

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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CAPITOL RECORDS, INC. et al.,  
Plaintiffs,

v.

NOOR ALAUJAN,  
Defendant.

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

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SONY BMG MUSIC ENTERTAINMENT  
et al., Plaintiffs,

v.

JOEL TENENBAUM,  
Defendants.

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

**PLAINTIFFS' PRETRIAL MEMORANDUM**

The following is the Plaintiffs' Pretrial Memorandum to be considered at the Pretrial Conference on July 20, 2009, at 9:30 A.M.

**1. Names, addresses and telephone numbers of trial counsel:**

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**2. Whether the case is to be tried with or without a jury:**

The case is to be tried with a jury.

**3. Summary of the positions asserted by all parties with regard to liability and damages:**

**Plaintiffs:**

Plaintiffs are the copyright owners or licensees of exclusive rights under United States copyright of each of the thirty (30) sound recordings listed on Plaintiffs' Second Amended Exhibit A and Second Amended Schedule 1 (Plaintiffs' Exhibits 1, 2) ("Sound Recordings"). The Sound Recordings are subject to valid Certificates of Copyright Registration issued by the

Register of Copyrights (Plaintiffs' Exhibits 3,7, 11), and Plaintiffs' copyright registration for each of the Sound Recordings was effective prior to the dates indicated on the registrations.

Plaintiffs brought this lawsuit alleging that Defendant used the KaZaA file sharing program to reproduce and distribute Plaintiffs' Sound Recordings online in violation of the Copyright Act.

MediaSentry has been engaged to assist Plaintiffs in locating individuals infringing their copyrights over peer-to-peer networks. On August 10, 2004, at approximately 12:49 a.m. EDT, MediaSentry discovered an individual using the KaZaA file-sharing program on the FastTrack network distributing 816 digital sound recordings to other users of the network, including many of Plaintiffs' copyrighted sound recordings, and specifically including Plaintiffs' 30 Sound Recordings at issue in this case. This individual's computer connected to the Internet at IP address 68.227.185.38. The KaZaA username for the individual at IP address 68.227.185.38 on August 10, 2004 at approximately 12:49 a.m. EDT was "sublimeguy14@KaZaA."

The Internet Service Provider ("ISP") for the computer with IP address 68.227.185.38 on August 10, 2004 was Cox Communications, Inc. ("Cox"). Information provided by Cox in response to a Rule 45 subpoena identified J. Tenenbaum, at 20 Upton Avenue in Providence, Rhode Island, as the subscriber of record for IP address 68.227.185.38 on August 10, 2004 at approximately 12:49 a.m. EDT. (Plaintiffs' Exhibit 23).

Prior to August 10, 2004, Defendant, Joel Tenenbaum, had installed the KaZaA file sharing program, created the "sublimeguy14@KaZaA" username, and used the KaZaA program and sublimeguy14@KaZaA username on his computer at 20 Upton Avenue to download and distribute music over the Internet. Defendant specifically knew that, unless the program defaults were changed, KaZaA was configured to share all of the files in his KaZaA shared folder with the millions of other people on the file sharing network. Defendant admits that Exhibit B to

Plaintiffs' Complaint shows the contents of his KaZaA shared folder as of August 10, 2004 and that the files in his shared folder were being offered for distribution from his computer to other users of the network.

Screen shots of Defendant's KaZaA shared folder listing the 816 digital sound recordings and other electronic files that Defendant was distributing to other KaZaA users are attached as Exhibit B to Plaintiffs' Complaint (Plaintiffs' Exhibit 15.) When it found Defendant distributing these 816 digital audio files to other users, MediaSentry initiated the download of all 816 files, and downloaded copies of five (5) sound recordings owned by Plaintiffs as a sample of the recordings Defendant was distributing. These five sound recordings are listed in Plaintiffs' Exhibit 1.

The information observed by MediaSentry on August 10, 2004 shows that most of the music files found on Defendant's computer on August 10, 2004 were downloaded from other users on the Internet. Specifically, the userlog.txt from Defendant's computer contains "description" fields showing the names of various users or ripping groups that "ripped" the original sound recording for distribution on the file sharing network. Differing naming conventions and ripping speeds also show that almost every files was downloaded from other users, and not ripped by Defendant.

Defendant did not have Plaintiffs' authorization to download or distribute any of Plaintiffs' Sound Recordings using KaZaA. Defendant knew that downloading and distributing copyrighted music files on the Internet without authorization was wrong. Among other things, prior to August 10, 2004, Defendant had used the Napster program to download music over the Internet and knew that Napster had been shut down. Additionally, Defendant continued to use peer-to-peer networks after August 10, 2004. Specifically, Defendant installed and used the

LimeWire file sharing program to download and distribute music over the Internet while at college. He also used numerous other P2P file sharing networks and continued to use Limewire to download and distribute copyrighted music until at least 2007, long after he had notice of the claims against him in this case.

Plaintiffs seek statutory damages under 17 U.S.C. § 504(c) for Defendants' infringement of Plaintiffs' reproduction and distribution rights under 17 U.S.C. § 106(1) and 106(3) in each of the Sound Recordings. Plaintiffs also seek a finding that Defendant's infringement was willful under 17 U.S.C. § 504(c)(2). In addition to statutory damages, Plaintiffs seek to recover their costs under 17 U.S.C. § 505 and a permanent injunction as prayed for in their Complaint under 17 U.S.C. § 502.

Defendant asserts that his infringement is protected by the affirmative defense of fair use, 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. 17 U.S.C. § 107; *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 184 (D. Mass. 2007); *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 141 (2d Cir. 1998). Defendant's copyright infringement does not meet any of the statutorily enumerated factors, and allegations of fair use as a defense to illegal P2P file sharing has been rejected by every court to rule on the issue. *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); *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.”). Plaintiffs have filed a Motion for Summary Judgment on the issue of fair use.

**4. Facts established by pleadings, stipulations or admissions of counsel:**

a. Plaintiffs are, and at all relevant times have been, the copyright owners or licensees of exclusive rights under United States copyright with respect to the sound recordings listed on Plaintiffs’ Second Amended Exhibit A and Second Amended Schedule 1 (Plaintiffs’ Exhibits 1, 2 (the “Sound Recordings”).

b. Plaintiffs provided copyright notices for each of the Sound Recordings and the copyright notices conformed to the requirements of section 402(b) and (c) of the Copyright Act. Specifically, each of the Sound Recordings contains a copyright notice that consists of the following three elements: (1) the symbol “(P)”; (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 of the Sound Recordings at issue, the copyright notice was placed on the surface of the sound recording and/or on the sound recording label or container. These published copies were widely available, and each of the published copies of the Sound Recordings were accessible by Defendant.

c. The Sound Recordings are subject to valid Certificates of Copyright Registration issued by the Register of Copyrights and were properly registered on or before the dates indicated in the certificates. Plaintiffs’ Exhibits 3, 7, and 11 contain certified copies of these Certificates of Copyright Registration from the United States Copyright Office, and the parties

stipulate to the authenticity of these Certificates under F.R.E. 901 and that such documents constitute business records under F.R.E. 803(6).

d. Plaintiffs did not authorize Defendant to copy or distribute to the public any of the Sound Recordings.

e. Defendant created the “sublimeguy14@KaZaA” username and used the KaZaA program and “sublimeguy14@KaZaA” username on his computer at 20 Upton Avenue through Cox Communications to download music from the Internet.

f. Defendant created the “sublimeguy14@KaZaA” username and used the KaZaA program and “sublimeguy14@KaZaA” username on his computer at 20 Upton Avenue through Cox Communications to distribute music over the Internet.

g. Exhibit B to Plaintiffs’ Complaint shows the contents of Defendant’s KaZaA shared folder as of August 10, 2004.

h. Defendant knew that, unless the program defaults were changed, the sound recordings in his KaZaA shared folder were being shared with the millions of other people on the file sharing network.

i. Defendant saw from the “traffic tab” on the KaZaA program that other users on the file sharing network were downloading files from his KaZaA shared folder.

j. Before Defendant used KaZaA, Defendant had used the Napster file sharing program to download music over the Internet. Defendant stopped using Napster and switched to KaZaA when the Napster program was shut down.

k. Defendant also used the LimeWire file sharing program to download music from the Internet while at college.

l. Defendant also used the LimeWire file sharing program to distribute music onto the Internet while at college.

m. Defendant also used Audio Galaxy, Morpheus, and iMesh file sharing programs to download music from the Internet.

n. Defendant also used Audio Galaxy, Morpheus, and iMesh file sharing programs to distribute music over the Internet.

**5. Contested issues of fact:**

a. Whether Defendant used an online media distribution system to download Plaintiffs' Sound Recordings to his computer.

b. Whether Defendant used an online media distribution system to distribute Plaintiffs' Sound Recordings from his computer.

c. Whether Defendant's infringement was willful.

**6. Jurisdictional questions:**

Jurisdiction is not disputed.

**7. Issues of law:**

*Plaintiffs' Submission of Issues of Law:*

a. To prevail in this action, Plaintiffs must show: (1) ownership of valid copyrights; and (2) that Defendant violated one or more of their exclusive rights under the Copyright Act.

*Saenger Org. v. Nationwide Ins. Licensing Assocs.*, 119 F.3d 55, 59 (1st Cir. 1997); *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.").

b. 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. *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008) (citing *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1160 n.19 (1st Cir. 1994)); *Jalbert v. Grautski*, 554 F. Supp. 2d 57, 67 (D. Mass. 2008 (“Intent is not an element of copyright infringement.”)); *Mitchell Int’l v. Rodriguez Fraticelli*, 2007 U.S. Dist. LEXIS 86787, \*16 (D.P.R. Nov. 26, 2007) (“It is irrelevant whether the infringement was knowingly or innocently since “copyright infringement does not have a scienter requirement.”); *Rosenthal v. E. MPC Computers, LLC*, 2007 U.S. Dist. LEXIS 47907 (D. Mass. 2007) (citing *inter alia*, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 304 (2d Cir. 1963)) (Liability for copyright infringement does not require an intent to infringe.). See *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978) (“[E]ven where the defendant believes in good faith that he is not infringing a copyright, he may be found liable”); see also *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 v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995) (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.”).

c. The act of downloading copyrighted sound recordings on a peer-to-peer network, without a license from the copyright owners, violates the copyright owners’ exclusive reproduction right. See 17 U.S.C. § 106(1); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*

*Ltd.*, 545 U.S. 913, 923, 929 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *BMG Music v. Gonzalez*, 430 F.3d 888, 893 (7th Cir. 2005); *In Re: Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003); *Arista Records LLC v. Doe*, 2008 U.S. Dist. LEXIS 89681, at \*31 (D. Me. Oct. 29, 2008).

d. The act of distributing copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive distribution right. *Grokster*, 545 U.S. at 923, 929; *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *Napster*, 239 F.3d at 1014; *Aimster*, 334 F.3d at 647; *Gener-Villar v. Adcom Group, Inc.*, 530 F. Supp. 2d 392, 406 (D.P.R. 2007); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401 (S.D.N.Y. 2002); *Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551, at \*7 (S.D. Tex. Mar. 12, 2008). A distribution to MediaSentry of a copyrighted sound recording owned or controlled by Plaintiffs violates Plaintiffs' right of exclusive distribution. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008) (holding that "distribution to MediaSentry can form the basis of an infringement claim . . . Eighth Circuit precedent clearly approves of the use of investigators by copyright owners."); *see also Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994) ("the copies made by [the defendant] at the request of the investigator were copyright violations"); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) (distribution to MediaSentry was an unauthorized distribution); *Interscope Records v. Leadbetter*, 2007 U.S. Dist. LEXIS 29818, \*12-13 (W.D. Wash. Apr. 23, 2007) (accepting that distribution to a copyright holder's investigator would be a copyright violation); *RCA/Ariola Int'l Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 777, 781 (8th Cir. 1988) (plaintiff "had proved a clear case of direct infringement against the [defendant] retailers by showing that the plaintiff's investigators were permitted to

make infringing copies” on cassette duplicating machines with the retailer’s direct assistance.); *RCA Records v. All-Fast Sys. Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y. 1984) (evidence that “defendant’s employees willingly and knowingly copied copyrighted tapes for plaintiffs’ investigators” established a likelihood of success on the merits of plaintiffs’ infringement claim); *Wahpeton Canvas Co. v. Bremer*, 893 F. Supp. 863, 871-72 (N.D. Iowa 1995) (holding, in the patent context, that the defendant’s sale of parts to the plaintiff’s investigator was not an authorized sale but, rather, was an infringing act) Further, an inference that a work was actually disseminated from one P2P user to another may be made where a defendant has completed all the necessary steps for the distribution of copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners. *See London-Sire Records, Inc. v. Doe I*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 984 (D. Ariz. 2008). In this case, Defendant completed all of the steps necessary for the distribution of Plaintiffs’ copyrighted Sound Recordings to millions of other users on the KaAaA network, and disseminated actual copies to MediaSentry.

e. The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from copyright owners, also violates the copyright owners’ exclusive right of distribution, regardless of whether an actual transfer of the file has been shown. *See New York Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) (holding electronic publishers liable for reproducing and distributing the plaintiffs authors’ copyrighted works by placing the works into an online database from where the works were “retrievable” by the public); *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 under section 106(3)); *Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others

to copy violate plaintiffs' distribution rights."); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) ("When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public . . . within the meaning of § 106(3)."); *Maverick Recording Co. v. Harper*, Civ. No. 5:07-cv-026-XR, slip op. at 3-6 (W.D. Tex. Sept. 16, 2008) (attached as Exhibit F) (holding that 17 U.S.C. § 106(3) includes a "making available" right of distribution); *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)."); *Sony Pictures Home Entm't, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-22 (N.D. Tex. 2007) (granting summary judgment to plaintiff motion picture companies based on evidence that copyrighted motion pictures were made available for download); *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 628 (D. Md. 2006) (relying on *Tasini* and holding that a website operator violated the plaintiff's distribution right by "making available" from its online database copies of the plaintiff's articles); *Columbia Pictures Indus., Inc. v. T&F Enters., Inc.*, 68 F. Supp. 2d 833, 839 (E.D. Mich. 1999) (holding that the defendant violated the plaintiffs' distribution right by "[holding] video cassettes out for distribution to the general public without authorization"); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 509 (N.D. Ohio. 1997) (finding distribution without actual transfer, and rejecting argument that defendants "never 'distributed' [plaintiffs'] photographs to their customers because it was the customers themselves who chose whether or not to download" the photographs from defendants' server); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. & Northwest Nexus, Inc.*, 983 F. Supp.

1167, 1173-74 (N.D. Ill. 1997) (finding infringement without transfers, and noting that “once the files were uploaded, they were available for downloading”); Letter of Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Sept. 25, 2002, *reprinted in* Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 114-15 (2002) (citing the Supreme Court’s *Tasini* decision and concluding that “making [a work] available for other users on a peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well as of the reproduction right.”) (attached as Exhibit G).

f. 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., Inc. 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”); 4 Melville B. Nimmer & David M. Nimmer, *Nimmer On Copyright* (“Nimmer”) § 14.04[A], at 14-44 (2002) (“Under the current [Copyright] Act, the copyright owner may elect to recover statutory damages, instead of actual damages and defendant’s profits.”); *Feltner v. Columbia Pictures TV*, 523 U.S. 340 (U.S. 1998); *Morley Music Co. v. Dick Stacey’s Plaza Motel, Inc.*, 725 F.2d 1 (1st Cir. 1983). 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). In

the case of willful infringement, like this one, “the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000” per infringement. *See* 17 U.S.C. § 504(c)(2).

g. In determining whether an infringer’s conduct was willful, the standard is “whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded that possibility.” *Gregerson v. Vilana Fin., Inc.*, 2008 U.S. Dist. LEXIS 11727, at \*16 (D. Minn. Feb. 15, 2008); *see also Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (citing 3 *Nimmer* § 14.04[B], at 14-40.2-.3 (1989)); *Hamil Am., Inc. v. GFI, Inc.*, 193 F.3d 92, 107 (2d Cir. 1999); *Universal City Studios Prods. LLLP & Paramount Pictures Corp. v. Bigwood*, 441 F. Supp. 2d 185, 191 (D. Me. 2006); *Segrets, Inc. v. Gillman Knitwear Co.*, 42 F. Supp. 2d 58, 81 (D. Mass. 1998). A plaintiff can prove willfulness “by proffering circumstantial evidence that gives rise to an inference of willful conduct.” *Gregerson*, 2008 U.S. Dist. LEXIS 11727, at \*16. Knowledge may be either actual or constructive. *GMA Accessories, Inc. v. Olivia Miller, Inc.*, 139 Fed. Appx. 301, 303 (2d Cir. 2005); *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005) (“even in the absence of evidence establishing the infringer’s actual knowledge of infringement, a plaintiff can still prove willfulness by proffering [sic] circumstantial evidence that gives rise to an inference of willful conduct.”). Importantly, knowledge can also be established by intentional concealment of the infringement. *See RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 859-60 (S.D.N.Y. 1984); *Johnson v. Salomon*, 1977 U.S. Dist. LEXIS 15735, at \*48, \*59 (D. Minn. May 25, 1977); 3B Kevin F. O’Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.54 (2005). Reckless disregard of the copyright holder’s rights can be inferred from continuous infringement, a past pattern of infringement, continuing

infringement despite warnings, or other circumstances. *See RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988) (“reckless disregard of the copyright holder’s rights (rather than actual knowledge of infringement) suffices to warrant award of the enhanced damages”); 4-14 *Nimmer* § 14.04[B][3][a]; *MJ Int’l, Inc. v. Hwangpo*, 2002 U.S. Dist. LEXIS 11079, at \*7-8 (D. Neb. June 6, 2002) (citing *RCA/Ariola International, Inc.*, 845 F.2d at 779); *Microsoft Corp. v. Evans*, 2007 U.S. Dist. LEXIS 77088, at \*15, 18-19 (E.D. Cal. Oct. 16, 2007).

h. Plaintiffs do not need to prove any actual damages to be entitled to an award of statutory damages. Plaintiffs may elect statutory damages regardless of the adequacy of the evidence offered as to their actual damages and the amount of Defendant’s profits. *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952) (“Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within [the] statutory limits to sanction and vindicate the statutory policy” of discouraging infringement); *Cable Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (A plaintiff may elect statutory damages “whether or not adequate evidence exists as to the actual damages incurred by plaintiffs or the profits gained by defendants.”); *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (citing *Woolworth*, 344 U.S. at 233); *Gregerson*, 2008 U.S. Dist. LEXIS 11727, at \*16 (a plaintiff may recover statutory damages whether or not there is any evidence of actual damages); *Los Angeles News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) (“Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of

discouraging infringement”); *Peer Int’l Corp.*, 909 F.2d at 1336; *Columbia Pictures Television, Inc. v. Krypton Broad.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (citing *Nimmer* § 14.04[A]); *Aimster*, 334 F.3d at 649 (“a copyright owner who can prove infringement need not show that the infringement caused him a financial loss”); *Bly v. Banbury Books, Inc.*, 638 F. Supp. 983, 987 (E.D. Pa. 1986) (requiring no proof of actual damages because such proof “would contravene the purpose of the statutory damages provision”); *Nimmer* § 14.04[A] (an award of statutory damages does not require evidence of actual damages). Congress gave copyright owners the choice to elect to receive statutory damages “precisely because of the difficulties inherent in proving actual damages and profits.” *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000), *aff’d in relevant part, rev’d on other grounds*, 262 F.3d 101 (2d Cir. 2001).

i. 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 Pac. & S. 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. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993); *see also Atari Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1982) (injunction “necessary to preserve the integrity of the copyright laws which seek to encourage individual efforts and creativity by granting valuable enforceable right”); *Morley Music Co. v. Café Cont’l, 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.”).



j. Once copyright infringement is established, irreparable injury is presumed. *See, e.g., Atari*, 672 F.2d at 620; *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634, 662 (N.D. Ill 2002); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 925 (N.D. Cal. 2001) (citing *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998)). Once irreparable injury is presumed, injunctive relief is appropriate because damages alone are not an adequate remedy. *See Napster*, 239 F.3d at 1027 (holding that an injunction “is not only warranted but required”); *Arista Records, Inc. v. Beker Enters., Inc.*, 298 F. Supp. 2d 1310, 1314 (S.D. Fla. 2003) (noting that injunctions are “regularly issued” because of the strong public interest in copyright protections); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392-93 (6th Cir. 1996) (“The weight of authority supports the extension of injunctive relief to future works.”).

k. 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. Pa. 1990). Section 505 also allows the Court to award “a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505; *Fogerty v. Fantasy, Inc.*, 510 US 517 (1994).

*Plaintiffs’ Submission of Evidentiary Issues:*

a. Plaintiffs will be filing a *Daubert* motion to exclude some or all of the proffered testimony of Defendant’s proposed expert witness Dr. J.A. Pouwelse.

b. Plaintiffs will be filing a *Daubert* motion to exclude some or all of the proffered testimony of Defendant’s proposed expert witness John Palfrey.

c. Plaintiffs may have other evidentiary issues depending on the exhibits Defendant intends to offer at trial.

**8. Requested amendments to the pleadings:**

None by Plaintiffs.

**9. Additional matters to aid in the disposition of the action:**

- a. Plaintiffs have filed a Motion for Summary Judgment on Defendant's fair use affirmative defense. A ruling on this motion would facilitate the parties' trial preparation.
- b. Defendant's purported expert John Palfrey should be excluded because he is not qualified to offer an expert opinion on fair use or the "fairness" of filesharing. Moreover, his testimony regarding "fairness" is not the proper subject for expert testimony.
- c. Defendant's purported expert Janis Pouwelse should be excluded because (1) he does not have expertise to offer testimony regarding the economic impact of file sharing and (2) Defendant has admitted that the identification in the case was accurate.
- d. Plaintiffs have filed an opposition (Doc. 868) to Defendant's Motion for Leave to Serve the Expert Report of Wayne Marshall (Doc. 860). A ruling on this motion would facilitate the parties' trial preparation.
- e. Plaintiffs are submitting Motions in Limine on the following issues:
  1. Defendant's attempt to raise extraneous and prejudicial material, not relating to this case.
  2. Motion in Limine to Exclude John Palfrey
  3. Motion in Limine to Exclude and/or Limit Janis Pouwelse.

**10. The probable length of trial:**

Plaintiffs anticipate 5 – 8 days for trial, exclusive of voir dire and based on the court's typical trial schedule of 9:00 a.m. to 1:00 p.m..

**11. Voir dire procedures:**

*Plaintiffs' proposed Voir Dire attached as Exhibit A hereto.*

*Plaintiffs' Proposed Voir Dire procedures:*

Plaintiffs agree with Defendant that the parties should be permitted to ask voir dire, with the Court asking introductory voir dire question. To the extent necessary or appropriate to ask potential jurors questions individually, Plaintiffs anticipate it could take several hours.

*Plaintiffs' proposed description of the case to be read to potential venire:*

This is a case of copyright infringement on the Internet. Plaintiffs own or control the copyrights to certain copyrighted sound recordings, including the 30 Sound Recordings at issue in this case. Plaintiffs allege that Defendant, Joel Tenenbaum, used a peer-to-peer file sharing network, in this case, KaZaA, to download Plaintiffs' copyrighted sound recordings from other users on the Internet, and to distribute Plaintiffs' copyrighted sound recordings to other users on the Internet, without Plaintiffs' consent or permission. Plaintiffs contend that they are entitled to statutory damages under the Copyright Act for Defendant's infringement of each of their 30 Sound Recordings.

**12. The names and address of witnesses who shall testify at the trial, and the purpose of the testimony of each witness.**

*Plaintiffs' Witness List attached as Exhibit B hereto.*

**13. A list of proposed exhibits, indicating which exhibits may be admitted without objection and a brief statement of the ground for any objection to others.**

*Plaintiffs' Exhibit List attached as Exhibit C hereto.*

**14. Jury Instructions.**

*Plaintiffs' proposed Jury Instructions attached as Exhibit D hereto.*

*Plaintiffs' proposed Verdict Form attached as Exhibit E hereto.*

Respectfully submitted this 15th day of July, 2009.

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

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