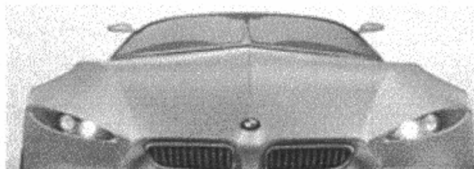
Exhibit Q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Debate over "making available" jury instruction as Capitol v. Thomas wraps up (updated)

By Eric Bangeman | Published: October 04, 2007 - 01:10AM CT

Duluth, Minnesota — After both parties rested in Capitol v. Thomas, the attorneys for both sides began going through Judge Michael J. Davis' proposed jury instructions. Instruction no. 14 proved to be a sticking point, as Thomas' counsel Brian Toder told Ars tonight that the judge's proposed instruction indicated that the plaintiffs must show that an *actual transfer took place* in order for there to be a finding of infringement. "The mere act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network without license from copyright owners does not violate the copyright owners' exclusive right to distribution," reads the proposed jury instruction. "An actual transfer must take place."

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Music industry counsel Richard Gabriel argued forcefully that making a file available was copyright infringement, citing a letter from US Copyright Registrar Mary Beth Peters that he said supported the argument as well as a handful of other cases. Gabriel asked the judge to modify the instruction to include "making available"; the judge said he would rule on Thursday morning.

The issue of whether making a file available over a P2P network was the equivalent of distribution, and therefore copyright infringement, has been a hotly debated topic during the course of the RIAA's file-sharing litigation. There have been a handful of pretrial rulings on the question, with most judges siding with the labels' view that making a file available on a peer-to-peer network is the same as infringement. There have been a couple of exceptions, however. One of those was in UMG v Lindor, where Judge David Trager ruled in December 2006 that the labels would have to show "that defendant actually shared sound files belonging to plaintiffs." Two other judges, one in Elektra v. Barker and another in Warner v. Cassin, have promised to rule on the issue.

The question of whether making a file available equals distribution came up on the first day of the trial during the testimony of Sony BMG head of litigation Jennifer Pariser. Toder asked her how she knew that the 25 songs covered in the lawsuit were distributed over KaZaA. "That's the way the system works," replied Pariser. "I know that each one of the 25 songs was distributed."

It was then that Toder raised the issue. Richard Gabriel quickly objected to Toder's mentioning the topic; the judge sustained the objection and the issue was dropped. Throughout the rest of the trial, the RIAA's assertions that Thomas engaged in distribution over KaZaA went unchallenged.

If Judge Davis decides to keep jury instruction no. 14 intact over the objections of the plaintiffs, it will make it more difficult to find that Thomas infringed. Of all the documentation presented, the only evidence of any distribution or downloading was that done by Media Sentry, the RIAA's authorized agents. Even if you believe that Thomas was sitting at the PC on the night of February 21, 2005 logged on to KaZaA as "tereastarr@KaZaA" with a shared folder full of music,

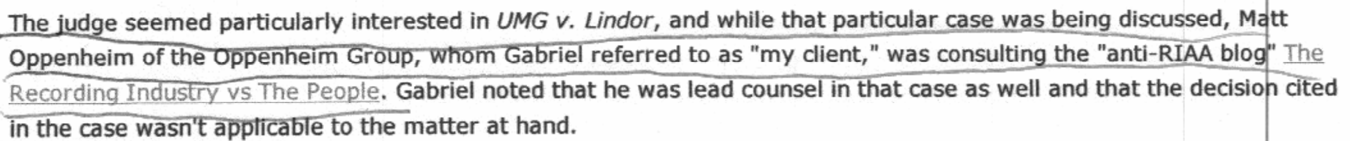
there has been no evidence presented by the RIAA that any "actual transfer" aside from the ones from tereastarr@KaZaA to the Media Sentry investigator took place.

There will be further discussion of the jury instructions tomorrow morning before closing arguments, and we'll update this post as necessary. Closing arguments will follow beginning at 9:30. The jury is likely to begin deliberations late in the morning, with a verdict hopefully before the jury leaves for the day at 4:15pm.

Update (October 4, 8:57 AM)

There was a conference this morning to go over the proposed jury instructions. Judge Davis began moving through them sequentially until he got to number 14. "Let's skip number 14 for now, because I think we're going to spend some time on that one," he said. After some minor tweaks to the other instructions, the parties returned to the instruction at issue.

Gabriel cited *Perfect 10 v. Amazon.com* and the original Napster case to support the RIAA's view that making a file available for distribution over a peer-to-peer network was a violation of the Copyright Act. "If there's an index and something behind it, that's distribution," argued Gabriel.



The judge seemed particularly interested in *UMG v. Lindor*, and while that particular case was being discussed, Matt Oppenheim of the Oppenheim Group, whom Gabriel referred to as "my client," was consulting the "anti-RIAA blog" The Recording Industry vs The People. Gabriel noted that he was lead counsel in that case as well and that the decision cited in the case wasn't applicable to the matter at hand.

Toder disagreed, but at the end, Judge Davis amended the instruction to say that the "act of making available for electronic distribution... violates the copyright owner's exclusive copyright." That decision should make it easier for the jury to find Thomas liable.

Filed under: Capitol v. Thomas, making available, music, RIAA, more...

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