

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., a Delaware Corporation; ELEKTRA
ENTERTAINMENT GROUP INC., a Delaware corporation;
VIRGIN RECORDS AMERICA, INC., a California corporation;
ARISTA RECORDS, INC., a Delaware corporation; SONY
MUSIC ENTERTAINMENT INC., a Delaware corporation;
UMG RECORDINGS, INC., a Delaware corporation; and BMG
MUSIC, a New York general partnership
Plaintiffs

v.

NOOR ALAUJAN
Defendant

BRIEF OF AMICUS CURIAE
REVIEWING ISSUES OF FACT AND LAW

| | |
|-----------------------|--------------|
| William W. Fisher III | Diane Cabell |
| Charles R. Nesson | Renny Hwang |
| Jonathan Zittrain | Ory Okolloh |
| John G. Palfrey | |

Berkman Center for Internet & Society at
Harvard Law School
1587 Massachusetts Avenue
Cambridge, MA 02138
617.495.7547

TABLE OF CONTENTS

| | |
|--|-----------|
| TABLE OF AUTHORITIES | iii |
| INTERESTS OF AMICI | viii |
| I. INTRODUCTION AND SUMMARY OF ARGUMENT..... | 3 |
| II. FACTUAL BACKGROUND..... | 7 |
| A. OVERVIEW OF KAZAA | 7 |
| B. DISABLING FILE-SHARING FEATURES IN KAZAA..... | 10 |
| C. PLAINTIFFS' PROCEDURE FOR IDENTIFYING INFRINGING MATERIALS AND USERS | 12 |
| III. ARGUMENTS THAT THE COURT MIGHT CONSIDER IN LIGHT OF THE UNRESOLVED FACTUAL AND SUBSTANTIVE ISSUES IN THESE CASES..... | 16 |
| A. FACT-BASED ARGUMENTS..... | 16 |
| 1. <i>There May Be Errors in Identifying Infringing Materials</i> | 16 |
| 2. <i>There May Be Errors in Identifying Infringing Users</i> | 18 |
| a. The IP Address Observed by the Plaintiff May be Incorrect | 20 |
| b. Error By the Plaintiff or the ISP May Identify an Incorrect ISP Account | 21 |
| c. The P2P Username May Belong to a Different User of the ISP Account | 22 |
| B. PROCEDURAL ARGUMENT | 28 |
| <i>Given the Possible Variations in the Factual Situations, Evidentiary Situations and Affirmative Defenses, the Court Might Reconsider Joinder in this Case</i> | 28 |
| C. SUBSTANTIVE ARGUMENTS | 32 |
| 1. <i>Certain Defendants May Have a Fair Use Defense</i> | 32 |

| | | |
|------------|---|-----------|
| a. | Purpose and Character of Use..... | 34 |
| b. | Nature of Copyrighted Work and Amount and Substantiality of Portion Used | 38 |
| c. | Market Impact | 38 |
| 2. | <i>The Defendant Who Had Neither Awareness Nor Intent to Distribute or to Copy May Not Be Liable for Infringement or May Be Entitled to Reduction in Damages</i> | 42 |
| a. | Copyright Infringement May Require Intent to Copy | 42 |
| b. | Innocent Intent in the Copyright Case Law | 45 |
| c. | There May be Authority Extending Innocent Intent to Provide Protection Against Liability for Those Who Could not Prevent Infringing Technology or Were Unaware of the Technology’s Infringing Capability | 48 |
| d. | Most Authorities Indicate that Copyright is Strict Liability and Innocent Intent Provides Discretion for Judges and Juries to Reduce Damages..... | 48 |
| 3. | <i>Defendants May Not Have Infringed Upon the Plaintiffs’ Right to Distribution As Merely Having Files in a Shared Folder May Not Constitute a Distribution.....</i> | 50 |
| 4. | <i>The Plaintiffs’ Claims are Likely Not Barred by the Doctrine of Laches.....</i> | 56 |
| D. | THE AMOUNT OF STATUTORY DAMAGES AVAILABLE TO THE PLAINTIFFS COULD BE REDUCED TO THE MINIMUM AMOUNT | 60 |
| IV. | CONCLUSION | 65 |
| | CERTIFICATE | 68 |

TABLE OF AUTHORITIES

CASES

| | |
|--|----|
| <i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001)..... | 35 |
| <i>BMG Music, et al. v. Does 1-203</i> , Case No. CV-04-650 (E.D. Pa. Mar. 5, 2004)..... | 31 |
| <i>Branch v. Ogilvy & Mather, Inc.</i> , 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991)..... | 47 |
| <i>Bright Tunes Music Corp. v. Harrisongs Music, Ltd.</i> , 420 F. Supp. 177 (S.D.N.Y. 1976), <i>aff'd sub nom Abkco Music, Inc. v. Harrisongs Music, Ltd.</i> , 722 F.2d 988 (2d Cir. 1983) | 43 |
| <i>Buck v. Jewell-La Salle Realty Co.</i> , 283 U.S. 191, 198 (1930) | 46 |
| <i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569, 579 (1994)..... | 34 |
| <i>Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.</i> , 259 F.3d 1186, 1192 (9th Cir. 2001) | 46 |
| <i>CRIA v. John Doe</i> , 2004 FC 488 [28] (2004) | 55 |
| <i>D.C. Comics Inc. v. Mini Gift Shop</i> , 912 F.2d 29, 35 (2d Cir. 1990) | 48 |
| <i>Danjaq LLC v. Sony Corp.</i> , 263 F.3d 942, 950 (9th Cir. 2001) | 57 |
| <i>DIRECTV v. Garbutt et al.</i> , Case No. 03 C 3499 (June 3, 2003) | 32 |
| <i>DIRECTV v. Loussaert</i> , 218 F.R.D. 639, (2003) | 30 |
| <i>DIRECTV, Inc. v. Barrett</i> , 2004 U.S. Dist. LEXIS 5086 (Mar. 19, 2004) ... | 30 |
| <i>Educational Testing Service v. Simon</i> , 95 F.Supp.2d 1081, 1087 (C.D.Cal. 1999)..... | 42 |
| <i>Ellison v. Robertson</i> , 189 F.Supp.2d 1051, 1058-9 (C.D. Cal. 2002) | 23 |
| <i>Feltner v. Columbia Pictures Television, Inc.</i> , 523 U.S. 340, 355 (1998) ... | 46 |
| <i>Folsom v. Marsh</i> , 9 F. Cas. 342 (C.C.D. Mass. 1841)..... | 33 |
| <i>Harper & Row, Publishers, Inc. v Nation Enterprises</i> , 471 U.S. 539, 566 (1985)..... | 40 |
| <i>Interscope et al. v. Does 1-25</i> , Case No. 04-CV-197 (M.D. Fla. Apr. 1, 2004)..... | 31 |
| <i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811, 818 (9th Cir. 2003)..... | 33 |
| <i>Lauratex Textile Corp. v. Allton Knitting Mills</i> , 517 F. Supp. 900 (S.D.N.Y. 1981) | 61 |
| <i>MGM Studios, Inc. v. Grokster, Ltd.</i> , 259 F. Supp. 2d 1029, 1032 (C.D. Cal, 2003)..... | 8 |
| <i>N.A.S. Import Corp. v. Chenson Enters., Inc.</i> , 968 F.2d 250, 253 (2d Cir. 1992)..... | 61 |

| | |
|---|----|
| <i>Nassau Cy. Ass'n of Ins. Agents v. Aetna Life & Cas. Co.</i> , 497 F.2d 1151 (2d Cir. 1974)..... | 30 |
| <i>National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.</i> , 991 F.2d 426, 434 (8th Cir. 1993)..... | 51 |
| <i>National Football League v. Primetime 24 Joint Venture</i> , 131 F. Supp. 2d 458, 476 (S.D.N.Y. 2001)..... | 47 |
| <i>New Line Cinema Corp. v. Russ Berrie & Co.</i> , 161 F. Supp. 2d 293, 303 (S.D.N.Y. 2001)..... | 62 |
| <i>Nintendo of Am., Inc. v. Ketchum</i> , 830 F. Supp. 1443, 1445 (M.D. Fla. 1993)..... | 61 |
| <i>Obolensky v. G.P. Putnam's Sons</i> , 628 F. Supp. 1552, 1555-1556 (S.D.N.Y.), <i>aff'd without opinion</i> 795 F.2d 1005 (2d Cir. 1986)..... | 51 |
| <i>Paramount Pictures Corp. v. Labus</i> , 16 U.S.P.Q.2d (BNA) 1142 (W.D. Wis. 1990)..... | 52 |
| <i>Peer Int'l Corp. v. Pausa Records, Inc.</i> , 909 F.2d 1332, 1336 (9th Cir. 1990), <i>cert. denied</i> 498 U.S. 1109 (1991)..... | 47 |
| <i>Pritikin v. Liberation Publications, Inc.</i> , 83 F. Supp. 2d 920, 923 (N.D.Ill. 1999)..... | 43 |
| <i>Rapport v. Spielberg, Inc.</i> , 16 F. Supp.2d 481 (D. N.J. 1998)..... | 29 |
| <i>Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.</i> , 180 F.3d 1072, 1079 (9th Cir. 1999)..... | 42 |
| <i>Repp v. Webber</i> , 132 F.3d 882, 889 (2d Cir. 1997)..... | 43 |
| <i>Rodgers v. Eighty-Four Lumber Co.</i> , 623 F. Supp. 889 (W.D. Pa. 1985).... | 62 |
| <i>Roy Export Co. v. Trustees of Columbia University</i> , 344 F.Supp. 1350 (S.D.N.Y. 1972)..... | 23 |
| <i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417, 429 (1984)..... | 3 |
| <i>TVT Records v. Island Def Jam Music Group</i> , 279 F. Supp. 2d 366, 382 (S.D.N.Y. 2003)..... | 42 |
| <i>Ty, Inc. v. GMA Accessories, Inc.</i> , 132 F.3d 1167, 1169 (7th Cir. 1997)..... | 43 |
| <i>UMG Recordings, Inc. v. MP3.com, Inc.</i> , 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)..... | 33 |
| <i>United Mine Workers v. Gibbs</i> , 383 U.S. 715, 724, (1966)..... | 28 |
| <i>United States v. 1071.08 Acres of Land, Yuman and Mahave Counties, Arizona</i> , 564 F.2d 1350 (9th Cir. 1977)..... | 31 |
| <i>Whitney v. Ross Jungnickel, Inc.</i> , 179 F. Supp. 751, 753 (S.D.N.Y. 1960) . | 43 |
| <i>Wihtol v. Crow</i> , 309 F.2d 777 (8th Cir. 1962)..... | 46 |
| <i>Wildlife Internationale, Inc. v. Clements</i> , 591 F. Supp. 1542, 1547 (S.D. Ohio 1984)..... | 52 |

| | |
|---|----|
| <i>Wooded Shores Property Owners Ass'n Inc. v. Mathews</i> , 345 N.E. 2d 186, 189 (1976) appeal after remand, 411 N.E. 2d 1206 (1980)..... | 57 |
| <i>Worlds of Wonder, Inc. v. Veritel Learning Systems, Inc.</i> , 658 F. Supp. 351, 354 (N.D.Tex.1986)..... | 44 |

STATUTES

| | |
|------------------------------|----|
| 17 U.S.C. § 101 | 53 |
| 17 U.S.C. § 106 | 3 |
| 17 U.S.C. § 106 (3) | 50 |
| 17 U.S.C. § 107 | 33 |
| 17 U.S.C. § 107-1332..... | 3 |
| 17 U.S.C. § 1201 | 54 |
| 17 U.S.C. § 504 (c)..... | 61 |
| 17 U.S.C. § 504 (c) (1)..... | 62 |
| 17 U.S.C. § 504 (c) (2)..... | 46 |
| 17 U.S.C. § 512 (h) (3)..... | 19 |

OTHER AUTHORITIES

| | |
|---|----|
| <i>41 More Sued over Music Downloads</i> , CNN.com, Dec. 4, 2003 | 21 |
| Benjamin R. Kuhn, <i>Comment: A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed over the Information Superhighways of Today and Tomorrow</i> , 10 Temp. Int'l & Comp. L.J. 171, 190 (1996) | 51 |
| Cade Metz, <i>The Trouble with Wireless</i> , ABCNEWS.com, Apr. 22, 2004 ... | 27 |
| CENTER FOR INFORMATION TECHNOLOGY NEWS, OBERLIN COLLEGE, <i>DISABLING FILE SHARING</i> (last modified Oct. 30, 2002)..... | 11 |
| Chris Gaither, <i>Recording Industry Withdraws Suit</i> , Boston Globe, Sept. 24, 2003 | 21 |
| CISCO SYSTEMS, INC., <i>IP ADDRESSING AND SUBNETTING FOR NEW USERS: UNDERSTANDING IP ADDRESSES</i> (last modified Dec. 26, 2003)..... | 14 |
| David L. Hayes, <i>Advanced Copyright Issues on the Internet</i> , 7 Tex. Int. Prop. L.J. 1, 37 (1998) | 56 |
| Declan McCullagh, <i>RIAA Apologizes for Threatening Letter</i> , CNET News.com, May 12, 2003 | 19 |

| | |
|---|----|
| Declaration of Jonathan Whitehead in Support of Motion for Leave to Take Immediate Action, <i>Atlantic v. Does 1-3</i> , No. 1:04-cv-00475-RCL (D.D.C. filed March 23, 2004)..... | 13 |
| <i>Digital Decoys Are Making Frustrated Pirates Say 'Arrr'</i> , MTV.com, March 11, 2003 | 17 |
| Felix Oberholzer and Koleman Strumpf, <i>The Effect of File Sharing on Record Sales: An Empirical Analysis</i> (March 2004) | 40 |
| H. Rep. No. 105-551, at 15 (1998)..... | 54 |
| have2Banonymous, <i>P2P Entrapment – Incriminating Peer to Peer Network Users</i> , Sept. 27, 2003..... | 20 |
| <i>Innocent File Sharers Could Appear Guilty</i> , The New Scientist, October 1, 2003 | 20 |
| Jay Lyman, <i>RIAA Ends Amnesty Offer in Face of Lawsuit</i> , eCommerce Times, Apr. 20, 2004 | 41 |
| Jim Esch, <i>Slicing and Dicing MP3 Bit Rates</i> (last visited on May 15, 2004)..... | 35 |
| John Borland, <i>RIAA sues 261 file swappers</i> , News.com, Sept. 8, 2003 | 59 |
| John Schwartz, <i>She Says She’s No Music Pirate. No Snoop Fan, Either</i> , New York Times, Sept. 25, 2003..... | 21 |
| Joseph V. Myers III, <i>Note: Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and the White Paper</i> , 49 Vand. L. Rev. 439, n129, Mar. 1996 | 52 |
| Katie Dean, <i>Fan to RIAA: It Ain’t Me, Babe</i> , Wired.com, Oct. 15, 2003 | 22 |
| LINKSYS, CISCO SYSTEMS, INC., APPLICATION NOTE: IMPORTANT INFORMATION FOR WIRELESS PRODUCTS (last visited on May 5, 2004) | 26 |
| Matt Loney, <i>Want Wi-Fi? Learn the secret code</i> , CNET News.com, June 26, 2002..... | 26 |
| Michael W. Carroll, <i>A Brief Analysis of A&M Records, Inc. v. Napster, Inc.</i> , 9 Vill. Sports & Ent. L. Forum 5, 17-21 (2002) | 36 |
| Michael Zennie, <i>Few at Indiana U. Nervous about Lawsuits</i> , Indiana Daily Student University Wire, Mar. 30, 2004..... | 63 |
| NETGEAR, WIRELESS LAN SECURITY (April 2003) | 27 |
| Nick Wingfield and Ethan Smith, <i>The High Cost of Sharing</i> , Wall Street Journal Classroom Edition, September 9, 2003..... | 17 |
| PENN STATE AUXILIARY AND BUSINESS SERVICES, PENNSYLVANIA STATE UNIVERSITY, HOW TO TURN OFF PEER TO PEER FILE SHARING PROGRAMS (last modified May 9, 2002)..... | 11 |

| | |
|---|----|
| Pierre N. Leval, <i>Toward a Fair Use Standard</i> , 103 Harv. L. Rev. 1105, 1111 (Mar. 1990) | 34 |
| Plaintiffs' Complaint for Copyright Infringement, Noor Alaujan..... | 3 |
| Press Release, In-Stat/MDR, 2003 Numbers Indicate that Joe Schmo's got Wi-Fi (Jan. 14, 2004) | 25 |
| Press Release, Internet Home Alliance, Internet Home Alliance Announces Results of its Most Comprehensive Connected Home Market Study to Date (Jan. 27, 2004) | 24 |
| <i>See, generally</i> , COMCAST, COMCAST HOME NETWORKING, PRODUCT FEATURES | 26 |
| SHARMAN NETWORKS LTD., KAZAA QUICK GUIDE (last visited on May 2, 2004) | 8 |
| Stephen J. Bigelow, <i>Use Your Bandwidth as You Wish</i> , ComputerUser.com, January 2003 | 14 |
| Tech Live Staff, <i>Music Wars Timeline</i> , TechTV, Sept. 12, 2003 | 59 |
| Ted Bridis, <i>Music Industry Sues Internet File Share Users</i> , San Francisco Examiner, Sept. 9, 2003 | 24 |
| U.S. COPYRIGHT OFFICE, SECTION 104 REPORT ON THE DIGITAL MILLENNIUM COPYRIGHT ACT (August 2001) at p. 94..... | 54 |
| UNIVERSITY OF DELAWARE, TURNING OFF AND DISABLING FILE-SHARING PROGRAMS (last modified Sept. 9, 2003) | 12 |
| WAL-MART, MUSIC DOWNLOADS (last visited on May 15, 2004)..... | 64 |
| WIPO Copyright Treaty | 53 |

RULES

| | |
|-----------------------------|----|
| FED. R. CIV. P. 20..... | 29 |
| FED. R. CIV. P. 21..... | 31 |
| FED. R. CIV. P. 42 (b)..... | 31 |

TREATISES

| | |
|---|----|
| 2 PAUL GOLDSTEIN, COPYRIGHT § 5.5.1 at 5:102, n.70 (2d ed. 1996)..... | 51 |
| 2 WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE (1994) | 47 |
| 2-8 NIMMER, <i>supra</i> § 8.11 [A] | 50 |
| 3-12 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 [A] [1] (2004)..... | 45 |
| 3-12 NIMMER, <i>supra</i> § 12.06..... | 57 |
| 4-13 NIMMER <i>supra</i> § 14.04..... | 46 |
| 4-13 NIMMER, <i>supra</i> § 13.08 (2004) | 45 |

| | |
|--|----|
| 4-14 NIMMER, <i>supra</i> § 14.04 [C] [2]..... | 47 |
| DRATLER, INTELLECTUAL PROPERTY LAW § 6.01 [3] [a]..... | 53 |

CONSTITUTIONAL PROVISIONS

| | |
|--|---|
| U.S. Const., art. I, sec. 8, cl.8..... | 3 |
|--|---|

INTERESTS OF AMICI

Amici are individual members of the Berkman Center for Internet and Society at Harvard Law School. The Berkman Center is a research program founded to explore cyberspace, share in its study, and help pioneer its development. We represent a network of faculty, students, and fellows working to identify and engage with the challenges and opportunities of cyberspace.

William W. Fisher III is the Hale and Dorr Professor of Intellectual Property Law at Harvard Law School and Faculty Director of the Berkman Center. Charles R. Nesson is the William F. Weld Professor of Law and Faculty Co-Director of the Berkman Center. Jonathan Zittrain is the Jack N. and Lillian R. Berkman Assistant Professor of Entrepreneurial Legal Studies and also a Faculty Co-Director. John Palfrey is Executive Director of the Berkman Center and Diane Cabell is the Director of Clinical Programs. All of the above have taught, published and/or practiced extensively in the field of Internet legal issues. Renny Hwang and Ory Okolloh are clinical students at Harvard Law School.* These *amici* file this brief in their individual, not institutional, capacities.

Amici submit this brief in response to the request of the Court to raise and address the most significant factual, procedural and substantive issues that are relevant to this action. *Amici* do not represent any of the parties, nor do we see our role as necessarily taking positions on the proper outcome of the issues. We hope to help the Court strike a fair balance among legitimate and often competing interests in this matter--upholding the valid rights of Plaintiffs as copyright holders, the due process and substantive protections of the Defendants, and the promotion of judicial efficiency--and to express this balance in recognition of the distinct factual circumstances and the distinct legal implications that may be raised by the Defendants in these cases.

* Other Harvard Law School students who assisted with the preparation of this brief were Aaron Kotok, Brad Carrick, Jason Lichter, Jeffrey Engerman, Agnes Li, Jinfei Zhang and Yuanshi Bu.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate purpose of U.S. Copyright law is to foster the growth of learning and culture for the public welfare. U.S. Const., art. I, sec. 8, cl. 8. The U.S. Copyright Act, 17 U.S.C. § 107-1332, aims to achieve this goal by providing incentives for authors to create new work by giving them limited monopoly rights in the products of their creativity. 17 U.S.C. § 106. In a manner designed to promote the greatest public access to the products of creativity, the law balances these property rights with certain limitations and requirements. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

The Plaintiffs in this action are music recording companies that have filed copyright infringement suits against individual consumers. Plaintiffs alleged that these individuals have engaged in unauthorized file-sharing activities, thereby infringing upon the Plaintiffs' exclusive rights of reproduction and distribution. *See, e.g., Plaintiffs' Complaint for Copyright Infringement, Noor Alaujan, ("Pls.' Compl.")*.

We recognize that in many instances it is likely that similarly positioned defendants have indeed violated one or more of the exclusive

rights of the copyright holders, and in such situations the most appropriate disposition for the parties may be to settle these claims expeditiously.

However, we focus this brief on the several unresolved factual and legal issues in these cases which may be relevant in some, though likely not all, of the joined actions at issue here.

As a threshold matter, we note that the claims aggregated in a single paragraph of the Complaint¹ require a more complex analysis by which two distinct actions—copying (downloading) and making works available to third parties for further reproduction (uploading)—may each be the basis of infringement of two distinct copyrights—the right to reproduce and the right to distribute. It is important to recognize that particular factual circumstances or defenses that may excuse or reduce liability for downloading may be inapplicable to activity involving uploading and *vice versa*. As well, conduct that does not infringe the Plaintiffs’ rights of reproduction may well infringe their rights of public distribution.

The major challenge for Plaintiffs in this case is one of proof. The exhibits presented at this point² do little to indicate whether copyrighted

¹ Pls.’ Compl. ¶ 15.

² *Id.*, Exhibits A and B.

material was actually copied or distributed in any particular case, or if the Plaintiffs have correctly identified the Defendants in every instance.

As to downloading, some Defendants may have claims under the exception of fair use, especially in light of the unsettled areas of substantive law around the meaning of and impact on the “market.” For example, an argument might be made, although it is not a compelling one, that downloading for sampling of potential purchases can be a noncommercial fair use. The Court may wish to permit Defendants to present such fair use defenses. However, other factors in the fair use analysis may not favor Defendants; therefore any decision to allow evidence on these points must be weighed against the efficiencies produced by joinder.

Fair use arguments in regard to uploading are weak. The dominant legal question (and strongest substantive argument for Defendants) in regard to this type of activity is whether simply placing works in a location that is accessible by others is sufficient to constitute an infringement of the Plaintiffs' rights of public distribution.

Lastly, the difficulty in disabling the uploading function of the file-sharing software may support a finding of innocent intent in regard to the

distribution claims which could justify a reduced damage award, although it is unlikely to affect liability itself.

Given the potential for variation of factual and legal issues among the various Defendants, the Court may wish to reconsider whether these cases are properly joined. In the alternative event that the parties involved pursue a course of settlement, the Court may wish to play an active role in this process, imposing reasonable parameters on the amount of the settlements.

II. FACTUAL BACKGROUND

A. Overview of KaZaA

Plaintiffs Exhibit B³ appears to reflect activity involving a user registered on KaZaA which is a peer-to-peer (P2P) software application that allows individual users to connect to each other, search each other's computers for files and then download files from each other.⁴ A P2P service is one where individual users connect to each other directly. KaZaA is one of several P2P software applications. Unlike earlier file-sharing applications such as Napster, KaZaA does not rely on any central point of management. A KaZaA user never deposits files in any central location; rather, he simply puts or leaves them on his personal computer in a "shared folder" that is accessible by other KaZaA users who can then choose for themselves which files in the first user's folder they wish to copy onto their own computers.

In downloading, the user copies a file from another source; in uploading, files on the user's computer are transmitted to other computers. It is the downloader who decides which file to copy from another P2P source and who issues the technical request for transmission of that copy; the

³ *Id.* Ex. B.

uploader merely cooperates with that request. The KaZaA platform operates in a similar manner to the Grokster network system described by the district court in *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1032 (C.D. Cal, 2003).

With KaZaA, it is easy to begin file sharing, but much more difficult to shut this function off.

The process to install KaZaA on a user's computer is fairly straightforward. However, the user may not be aware of the operational significance of the program's default settings. Once installed, there are several ways to begin file sharing, but by default, KaZaA starts itself immediately when the user turns on his computer. The program runs in the background, pre-set with the file-sharing feature turned "on" and configured to allow an unlimited number of uploads at a time. Many users may not be aware that the program is running continuously in this fashion.

Unless the user changes these default settings, KaZaA will begin to run automatically every time the user turns on his computer.

⁴ See SHARMAN NETWORKS LTD., KAZAA QUICK GUIDE (last visited on May 2, 2004) at <http://www.kazaa.com/us/help/quickstart.htm>.

There are other ways to start KaZaA. The user can always click on the KaZaA program icon which was automatically installed by default on the user's desktop and in the Windows taskbar (located at the bottom of the computer screen).

When a user downloads a file from another KaZaA user, by default that copy is stored in the publicly shared folder, which means that it becomes immediately available for copying by others on the KaZaA network. KaZaA defaults to creating a shortcut to open this folder on the user's desktop; however the user may not be aware where exactly the folder itself is located on his computer.⁵

Under the default settings, if the user wants to immediately discontinue file sharing, he must either select the "Disconnect" option under the "File" menu, or shut down the KaZaA program entirely. Unlike most computer applications, clicking on the "x" button on the top right-hand corner of the KaZaA program does not shut down KaZaA. This action merely hides the KaZaA program from the screen while the program continues to run the program in the background. To actually shut down the

⁵ The full path to the folder is usually defaulted to C:\Program Files\KaZaA\My Shared Folder.

program, the user must then right-click the KaZaA icon located in Windows taskbar and choose the “close” option. KaZaA does give a warning about the fact that the “x” button does not shut down KaZaA and gives the user alternate instructions on how to do so in a pop-up window; the user has the option to “not show this [warning] message again.”

B. Disabling File-Sharing Features in KaZaA

Disabling the default file-sharing features in KaZaA is a complicated process due to an intricate series of steps within the software itself. In addition, the available resources that detail how to disable file sharing are often inconsistent or provide incomplete instructions.

To change or disable the uploading function, the user must go through several steps. He must open the “Options” window by selecting “Options” under the “Tools” menu. Then the user must then select the “Sharing” tab in order to access the sharing options and change them.

Numerous college websites describe in detail how to disable the file-sharing features of KaZaA and other P2P programs, for reasons ranging from avoiding possible copyright liability to reducing strain on personal or ISP bandwidth. As one college administrator notes, “many people are

unaware, that if file-sharing is on when they download a music or movie file, they automatically turn their computer into a server, providing those files to others across the Internet.” CENTER FOR INFORMATION TECHNOLOGY NEWS, OBERLIN COLLEGE, DISABLING FILE SHARING (last modified Oct. 30, 2002).⁶ Others have highlighted the difficulty of disabling the file-sharing feature in P2P programs, because these programs “continue to run on your computer even if you click on the '*X*' to close the main program window” allowing uploading to occur even when one may think they have cut their connection to the service. *See* PENN STATE AUXILIARY AND BUSINESS SERVICES, PENNSYLVANIA STATE UNIVERSITY, HOW TO TURN OFF PEER TO PEER FILE SHARING PROGRAMS (last modified May 9, 2002).⁷

The websites that describe how to disable the file-sharing feature typically offer different instructions for the same programs. Some instructions for disabling the feature on KaZaA list one or two steps (NETWORK SECURITY CENTER, UNIVERSITY OF CHICAGO, DISABLING FILE SHARING IN KAZAA, UNIVERSITY OF CHICAGO

⁶ *At* <http://www.oberlin.edu/cit/docs/general/filessharing.html>.

⁷ *At* http://www.rescom.psu.edu/pages/peer2peer/pages/peer2peer_turnoff.htm.

(2001)⁸) while others list as many as twenty (UNIVERSITY OF DELAWARE, TURNING OFF AND DISABLING FILE-SHARING PROGRAMS (last modified Sept. 9, 2003) ⁹). Many of these instructions include using options and commands only accessible from the “Advanced” tabs in particular menus, something the typical computer user may find intimidating.

The varying sources of instructions on disabling file sharing and the inconsistencies among them demonstrate that it can be extremely difficult for a non-expert computer user to shut down their file-sharing capability. This may be relevant to a finding of innocent intent as described hereafter.¹⁰

C. Plaintiffs' Procedure for Identifying Infringing Materials and Users

Plaintiffs' exhibits¹¹ lack details as to the procedure used by the Plaintiffs to identify the Defendants. However, previously-filed declarations in similar litigation describe the standard means of obtaining identity information used by the Plaintiffs' trade association, the Recording Industry Association of America (RIAA). *See* Declaration of Jonathan Whitehead in

⁸ *At* <http://security.uchicago.edu/peer-to-peer/kazaa/index.shtml>.

⁹ *At* <http://www.udel.edu/topics/bandwidth/disabling.html>.

¹⁰ *See* Section III (C) (2), *infra*.

Support of Motion for Leave to Take Immediate Action, *Atlantic v. Does 1-3*, No. 1:04-cv-00475-RCL (D.D.C. filed March 23, 2004) (Whitehead Decl.).

The process begins with the RIAA conducting searches of the Internet, particularly “file-copying services,” including P2P applications such as KaZaA, “for infringing copies of sound recordings.” *Id.* at 5. Having located a particular P2P user that they believe to be “offering for distribution...illegal copies of sound recordings,” the RIAA then uses the P2P software functionality itself to collect a list of all the shared files being made available under that P2P username and records screen images of such file listings. *Id.* at 7.

Having identified a P2P username, the RIAA then associates the username with a specific Internet Protocol (“IP”) address. *Id.* at 5. The declaration contains no information as to how this association was made other than it being the “general...result” of the searches conducted by the RIAA. *Id.* The IP address noted by the RIAA will then be used to “ascertain, in general terms, the ISP that provides the [alleged] infringer

¹¹ See Pls.' Compl. Ex. A and Ex. B.

with access to the Internet” via “publicly available databases” that allow for determining which ISP had been assigned the IP address in question. *Id.*

An IP address is a number that is assigned by a user’s Internet service provider (“ISP”) to represent a “particular computer or server using the Internet.” *Id.* IP addresses range from 4 to 12 numbers in length.¹²

Whether the IP address identifies a *computer* or a *server*, however, is an important distinction. Many users have local home or office networks that allow multiple computers to share a single connection to their ISP. In these cases, the IP address will frequently be assigned to this local network’s server (also called a “router”) resulting in a single IP address simultaneously representing all the computers sharing that particular connection, just as a single street address is used for all occupants living in the same house. *See* Stephen J. Bigelow, *Use Your Bandwidth as You Wish*, ComputerUser.com, January 2003. In the presence of a local network, therefore, the IP address will not necessarily identify the particular computer that has been used to access the P2P system, much less which human being was operating it.

¹² CISCO SYSTEMS, INC., IP ADDRESSING AND SUBNETTING FOR NEW USERS: UNDERSTANDING IP ADDRESSES (last modified Dec. 26, 2003) at http://www.cisco.com/warp/public/701/3.html#ustand_ip_add.

In sum, the RIAA's procedure for identifying infringing users is a multi-step process filled with multiple associations and assumptions which mask potential points of failure and variation as among the many Defendants.

III. ARGUMENTS THAT THE COURT MIGHT CONSIDER IN LIGHT OF THE UNRESOLVED FACTUAL AND SUBSTANTIVE ISSUES IN THESE CASES

A. Fact-based Arguments

1. There May Be Errors in Identifying Infringing Materials

The threshold issue to address when examining the claims before this Court is whether there was actual infringement in each of the instances claimed by the Plaintiffs. It is an open question whether the Defendants were even in possession of copyrighted material. There are two reasons why this fact cannot be definitively ascertained from the Plaintiffs' exhibits which include lists of files that the Defendants have allegedly infringed.

First, KaZaA does not guarantee the quality and authenticity of its files because of its truly distributed nature. P2P systems allow each individual user to select any title they wish to name a file. As with file folders in a filing cabinet, one must open the file folder and pull out the documents inside it in order to determine its true contents. If one simply relies on the title written on the folder's tab, one may discover that the title does not relate to the contents or that the folder is empty.

Further, many songs are "spoofed." Decoy files bearing a song's title were purposely deployed throughout P2P networks in order to make it more difficult to locate a real version of a song. These decoys proliferated through the P2P network much like real songs would do because users who download them often leave the decoys in their shared folders. Many decoys lead off with a brief segment of the recording before changing to mere noise.

¹³ So far, the Plaintiffs have only produced lists of file titles; the actual content in any such file, however, may be a legally purchased digital audio file, it may be a spoof, it may contain non-copyrighted material about that particular song, or it may contain totally unrelated content. The RIAA has admitted that "it does not routinely require its 'Internet copyright enforcers' to listen to the song that is allegedly infringing."¹⁴ Although the RIAA claimed to have "listened to a sample of the music files" allegedly offered by a Defendant,¹⁵ that claim does not negate the possibility that the file is a decoy, and in any event this claim appears to indicate a change in practice made after the filing of this case.

¹³*Digital Decoys Are Making Frustrated Pirates Say 'Arrr'*, MTV.com, March 11, 2003 at http://www.mtv.com/news/articles/1470464/20030310/linkin_park.jhtml?headlines.

¹⁴ See Nick Wingfield and Ethan Smith, *The High Cost of Sharing*, Wall Street Journal Classroom Edition, September 9, 2003.

***Second, there may also be concerns about the level of care exercised by the Plaintiffs in conducting the specific investigation in this case. In particular, Pls.’ Compl. Ex. A lists seven copyrighted recordings that the Plaintiffs claim were the subject of copyright infringement by Defendants. Of the seven allegedly infringing files, two are not found anywhere within the thirty-eight pages of screen images¹⁶ shown in Ex. B which lists files allegedly available through KaZaA from a user identified as “sa6alt@KaZaA.”

2. There May Be Errors in Identifying Infringing Users

An analysis of the Plaintiffs’ process for identifying infringing users reveals several areas in which misidentification of Defendants may occur. While the Plaintiffs portray their process as establishing a certain link between the P2P username and the infringer, this process is more accurately understood as a multi-part and multi-party chain: one link connects the P2P username with an IP address, another link connects that IP address with the

¹⁵ Whitehead Decl. at 5.

¹⁶ Both “Fast Car” by Tracy Chapman and “I’m With You” by Avril Lavigne are named in Exhibit A, but do not appear within the listings presented in Exhibit B.***[**NOTE by authors added after submission of this brief: This statement is inaccurate. It was based on docketed exhibits which subsequently turned out to be incomplete. Both songs were in fact included in Pls.’ Ex. B as submitted to the court.**]

ISP account holder¹⁷, and a last, final link connects the ISP account holder with the individual using that P2P username to share the allegedly infringing files. Each of these links must remain intact for the correct individual to be identified.

At each stage of the process, the technical complexities of the Internet, as well as the realities of the way personal computers are being used, inject uncertainty into the process of identifying the persons anonymously or pseudonymously sharing files through their P2P usernames. Well-publicized instances of apparent mistake have yet to be conclusively explained by any of the parties involved, indicating that there may be other, thus far unidentified, flaws in the identification process. *See* Declan McCullagh, *RIAA Apologizes for Threatening Letter*, CNET News.com, May 12, 2003.¹⁸ Ultimately, it remains an open question whether the combination of an IP address, date and time constitute sufficient information to accurately identify an alleged infringer. There are several particular

¹⁷ The identity of the defendant in this action was obtained via a subpoena under the Digital Millennium Copyright Act, which requires that an Internet service provider disclose “information sufficient to identify the alleged infringer of the material described in the notification.” 17 U.S.C. § 512 (h) (3). However, this method of obtaining information regarding the identity of P2P file sharers has since been invalidated. *See* Section III (2) (b), *infra*.

situations where mistakes may occur in the process of identifying an alleged infringer through the use of an IP address.

a. The IP Address Observed by the Plaintiff May be Incorrect

There may be errors in the process by which Plaintiffs observe the IP address that they subsequently associate with a Defendant. The technical vulnerabilities of certain P2P networks are such that “innocent users could in theory be wrongly accused of sharing copyrighted music.” *Innocent File Sharers Could Appear Guilty*, The New Scientist, October 1, 2003.¹⁹ For example, there are several methods by which P2P applications may be manipulated to “look as if a user is illegally offering files for download” by falsely displaying an incorrect IP address. *See have2Banonymous, P2P Entrapment – Incriminating Peer to Peer Network Users*, Sept. 27, 2003.²⁰ Such techniques call into question whether the IP address observed by the Plaintiffs is properly associated with the P2P account under investigation.

¹⁸ At http://news.com.com/2100-1025_3-1001095.html.

¹⁹ At <http://www.newscientist.com/news/news.jsp?id=ns99994222>.

²⁰ At http://members.ozemail.com.au/~123456789/p2p_entrapment.pdf. While this research was conducted P2P applications other than KaZaA, similar techniques are likely possible on KaZaA.

b. Error By the Plaintiff or the ISP May Identify an Incorrect ISP Account

The Plaintiffs' identification process assumes the method by which the IP address is recorded and transmitted to the ISP, as well as the ISP's retrieval of account information, are not susceptible to error. Recent events have proven this assumption to be ill founded. In one well-publicized case, a defendant was found to have a computer incapable of running the P2P software in question. John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, New York Times, Sept. 25, 2003. Although the plaintiffs in that case failed to offer an explanation for the error, outside observers have speculated that, given the unwieldy format of IP addresses, the most likely cause was manual error on either the part of the plaintiffs or of the ISP.²¹ Chris Gaither, *Recording Industry Withdraws Suit*, Boston Globe, Sept. 24, 2003. Other cases raise similar concerns, including one where an individual not owning a computer was sued (*41 More Sued over Music Downloads*, CNN.com, Dec. 4, 2003)²² and another where the individual did not use the P2P application in question and did not recognize

²¹ IP addresses are 4 to 12-digit numbers, with a format such as: 141.154.225.24.

²² At <http://www.cnn.com/2003/TECH/internet/12/04/downloading.music.ap/> (last visited on Apr. 27, 2004).

the bulk of songs he was accused of sharing (Katie Dean, *Fan to RIAA: It Ain't Me, Babe*, Wired.com, Oct. 15, 2003.²³). Unless the Plaintiffs can explain the source of these errors, the Court has reason to question the evidence presented concerning the Defendants' alleged infringing activities.

c. The P2P Username May Belong to a Different User of the ISP Account

Even in situations where the correct IP address has been observed by the RIAA and no error has occurred in locating the ISP account, there are several reasons why the holder of the account may not be the same individual who offered the allegedly infringing material under the P2P username in question. In general, the ISP account does not necessarily identify the specific individual, or even the specific computer involved.²⁴

There are at least three situations where the P2P username may not

²³ At <http://www.wired.com/news/digiwood/0,1412,60814,00.html> (last visited on Apr. 27, 2004).

²⁴ In the Whitehead Declaration, the plaintiffs claim that “once provided with the IP address, plus the date and time of the [alleged] infringing activity, the [alleged] infringer's ISP,” they can then “identify the computer from which the [alleged] infringement occurred.” Whitehead Decl. at 6. However, the same declaration also admits that the IP address may represent a “computer or server.” *Id* at 5 (emphasis added). Accordingly, the plaintiffs' assertion is not foolproof: the ISP cannot necessarily identify the specific computer involved, but only the individual named on the ISP account which had been assigned the particular IP address at the time in question.

accurately identify the specific individual engaging in the file-sharing activities.

First, the P2P username may belong to a different user of the same computer. Even when the Defendant's computer is the machine used under the P2P username to make files available for download, there is no way to identify the individual utilizing that P2P username. This is of particular concern in cases where household members share access to a single computer. Liability in these situations is unclear. In the case of parents and minor children, the law would only hold the parent responsible if guilty of either vicarious²⁵ or contributory²⁶ infringement. In fact the parent may have neither the requisite knowledge for contributory infringement nor the control or financial benefit necessary for vicarious infringement. Even less clear are situations where the relationship is not a parent-child relationship, for example a grandfather-grandchild relationship²⁷ or where the parties are unrelated, such as roommates. While there may indeed be some degree of

²⁵ Vicarious infringement would require that parents had control over the infringing activity and also that they financially benefited from it. *Roy Export Co. v. Trustees of Columbia University*, 344 F.Supp. 1350 (S.D.N.Y. 1972).

²⁶ Contributory infringement requires actual or constructive knowledge of the infringing activity, *Sony*, 464 U.S. at 487-8, and a material contribution to the conduct. *Ellison v. Robertson*, 189 F.Supp.2d 1051, 1058-9 (C.D. Cal. 2002).

liability in these situations for the computer owners, it is not certain that the Defendants are necessarily the party directly responsible for the alleged infringement.

Second, the P2P username may belong to the user of a different computer on a home network. When several computers are sharing a single Internet connection, it may be impossible to determine whether the individual acting under the P2P username was the ISP account holder, a child, a roommate, or anyone else sharing the access. Home networks have become increasingly popular in recent years; they have been installed in an estimated 7.8 million US households. Press Release, Internet Home Alliance, Internet Home Alliance Announces Results of its Most Comprehensive Connected Home Market Study to Date (Jan. 27, 2004).²⁸ Since all computers utilizing the network would appear to the ISP to have the same IP address, the only identity that could be obtained would be that of the ISP account holder; any of the computers utilizing the network could be the computer from which a particular P2P username's file-sharing

²⁷ See Ted Bridis, *Music Industry Sues Internet File Share Users*, San Francisco Examiner, Sept. 9, 2003.

activity occurred.²⁹ Again, the link between P2P username and the Defendant is less than fully reliable.

Finally, the P2P username may belong to the individual accessing a wireless network without authorization. Wireless networks may allow neighbors and even passers-by to share an Internet connection without authorization of the ISP account holder. Such easy accessibility introduces another potential source of error in the identification process. Wireless networks have become extremely popular, with wireless hardware sales for 2003 estimated at \$1.7 billion and many networking units priced well below \$100 each. Press Release, In-Stat/MDR, 2003 Numbers Indicate that Joe Schmo's got Wi-Fi (Jan. 14, 2004).³⁰ Wireless networks generally have a range of at least 150 feet, meaning that a neighbor within the same apartment building or dormitory would be within range to access the Internet via the network server. *See, generally*, COMCAST, COMCAST HOME

²⁸ *At*

http://www.internethomealliance.com/press_room/press_releases/docs/State%5Fof%5Fthe%5FMarket%5F2003%5FRelease%5F3%2Epdf.

²⁹ Section II (A) (2) (c) discusses liability when a parent is involved. Liability for the actions of a roommate is unclear: while the situation is similar to having the telephone bill in your name, the civil liability requested by the plaintiffs goes far beyond bearing ultimate responsibility for paying the phone company.

³⁰ *At* <http://www.instat.com/press.asp?ID=851>.

NETWORKING, PRODUCT FEATURES.³¹ A practice called “warchalking” has arisen, whereby a series of symbols, similar to the signs used by hobos during the Great Depression to indicate the source of a free meal, are chalked on buildings by laptop Fagins who prowl the streets hoping to pinch a little free access from an unsuspecting victim’s wireless connection. Matt Loney, *Want Wi-Fi? Learn the secret code*, CNET News.com, June 26, 2002.³² In this situation, the ISP would again identify only the ISP account holder and not the actually individual engaged in file sharing. Although wireless networks may be secured against unauthorized access, security problems are widespread.³³ a recent study found that “21 percent of home [wireless] users can access their neighbors’ wireless networks, and 4 percent have ‘accidentally’ logged on, sometimes peeking at files and surfing the Internet through a neighbor’s broadband connection.”

³¹ At <http://homenetworking.comcast.net/features.asp> (last visited on May 5, 2004).

³² At http://news.com.com/2100-1033-939546.html?tag=cd_mh.

³³ This is largely because most wireless networking equipment is sold with the security features disabled by default and, similar to disabling P2P file-sharing features, enabling wireless security can prove difficult for the non-expert. See e.g., LINKSYS, CISCO SYSTEMS, INC., APPLICATION NOTE: IMPORTANT INFORMATION FOR WIRELESS PRODUCTS (last visited on May 5, 2004) (“Linksys products provide several network security features, but they require specific action on your part for implementation”) at <http://www.linksys.com/splash/wirelessnotes.asp>.

Cade Metz, *The Trouble with Wireless*, ABCNEWS.com, Apr. 22, 2004.³⁴

These numbers are not surprising, as many wireless networks do not even have the most basic security features enabled, “leaving the networks wide open for any unauthorized users within range.” NETGEAR, WIRELESS LAN SECURITY (April 2003).³⁵ Again, the identity of the actual file-sharer is not clear merely from the name on the ISP account.

In light of the foregoing analysis, it is suggested that the Court keep in mind that there are several possible sources of error in the Plaintiffs’ identification process: the allegation of sharing copyrighted material may be incorrect, technical or human error could implicate an innocent party, and others sharing Internet access with the Defendant, legitimately or not, may be the ones sharing files.

³⁴ *At*

http://abcnews.go.com/sections/scitech/ZDM/wireless_troubles_pcmag_040422.html.

³⁵ *At* http://www.netgear.com/pdf_docs/WLAN_Security_Concepts.pdf. Less than half of wireless networks surveyed had even the most basic security features enabled.

B. Procedural Argument

Given the Possible Variations in the Factual Situations, Evidentiary Situations and Affirmative Defenses, the Court Might Reconsider Joinder in this Case

We acknowledge that joinder is generally favored under the Federal Rules. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 724, (1966) (“Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.”). However, it is reasonable for the Court to reconsider whether the unrelated Defendants in this case are properly joined, particularly in light of possible factual differences and evidentiary situations, and given that the Plaintiffs have so far made a weak factual showing and with respect to only a few of the Defendants.³⁶

There are two specific requirements for joinder under Federal Rule 20: “(1) a right to relief must be asserted by, or against, each plaintiff or Defendant relating to or arising out of the same transaction or occurrence, or series of transactions or occurrences; and (2) some question of law or fact

³⁶ *See* Pls.’ Compl., Exs. A and B.

common to all the parties must arise in the action."³⁷ The determination of whether the situation constitutes the same transaction or occurrence for purposes of Rule 20 is determined on a case-by-case basis.³⁸

The Plaintiffs in this case have so far failed to allege that the Defendants acted pursuant to any common plan, or that liability arises out of a common transaction, occurrence, or series of transactions or occurrences. Plaintiffs have only alleged that the Defendants used “an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others.” *See* Pls.’ Compl. ¶ 15. It is unclear whether the same file-sharing software was being used, whether similar material was made available, and whether these transactions were connected or occurring at the same time. In addition, while there may be a common question of law, the Defendants in this case could be in factually dissimilar situations and may raise different arguments and defenses, which are typically fact-specific. *See Rapport v. Spielberg, Inc.*, 16 F. Supp.2d 481 (D. N.J. 1998).

³⁷ FED. R. CIV. P. 20

While the Plaintiffs may argue that the Defendants allegedly used the same medium to infringe Plaintiffs' copyrights, or that the Defendants committed a similar wrong against some or all of the Plaintiffs, their arguments are not dispositive. *See Nassau Cy. Ass'n of Ins. Agents v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir. 1974) (refusing joinder in an antitrust violation case where 164 insurance companies are alleged to have cheated hundreds of agents in the same way because there was "no allegation of conspiracy or other concert of action"). *See also DIRECTV v. Loussaert*, 218 F.R.D. 639 (2003) ("Although the same transaction or occurrence requirement of Rule 20 may be construed liberally, this does not mean joinder is proper in the absence of a transactional link. While DIRECTV alleges all defendants have violated the same statutes under which it is entitled to relief, the alleged violations of each defendant did not arise out of the same transaction or occurrence."). *But cf. DIRECTV, Inc. v. Barrett*, 2004 U.S. Dist. LEXIS 5086 (Mar. 19, 2004) (exercising discretion and refusing to sever by liberally interpreting "transaction" and finding that since claims against the defendants involve at least one common question of

³⁸ *Id.*

law or fact the interests of judicial economy outweigh any potential prejudice to the defendants, but reserving the right to sever under Rule 20(b)).

In *BMG Music, et al. v. Does 1-203*, Case No. CV-04-650 (E.D. Pa. Mar. 5, 2004), Judge Newcomer found severance appropriate because:

Nothing in the Complaint indicates that the alleged claims are the result of the same incident or incidents; and...the claims against the different Defendants will require separate trials as they may involve separate witnesses, different evidence, and different legal theories and defenses, which could lead to confusion of the jury. *United States v. 1071.08 Acres of Land, Yuman and Mahave Counties, Arizona*, 564 F.2d 1350 (9th Cir. 1977); FED. R. CIV. P. 21; FED. R. CIV. P. 42 (b). Moreover, the Court finds that there will almost [be] separate issues of fact with respect to each Defendant. FED. R. CIV. P. 20.

Judges in other district courts have also recognized concerns about the suitability of joinder in similar suits filed by the recording industry. *See Interscope et al. v. Does 1-25*, Case No. 04-CV-197 (M.D. Fla. Apr. 1, 2004) (ordering severance because of the unreasonable prejudice and expense to which the defendants would otherwise be subjected).

In another analogous situation, several district courts have refused to allow a company that distributes television programs through satellite systems to join hundreds of otherwise unrelated individuals for allegedly

using pirated access boxes to obtain satellite signals without paying for them. *See e.g., DIRECTV v. Garbutt et al.*, Case No. 03 C 3499 (June 3, 2003) (dismissing DIRECTV's complaint without prejudice because plaintiff improperly seeks to join separate and distinct defendants in the same lawsuit; DIRECTV must file separate lawsuits or submit a brief explaining the joinder of defendants in one lawsuit).³⁹

The Court has valid concerns regarding judicial efficiency and the need to mitigate the risk of disparate outcomes. In addition, Plaintiffs in this case would bear a heavy burden if required to produce factual evidence with respect to each individual file. However, given the variety of possible factual situations that may exist, it is of no less concern to protect the due process rights of the individual Defendants in consideration of the burden and costs they face by being at the receiving end of inexact complaints and proof by aggregation.

C. Substantive Arguments

1. Certain Defendants May Have a Fair Use Defense

Some Defendants may be able to establish facts that warrant protection from liability under the fair use doctrine. The notion that certain

³⁹ For other similar cases, *see* <http://www.directdefense.org/files/>.

otherwise-infringing uses of a copyrighted work do not give rise to liability dates back to *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), and was codified in 17 U.S.C. § 107, which reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Note that these factors must be balanced “in light of the objectives of copyright law.” See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003). In addition, “other relevant factors may also be considered.” *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000). Nevertheless, most courts when construing the fair-use doctrine have

limited their attention to the four factors specified in Section 107. The meanings of those factors and their possible application to this case are reviewed below.

a. Purpose and Character of Use

Judge Leval, an influential interpreter of and commentator on the fair-use doctrine, has contended that “the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”

Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (Mar. 1990) (emphasis in original). In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) [citations omitted], the Supreme Court borrowed heavily from Leval in its articulation of the standard:

The central purpose of this investigation is to see...whether the work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character...it asks, in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use...the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

The argument that altering the technical format of the files from CD audio format to MP3 format constitutes a transformative use of works has been made, but not successfully. *See, e.g., UMG Recordings*, 92 F. Supp. 2d at 351 (stating that mere retransmission in another medium is an insufficient basis for transformation) and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (same).⁴⁰

As to downloading, Defendants might invoke the first factor in a different way by establishing that their copies were made for personal, noncommercial use. Generally speaking, the less “commercial” the character of a defendant’s behavior, the more likely it is to be deemed “fair.”

To be sure, the application of this principle to the facts of the present case is not quite as straightforward as it might appear. In the *Napster*

⁴⁰ In *UMG Recordings*, 92 F. Supp. 2d at 350, the court addressed in passing an argument made by defendant that MP3 files do not constitute reproductions under the Copyright Act because they are not physically identical to the sounds on CD. The court dismissed this argument on the grounds that “some slight, humanly undetectable difference between the original and the copy” does not constitute grounds for avoiding liability. *Id.* However, the court did not address the fact that not all MP3 files are alike. *See* Jim Esch, *Slicing and Dicing MP3 Bit Rates* (last visited on May 15, 2004)), at <http://www.digitalprosound.com/Htm/WebAudio/2000/Oct/MP3bitrates.htm>. MP3 files can be encoded at different “bit rates” – the lower the bit rate, the smaller the file and the worse the sound quality. *Id.* An MP3 file encoded at 64kbps is roughly equivalent to FM radio, which is of a noticeably lower fidelity than audio CDs. As such, the argument that MP3 files are not reproductions may have more validity than the court in *UMG Recordings* originally thought. Whether MP3 files might nevertheless be viewed as

decision, the Ninth Circuit interpreted the term “commercial” quite broadly, holding that “repeated and exploitative copying of copyrighted works,” even without direct economic benefit, is sufficient for a court to find a commercial use. *Napster*, 239 F.3d at 1015.

However, *Napster's* fair use reasoning has not been adopted by other circuits, perhaps due to a perceived fallacy in the court's analysis. See Michael W. Carroll, in *A Brief Analysis of A&M Records, Inc. v. Napster, Inc.*, 9 Vill. Sports & Ent. L. Forum 5, 17-21 (2002). Prof. Carroll argues that the Ninth Circuit erred in aggregating the users of the Napster service so as to apply the fair use factors to the “average” user resulting in generic constructs that may not apply, factually or equitably, across the entire spectrum of individual Napster users. While some number of Napster users undoubtedly used the service in order to acquire commercially valuable goods at no cost, it is also possible that others downloaded files exclusively for sampling, space shifting, or some other noncommercial personal use.

Where this Court can make the *factual* determination that Defendants either deleted the MP3 files after sampling them, or created the MP3 files

infringing via the doctrine of substantial similarity is another matter, beyond the scope of this footnote.

exclusively for space-shifting purposes from audio CDs they had previously purchased, this court can also make the *legal* determination that such uses are noncommercial. Carroll at 20-21.

As to uploading, by contrast, a fair use argument based on a noncommercial characterization seems less tenable, even if it were possible to show that every party uploading from Defendants also restricted themselves to noncommercial uses. *See Napster*, 239 F.3d at 1018 (noting that the additional element of distribution to the general public present in that case undercut the “shifting” analysis of *Sony*). Nonetheless, the Ninth Circuit introduced some measure of flexibility in *Kelly*, 336 F.3d at 818, when it implicitly established a spectrum of commerciality, stating that because the defendant “was neither using [plaintiffs’] images to directly promote its web arguably a direct economic benefit, site nor trying to profit from [plaintiffs’] images...the commercial nature of the use weighs only slightly against a finding of fair use.” The argument can be made that the use in question, even if commercial, is sufficiently comparable to the use in *Kelly* to be accorded only slight negative weight under the first factor in the fair use analysis.

**b. Nature of Copyrighted Work and Amount and
Substantiality of Portion Used**

The nature of the copyrighted work (the second factor) and the substantiality of the portion used (the third factor) appear quite clearly to favor the Plaintiffs in virtually all relevant fact patterns. With respect to the nature of the copyrighted work, creative recordings “fall[] within the core of the copyright’s protective purposes” and are therefore entitled to the highest level of protection. *Campbell*, 510 U.S. at 586. As the MP3 files in question all presumably contain previously published songs, the benefit to the Plaintiffs of the second factor may be dampened. But since the MP3 files (other than those that constitute “spoofs”) presumably contain entire songs, the third factor “militates against a finding of fair use.” *Kelly*, 336 F.3d at 820.

c. Market Impact

Defendants may be able to argue that the effect of P2P file-sharing (whether downloading or uploading) on the *current* market for CD sales is minimal, and its impact on any *potential* market is unknown, hence the fourth factor in the fair use analysis falls in their favor. Note that this factor

is somewhat intertwined with the commercial-noncommercial assessment performed when determining the purpose and character of the use.

Commercial uses carry with them a presumption of market harm, whereas noncommercial uses require the Plaintiff to prove harm to the market or to a potential market. *Sony*, 464 U.S. at 451.

Identification of the appropriate market is a critical step in analyzing the fourth factor. Quite frankly, however, market definition is still unresolved in this context. To the extent the current market is accurately represented by audio CD sales,⁴¹ there have been numerous studies performed to date, four of which were cited in *Napster*, 239 F.3d at 1016-18. Unfortunately, the results of the cited studies were conflicting, and each one is open to critique on methodological grounds. *Id.* A more recent study has determined that downloads have a statistically insignificant effect on sales. *See* Felix Oberholzer and Koleman Strumpf, *The Effect of File Sharing on*

⁴¹ The extent to which MP3 files are perfect substitutes for audio CDs is also subject to debate. *See* the preceding footnote, *supra*, for a discussion of how MP3 files encoded at low bit rates may in fact be noticeably inferior to audio CD sound quality. In *Kelly*, 336 F.3d at 821 n.37, the court pointed out that “in the unique context of photographic images, the quality of the reproduction may matter more than in other fields of creative endeavor.” The court in *Kelly* emphasized the quality distinction in holding that the creation of thumbnail images constitutes a fair use. *Id.* Defendants can make the argument that MP3 files, particularly small, low bit-rate MP3 files, are more analogous to thumbnail images than to perfect reproductions.

Record Sales: An Empirical Analysis (March 2004).⁴² However, this study has also come under attack by industry consultants and academics alike. See John Schwartz, *A Heretical View of File Sharing*, New York Times, Apr. 5, 2004, and Stan Liebowitz (detailing concerns he has put to Professors Oberholzer and Strumpf) at http://www.utdallas.edu/~liebowit/knowledge_goods/kolemanletter.htm.

The Plaintiffs may suggest that there remains a potential market (perhaps for online music sales) that has been harmed, *ex ante*, by Defendants' activities. However, no empirical study has conclusively established a deleterious effect of file sharing in that market.

Without such proof of negative market impact, which is generally deemed the most critical factor in a fair-use analysis,⁴³ Plaintiffs' arguments in favor of injunction and damages are compromised. See *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 U.S. 539, 566 (1985) (this factor "is undoubtedly the single most important element of fair use"). While it is likely not coincidental that the increase in the usage of P2P applications for sharing music files in the past several years has been accompanied by a

⁴² At http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

decline in sales of sound recordings, the actual impact of file sharing on music sales has neither been accurately estimated nor convincingly proven. The RIAA has admitted that P2P is just “one factor” of several that are hurting music sales. *See* Jay Lyman, *RIAA Ends Amnesty Offer in Face of Lawsuit*, eCommerce Times, Apr. 20, 2004, at <http://www.ecommercetimes.com/perl/story/33487.html>. Other factors mentioned by the RIAA include economic conditions and competing forms of entertainment that are displacing legitimate music sales. *Id.*

In summary, fair use is an *ad hoc*, fact-specific defense and therefore difficult to apply to joined cases. The Court should thus remain sensitive to the possibility that some of the Defendants may be able to present valid fair use defenses, while recognizing that many may not. As a general matter, the fair-use arguments that might be deployed to justify uploading are very weak. Some of the arguments that some of the Defendants might invoke to justify downloading are stronger. In particular, Defendants who downloaded songs solely for sampling purposes who might find protection

⁴³ Some argue that the first factor—whether or not the use is transformative—should be the most important factor. *See* Section III (C) (1) (a), *supra*.

under the logic of *Sony*, despite the fact that the Ninth Circuit in *Napster* did not recognize such a defense.⁴⁴

2. The Defendant Who Had Neither Awareness Nor Intent to Distribute or to Copy May Not Be Liable for Infringement or May Be Entitled to Reduction in Damages

a. Copyright Infringement May Require Intent to Copy

Copyright infringement is seen almost unanimously as a strict liability offense. *See, e.g., Educational Testing Service v. Simon*, 95 F.Supp.2d 1081, 1087 (C.D.Cal. 1999) (“There is no need to prove anything about a defendant's mental state to establish copyright infringement; it is a strict liability tort.”); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 366, 382 (S.D.N.Y. 2003) (“The law does not require knowledge to establish copying for purposes of copyright infringement....”).

However, at least one Court goes further, arguing that “copyright infringement is not strict liability, unlike patent infringement, but requires at

⁴⁴ “Space-shifting” has been held to be a fair use. *See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (“Rio [a portable MP3 player] merely makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user's hard drive...such copying is a paradigmatic noncommercial personal use.”). Likewise, so has “time-shifting.” *See generally Sony*, 464 U.S. at 423 (holding that “time-shifting,” where a video tape recorder owner records a television show for later viewing, is a fair use). The Copyright Act also provides fair use exemptions for criticism, educational and other noncommercial uses. 17 U.S.C. § 107.

least intent to copy, although not intent to infringe.” *Pritikin v. Liberation Publications, Inc.*, 83 F. Supp. 2d 920, 923 (N.D.Ill. 1999). While this argument was made in the context of demonstrating that an independently created work that is substantially similar to another work is not infringing if no access is proven, this assertion raises the question of what is the actual knowledge requirement in copyright infringement.⁴⁵

Many cases point out that “unconscious” or “subconscious” copying constitutes infringement. However, one could argue that every case involves either “unconscious” or “subconscious” copying in a particular act. *See, e.g., Whitney v. Ross Jungnickel, Inc.*, 179 F. Supp. 751, 753 (S.D.N.Y. 1960); *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997). For example, one could create a work that copies from another, even if one is unaware that the original work, lodged in the creator’s memory, is the source. *See, e.g., Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff’d sub nom Abkco Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983). None of these cases, however, address the

⁴⁵ The *Pritikin* court cited *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169 (7th Cir. 1997), noting that “[t]he Copyright Act forbids only copying; if independent creation results in an identical work, the creator of that work is free to sell it.” *Pritikin* 83 F.

situation where the alleged infringer is unaware that they are even acting at all, and have no intention to act.⁴⁶

Thus, as the term “copy” is simply “judicial shorthand for the infringement of any of a copyright owner’s exclusive rights” (*Worlds of Wonder, Inc. v. Veritel Learning Systems, Inc.*, 658 F. Supp. 351, 354 (N.D.Tex.1986)), and since those rights include distribution (17 U.S.C. § 106), someone who did not intend to distribute protected works, and who thought that he had prevented this from happening, may not have the requisite intent to copy or distribute. Similarly, this may apply where a Defendant, whether because of his level of sophistication or the technological barriers in place, is unable to control or supervise infringing conduct of which he neither approves nor is aware.

A proper analogy can therefore be made to culpability in vicarious infringement doctrine. Like standard copyright infringement, “lack of

Supp. 2d at 923. This raises the question of whether the intent to copy is necessary for copyright infringement.

⁴⁶ Further, none of the three common variations of infringement detailed in Section III (C) (2) (a), *supra*, consider that a defendant may be totally unaware that any copying (or, for that matter, any act at all) is taking place. Understandably, pre-Internet copyright doctrine did not address the instance where a defendant, without acting at all, appears to violate a copyright holder’s exclusive rights. It may simply have been too difficult to envision without today’s technology, and it is therefore unclear what knowledge requirement applies when any copying that occurs without the defendants’ participation.

knowledge” (in vicarious infringement, of the primary infringer’s conduct) is not a defense. 3-12 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 [A] [1] (2004). However, there is no vicarious liability if the related defendant does not have the “right or ability to supervise the infringing conduct.” *Id.*⁴⁷ Similarly, there may be no copyright liability if the defendant did not have the knowledge or intent to distribute. Although it will be difficult for many Defendants to argue that they lacked intent to download, some may be able to point to the complexity of KaZaA's installation and disabling functions to support a finding that there was no awareness or intent to permit uploading.

b. Innocent Intent in the Copyright Case Law

Section 504 (c) (2) of the Copyright Act provides for an “innocent intent” response to allegations of copyright infringement. 17 U.S.C. § 504 (c) (2). Innocent intent in copyright infringement is not a defense to a claim for infringement, but rather “bear[s] upon the remedies available against...a defendant.” See 4-13 NIMMER, *supra* § 13.08 (2004) where the authors cite three common variations of innocent intent:

⁴⁷ For more on the implications of not acting to distribute, see Section III (C) (3), *infra*.

1. Defendant's work is copied from the Plaintiffs', but this is done subconsciously and in good faith, having forgotten that the Plaintiffs' work was the source. [citing to *Bright Tunes*, 420 F. Supp. 177, *supra*.]
2. Defendant's work is based upon an infringing work furnished by a third party. *See, e.g., Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1930).
3. Defendant consciously and intentionally copies from the Plaintiff's work, with a good faith belief that the conduct is not infringing. *See, e.g., Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962).

The result of demonstrating innocent intent is that a court has the flexibility to reduce statutory damages below the minimum of \$750 to as low as \$200. 17 U.S.C. § 504 (c) (2) . Yet, even when infringement is proven, the court may exercise its discretion in awarding damages.⁴⁸ 4-13 NIMMER *supra* § 14.04.⁴⁹

⁴⁸ *See* Section III (D), *infra*, regarding the effect on innocent intent on remedies available for copyright infringement.

⁴⁹ The precise legal status of these limits is somewhat hazy. The Supreme Court has ruled that to the extent Section 504(c) fails to provide a jury trial right, it violates the Seventh Amendment and is therefore unconstitutional. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). “However, this holding in no way implies that copyright plaintiffs are no longer able to seek statutory damages under the Copyright Act.” *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1192 (9th Cir. 2001). Nimmer explains further: “Eight justices of the Supreme Court have now determined that Congress did not allow for juries to be appointed under Section 504(a), which is therefore unconstitutional; one might therefore conclude that an award of statutory damages cannot ever be invoked against a defendant who demands her right to a jury trial... But in the topsy-turvy world of the Seventh

The burden of proving innocent intent is on the defendant and is “a heavy one.” 2 WILLIAM F. PATRY, *COPYRIGHT LAW & PRACTICE*, at 1175 (1994), quoted in *National Football League v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 476 (S.D.N.Y. 2001). “The defendant must prove that it did not know and should not have known that its conduct constituted infringement.” *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991). Further, the defendant “must not only establish its good faith belief in the innocence of its conduct, [but] it must also show that it was reasonable in holding such a belief.” *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th. Cir. 1990), *cert. denied* 498 U.S. 1109 (1991). Use of the innocent infringer damage reduction “appears to have been limited to cases where the defendant (often unsophisticated) proves that it did not know about plaintiff’s copyright and immediately ceased its infringing conduct upon being made aware of plaintiff’s copyright claim.” *Id.* See also *D.C. Comics Inc. v. Mini Gift*

Amendment, a finding that a statute is unconstitutional typically does not render it inoperative. Whenever the Supreme Court has determined that the particular statute under examination does not accord the right to a jury but the Seventh Amendment so requires in that type of case, the same pattern recurs: Notwithstanding that the Court holds the enactment of Congress unconstitutional, the statute itself goes on functioning.” 4-14 NIMMER, *supra* § 14.04 [C] [2].

Shop, 912 F.2d 29, 35 (2d Cir. 1990) (“The level of sophistication of the defendant in business is an entirely proper means of determining whether or not his infringement was innocent.”)

c. There May be Authority Extending Innocent Intent to Provide Protection Against Liability for Those Who Could not Prevent Infringing Technology or Were Unaware of the Technology’s Infringing Capability

Pritikin, arguing that copyright law is not strict liability because it requires at least the intent to copy, may have significant implications for the application of innocent intent to the file-sharing context. *Pritikin* seems to indicate that a defendant would lack the necessary minimum intent to be liable for infringement, if he is able to show reasonable unawareness of the file-sharing capability of his KaZaA usage, or demonstrate that he made good faith, albeit unsuccessful, attempts to disable the file-sharing capability. Such a case would seem to go beyond subconscious or unconscious infringement because the defendant would not be engaging in any act. Rather, whatever copying may occur may have taken place without the defendant’s involvement.

d. Most Authorities Indicate that Copyright is Strict Liability and Innocent Intent Provides Discretion for Judges and Juries to Reduce Damages

As noted above, a Defendant's lack of knowledge of copyright status, the possibility of unconscious or subconscious infringement, or a low level of sophistication can all lead to reduced damages after a finding of liability. When using KaZaA, it may be unclear to an unsophisticated party that by simply downloading the service and failing to take certain additional affirmative action, the user is making certain files on his computer available to be uploaded by other users. Other, perhaps more savvy users may try to follow a series of instructions from available resources, thinking they have effectively halted file-sharing.

However, the inconsistencies among instructions available on-line for disabling file-sharing in KaZaA demonstrate that it can be very difficult, and perhaps impossible, task for all but the most expert computer users. It would seem, therefore, that only the most sophisticated parties – who are aware of file-sharing, its legal implications, and how to disable the file-sharing process, and who choose not to disable it – should be denied the benefit of the reduction in damages resulting from the innocent intent doctrine.

3. Defendants May Not Have Infringed Upon the Plaintiffs' Right to Distribution As Merely Having Files in a Shared Folder May Not Constitute a Distribution

The Defendant may not have infringed upon the Plaintiffs' right to distribution, as merely having personal files in a shared folder on one's personal computer may not constitute a distribution under the U.S. Copyright Act.

Section 106 (3) of the Copyright Act grants copyright owners the exclusive right to distribution – 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). Only distributions that are made “to the public” fall under the Copyright Act. 2-8 NIMMER, *supra* § 8.11 [A].

The scope of the right to distribution is subject to interpretation. The hard question is whether the *mere offering* of a work to the public triggers the distribution right. The leading copyright treatises have asserted that the mere offering of copies of the work to members of the public is by itself not sufficient to trigger the distribution right and that infringement of the right requires an actual dissemination of copies of the work. 2-8 *Id.* §8.11[A], n2,

n3. See also 2 PAUL GOLDSTEIN, COPYRIGHT § 5.5.1 at 5:102, n.70 (2d ed. 1996) (stating that “an actual transfer must take place; a mere offer of sale will not violate the right”).⁵⁰ Accordingly, simply “making available for distribution,”⁵¹ as the Plaintiffs allege, of the work to the public is not sufficient – an actual transfer of the work to members of the public must occur. This general rule is widely supported by a range of circuit and district court decisions. In *National Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993), the Eighth Circuit found that no distribution occurred when the defendant, without the copyright owner’s permission, permitted third parties to use a copyrighted computer program. A district court came to the similar conclusion in

⁵⁰ It is important to note the relationship and distinction between the right to publication and the right to public distribution under the Copyright Act. Publication is defined as the public distribution or public offering of a work. Compare 17 U.S.C. § 101 (defining “publication”) with 17 U.S.C. § 106(3) (listing distribution as a right of the owner). Conversely, the mere offering of copies is not sufficient to trigger the public distribution right. *Obolensky v. G.P. Putnam's Sons*, 628 F. Supp. 1552, 1555-1556 (S.D.N.Y.), aff’d without opinion 795 F.2d 1005 (2d Cir. 1986). Thus, public distribution is a subset of publication – it is a publication that is not a mere offering of the work.

⁵¹ If the mere “mak[ing] available” of a work triggered the distribution right, then bookstores that make their books available to customers who browse and read the books without paying for them would arguably be guilty of contributory or vicarious infringement of the distribution right. Such a situation does not seem to be within the intent of the Copyright Act. See Benjamin R. Kuhn, *Comment: A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed over the Information Superhighways of Today and Tomorrow*, 10 Temp. Int’l & Comp. L.J. 171, 190 (1996).

Paramount Pictures Corp. v. Labus, 16 U.S.P.Q.2d (BNA) 1142 (W.D. Wis. 1990), holding that an offer to distribute videotapes to members of the public did not constitute infringement, as copyright infringement occurs only upon an actual rental of the videotapes. Likewise, in *Obolensky*, *supra* note 47, a New York district court held that no copyright infringement occurs where the “defendant offers to sell copyrighted materials but does not consummate a sale; equally, there is no infringement of the [distribution] right where there is copying, but no sale of the material copied.”

However, other authorities have identified an offering of the work to the public for distribution as the triggering event. *See, e.g., Wildlife Internationale, Inc. v. Clements*, 591 F. Supp. 1542, 1547 (S.D. Ohio 1984) (stating that an “offer of sale to the public or otherwise” could constitute copyright infringement); *see generally* Joseph V. Myers III, *Note: Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and the White Paper*, 49 Vand. L. Rev. 439, n.129, Mar. 1996. These authorities suggest that merely making the work available to the public for distribution could constitute

infringement,⁵² and that an infringement may occur absent any actual transfers of copies or of works.⁵³

In approaching this issue, this Court might also consider legislative sources as well as international standards for the right of distribution. In particular, the United States is signatory to the WIPO Copyright Treaty (WCT).⁵⁴ Article 6(1) of the WCT, the “Right of Distribution” states that: “authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership” and Article 8, the “Right of Communication to Public” continues: “authors...shall enjoy the exclusive right of authorizing any communication to the public of their

⁵² Such a standard parallels the definition of the right of publication, which provides that, under some circumstances, an offer can be sufficient to trigger the distribution right. 17 U.S.C. § 101 (stating that where the purpose is for further distribution, performance, or display, an offer alone can constitute publication of a work). A commentator has argued that the legislative language indicates that the publication standard should be used to decide whether a distribution has occurred for the following reasons: (1) “the statute defines the term ‘publication’ in almost the exact same language that it uses to express the distribution right” and (2) the House Report twice refers to the distribution right as “publication” or the “exclusive right of publication.” DRATLER, INTELLECTUAL PROPERTY LAW § 6.01 [3] [a] at 6-13 (cited in note 77); *see also* MYERS, *supra*, at n.130.

⁵³ The actual dissemination standard may also be problematic as the sources that the Nimmer and Goldstein treatises rely upon in support of the standard may not do not actually state that an offer alone cannot trigger the distribution right. *See* MYERS at 466.

works, by wire or wireless means, including the making available to the public of their works.”

However, while there exists an international right of “making available,” the United States has acknowledged that its copyright laws are unique and more complex. As the Registrar of Copyrights notes in the DMCA Section 104 Report, no country “other than the United States...has implemented the making available right through the application of a combination of the distribution, reproduction, public performance and public display rights.”⁵⁵ Nevertheless, in implementing the WCT, Congress determined that it was not necessary to add any additional rights to Section 106 of the Copyright Act, because the DMCA anti-circumvention provisions (17 U.S.C. § 1201) “fully and adequately implements the obligations of the new WIPO treaties... [t]he treaties [did] not require any change in the substance of the copyright rights or exceptions in U.S. law.” H. Rep. No. 105-551, at 15 (1998).

⁵⁴ WIPO Copyright Treaty, Dec. 20, 1996, art.8. The list of WIPO member states can be found on the WIPO website, *available at* http://www.wipo.int/about-wipo/en/members/member_states.html.

⁵⁵ See U.S. COPYRIGHT OFFICE, SECTION 104 REPORT ON THE DIGITAL MILLENNIUM COPYRIGHT ACT (August 2001) at p. 94 *available at* <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

With this background, the Court should note that a colorable argument can be made that a “distribution” requires not merely an offering but also an *actual transfer* of the work.

While U.S. courts have not ruled conclusively on this open question, a recent decision by a Canadian federal court has affirmed the proposition that “the mere fact of placing a copy on a shared directory in a computer where that copy can be accessed via a P2P service does not amount to distribution.” *CRIA v. John Doe*, 2004 FC 488 [28] (2004). The court explained that in order for there to be a “distribution,” “there must be a positive act by the owner of the shared directory, such as sending out the copies or advertising that they are available for copying.” *CRIA* [28]. The Canadian court found no “real difference” between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy of a file on a shared directory. *CRIA* [27]. Although Canadian law is not dispositive here, this analysis is consistent with the principles of U.S. copyright doctrine: “distribution” requires an active and completed effort by the alleged infringer – an element missing from the present case. The Plaintiff has not alleged or shown any evidence

that an actual transfer of a copyrighted music file to a specific member of the public has taken place.⁵⁶

Although the Ninth Circuit in *Napster* asserted that “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights,” it did so without any analysis and without any users actually appearing in the case. The question before the *Napster* Court was whether or not the file sharing service was itself infringing, not whether an individual user had violated plaintiffs’ copyrights. Thus, *Napster* is distinguishable from the current case because it is one thing for a court to determine, albeit implicitly, that some downloading of files has occurred that was facilitated by Napster, but it is quite another matter to conclude that any particular file had actually been downloaded.

4. The Plaintiffs’ Claims are Likely Not Barred by the Doctrine of Laches

⁵⁶ Such a “distribution” does not involve a “sale or other transfer of ownership” because, arguably, the alleged distributor never had an ownership interest in the copy received by the requesting user. See David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 Tex. Int. Prop. L.J. 1, 37 (1998). Accordingly, the copyright owner’s right to authorize “rental, lease, or lending” would not be infringed because the three uses are defined by retention of an ownership interest in the copy. See Carroll at n52. As digital technology operates by making multiple copies, the reproduction right has displaced the distribution right in many contexts. *Id.*

Although a Defendant may argue that the Plaintiffs' claims are barred by the doctrine of laches, in that the Plaintiffs' prolonged inaction in allowing file-sharing to occur on the KaZaA network resulted in the Defendant's reliance on file-sharing as a legal practice, it is unlikely that the doctrine's requirements will be satisfied.

Laches is an equitable defense that prevents a plaintiff, who "with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950 (9th Cir. 2001). The doctrine is defined as "neglect to assert a right or claim which, taken together with a lapse of time and other circumstances" cause "prejudice to the adverse party." *Wooded Shores Property Owners Ass'n Inc. v. Mathews*, 345 N.E. 2d 186, 189 (1976) appeal after remand, 411 N.E. 2d 1206 (1980).

Courts have recognized laches as a defense to copyright infringement. *Danjaq*, 263 F.3d at 951. To sustain a laches defense, a defendant must show three requirements: 1) delay by the plaintiff in filing suit; 2) the delay was unreasonable or inexcusable; and 3) such unreasonable delay was prejudicial to the defendant. *See* 3-12 NIMMER, *supra* § 12.06.

The period of delay is measured from the time of the act of infringement on which suit is based. *Danjaq*, 263 F.3d at 952. Although laches may be asserted for undue delay in pursuing an action after, as well as prior to, the filing of the complaint, failure to seek a preliminary injunction is not in itself grounds for asserting laches. *See* 3-12 NIMMER, *supra* § 12.06.

The next requirement for laches is that the delay be unreasonable or inexcusable. A two-year delay in filing an action has rarely been held sufficient to constitute laches, whereas decades of delay have clearly sufficed. *Id.* Delay may be excused if, until shortly before the time of filing, plaintiff could have reasonably concluded that any infringements were so minor that any “enforcement of the copyright was not worth the cost of litigation.” *Id.*

The last requirement is that the defendant suffers prejudice. A defendant may argue expectation-based prejudice: a demonstration of prejudice by showing that the defendant took actions or suffered consequences that he would not have, had the plaintiff brought suit promptly. *Danjaq*, 263 F.3d at 654-55. Laches requires a change in

position of reliance; a mere false sense of security instilled in the defendant as a result of plaintiffs' delay is not sufficient. 3-12 NIMMER, *supra* § 12.06.

Similarly situated defendants have argued that the doctrine of laches bars the plaintiffs' claims by asserting that the plaintiffs did not make a diligent attempt to enjoin the file-sharing practices of which they complain. Here, the argument goes, the plaintiffs have allowed individuals to use KaZaA and other file-sharing websites and services to freely trade music over the Internet for over two years.⁵⁷ Due to the plaintiffs' prolonged inaction, the practice of music file sharing has become common practice among Internet users.⁵⁸ The plaintiffs' inaction in preventing these practices has allowed individuals, including the Defendants, to justifiably rely on the assumption that any such file sharing was a wholly legal or accepted

⁵⁷ Napster was first made available in June 1999; KaZaA was developed in February of 2001. See Tech Live Staff, *Music Wars Timeline*, TechTV, Sept. 12, 2003, at <http://www.techtv.com/specials/musicwars/story/0,24330,3521040,00.html>. The complaint against the defendant was filed in September of 2003. See Pls.' Compl. Although the RIAA earlier filed suits against file-sharing services such as Napster and Grokster, it did not begin filing suits against individual file-sharers until late 2003. See John Borland, *RIAA sues 261 file swappers*, News.com, Sept. 8, 2003 at <http://news.com.com/2100-1023-5072564.html>.

⁵⁸ In 2003, there were more than three million simultaneous users sharing over a half a billion files on KaZaA. There are more than one billion downloads of music files each

practice. Accordingly, such defendants claim that the plaintiffs' unreasonable delay and inaction in allowing such file sharing to continue was indefensible and prejudicial to the defendants, by reason of their change of position in reliance as a result of such delay.

However, it is unlikely that the doctrine of laches applies in this case. Since laches attaches to the actual "act of infringement," reference to the general history of file sharing may not be applicable. Moreover, regardless of when laches attached, it is likely that the delay was not inexcusable – the period of delay, if any, was far closer to two years than two decades. Finally, it is debatable whether any Defendant truly relied on the idea that file sharing is a "wholly legal or accepted practice," or rather continued to participate in file-sharing activities irrespective of that notion. As there may be little evidence to support any of the three requirements of laches, the Plaintiffs' claims are unlikely to be barred by the doctrine of laches.

**D. The Amount of Statutory Damages Available to the Plaintiffs
Could Be Reduced to the Minimum Amount**

Plaintiffs have requested statutory damages in lieu of actual damages. Section 504 (c) of the Copyright Act gives the Court the discretion to award

week, and over 60 million Americans above the age of twelve have downloaded music.

statutory damages ranging from \$750 to \$30,000. 17 U.S.C. § 504 (c). The maximum may be increased to as much as \$150,000 upon a showing of willfulness 17. U.S.C. § 504(c) (2).⁵⁹ Nimmer suggests,

It seems clear that here, "willfully" means with knowledge that the defendant's conduct constitutes copyright infringement. Otherwise, there would be no point in providing specially for the reduction of minimum awards in the case of innocent infringement, as any infringement that was nonwillful would necessarily be innocent.⁶⁰

On the other hand, “when the defendant sustains the burden of proving that he was not aware and had no reason to believe that his acts constituted an infringement of copyright, and the court so finds, the court may reduce the applicable minimum of \$200.” U.S.C. § 504(c) (2).

However, only teachers, librarians and broadcasters employed by non-profit organizations may be totally exempted from a damage award. *Id.*

Oberholzer and Strumpf, *supra*.

⁵⁹ Willfulness does not in itself necessitate imposition of the maximum award of statutory damages. *Lauratex Textile Corp. v. Allton Knitting Mills*, 517 F. Supp. 900 (S.D.N.Y. 1981). See *N.A.S. Import Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 253 (2d Cir. 1992) (district court has discretion not to enhance statutory damages even for willful infringements) and *Nintendo of Am., Inc. v. Ketchum*, 830 F. Supp. 1443, 1445 (M.D. Fla. 1993) (imposing small statutory damages, even against those convicted of criminal copyright infringement).

⁶⁰ See 4-14 Nimmer, *supra* § 14.04 (B) (3), at fn.81.10 citing cases quoting these sentences.

An additional factor in the present case is the large numbers of infringements that have been alleged. Special considerations apply where defendants have engaged in multiple acts of infringement. The current Copyright Act explicitly provides that a statutory damage award is payable "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). The applicable minimum damages could therefore be multiplied by the number of infringed works. *See Rodgers v. Eighty-Four Lumber Co.*, 623 F. Supp. 889 (W.D. Pa. 1985).

In *UMG Recordings*, the per-infringement multiplication was strictly imposed, although the same court later adopted a formula more commensurate with the actual damages incurred in *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 303 (S.D.N.Y. 2001).

According to Nimmer,

The point is not that statutory damages always need to fall beneath other measurements, but rather that they should be woven out of the same bolt of cloth as actual damages...But a multimillion dollar award seems wholly out of kilter. By any reasonable metric,

the award in *UMG. v. MP3.Com* seems likewise disproportionate.⁶¹

Even using more modest metrics, there are other factors that may impact the damage calculations although there is no uniform agreement as to the appropriate formulae for each⁶²

The fact remains that where any single Defendant in the present case is deemed liable for infringing 11 or more different works copyrighted by any one of the Plaintiffs, the minimum award which the Court could apply would be very close to the amount that Plaintiffs have apparently offered similarly situated defendants to settle similar claims.⁶³ This may seem a harsh result when the same 11 songs might now be legally downloaded at a retail cost of 88 cents each,⁶⁴ however it should be remembered that an unknown number of copies may have been uploaded from Defendants' folders by other KaZaA users. Viewed in light of that possibility, Plaintiffs'

⁶¹ 4-14 NIMMER, *supra* § 14.04 (E) (1).

⁶² *See id.*, generally addressing different damage treatments depending on such factors as infringement of multiple works covered by a single registration on a compilation, multiple infringers deemed to be acting jointly, and, as in the present case, infringement of multiple copyrights involving a single work.

⁶³ A spokesman for the RIAA recently indicated that all of the file-swapping cases it has filed to date have settled prior to trial and that the average settlement has been \$3000. Michael Zennie, *Few at Indiana U. Nervous about Lawsuits*, Indiana Daily Student University Wire, Mar. 30, 2004.

offer may seem generous, particularly for those Defendants who cannot avail themselves of any factual or legal defenses.

On the other hand, due to the potential for factual and legal defenses that individual Defendants might raise, the Court may consider the suitability of approving lower settlements. The Court may also wish to consider that there may be other copyright holders in addition to the Plaintiffs who might be able to bring additional claims against the Defendants regarding the same works. Composers, artists, performers, and other record labels may each be making demands for statutory damage awards. Therefore imposition of maximum penalties in the initial infringement cases might interfere with reasonable recovery by other rights holders.

⁶⁴ See WAL-MART, MUSIC DOWNLOADS (last visited on May 15, 2004) at <http://musicdownloads.walmart.com/catalog/servlet/MainServlet>.

IV. CONCLUSION

It is unlikely that most Defendants will have strong legal defenses to present in this case. However there are several unresolved factual and substantive issues that may warrant further examination by the court before final disposition as to any specific individual.

Due to the multiple steps involved in identifying users of P2P applications, there may be errors in identifying infringing materials as well as infringing users. The Court may find that some individuals are entitled to fair use defenses as to downloading; it may generally hold that simply making files available on a P2P system for uploading does not amount to infringement of the right to public distribution. Damages might be minimized upon a showing of innocent intent. Because there may be variations of applicable fact and law among individual Defendants, the court may wish to reconsider joinder. However, as it is unlikely that many Defendants will have any viable defense, joinder can provide substantial benefits of efficiency.

There is a strong likelihood that a majority of these cases will result in settlements. To that extent, the Court may wish to take an active role in the process by assuring that factual distinctions are properly noticed and reflected in the final disposition. The Court may want to consider setting a maximum limit on the amount of the settlement. The average settlement amount appears to have been \$3,000. As this seems to be the amount that the Plaintiffs are willing to accept from those it deems to be infringers, this amount may serve to be a reasonable upper limit for settlements. A lesser amount could be approved by the Court where fewer discrete instances of infringement are involved, or where the facts suggest innocent infringement.

Finally, a disposition of the present case may lull Defendants into a false sense of security that by fulfilling the Plaintiffs' demands they are hereafter immune from all actions relating to their former file sharing activity. The Court should impress upon Defendants that they may remain at risk of further claims.

For the foregoing reasons, *amici* suggest that the Court to exercise caution in regard to any aggregate treatment of Defendants and to consider

reduced awards in light of the difficulty of assessing actual and legal harm to the Plaintiffs.

Respectfully submitted,

William W. Fisher III BBO # 649384
Charles R. Nesson
Jonathan Zittrain BBO # 650403
John Palfrey BBO # 652137
Diane Cabell BBO # 495940
Renny Hwang and
Ory Okolloh
Berkman Center for Internet & Society at
Harvard Law School
1587 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-7547
Facsimile: (617) 495-7641

DATED: May 24, 2004

CERTIFICATE OF COMPLIANCE

I hereby certify that, by leave of the Court, this brief exceeds the volume limitation of Local Rule 7.01 (b) (4). This brief contains 77 pages.

By _____
Diane Cabell BBO # 495940
Berkman Center for Internet &
Society at
Harvard Law School
1587 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-7547
Facsimile: (617) 495-7641

Dated: May 24, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2004, a true copy of the within Brief of Amici Curiae together with the Motion on Behalf of Members of the Berkman Center for Internet & Society at Harvard Law School to File Amicus Brief and for Leave to Exceed Page Limit was served via Federal Express overnight delivery, postage prepaid, upon the Plaintiffs' counsel of record in accordance with the Court's order regarding abbreviated service:

Colin J. Zick and
Gabriel M. Helmer
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210-2600
617-832-1000

By _____
Diane Cabell BBO# 495940
Berkman Center for Internet &
Society at
Harvard Law School
1587 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-7547
Facsimile: (617) 495-7641