Ira M. Schwartz (State Bar No. 010448)
DECONCINI MCDONALD YETWIN & LACY, P.C.
7310 North 16th Street, Suite 330
Phoenix, AZ 85020
Telephone: (602) 282-0500
Facsimile: (602) 282-0520
ischwartz@dmylphx.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Atlantic Recording Corporation, et al., Plaintiffs, vs. Pamela And Jeffrey Howell, Defendants.	Case No.: 2:06-cv-02076-PHX-NVW **PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT PURSUANT TO COURT'S ORDER OF OCTOBER 3, 2007**

INTRODUCTION

On August 20, 2007 this Court issued an Order (Doc. No. 43) granting Plaintiffs' Motion for Summary Judgment. The Court's initial order was proper because the evidence in this matter establishes unquestionably that Defendant engaged in the unauthorized distribution of Plaintiffs' copyrighted works. In an Order dated October 3, 2007 (Doc. No. 54), the Court asked the parties to address the following questions:[1]

> 1. Does the record in this case show that it is impossible for Plaintiff to prove particular instances of Defendant Howell's illegal distribution of the

[1] Plaintiffs are not aware of a Local Rule, or direction from the Court, regarding the page limitations imposed on a unique supplemental brief requested by the Court on particular issues. However, Plaintiffs have attempted to respond to each of the Court's questions in a thorough yet succinct manner. If the Court determines that LR 7.2(e), explicitly applicable to motions and supporting memoranda, applies, Plaintiffs will submit a necessary motion for leave at the Court's direction.

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Phoenix, Arizona 85020

copyrighted material through Kazaa, and the Defendant Howell is responsible for the absence of such records of distribution?

2. Does the record in this case show that Defendant Howell possessed an "unlawful copy" of the Plaintiff's copyrighted material, and that he actually disseminated that copy to the public?

3. Does the record in this case show that Defendant Howell offered to distribute the Plaintiff's copyrighted work "for purposes of further distribution, public performance, or display?"

4. Did Defendant Howell admit on the record that he is responsible for the Plaintiff's copyrighted material appearing in his Kazaa shared folder?

The Court further advised the parties of its interest in the following cases regarding the need to show an actual transfer of an identifiable copy of a copyrighted work to prove infringement of the right to distribute: *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2000); *In Re. Napster, Inc. Copyright Litigation*, 377 F.Supp.2d 796 (N.D. Cal. 2005); *Perfect 10, Inc. v. Google, Inc.*, 487 F.3d 701 (9th Cir. 2007). These issues are addressed below.

ARGUMENT

A. Plaintiffs have submitted undisputed evidence of unauthorized distribution by Defendant.

Plaintiffs have established the unlawful distribution of their copyrighted sound recordings by proving that Defendant actually distributed Plaintiffs' sound recordings and that Defendant made them available to others on a peer-to-peer file sharing network.

Section 501(a) of the Copyright Act provides, in relevant part, "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright . . . ." 17 U.S.C. § 501(a). One of the

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7310 North 16th Street, Suite 330
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exclusive rights referred to in section 501(a) is the right of distribution that is set forth in section 106(3), which provides:

> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . .
>
> (3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . .

17 U.S.C. § 106(3).

1. Plaintiffs' evidence demonstrates that Defendant actually distributed Plaintiffs' copyrighted sound recordings in violation of the Copyright Act.

A person violates a copyright holder's distribution right by making an actual, unauthorized distribution of a copyrighted work. *Perfect 10, Inc. v. Google, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007) (unauthorized "actual dissemination" of copyrighted work violates the distribution right in section 106)(3)); *In re Aimster Copyright Litig.*, 334 F.3d 643, 647 (7th Cir. 2003) (unauthorized "transfer" of copyrighted work violates distribution right). Here, it is undisputed that Defendant actually distributed Plaintiffs' copyrighted sound recordings in violation of the Copyright Act.

First, Defendant actually distributed the 11 sound recordings listed on Exhibit A to Plaintiffs' Complaint from the KaZaA shared folder on his computer to Plaintiffs' investigator, MediaSentry. (Decl. of Doug Jacobson ¶ 6, attached as Exhibit A hereto.) The "systemlog.txt" file showing the proof of Defendant's distribution of these 11 sound recordings is attached as Exhibit 1 to the Declaration of Doug Jacobson. (*Id.*)[2] These 11 sound recordings are a subset of the 54 "Sound Recordings" at issue in Plaintiffs' motion

[2] Exhibit A to Plaintiffs' Complaint shows 11 of the 12 sound recordings that MediaSentry downloaded from Defendant's shared folder.

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Phoenix, Arizona 85020

for summary judgment. (*See* SOF, Doc. No. 31, at ¶¶ 5-6; Exhibit 12 to SOF at ¶¶ 13, 17-18.)

Second, because online "piracy typically takes place behind closed doors and beyond the watchful eyes of a copyright holder," *Warner Bros. Records, Inc. v. Payne*, Case No. W-06-CA-051, slip opinion at 7 (W.D. Texas July 17, 2006) (Exhibit B hereto), Plaintiffs should be allowed to prove actual distribution based on circumstantial evidence. Here, the evidence shows that Defendant actually distributed the other 43 Sound Recordings that are the subject of Plaintiffs' motion for summary judgment. Specifically, it is undisputed that all 54 of the Sound Recordings at issue were in the KaZaA shared folder on Defendant's computer and that Defendant distributed 11 of them on January 30, 2006. (*See* Jacobson Decl. ¶¶ 6, 7; SOF, Doc. No. 31, at ¶¶ 5-6; Exhibit 12 to SOF at ¶¶ 13, 17-18.) It is further undisputed that the whole purpose of KaZaA is to share files with other users and that Defendant intended this purpose when he downloaded KaZaA to his computer. (Exhibit 12 to SOF at ¶ 13; Howell Deposition Excerpt, 164:11 to 165:22; 187:14 to 188:19, attached as Exhibit C hereto.) Finally, Defendant acknowledges that he saw evidence of other KaZaA users downloading files from the shared folder on his computer. (Howell Dep. 224:24 to 225:7.) This evidence establishes beyond question that Defendant actually distributed Plaintiffs' Sound Recordings to other KaZaA users.

2. Defendant made Plaintiffs' copyrighted sound recordings available to others on a peer-to-peer file sharing network in violation of the Copyright Act.

a. Making copyrighted sound recordings available for distribution to others on a peer-to-peer network without authorization from

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the copyright holder violates the copyright holder's distribution right.

The Copyright Act gives copyright owners "exclusive rights ***to do and to authorize***" certain acts with respect to their copyrighted works, including "***to distribute copies*** or phonorecords of the copyrighted work to the public" 17 U.S.C. § 106(3) (emphasis added). "Anyone who violates any of the exclusive rights of the copyright owner as provided by section [] 106 . . . is an infringer of the copyright." 17 U.S.C. 501(a).

Reading sections 501 and 106(3) together shows, first, that it is an actionable infringement for one to violate a copyright owner's exclusive right to authorize the distribution of copies or phonorecords of a copyrighted work. Thus, under the statute's plain language, the distribution right does not require a consummated transfer of the copyrighted work at issue. Here, Defendant authorized distribution by placing Plaintiffs' copyrighted works in his shared folder, where they were then available to other KaZaA users. This violates the express language of section 106(3).

Moreover, in adopting the language of section 106(3), Congress specifically noted that that section established the exclusive right of publication and gave the copyright owner the right to control the first public distribution of an authorized copy of the work. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 62, reprinted in 1976 U.S.C.C.A.N. 5659, 5675-76. This determination has led various courts and commentators to find that distribution and publication are synonymous. *See, e.g., Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995); *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 299 (3d Cir.); NIMMER ON COPYRIGHT § 8.11(A) (2005) (noting that the right of distribution "is a right to control the work's publication . . . . The term 'distribution' rather than 'publication' was used merely 'for the sake of clarity.'").

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"Publication," in turn, is defined as:

> [T]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The ***offering to distribute*** copies or phonorecords to a group of persons ***for purposes of further distribution***, public performance, or public display, constitutes publication.

17 U.S.C. § 101 (emphasis added). Accordingly, under the clear language of the statute, the making available of a work (*i.e.*, the offering to distribute that work) falls within the exclusive right of distribution.

The United States Copyright Office has reached precisely the same conclusion. The Register of Copyrights addressed the issue of offering copyrighted works on a peer-to-peer network directly: "***[M]aking [a work] available for other users of a peer to peer network to download . . . constitutes an infringement of the exclusive distribution right***, as well of the reproduction right." Letter from Marybeth Peters to Rep. Howard L. Berman at 1 (Sept. 25, 2002) (emphasis added) (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001)), *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) (attached as Exhibit D hereto). The Copyright Office's interpretation of the Act is entitled to deference where, as here, it is a reasonable one. *See Bonneville International Corp. v. Peters*, 347 F.3d 485, 490 & n. 9 (3d Cir. 2003); *Batjac Productions Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998), cert. denied, 526 U.S. 1158 (1999) ("[T]he Register [of Copyrights] has the authority to interpret the copyright laws and [] its interpretations are entitled to judicial deference if reasonable.") (citations omitted).

The courts, too, have found that, even in the absence of proof that a copyrighted work has actually been fully transmitted to another, the section 106(3) distribution right is

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violated when a copyrighted work is made available for others on a peer-to-peer file sharing network. *See 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."); *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) ("[P]eople who post or download music files are primary infringers."); *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 made available for download from the defendant's computer); *Motown Record Co. v. DePietro*, 2007 U.S. Dist. LEXIS 11626, * 12-13, FN 38 (E.D. Pa. 2007) ("A plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant 'made available' the copyrighted work.").

In addition to these authorities, on October 2-4, 2007, national counsel for Plaintiffs tried the case of *Capitol Records, Inc. v. Thomas*, Case No. 06-cv-1497 (MJD/RLE) (D. Minn.), which involved claims of copyright infringement that are virtually identical to the claims at issue in this case and resulted in a verdict for the record company plaintiffs totaling $222,000.00. During the trial, an issue arose in the context of jury instructions as to whether it is a violation of the exclusive right of distribution for one to make sound recordings available on a peer-to-peer network, without proof of actual receipt of the sound recording by a third-party. After hearing argument and reviewing the case law, the *Thomas* court agreed with the record companies' position and instructed the jury as follows:

> The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown.

A copy of this jury instruction is attached as Exhibit E hereto, and is also available on PACER in the *Thomas* case, Doc. No. 97, Jury Instruction No. 15.

In the *Napster* case, the Ninth Circuit evaluated the situation where individual Napster users made copyrighted sound recordings "available for copying by other Napster users." 239 F.3d at 1011. The evidence in the *Napster* case showed that the names of the music files stored in the Napster user's "user library" were "uploaded" to the Napster servers where they were displayed for other users, who could then search the file names and download copies of the actual music files directly from the original user's computer, such that each user would then have copies of the files. *Id.* at 1011-12. Based on this evidence, the Ninth Circuit held that "***Napster users who upload file names to the search index for others to copy violate [the copyright holder's] distribution rights***." *Id.* at 1014 (emphasis added).

The Ninth Circuit also rejected Napster's fair use, "space-shifting" defense for the same reason. Specifically, the court held that Napster could not argue that its users were engaged in legitimate space-shifting because, in addition to downloading, the use of Napster's peer-to-peer file sharing "***simultaneously involve[d] distribution of the copyrighted material to the general public***." *Id.* at 1019 (emphasis added).

On remand, the plaintiffs in the *Napster* case argued "that Napster itself directly infringed plaintiffs' distribution rights by maintaining a centralized indexing system

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7310 North 16th Street, Suite 330
Phoenix, Arizona 85020

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7310 North 16th Street, Suite 330
Phoenix, Arizona 85020

listing the file names of all MP3-formatted music files available on the Napster network." *In re Napster*, 377 F. Supp. 2d 796, 802 (N.D. Cal. 2005). The district court, however, rejected the plaintiffs' indexing argument, holding that, absent proof that music files had been "uploaded onto the network," the fact that such files had been listed on the Napster index did not infringe the plaintiffs' distribution right. *Id.* at 803.

Although some have argued that the district court's decision on remand runs counter to the "making available" right of distribution, the Ninth Circuit recently reaffirmed its holding in the *Napster* case regarding distribution in *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

In *Perfect 10*, the Ninth Circuit held that the defendant, Google, had not infringed the plaintiffs' right of distribution by providing links telling users of Google's search engine where to find the plaintiffs' copyrighted images. *Id.* at 718-19. In reaching its decision in the *Perfect 10* case, the court first reiterated the "deemed distribution rule" that formed the basis of its *Napster* decision. Specifically, the court reiterated that "the distribution rights of the plaintiff copyright owners [in the *Napster* case] were infringed by Napster *users* (private individuals with collections of music files stored on their home computers) when they used the Napster software to make their collections available to all other Napster users." *Id.* at 719 (emphasis in original) (citing *Napster*, 239 F.3d at 1011-14). The court held, however, that the "deemed distribution rule" did not apply to Google because, "[u]nlike the participants in the Napster system . . . Google does not own a collection of Perfect 10's full-size images and does not have a collection of stored full-size

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7310 North 16th Street, Suite 330
Phoenix, Arizona 85020

images it makes available to the public." *Id.* Thus, Google itself did not "distribute" the plaintiff's images in violation of the Copyright Act. *Id.*

Other courts have also concluded that placing files in a "shared folder" available to other users for download constitutes a distribution of the files. In *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007), for example, the Tenth Circuit held a defendant criminally liable for using KaZaA to distribute child pornography. *Id.* at 1220. The evidence in the case showed that the defendant had stored pornographic images and videos "in a shared folder on his computer accessible by other users of the network." *Id.* at 1220-21. On appeal, the defendant argued that the prosecution had no evidence of actual transmission of files to other users. *Id.* at 1223. The court, however, rejected that argument, "We have little difficulty in concluding that [the defendant] *distributed* child pornography" by placing the pornography in his computer's KaZaA shared folder. *Id.* at 1123-24.

Likewise, in *Sony Pictures Home Entm't, Inc. v. Lott*, 471 F. Supp. 2d 716 (N.D. Tex. 2007), the plaintiffs presented evidence that the defendant shared "files containing the [the plaintiffs' copyrighted] Motion Pictures, ***making them available for download*** by other [peer-to-peer] users." *Id.* at 719 (emphasis added). Based on this evidence, and relying on the Ninth Circuit's *Napster* ruling, the *Lott* court held that the defendant had violated the plaintiffs' right of distribution and granted summary judgment in the plaintiffs' favor. *Id.* at 722 (citing *Napster*, 239 F.3d at 1014).

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Finally, although not a file sharing case, the Fourth Circuit's decision in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), is instructive. In *Hotaling*, the defendant library obtained unauthorized copies of the plaintiffs' work, added a listing of the unauthorized copies to its index of available works, and made the unauthorized copies available for the public to check out of its library. *Id.* at 203. Based on this evidence, the Fourth Circuit held that, even in the absence of proof that the work had actually been provided to the public, the work had been distributed within the meaning of 17 U.S.C. § 106(3). *Id.* Analogous to the evidence presented in *Napster*, it was sufficient that the title of the work had been included in an index and that the library had an unauthorized copy of the work that could have been checked out by a member of the public. *See id.* It was not necessary for the plaintiffs to show that the work had ever actually been checked out. *Id.*

b. Defendant distributed Plaintiffs' copyrighted sound recordings in violation of the Copyright Act by making them available to others on a peer-to-peer file sharing network.

Similar to the circumstances presented in the *Napster*, *Hotaling*, *Shaffer*, *Thomas*, and *Lott* cases, Plaintiffs have undisputed evidence that all 54 of Plaintiffs' copyrighted Sound Recordings at issue in this case were in the KaZaA shared folder on Defendant's computer on January 30, 2006 and were made available by Defendant to other KaZaA users for download. (*See* Jacobson Decl. ¶¶ 6, 7; SOF, Doc. No. 31, at ¶¶ 5-6; Exhibit 12 to SOF at ¶¶ 13, 17-18.) By making Plaintiffs' copyrighted Sound Recordings available for download by other KaZaA users, Defendant violated Plaintiffs distribution right under

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7310 North 16th Street, Suite 330
Phoenix, Arizona 85020

section 106(3) of the Copyright Act. *See Perfect 10, Inc.*, 487 F.3d at 719; *Napster*, 239 F.3d at 1014; *Lott*, 471 F. Supp. 2d at 722.

B. The record shows that Defendant is responsible for particular instances of distribution of Plaintiffs' copyrighted works, that no log files showing particular instances of Defendant's illegal distribution exist, and that Defendant is responsible for the absence of records showing additional instances of illegal distribution.

1. Defendant is responsible for particular instances of distribution of Plaintiffs' copyrighted sound recordings.

As demonstrated above and in Plaintiffs' motion for summary judgment, it is undisputed that Defendant actually disseminated at least 11 of Plaintiffs' copyrighted sound recordings. (SOF, Doc. No. 31, at ¶¶ 5-6; Exhibit 12 to SOF at ¶¶ 13, 17-18.) These 11 sound recordings are shown in the "systemlog.txt" file, and were downloaded from Defendant's computer by Plaintiffs' investigator on January 30, 2006. (Jacobson Decl. ¶ 6 and Exhibit 1 thereto.) Each of these actual, unauthorized disseminations of Plaintiffs' copyrighted works violates Plaintiffs' exclusive distribution right under the Copyright Act. *See Perfect 10*, 416 F. Supp. 2d at 844.

2. The KaZaA program does not keep a log of illegal distribution of copyrighted material.

The idea behind peer-to-peer networks is to allow people to connect to each other and share files. (Exhibit 12 to SOF at ¶ 13.) Peer-to-peer networks like KaZaA allow users to transfer files directly from user to user. (*Id.*) A standard feature of the KaZaA program is that it shows individual users what files are being copied by other users as they are being copied. (Jacobson Decl. ¶ 9.) The KaZaA program, however, does not create a

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log of what files are actually being copied by other users. (*Id.*) Nor does the program permit third parties, such as copyright holders, to see what copyrighted files are actually being transferred from one KaZaA user to another. (*Id.*) Thus, unless the individual KaZaA user makes a log of the files that he or she has actually distributed to other KaZaA users, it is difficult for any third party to determine exactly what files were actually distributed or when. (*Id.*)

3. Defendant is responsible for the absence of records of additional particular instances of his illegal distribution.

Defendant was well aware long before this lawsuit that KaZaA was designed to allow "multiple people to share files" and that files in a KaZaA user's shared folder, including Defendant's shared folder, are "available to other people" for download. (Howell Dep. 139:1 to 139:9; 152:7 to 152:19; 162:14 to 163:24.) Defendant downloaded KaZaA to his computer for the express purpose of sharing files. (*Id.* at 164:11 to 165:22; 187:14 to 188:19.) Defendant acknowledges that he saw indications that other KaZaA users were downloading files from the shared folder in his computer, and that he never did anything to stop it. (*Id.* at 224:24 to 225:7.)

Defendant also intentionally removed the KaZaA program and the infringing files from his computer hard drive *after* he had notice of Plaintiffs' lawsuit and of his duty to preserve evidence. After learning about this lawsuit, Defendant "completely wiped" the KaZaA program from his computer. (*Id.* at 99:8 to 99:23.) In fact, Defendant removed the KaZaA program and the entire contents of his shared folder from his computer *after* he

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had received a letter from Plaintiffs instructing him "to maintain the information." (*Id.* at 105:10 to 105:25.)

One of the best ways to test a defendant's denial of responsibility for illegal file sharing would be to look at the contents of the defendant's computer hard drive, which would show, among other things, the existence of peer-to-peer software programs, the user's chosen preferences for the use of such programs, the dates of use of such programs, the profile of the individual using such programs, and any sound recordings that were downloaded using such programs. (Jacobson Decl. ¶ 10.) A forensic examination might also provide indications of particular instances of distribution from Defendant's shared folder. (*Id.*) That information, however, has now been intentionally "wiped" from Defendant's computer. Defendant's intentional destruction of this evidence severely and irreparably prejudices Plaintiffs' ability to prove their claim against Defendant and warrants harsh sanctions. *See, e.g.*, *Arista Records LLC v. Tschirhart*, 241 F.R.D. 462, 465-66 (W.D. Tex. 2006) (recognizing that "the best proof" of online copyright infringement "would be to examine [the defendant's] computer hard drive" and holding that "[b]y destroying the best evidence relating to the central issue in the case, defendant has inflicted the ultimate prejudice upon plaintiffs" and "no lesser sanction [than default] will adequately punish this behavior and adequately deter its repetition in other cases.").[3]

[3] Plaintiffs intend to pursue spoliation sanctions against Defendant if this matter is not resolved through summary judgment.

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C. Defendant possessed unauthorized copies of Plaintiff's copyrighted sound recordings on his computer and actually disseminated such unauthorized copies over the KaZaA peer-to-peer network.

It is undisputed that Defendant possessed unauthorized copies of Plaintiffs' copyrighted sound recordings on his computer. Exhibit B to Plaintiffs' Complaint is a series of screen shots showing the sound recording and other files found in the KaZaA shared folder on Defendant's computer on January 30, 2006. (SOF, Doc. No. 31, at ¶¶ 4-6); Exhibit 12 to SOF at ¶¶ 13, 17-18.) Virtually all of the sound recordings on Exhibit B are in the ".mp3" format. (Exhibit 10 to SOF, showing virtually all audio files with the ".mp3" extension.) Defendant admitted that he converted these sound recordings from their original format to the .mp3 format for his and his wife's use. (Howell Dep. 107:24 to 110:2; 114:1 to 116:16). The .mp3 format is a "compressed format [that] allows for rapid transmission of digital audio files from one computer to another by electronic mail or any other file transfer protocol." *Napster*, 239 F.3d at 1011. Once Defendant converted Plaintiffs' recording into the compressed .mp3 format and they are in his shared folder, they are no longer the authorized copies distributed by Plaintiffs. Moreover, Defendant had no authorization to distribute Plaintiffs' copyrighted recordings from his KaZaA shared folder.

Each of the 11 sound recordings on Exhibit A to Plaintiffs' Complaint were stored in the .mp3 format in the shared folder on Defendant's computer hard drive, and each of these eleven files were actually disseminated from Defendant's computer. (*See* Jacobson Decl. ¶ 6 and Exhibit 1 thereto.) Each of these actual, unauthorized disseminations of

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Plaintiffs' copyrighted works violates Plaintiffs' exclusive distribution right under the Copyright Act. *See Perfect 10*, 416 F. Supp. 2d at 844. In addition, Defendant unlawfully distributed all 54 of Plaintiffs' Sound Recordings by making unauthorized copies of the recordings available to other KaZaA users for download. *See Perfect 10, Inc.*, 487 F.3d at 719; *Napster*, 239 F.3d at 1014; *Hotaling*, 118 F.3d at 203; *Lott*, 471 F. Supp. 2d at 722.

D. Defendant offered to distribute the Plaintiff's copyrighted work "for purposes of further distribution, public performance, or display."

As the Ninth Circuit held in *Perfect 10*, the "deemed distribution" rule applied in the *Napster* case because individual Napster users owned copies of the plaintiffs' copyrighted sound recordings and made such recordings available to other Napster users over the Napster peer-to-peer network. *Perfect 10*, 487 F.3d at 718-19. The Ninth Circuit's holdings is entirely consistent with the Copyright Act's provision defining the term "publication" to include "the offering to distribute . . . to a group of persons for purposes of further distribution." 17 U.S.C. § 101; *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985) (equating the term "distribution" with the right of "publication").

It is undisputed that KaZaA is expressly designed to allow "multiple people to share files" and that files in a KaZaA user's shared folder, including Defendant's shared folder, are "available to other people" for download. (Howell Dep. 139:1 to 139:9; 152:7 to 152:19; 162:14 to 163:24.) Indeed, at the time Plaintiffs' investigators detected Defendant's infringement in this case, there were "2,282,954 users online, sharing 292,532,420 files." (Jacobson Decl. ¶ 8; Exhibit 10 to SOF.) Defendant's very means of

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infringement, therefore (*i.e.*, an online media distribution system with tens of millions of potential users), necessarily contemplates that every distribution of Plaintiffs' copyrighted recordings will be followed by "further [unlawful] distribution" by the users who download Plaintiffs' recordings to their computers. *See Napster*, 239 F.3d at 1019 (observing that every download over a peer-to-peer network "simultaneously involve[s] distribution of the copyrighted material to the general public").

Indeed, Defendant's conduct in this case has subjected Plaintiffs' valuable sound recordings to ongoing "viral" infringement. *See In re Aimster Copyright Litig.*, 334 F.3d 643, 646 (7th Cir. 2003) (observing that "the purchase of a single CD could be levered into the distribution within days or even hours of millions of identical, near-perfect . . . copies of the music recorded on the CD"). When digital works are distributed via the Internet, "[e]very recipient is capable not only of . . . perfectly copying plaintiffs' copyrighted [works,] . . . [t]hey likewise are capable of transmitting perfect copies of the [works]." *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 331-32 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001). The "process potentially is exponential rather than linear," which means of transmission "threatens to produce virtually unstoppable infringement of copyright." *Id.*

E. Defendant is responsible for Plaintiffs' copyrighted material appearing in his KaZaA shared folder.

As demonstrated in Plaintiffs' motion for summary judgment, it is undisputed that Defendant downloaded the KaZaA file sharing software to his computer and that he created the "jeepkiller@KaZaA" username. (*See* SOF ¶ 4.) It is also undisputed that, on

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January 30, 2006, Defendant was distributing all of the sound recordings listed on Exhibit B to the Complaint (Exhibit 10 to Plaintiffs' SOF) over the Internet to other KaZaA users under the username "jeepkiller@KaZaA." (*See* SOF ¶¶ 4, 6.) Defendant admits that all of the sound recordings in Exhibit B to the Complaint were in the KaZaA shared folder that he created on his computer and were being distributed to other KaZaA users from his computer. (*See* SOF ¶¶ 4-9.) Indeed, Defendant concedes that the music files in his shared folder were "music files that [he] had put on his computer" and that such files "were shared via KaZaA." (Howell Dep. 174:19 to 174:25.)

In sum, it is undisputed that Defendant intentionally uploaded digital music files to his computer, and that those files were being distributed to other KaZaA users without Plaintiffs' permission in violation of the Copyright Act. Defendant's bald assertion that he did not realize these sound recordings were being distributed from his KaZaA shared folder to other KaZaA users is both belied by the facts and irrelevant under the law.

First, Defendant readily concedes that he used KaZaA to download and share pornography files, and that he intentionally stored his pornography files in his shared folder. (*Id.* at 87:19 to 88:3; 139:1 to 139:22; 162:14 to 165:24; 169:17 to 170:25; 187:14 to 188:19.) He further admits that he had created a "shortcut" to his shared folder so he could see and access its contents when he wanted to. (*Id.* at 173:16 to 173:25.) Even a cursory glance of Defendant's shared folder shows that the music files numbered in the thousands and were interspersed with the pornography files throughout the shared folder. (*See* Exhibit 10 to SOF: Part 1 at 2-3; Part 3 at 30-31; Part 4 at 16-17, 20-21, 27-28, 30-31; and Part 5 at 4-5, 21-23.)

Second, Defendant's professed ignorance is not a defense to Plaintiffs' proof of his infringement. Because copyright infringement is a strict liability offense, Plaintiffs "need not demonstrate [Defendant's] intent to infringe the copyright in order to demonstrate copyright infringement." *See UMG Recordings, Inc. v. Disco Azteca Distr., Inc.,* 446 F.

DECONCINI MCDONALD YETWIN & LACY, P.C.
7310 North 16th Street, Suite 330
Phoenix, Arizona 85020

Supp. 2d. 1164, 1172 (E.D. Cal. 2006); *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."); 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.").

Third, Defendant's bald, unsupported assertion of ignorance is not sufficient to defeat Plaintiffs' motion for summary judgment, which establishes beyond question that Defendant intentionally uploaded digital music files to his computer and that those files were being distributed to other KaZaA users from Defendant's KaZaA shared folder without Plaintiffs' permission. *See* Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial."); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 553 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.")(citation omitted).

Finally, as discussed above, an examination of Defendant's computer would ordinarily show, among other things, Defendant's chosen preferences for using the KaZaA software program on his computer and the dates that particular files were added to Defendant's KaZaA shared folder. (Jacobson Decl. ¶ 10.) Among the preferences available to KaZaA users is a preference allowing KaZaA users to share specific files on the user's hard drive. (*Id.*) That information, however, has now been intentionally

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7310 North 16th Street, Suite 330
Phoenix, Arizona 85020

"wiped" from Defendant's computer. (Howell Dep. 99:8 to 99:23; 105:10 to 105:25.) Defendant's destruction of this material evidence more than justifies an inference that a forensic examination of Defendant's computer would have shown conclusively that Defendant was intentionally distributing the music files in his shared folder with other KaZaA users, especially given that the music files were interspersed among the pornography files that Defendant concedes he was intentionally distributing to other KaZaA users. *See Computer Assoc. Int'l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990) ("[W]here a party destroys evidence after being put on notice that it is important to a lawsuit, and being placed under a legal obligation to preserve and produce it, the compelling inference is that the evidence would have supported the opposing party's case."); *Tschirhart*, 241 F.R.D. at 465 (holding that "[b]y destroying the best evidence relating to the central issue in the case, defendant has inflicted the ultimate prejudice upon plaintiffs.").

CONCLUSION

For all of these reasons, as well as those stated in Plaintiffs' motion for summary judgment (Doc. No. 30), and motion for leave to file supplemental dispositive motion (Doc. No. 50), Plaintiffs respectfully request entry of an order (1) granting summary judgment in favor of Plaintiffs and against both Defendants based on Defendant Jeffrey Howell's infringement of Plaintiffs' Sound Recordings done on behalf of the marital community of Jeffrey and Pamela Howell, (2) minimum statutory damages of $750 for each of the fifty-four Sound Recordings at issue for a total amount of $40,500.00, (3) an injunction as prayed for in Plaintiffs' Complaint preventing Defendants from further copyright infringement, and (4) an award of costs in the amount of $350.00. Plaintiffs further request such other relief as the Court deems just and necessary.

DECONCINI MCDONALD YETWIN & LACY, P.C.
7310 North 16th Street, Suite 330
Phoenix, Arizona 85020

Respectfully submitted this 7th day of December 2007.

DECONCINI MCDONALD YETWIN & LACY.

By: *s/ Ira M. Schwartz*

Ira M. Schwartz
Michael A. Cordier
7310 North 16th Street, Suite 330
Phoenix, AZ 85020
Telephone: (602) 282-0500
Facsimile: (602) 282-0520
ischwartz@dmylphx.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 7, 2007, a copy of the foregoing document was served upon the Defendants via United States Mail at the following address:

Pamela And Jeffrey Howell
4192 N. 81st Street
Scottsdale, Az 85251-2672
Defendants

s/ Ira M. Schwartz