EXHIBIT D

TO PLAINTIFFS' PRETRIAL MEMORANDUM

PLAINTIFFS' PROPOSED JURY INSTRUCTION

PLAINTIFFS' PROPOSED INSTRUCTION NO. 1

Ladies and Gentlemen: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions - both those I give you now and those I give you later - are equally binding on you and must be followed.

This is an action for copyright infringement. A "copyright" is the exclusive right to copy. A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, mask works fixed in semiconductor chip products, or a computer program.

The owner of a copyright generally has the right to exclude any other person from reproducing, preparing derivative works, distributing, performing, displaying, or using the work covered by copyright for a specific period of time. One who reproduces or distributes a copyrighted work during the term of the copyright, infringes the copyright, unless licensed by the copyright owner.

In this case, the plaintiffs, Sony BMG Music Entertainment, Warner Bros. Records Inc., Arista Records LLC, and UMG Recordings, Inc., allege that the defendant, Joel Tenenbaum, infringed their copyrights in certain sound recordings by using an online, peer-to-peer file sharing system to download the sound recordings and distribute them to others without authorization from the plaintiffs. The defendant denies that allegation. It will be your duty to decide from the evidence whether the plaintiffs are entitled to a verdict against the defendant.

From the evidence you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You will

then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony and the extent to which their testimony is consistent with other evidence that you believe.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* §§ 101.01 and 160.01 (2005) (modified) (citing 8TH CIR. CIVIL JURY INSTR. § 1.01 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 2

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses; documents and other things received as exhibits; any facts that have been stipulated - that is, formally agreed to by the parties; and any facts that have been judicially noticed - that is facts which I say you must accept as true.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers are not evidence.

2. Exhibits that are identified by a party but not offered or received in evidence are not evidence.

3. Objections are not evidence. Lawyers have a right and sometimes an obligation to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the information might have been.

4. Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence and must not be considered.

5. Anything you see or hear about this case outside the courtroom is not evidence.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 101.40 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 1.02 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 3

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for "expert witnesses." An expert witness is a person who, by education and experience has become an expert in some art, science, profession or calling. Expert witnesses may state their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Capitol Records, Inc. v. Thomas-Rasset, Jury Instruction No. 7, Oct. 4, 2007 (Doc. No. 97) and Jury Instruction No. 8 (on retrial) (Doc. No. 335).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 4

During the trial it may be necessary for me to speak with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence which govern the trial, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 102.02 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 1.03 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 5

At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult. You must pay close attention to the testimony as it is given.

If you wish, however, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. And do not let note-taking distract you so that you do not hear other answers by the witness. The Clerk will provide each of you with a pad of paper and a pen or pencil. At each recess, leave them _____.

When you leave at night, your notes will be secured and not read by anyone.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 101.13 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 1.03 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 6

To insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended and your verdict has been accepted by me. If someone should try to talk to you about the case during the trial, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case - you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side - even if it is simply to pass the time of day - an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, remember it is because they are not supposed to talk or visit with you either.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio, television or Internet reports about the case or about anyone involved with it. I am advised that reports about this trial are appearing in the newspapers, on television and radio, and on the Internet. The person who wrote or is reporting the story may not have listed to all of the testimony as you have, may be getting information from people who you will not see here in Court under oath and subject to cross-examination, may emphasize an

unimportant point, or may simply be wrong. Therefore, until the trial is over I suggest that you avoid reading any newspapers or news journals and listening to any television, radio or Internet newscasts because you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case, you will know what you need to decide it.

Sixth, do not do any research or make any investigation on your own about any matter involved in this case. By way of examples, that means you must not consult a dictionary, textbook, encyclopedia, talk with a person you consider knowledgeable, or go to the Internet for information about some issue or person in this case. In fairness, learn about this case from the evidence you receive here at the trial and apply it to the law as I give it to you.

Seventh, cell phones are not permitted in the jury room during deliberation.

Eighth, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 101.11 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 1.05 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 7

We are about to take [our first] break during trial and I want to remind you of the instruction I gave you earlier. During this recess or any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, please let me know about it immediately. [Do not read, watch or listen to any news reports of the trial.] Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

If you need to speak to me about anything, simply give a signed note to the marshal to give to me.

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 101.11 (2005) (citing Pattern Jury Instructions of the District Judges' Association of the fifth Circuit, Civil cases, Instruction No. 2.1 (1999).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 8

The plaintiffs and the defendant have stipulated - that is, they have agreed - that if _____ were called as a witness he [she] would testify in the way counsel have just stated. You should accept that as being _____'s testimony, just as if it had been given here in court from the witness stand.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 101.48 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 2.02 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 9

The plaintiffs and the defendant have stipulated -- that is, they have agreed -- that certain facts are as counsel have just stated. You should, therefore, treat those facts as having been proved.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 101.48 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 2.03 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 10

Even though no evidence has been introduced about it, I have decided to accept as proved the facts that: _____. The rules of evidence permit the judge to accept facts which the judge believes cannot reasonably be disputed.

You must, therefore, treat this fact as proved.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 102.20 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 2.04 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 11

Certain charts and summaries have been shown to you in order to help explain facts disclosed by books, records, and other documents that are evidence in the case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries do not correctly reflect facts or figured shown by the evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 104.50 (2005).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 12

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 103.01 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 3.01 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 13

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict[s] should be.

During this trial I have occasionally asked questions of witnesses in order to bring out facts not then fully covered in the testimony. Do not assume that because I asked questions I hold any opinion on the matters to which my questions related.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 103.33 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 3.02 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 14

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 101.43 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 3.03 (1999)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 15

Do not let bias, prejudice or sympathy play any part in your deliberations. You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar situations in life. A corporation is entitled to the same fair trial as a private individual. All persons, including corporations, and other organizations stand equal before the law, and are to be treated as equals.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions §§ 103.12 and 103.21 (2005) (citing United States Court of Appeals Fifth Judicial Circuit Pattern Jury Instructions 2004 (Civil Cases) Cautionary Instructions 2.13.

PLAINTIFFS' PROPOSED INSTRUCTION NO. 16

Certain testimony was presented to you through depositions. Depositions are the sworn, recorded answers to questions asked of witnesses in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, that witness' testimony may be presented, under oath, in the form of a deposition. Some time before this trial, attorneys representing the parties in this case questioned these witnesses under oath. A court reporter was present and recorded the testimony. This deposition testimony is entitled to the same consideration and is to be judged by you as to credibility and weighed and otherwise considered by you insofar as possible in the same way as if the witness had been present and had testified from the witness stand in court.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 102.23 (2005) (citing United States Court of Appeals Fifth Judicial Circuit Pattern Jury Instructions 2004 (Civil Cases) Cautionary Instructions 2.23 (modified)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 17

In this case, each party asserting a claim or a defense has the responsibility to prove every essential part of the claim or defense by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a claim or contention is more likely true than not true.

When more than one claim is involved, and when more than one defense is asserted, you should consider each claim and each defense separately; but, in deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the party making that claim or contention.

You may have hear the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 101.41 (2005) (citing United States Court of Appeals Eleventh Circuit Pattern Jury Instructions 2005 (Civil Cases), 6.1 (modified)).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 18

Generally speaking, there are two types of evidence that are generally presented during a trial-direct evidence and circumstantial evidence. "Direct Evidence" is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. "Indirect or circumstantial" evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.56 (2005).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 19

I will now instruct you on the elements of the plaintiffs' claim for copyright infringement. In order to prevail on their copyright infringement claim, the plaintiffs must prove two things:

First: The plaintiffs are the owners of works protected by the Copyright Act.

Second: The defendant infringed one or more of the rights granted by the Act.

Each of these aspects has several elements that I will explain to you.

3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.21 (2005).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 20

The first thing that Plaintiffs must prove is that Plaintiffs are the owners of works protected by the Copyright Act. In order to prove this, Plaintiffs must show either that Plaintiffs are the owners of the works in issue, or that Plaintiffs' relationship with the owners of those works permits Plaintiffs to claim ownership of those works.

Plaintiffs' certificates of registration of Plaintiffs' copyrights are what is called prima facie evidence of the element of ownership. In other words, if there is no evidence against Plaintiffs as to that element, the registration certificate alone is sufficient to establish that element.

3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.22 (2005) (modified).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 21

In addition to establishing that Plaintiffs are the copyright owners of the works in question, Plaintiffs must also prove that Defendant infringed Plaintiffs' rights in those works.

3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.26 (2005) (modified).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 22

Plaintiffs claim in this case that Defendant violated their exclusive rights to reproduce and distribute their copyrighted works. One who reproduces or distributes a copyrighted work during the term of the copyright infringes the copyright, unless licensed by the copyright owner.

3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.01 (2005) (modified).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 23

To prove infringement, Plaintiffs need not prove that the Defendant intended to infringe.

The Defendant's intent is not relevant to prove 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)); *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."); *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.").

PLAINTIFFS' PROPOSED INSTRUCTION NO. 24

The act of downloading copyrighted sound recordings on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive reproduction right.

17 U.S.C. § 106(1); *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); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *Arista Records LLC v. Doe*, 2008 U.S. Dist. LEXIS 89681, at *31 (D. Me. Oct. 29, 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 25

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.

17 U.S.C. § 106(3); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 923, 929 (2005); *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 26

A distribution of a copyrighted sound recording to MediaSentry on a peer-to-peer network violates the copyright owner's exclusive distribution right.

Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008) (Doc. No. 197 at 11) (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"); *Atlantic Recording Corp. v. Howell*, 554 F. Supp 2d 976, 985 (D. Ariz. 2008) (quoting *Olan Mills* and holding that "'[T]he investigator's assignment was part of [the recording companies'] attempt to stop [the defendant's] infringement,' and therefore the 12 copies obtained by MediaSentry are unauthorized.").

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 27

An inference that a distribution actually took place 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.

London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 169 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 984 (D. Ariz. 2008).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 28

Placing the plaintiffs' copyrighted sound recordings in a shared folder on an online media distribution system without authorization from the plaintiffs also violates the plaintiffs' exclusive right to distribute their sound recordings.

17 U.S.C. § 106(3); *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, Inc. v. Google, Inc.*, 487 F.3d 701, 719 (9th Cir. 2007) (holding that, while "the distribution rights of the plaintiff copyright owners [in the *Napster* case] were infringed by Napster users . . . when they used the Napster software to make their collections available to all other Napster users," Google could not be held liable on the same basis because it did not possess a collection of Perfect 10's works); *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) ("[P]eople who post or download music files are primary infringers."); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) ("transmitting a digital copy of [copyrighted] music . . . infringes copyright"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."); *Sony Pictures Home Entm't, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-22 (N.D. Tex. 2007) (granting summary judgment to the plaintiff motion picture companies based on evidence that their copyrighted motion pictures were being distributed from the defendant's computer); *Motown Record Co. v. DePietro*, No. 04-CV-2246, slip op. at 7 and n.38 (E.D. Pa. Feb. 16, 2007) (holding that making copyrighted works available to other online file sharers violates the copyright holder's distribution right); *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); *see also United States v. Shaffer*, 472 F.3d 1219, 1224 (10th Cir. 2007) ("We have little difficulty in concluding that [the defendant] distributed child pornography" by placing the pornography "in his computer's Kazaa shared folder."); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (placing unauthorized copy of copyrighted work in library's collection, listing work in library's index or catalog system, and making work available to borrowing or browsing public was distribution of work within meaning of Copyright Act); *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").

Universal City Studios Productions LLLP v. Bigwood, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006) (making movies available on the internet violated the copyright owner's exclusive distribution right).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 29

Willful infringement is that committed with knowledge of or "reckless disregard" for the plaintiffs' copyrights.

3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.54 (2005) (modified); 4-14 Nimmer on Copyright § 14.04; *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 191 (D. Mass. 2007).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 30

Knowledge may be either actual or inferred from the evidence. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant's knowledge or intent.

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); *Rso Records, Inc. V. Peri*, 596 F. Supp. 8 (S.D.N.Y. 1984); *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).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 31

Reckless disregard can be inferred from continuous infringement, a past pattern of infringement, continuing infringement despite warnings, or other circumstances.

4-14 Nimmer on Copyright § 14.04; *Microsoft Corp. v. Evans*, 2007 U.S. Dist. LEXIS 77088, at *15, 18-19 (E.D. Cal. Oct. 16, 2007)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 32

If you find that Plaintiffs have valid copyrights and you find that those copyrights were infringed by Defendant, then you should find for Plaintiffs. You must then decide on the amount of damages Plaintiffs are entitled to recover.

3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.90 (2005).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 33

If you find that Plaintiffs have established both elements of their claim for copyright infringement, then, under the Copyright Act, Plaintiffs are entitled to a sum of not less than $750 or more than $30,000 per act of infringement (that is, per sound recording downloaded or distributed without license), as you consider just.

If you find that Defendant's actions were willful, then, under the Copyright Act, Plaintiffs are entitled to a sum of not less than $750 or more than $150,000 per act of infringement (that is, per sound recording downloaded or distributed without license), as you consider just.

In determining the just amount of statutory damages, you may consider the willfulness of Defendant's conduct, Defendant's innocence, Defendant's continuation of infringement after notice or knowledge of the copyright or in reckless disregard of the copyright, the effect of Defendant's prior or concurrent copyright infringement activity, and whether profit or gain was established.

17 U.S.C. § 504; 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, Federal Jury Practice & Instructions § 160.93 (2005) (modified).

PLAINTIFFS' PROPOSED INSTRUCTION NO. 34

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. The form reads: (...read form...). You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

3A Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 101.01 (2005) (citing 8TH CIR. CIVIL JURY INSTR. § 3.06 (1999)).