered. *Levin v. Dalva Bros.*, 459 F.3d 68, 78 (1st Cir. 2006) ("a district court acts properly by excluding opinions that are beyond the witness's expertise"). Indeed, Dr. Pouwelse admits that he has no expertise at all in economics that he bases his views on what he has read and nothing else.⁵ (Pouwelse Dep. Vol. I at 125:13 to 127:19, 137:7 to 137:25, 181:2 to 181:19, **Exhibit O.**)

⁵ Plaintiffs intend to file a *Daubert* motion to preclude Dr. Pouwelse from testifying on any topics relating to economics, market analysis, or business issues as Dr. Pouwelse admittedly has no expertise in any of these areas.

IV. Defendant's Proposed "Fairness" Factors Do Not Create A Disputed Issue Of Material Fact.

Recognizing that he fails the four statutory factors, Defendant attempts to avoid summary judgment by arguing that file sharing was "fair" in the context of Defendant's experience and of the time in which he infringed. Defendant's "fairness" arguments include (1) Defendant's state of mind at the time he engaged in the infringing behavior; (2) the music industry did not employ a business model he approved of; (3) the availability of alternatives to P2P in readily accessible form was limited; (4) the music industry benefits from his illegal P2P file sharing; and (5) his emotional ties to the music make it fair. Defendant's arguments have no merit and do not save his fair use defense from summary judgment.

While the Court may consider equitable factors beyond those specifically enumerated in the Copyright Act, such factors must be related to Defendant's use of Plaintiffs' copyrighted recordings and must serve a purpose of the Copyright Act. *See United States v. ASCAP*, 599 F. Supp. 2d 415, 423-424 (S.D.N.Y. 2009) (the court may consider additional factors in line with the copyright law's goal of promoting the Progress of Science and the useful Arts); *see also Cable/Home Commc'ns Corp. v. Network Prods., Inc.*, 902 F.2d 829, 844 (11th Cir. 1990) (citation omitted) ("To constitute 'fair use' the permitted use must be for some legitimate, fair and reasonable purpose.").

Here, Defendant's proposed "fairness" factors must be rejected for at least three reasons. First, where, as here, all four statutory factors weigh heavily against a finding of fair use, a defendant cannot survive summary judgment by asserting other, generalized arguments of fair use. Second, courts have consistently rejected virtually every argument raised by Defendant, and none of Defendant's arguments serve the purpose of the fair use doctrine or the purpose of copyright law. Indeed, Defendant's arguments, like his infringement, serve only his own narrow

interests in getting his music for free. Third, because there is no legal or factual support for any fair use defense in this case, it is apparent that Defendant's fair use argument is an improper attempt at jury nullification.

A. Where All Four Statutory Factors Weigh Heavily Against A Finding Of Fair Use, Defendant Cannot Avoid Summary Judgment By Proffering Additional Factors.

Where all four fair use factors weigh against a defendant, arguments outside of the statutory factors do not save him from summary judgment on this issue. *See Batesville Servs. v. Funeral Depot, Inc.*, 2004 U.S. Dist. LEXIS 24336, at *26 (S.D. Ind. Nov. 10, 2004) (granting plaintiffs' motion for summary judgment where all four factors weighed against defendant and rejecting his claim that he served the "greater consumer good"); *Castle Rock Entm't*, 150 F.3d at 146 (affirming summary judgment on fair use where all four factors favored plaintiff and rejecting other factors); *Encyclopedia Britannica*, 542 F. Supp. at 1180 (granting summary judgment and rejecting "farfetched" and "erroneous" additional factors). Indeed, allowing a defendant to assert new factors untethered to his use of the copyrighted material and unrelated to the purpose of the Copyright Act would preclude summary judgment in every fair use case. Here, Defendant's proposed "fairness" factors would subsume and make irrelevant the four statutory factors. Because this proposed analysis would remove "use" from the "fair use" inquiry, it would distort the Copyright Act and should not be presented to the jury.

B. Courts Have Soundly Rejected Almost All Of Defendant's Arguments In Favor Of His Generalized Fairness Defense As A Matter Of Law.

Defendant's additional factors also fail on the merits. First, Defendant's argument that his state of mind should be a factor in determining if the use was "fair," is belied by the both the facts and the law. Defendant knew that Napster was shut down because copyright infringement is illegal. (J. Tenenbaum Dep. Vol. I at 106:24 to 110:2, **Exhibit H** to Pls.' Appx.) Defendant

also knew that his school was blocking access to P2P services. (J. Tenenbaum Dep. Vol. II at 32:2 to 34:4, 53:24 to 54:21, **Exhibit I** to Pls.’ Appx.) This testimony demonstrates clearly that Defendant was well aware of the consequences of his actions. Beyond that, the law is clear that knowledge and intent are not relevant in determining whether or not someone engaged in infringement. Copyright infringement is a strict liability offense – no intent is required and ignorance of the law does not excuse it. *See, e.g., Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) (‘Copyright infringement actions . . . ordinarily require no showing of intent to infringe.’).

Second, Defendant has argued that his unauthorized uploading and downloading was fair use because, in his opinion, Plaintiffs did not employ the a business model of his liking. The Seventh Circuit, however, soundly rejected this same argument in the *Gonzalez* case. Writing for the panel, Judge Easterbrook ruled that:

[c]opyright law lets authors make their own decisions about how best to promote their works; copiers such as Gonzalez cannot ask courts (and juries) to second-guess the market and call wholesale copying “fair use” if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute.

Gonzalez, 430 F.3d at 891. Not only does this argument fail as a matter of law, but there is no factual support for the argument either. Simply put, illegal file sharing cannot be considered a better business model under any theory. (Declaration and Report of S. Liebowitz at 9, ¶¶ 41-42, **Exhibit K** to Pls.’ Appx.) File-sharing networks, beginning with Napster and moving on to KaZaA and others, do not produce their own competing music using business models that are outperforming the industry’s models. (*Id.*) Rather, illegal file-sharing alternatives merely leech off the efforts of others who actually create the music to which the public wishes to listen. (*Id.*)

Next, Defendant’s claim that his downloading and distribution was fair because digital music was purportedly unavailable in a readily accessible form is without factual or legal

support. (See J. Tenenbaum Dep. Vol. II at 112:10 to 115:4, **Exhibit I** to Pls.’ Appx.)

“Copyright is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders’ property interests.” *UMG Recordings*, 92 F. Supp. 2d at 352 (rejecting defendant’s proposed fair use factor that it “provides a useful service to consumers that, in its absence, will be served by ‘pirates.’”). Plaintiffs’ choice of media “does not abrogate their rights as copyright holders.” See *Encyclopedia Britannica*, 542 F. Supp. at 1180 (entering summary judgment on fair use and rejecting defendant’s additional factors).

Defendant’s “availability” argument also fails on the facts. Defendant’s primary purpose was to avoid the cost of buying music – music which he concedes was widely available to him from legitimate sources, including both physical retailers and online sources. (J. Tenenbaum Dep. Vol. II at 122:14 to 122:20, **Exhibit I** to Pls. Appx.) Moreover, by August 2004, when Defendant was caught infringing, a vibrant market for legal downloads had emerged and was flourishing. Indeed, by 2004, over one million sound recordings were available for legal digital download and there were more than 230 online services available for consumers to purchase music legally online. (See IFPI:05 Digital Music Report, available at <http://www.ifpi.org/content/library/digital-music-report-2005.pdf>.)⁶

Third, courts have consistently rejected Defendant’s argument that the alleged increased distribution of a copyright holder’s work because of illegal P2P file sharing is a benefit to the copyright holder that would excuse Defendant’s infringement.⁷ In *Napster*, the Ninth Circuit

⁶ Apparently recognizing that his “availability” argument lacked any factual merit, Defendant went so far as to claim that even though iTunes launched in 2003 and proved an immediate commercial success, he was entitled to infringe until “a pool of his friends” use the legitimate service and give him positive reviews. (J. Tenenbaum Dep. Vol. II at 119:6 to - 120:11, **Exhibit I** to Pls.’ Appx.)

⁷ Moreover, while Defendant makes this argument that his infringement increased sales for the record companies, he was unable to point to any specific evidence of this with respect to

held that “[i]ncreased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material.” 239 F.3d at 1018; *see also* *L.A. Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669, at *73 (C.D. Cal. Mar. 31, 2000) (same); *In Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782, 790 (N.D. Ill. 1998) (same). Similarly, while “[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work,” this does not render the infringement fair use. *Harper & Row*, 471 U.S. at 567 (citation omitted). Indeed, the plaintiff copyright owner is entitled to control its protected material. *Campbell*, 510 U.S. at 591 n.21. The court’s reasoning in *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) is instructive:

Any alleged positive impact of defendant’s activities on plaintiffs’ prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs’ copyrighted works. This would be so even if the copyright holder had not yet entered the new market in issue, for a copyright holder’s “exclusive” rights, derived from the Constitution and the Copyright Act, include the right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable.

Id. at 352; *Campbell*, 510 U.S. at 591 n.21.

Employing a similar analysis, the Seventh Circuit squarely rejected Defendant’s related “sampling” argument, *i.e.*, that his downloading should be considered fair use because he “sampled” at least one of the songs at issue and later purchased the song. (J. Tenenbaum Dep. Vol. II at 109:5-20, **Exhibit I** to Pls.’ Appx.) This “try-before-you-buy” argument simply does not hold water because “many people are bound to keep the downloaded files without buying originals.” *Gonzalez*, 430 F.3d at 890. As part of the court’s analysis, Judge Easterbrook distinguished alleged file sharing sampling from the authorized previews of sound recordings

the 30 sound recordings at issue in this case. (J. Tenenbaum Dep. Vol. II at 169:24 to 171:15, **Exhibit I** to Pls.’ Appx.)

that are available to consumers. Unlike illegal file sharing, authorized previews “share the feature of evanescence: if a listener decides not to buy (or stops paying the rental fee), no copy remains behind.” *Id.* at 891. Here, Defendant did not delete the copies he downloaded to “sample” because they were all found in his shared folder. Moreover, Defendant’s sampling argument ignores completely the fact that Defendant not only downloaded these sound recordings, he maintained them, burned them to CDRs, and also distributed them to other KaZaA users. Sampling can in no way excuse these behaviors.

In the same vein, Defendant’s contention that illegal file sharing benefits “obscure” songs, even if true (and there is no basis to say it is) does not excuse his infringement. In *Campbell*, the Supreme Court specifically rejected the idea that giving exposure to a little known work through illegal means can somehow cleanse the illegal act. Using the example of a film producer’s appropriation of a composer’s previously unknown song that turns the song into a commercial success, the Court held that “the boon to the song does not make the film’s simple copying fair.” *Campbell*, 510 U.S. at 591 n.21. Moreover, it is absurd to suggest that less copyright protection should be afforded those works that are less popular.

Finally, Defendant’s assertions that his own emotional ties to music rise to the level of a fair use fail as a matter of law. First, Defendant’s subjective intent is not relevant. Second, to the extent that questions on subjective topics such as whether Defendant “identified” with the music he took, or whether the music “expresses” who he is, are relevant at all, they militate against a finding of fair use in this case. Indeed, to the extent Defendant took Plaintiffs’ songs because he “identified” with them, this demonstrates that he took them primarily to serve his own “private interests rather than the public interest in underlying copyright law.” *See Fitzgerald*, 491 F. Supp. 2d at 184. Moreover, no matter how much Defendant claims he

“identified” with a particular song, this does not give him the right to distribute that song, for free, to any one of the million strangers he connected to on KaZaA.

Because Defendant’s proffered “fair use” theories have no legal merit, and because none of his factual allegations, even if accepted as true, would support his fair use defense, there are no material issues of disputed fact and summary judgment should be entered in Plaintiffs’ favor on the question of fair use.

C. Defendant’s Fair Use Argument Is An Improper Attempt At Jury Nullification.

Given the overwhelming weight of case law that stands against the application of fair use in the context of this case, the complete lack of any cogent theory or evidence from Defendant to support a fair use defense, and the unequivocal rejection of fair use as a defense in this case by Defendant’s own legal consultants, it is obvious that Defendant does not seek to advance any legitimate notion of fair use at all. Rather, it appears that Defendant seeks to present this issue for purely emotional purposes, which is not proper.

The First Circuit has soundly rejected attempts by counsel to “speak to the jury” and encourage jurors to ignore the law and decide cases based on emotion. In *Polansky v. CNA Ins. Co.*, 852 F.2d 626 (1st Cir. 1988), the First Circuit stated, “[e]ven more troublesome to us is Polansky’s thinly veiled yet successful attempt to introduce an emotional element into the jury’s deliberations, an emotional element which could only have ‘an undue tendency to suggest decision on an improper basis.’” *Id.* at 630 (citation omitted) (granting new trial). Similarly, in *Smith v. Kmart Corp.*, 177 F.3d 19, 26 (1st Cir. 1999), the First Circuit held that “introduction of purely emotional elements into the jury’s deliberations is clearly prohibited conduct.” In *Smith*, the court concluded that the plaintiff’s argument failed to address the legal issues and thus must have been intended merely to inflame the emotions of the jury. *Id.* at 26; *see also Maine Energy*

Recovery Co. v. United Steel Structures, 1999 Me. Super. LEXIS 149, at *2 (May 24, 1999) (granting a new trial where defense counsel attempted to nullify the jury by suggesting proceedings were unjust).

Further, it is the court's duty to forestall such nullification arguments as Defendant seeks to present here. *See United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997) (jury nullification is a direct violation of the juror's oath to apply the law and therefore trial courts must prevent nullification); *Ruiz v. Knowles*, 2005 U.S. Dist. LEXIS 28441, at *44 (N.D. Cal. Nov. 10, 2005) (judges have "the duty to forestall or prevent such conduct").

For these reasons, the Court must prevent defense counsel's overt attempts to argue emotion over law in this case. While Defendant and his counsel are on a crusade to transform Defendant's illegal actions into a referendum on the "fairness" of online copyright infringement, such arguments, untethered to any conceivable notion of fair use, constitute an improper attempt to have the jury ignore the black letter law. Defendant and his counsel must not be permitted to assert such a baseless defense in order to achieve extra-judicial ends.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court enter summary judgment in favor of Plaintiffs on Defendant's fair use affirmative defense.

Respectfully submitted this 13th day of July, 2009.

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ATLANTIC RECORDING CORPORATION;
ARISTA RECORDS LLC; and UMG
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