

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\_\_\_\_\_  
CAPITOL RECORDS, INC., et al.,  
Plaintiffs,  
v.  
NOOR ALAUJAN,  
Defendant.  
\_\_\_\_\_

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

\_\_\_\_\_  
SONY BMG MUSIC ENTERTAINMENT,  
et al., Plaintiffs,  
v.  
JOEL TENENBAUM,  
Defendant.  
\_\_\_\_\_

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

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS’ MOTION FOR  
SUMMARY JUDGMENT RE DEFENDANT’S FAIR USE DEFENSE**

**A. Defendant Used The KaZaA Online File Sharing Program To Download And  
Distribute Plaintiffs’ Copyrighted Sound Recordings.**

1. 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. (Connelly Decl. ¶ 9, **Exhibit A** to Pls.’ Appx.; Jacobson Supp. Report at 8-9, ¶¶ 22-28, **Exhibit B** to Pls.’ Appx.) This person was distributing 816 digital audio files from a “shared” folder on his computer to millions of other users on the KaZaA network. (*Id.*)

2. **Exhibit C** to Plaintiffs' Appendix is a series of screen shots showing the contents of the `sublimeguy14@KaZaA` shared folder on August 10, 2004. (Connelly Decl. ¶ 9.) These screenshots are also attached as Exhibit B to Plaintiffs' Complaint. (*Id.*)

3. Plaintiffs' claim in this case focuses on the 5 sound recordings listed in Plaintiffs' Second Amended Exhibit A and the 25 sound recordings listed in Plaintiffs' Second Amended Schedule 1. Copies of Plaintiffs' Second Amended Exhibit A and Second Amended Schedule 1 are attached as **Exhibit D** to Plaintiffs' Appendix.

4. When installing KaZaA, a user creates a "shared" folder on his computer to store files downloaded from other users on the KaZaA network and to distribute files to other users on the network. (Jacobson Supp. Report at 4-5.)

5. On August 10, 2004, MediaSentry initiated the process of downloading each of the 816 digital audio files stored in the `sublimeguy14@KaZaA` shared folder. (Connelly Decl. ¶ 10.) This process allowed MediaSentry to obtain the metadata of each digital audio file in the shared folder and to ensure that there was an actual file being distributed. (*Id.*) Had it chosen to do so, MediaSentry could have downloaded complete copies of any of the audio files listed in the shared folder. (*Id.*)

6. All 30 of the sound recordings at issue in this case were found in the `sublimeguy14@KaZaA` shared folder on August 10, 2004, and MediaSentry downloaded copies of the 5 recordings listed on Plaintiffs' Second Amended Exhibit A on that same date as a sample. (Connelly Decl. ¶ 11; Jacobson Supp. Report at 8-9, ¶¶ 23-25.) MediaSentry's system log and download data files show proof of this distribution to MediaSentry. (Connelly Decl. ¶ 11; Jacobson Supp. Report at 9, ¶¶ 24-25.)

7. 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. (Jacobson Supp. Report at 9, ¶ 29.)

8. In response to a federal court subpoena (**Exhibit E** to Plaintiffs' Appendix), 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. (**Exhibit F** to Plaintiffs' Appendix). (Cadenhead Dep. at 50:2 to 55:5, **Exhibit G** to Plaintiffs' Appendix.) One of the email addresses associated with this Cox account is "sublimeguy14@Cox.net." (*Id.* at 52:2 to 53:5.)

9. Defendant set up the KaZaA account on his computer and created the "sublimeguy14@KaZaA" username. (J. Tenenbaum Dep. Vol. I at 82:20 to 83:24, 85:2 to 85:3, **Exhibit H** to Plaintiffs' Appendix.) Defendant also used the "sublimeguy14@Cox" email address. (J. Tenenbaum Dep. Vol. I at 22:8 to 22:16.)

10. The sublimeguy14@KaZaA shared folder, which is Exhibit B to Plaintiffs' Complaint, is Defendant's shared folder. (J. Tenenbaum Dep. Vol. I. at 131:3 to 133:16, 268:3 to 268:11.)

11. Defendant used the KaZaA program on his computer and the sublimeguy14@KaZaA user name to download songs from other KaZaA users on the Internet. (J. Tenenbaum Dep. Vol. I at 32:4 to 32:21, 158:10 to 159:22, 160:9 to 161:1.)

12. 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. (J. Tenenbaum Dep. Vol. I at 157:4 to 158:3.)

13. Defendant burned copies of between 50 and 600 of the songs that were in his KaZaA shared folder to home made CDRs so he could take those songs with him to college. (J. Tenenbaum Dep. Vol. I at 209:20 to 210:12, 211:8 to 211:18.)

14. 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. (J. Tenenbaum Dep. Vol. I at 110:11 to 112:5.)

15. The whole purpose behind P2P networks such as KaZaA is to allow users to share files with other users for free. (Jacobson Supp. Report at 3-5; J. Tenenbaum Dep. Vol. II at 28:8 to 28:13, **Exhibit I** to Plaintiffs' Appendix.) Defendant did not pay for any of the sound recordings he downloaded from KaZaA. (J. Tenenbaum Dep. Vol. I at 111:7 to 112:5, and Vol. II at 198:11 to 198:13.)

16. During the course of discovery, Plaintiffs conducted a forensic examination of another computer used by Defendant, a Gateway computer. (Jacobson Supp. Report at 9, ¶¶ 30-31.) This examination showed that Defendant used the LimeWire file sharing program on his Gateway computer starting in February 2004 and that he was distributing thousands of sound recordings from his LimeWire shared folder (C:/My Music) through at least February 2007, and possibly as late as May 2008. (*Id.* at 9-10, ¶¶ 32, 33, 40.)

17. 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. (J. Tenenbaum Dep. Vol. II at 27:10 to 27:13, 53:24 to 54:21, 57:8 to 57:11.)

**B. Illegal File Sharing Like That Defendant Has Engaged In Has Caused Significant Harm To The Market For Legitimate Copies Of Plaintiffs' Sound Recordings.**

18. Illegal online file sharing like that Defendant has engaged in has caused reduced sales of legitimate copies of Plaintiffs' works. (Pls.' Resp. to Interrog. No. 14, attached as **Exhibit J** to Plaintiffs' Appendix; Declaration and Report of S. Liebowitz at 5-6, ¶¶ 21-26, **Exhibit K** to Plaintiffs' Appendix; Palfrey Dep. at 65:9 to 65:14, **Exhibit L** to Plaintiffs' Appendix; *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) ("Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying originals."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (holding that illegal file sharing "reduces audio CD sales among college students")). Sales of sound recordings have decreased since the inception of P2P piracy. (Declaration and Report of S. Liebowitz at 5, ¶ 21.) Since the pirated version is very often an almost perfect substitute for the purchased version, many users will keep the pirate version and not spend the money required for a purchase. (*Id.* at 3, ¶ 13.)

19. Illegal file sharing like that Defendant has engaged in has also harmed Plaintiffs' ability to develop a market for the legal distribution of their works on the Internet. (Pls.' Resp. to Interrog. No. 14; Liebowitz Report at 6, ¶ 27; *Napster*, 239 F.3d at 1016 (holding that illegal file sharing "raises barriers to plaintiffs' entry into the market for the digital downloading of music"); Email of W. Fisher to C. Nesson dated March 29, 2009, **Exhibit M** to Plaintiffs' Appendix, stating that "it's not credible to argue that widespread P2P file sharing 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.")

20. The following markets for legitimate copies of Plaintiffs' works have been negatively impacted by illegal peer-to-peer file sharing such as that engaged in by Defendant:

physical CD sales, sales of authorized digital downloads, 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 sites. (Pls.' Resp. to Interog. No. 14.) 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. (Declaration and Report of S. Liebowitz at 6-7, ¶ 28.)

21. Defendant did not do anything to change, alter, or add to the 30 sound recordings at issue in this case. (J. Tenenbaum Dep. Vol. II at 205:11 to 205:15.)

22. Every time Defendant downloaded a sound recording, it was his intent to download the entire recording. (J. Tenenbaum Dep. Vol. II at 94:6 to 94:14.)

Respectfully submitted this 13<sup>th</sup> day of July, 2009.

SONY BMG MUSIC ENTERTAINMENT;  
WARNER BROS. RECORDS INC.;  
ATLANTIC RECORDING CORPORATION;  
ARISTA RECORDS LLC; and UMG  
RECORDINGS, INC.

By their attorneys,

By: s/ Eve G. Burton

Timothy M. Reynolds (*pro hac vice*)  
Eve G. Burton (*pro hac vice*)  
Laurie J. Rust (*pro have vice*)  
HOLME ROBERTS & OWEN LLP  
1700 Lincoln, Suite 4100  
Denver, Colorado 80203  
Telephone: (303) 861-7000  
Facsimile: (303) 866-0200  
Email: [tim.reynolds@hro.com](mailto:tim.reynolds@hro.com)  
[eve.burton@hro.com](mailto:eve.burton@hro.com)  
[laurie.rust@hro.com](mailto:laurie.rust@hro.com)

Matthew J. Oppenheim (*pro hac vice*)  
Oppenheim Group  
7304 River Falls Drive  
Potomac, Maryland 20854  
Telephone: (301) 299-4986  
Facsimile: (866) 766-1678  
Email: [matt@oppenheimgroup.net](mailto:matt@oppenheimgroup.net)

Daniel J. Cloherty  
DWYER & COLLORA, LLP  
600 Atlantic Avenue - 12th Floor  
Boston, MA 02210-2211  
Telephone: (617) 371-1000  
Facsimile: (617) 371-1037  
Email: [dcloherty@dwyercollora.com](mailto:dcloherty@dwyercollora.com)

ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 13, 2009.

s/ Eve G. Burton