

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CAPITOL RECORDS INC.,)	
a Delaware corporation, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Case No. 06-1497 (MJD/RLE)
v.)	
)	
JAMMIE THOMAS,)	
)	
Defendant.)	

PLAINTIFFS' SUPPLEMENTAL BRIEF PURSUANT TO MAY 15, 2008 ORDER

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Pursuant to the Court's May 15 Order ("Order"), Plaintiffs respectfully submit this supplemental brief. There is no basis in law or fact for setting aside the jury's verdict of willful copyright infringement and requiring a new trial.

As a threshold matter, the verdict should be sustained whether or not Jury Instruction 15 correctly states the law, because the verdict rests on unimpeachable findings of willful infringement. In all events, Instruction 15 correctly stated the law. The statutory text and decades of precedent compel the conclusion that making copyrighted sound recordings available for distribution violates a copyright owner's exclusive right of distribution even if it has not been proven that specific unauthorized copies have changed hands. The Eighth Circuit's decision in *National Car Rental System, Inc. v. Computer Associates, International, Inc.*, 991 F.2d 426 (8th Cir. 1993), is not to the contrary. That case involved a wholly different question that has no bearing on this case. The *National Car Rental* court held that allowing an authorized party to use software for an unauthorized purpose was not a distribution. The case did not raise — much less resolve — the question whether making software available for copying constitutes infringement.

Finally, restricting the copyright laws in the manner contemplated in this Court's Order would blow a gaping hole in the protections the law affords copyright owners. Congress cannot possibly have intended to allow a person to set up a business selling copyrighted works without a license and invite customers in to acquire the infringing works when the customer wants, so long as they were never caught in the act of actually transferring copies of copyrighted works to others. That regime serves no valid public

policy purpose. A person who makes infringing works available for copying by others has done everything that person needs to do to transfer infringing copies to the public, and there is no reason to allow a person to do so with impunity. Such a rule would invite abuse and cripple copyright enforcement, especially in the digital era. Millions of people use services like KaZaA to make copyrighted works available for illegal downloading. Copyright owners typically have no way to monitor — much less prove — the actual transfer of those files. If Defendant Thomas and others cannot be held liable when they make thousands of works available for unauthorized copying, copyright owners' exclusive right to distribute their works will be rendered worthless. That result would defy common sense and Congress's clear intent.

INTRODUCTION

As the trial evidence showed, Defendant Thomas played an active role in the distribution of Plaintiffs' copyrighted works across the Internet. Defendant copied hundreds of Plaintiffs' copyrighted works onto her hard drive in a shared folder for the sole purpose of uploading further copies of those sound recordings to others, for free. Plaintiffs' investigators established that Thomas made those copies available to anyone who wanted them. Indeed, Plaintiffs downloaded numerous examples of infringing works. Defendant Thomas knew precisely what she was doing: she was intentionally infringing Plaintiffs' copyrights by offering illegal copies of sound recordings to anyone who wanted them on a medium (KaZaA) that millions of people use every day to steal copyrighted works. Those facts fully justify the jury's finding that Thomas committed willful infringement.

The Court's Order suggests a concern that Thomas's conduct may not have violated Plaintiffs' exclusive right to distribute copyrighted works and that there should be a new trial with a revised Instruction 15 that would require Plaintiffs to show that third parties actually copied the particular works that Thomas provided. Such a retrial would fly in the face of clear statutory language and depart sharply from decades of case law holding that a copyright owner's right to "distribute" works includes an exclusive right to control the "making available" of those works to others. Long before illegal uses of KaZaA and other peer-to-peer systems wreaked havoc on Plaintiffs' business, courts took a common-sense approach to distribution: If the owner of a video rental store made an unauthorized copyrighted video available on the shelves of his store, courts did not require copyright owners to sit monitoring the store and waiting for someone — if they could catch him — to rent or buy the video in question. Rather, the *offer* to sell, rent, or give away the video has always been enough. Nothing about the Internet context warrants any change in that common-sense understanding. Requiring a plaintiff to show actual transfers would cripple copyright owners' ability to protect themselves in the digital era. Nothing in the law requires that counterintuitive result.

ARGUMENT

I. THE JURY VERDICT SHOULD BE UPHOLD EVEN IF THE COURT HAS DOUBTS ABOUT INSTRUCTION 15.

Jury Instruction 15 correctly stated copyright law. But this Court can and should uphold the verdict without reconsidering Instruction 15. The parties, the Court, and the jurors have invested substantial effort and resources to reach a definitive resolution. The

jury had no difficulty concluding that Thomas perpetrated massive, deliberate infringement, and that her conduct justified a substantial damages award. That considered judgment should not be disturbed unless the alleged error in Instruction 15 prejudiced the defendant. *See United States v. Jiminez*, 487 F.3d 1140, 1146 (8th Cir. 2007); *Eich v. Board of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 761 (8th Cir. 2003); *United States v. Wilson*, 103 F.3d 1402, 1408 (8th Cir. 1997) (weighing “waste [of] judicial resources” in refusing to overturn jury verdict). In the Eighth Circuit, a new trial is “necessary only when the errors misled the jury or had a probable effect on the jury’s verdict.” *Slidell, Inc. v. Millennium Inorganic Chemicals, Inc.*, 460 F.3d 1047, 1054 (8th Cir. 2006). Defendant Thomas cannot meet that test for two reasons.

First, as even Defendant’s *amici* appear to concede, *see* Copyright Law Professors Amicus Br. at 8 (“a person who makes an unauthorized copy or phonorecord of a copyrighted work, for purposes of uploading it onto a peer-to-peer network, violates the reproduction right”), EFF Amicus Br. at 17, the jury’s finding that Thomas engaged in the unauthorized reproduction of Plaintiffs’ sound recordings suffices to sustain the verdict. Evidence showed that Defendant had 1,702 audio files in the KaZaA shared folder on her computer. Plaintiffs’ witnesses went through pages and pages of screenshots identifying recordings in that folder to which they owned the rights. Pls. Trial Ex. 6. Defendant had copied the bulk of these sound recordings from other KaZaA users, and she had previously studied the *Napster* decision and knew that copying and sharing copyrighted music files over the Internet was illegal. Moreover, Defendant

refused to take responsibility for her actions and connived to destroy evidence of her massive infringement by replacing her hard drive.

This conduct indisputably establishes a willful violation of Plaintiffs' exclusive right of reproduction under Section 106(1). *See, e.g., BMG Music v. Gonzalez*, 430 F.3d 888, 890-91 (7th Cir. 2005); *Atlantic Recording Corp. v. Visione*, No. 07-CV-2268, 2008 WL 1924892, at *3 (N.D. Ill. Apr. 29, 2008); *see also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.04[B][3][a], at 14-77 - 78 (2008) (“[W]illfully’ means with knowledge that the defendant’s conduct constitutes copyright infringement.”) (footnotes omitted); *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990). Because the reproduction charge was proper, the jury’s verdict must be upheld.

Second, Thomas violated Plaintiffs’ exclusive right to distribute under Section 106(3) even under the unduly restrictive definition suggested in this Court’s Order. The trial evidence establishes that MediaSentry initiated the download of *every* file in Defendant’s shared folder (to confirm that it was actually being distributed), and completed downloads of numerous files. Thus, unlawful distribution is proven here even if an actual transfer of an infringing copy is required (and it is not).

It does not matter that a representative of the copyright owners downloaded the copies. In *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1347 (8th Cir. 1994), the plaintiff hired an investigator to obtain reproductions of photographs from the defendant. The court rejected the argument that the infringement was not actionable because it was “licensed” by the plaintiffs via their investigator:

Olan Mills did not authorize the investigator to validate Linn Photo's unlawful conduct. Indeed, the investigator's assignment was part of Olan Mills' attempt to stop Linn Photo's infringement. Accordingly, the copies made by Linn Photo at the request of the investigator were copyright violations.

Id. at 1348.

The Eighth Circuit has also recognized that evidence of infringements involving the public at large is unnecessary once a copyright owner has shown an infringement initiated by its own investigator. In *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988), plaintiffs used an investigator to gather evidence on the illegal usage of tape-duplicating machines at retail establishments. The investigator provided evidence only of his own interactions with the retailers; he “made no effort to observe whether or not any of the bona fide customers copied copyrighted recordings.” *Id.* at 777. Liability was nonetheless obvious based on “the retailers’ actions.” *Id.* at 782.¹

¹ See also, e.g., *Microsoft Corp. v. Rechanik*, 249 F. App'x 476, 478 (7th Cir. 2007) (distribution liability based on sales to Microsoft private investigators), *cert. denied*, No. 07-9250, 2008 WL 2002100 (U.S. May 12, 2008); *Atlantic Recording Corp. v. Howell*, No. Cv-06-2076, 2008 WL 1927353, at *8 (D. Ariz. Apr. 29, 2008) (distribution liability based on MediaSentry's downloads); *Interscope Records v. Leadbetter*, No. C05-1149, 2007 WL 1217705, at *4 (W.D. Wash. Apr. 23, 2007) (MediaSentry declaration was evidence that files “were actually disseminated out of the shared folder (‘uploaded’) and captured (‘downloaded’)”); *U2 Home Entm't, Inc. v. Fu Shun Wang*, 482 F. Supp. 2d 314, 317-18 (E.D.N.Y. 2007) (distribution liability based on rentals to plaintiffs' investigator); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 190 (D. Me. 2006) (distribution liability based on MediaSentry's downloads); *Columbia Pictures Indus., Inc. v. Garcia*, 996 F. Supp. 770, 771 (N.D. Ill. 1998) (distribution liability based on MPAA's investigator's “determin[ation] that Garcia was renting unauthorized duplicate videotapes”); *Paramount Pictures Corp. v. Labus*, No. 89-C-797-

Thus, there is no basis for questioning the jury’s verdict that Thomas infringed Plaintiffs’ exclusive rights to control reproduction and distribution. Nor is there any basis for revisiting the jury’s damages award. In addition to finding liability for infringing all of the works in question, the jury awarded the same amount of *damages* for works that were fully downloaded as it did for works that were only partially downloaded. The jury did not base its damages figure on whether there was a complete transfer.²

II. THE COPYRIGHT ACT DEFINES UNLAWFUL DISTRIBUTION TO INCLUDE MAKING DIGITAL FILES AVAILABLE FOR COPYING BY OTHERS.

Under 17 U.S.C. § 106, “the owner of copyright under this title has the exclusive rights to *do* and to *authorize* any of the following: ... (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” That text, reinforced by its legislative history, conclusively establishes that a copyright owner’s exclusive right to “distribute” is violated when another party, without authorization, makes digital copies of copyrighted works available for download by others. *First*, the term “distribute” in Section 106 necessarily encompasses the act of making copies available for others to take, whether or not a copy is transferred. That is the plain meaning of the term “distribute” — as the Supreme Court, lower courts, and the Register of Copyrights have concluded under the Copyright Act and in related contexts, and as the statutory context and legislative history

C, 1990 WL 120642, at *5 (W.D. Wis. Mar. 23, 1990) (rejecting as “completely without merit” argument that video rentals to investigator could not establish infringement).

² In any event, the jury indisputably found statutory damages of \$9,250 for each of the seven confirmed infringements, for a minimum damages award of \$64,750.

of Section 106 confirm. *Second*, Defendant has further violated Plaintiffs' distribution right by purporting to "authorize" distribution by inviting millions of users to download copies of Plaintiffs' works from her shared folder.

A. The Right To "Distribute" Encompasses Making Works Available for Copying by Others.

1. The Plain Meaning of "Distribute" in Section 106 Encompasses the Exclusive Right To "Make Available."

Section 106(3) grants a copyright owner the exclusive right to "distribute" copies of copyrighted works to the public by any means of transfer of ownership or by rental, lease or lending. By definition, a person who possesses the *exclusive* right to distribute works also possesses the exclusive right to make works available for copying by others. Making a work available for copying is a critical and indispensable part of the process of transferring ownership of copies of a work. Thus, a copyright owner's exclusive right to distribute necessarily includes the right to control how a work is made available to the public. When someone makes a copyrighted work available for copying by others without authorization — as Defendant did here with thousands of works — that person is doing something that Section 106 gives the copyright owner the exclusive right to "do." That the person's acts of distribution have not yet resulted in the actual transfer of a copy does not mean that the person has the right to "do" those acts. To the contrary, that person is invading the sphere of activity that Section 106 gives the copyright owner the exclusive right to control.

This is precisely what the Supreme Court held in *New York Times Co. v. Tasini*, 533 U.S. 483, 488 (2001). In *Tasini*, the defendants were electronic publishers licensed

to “reproduce or distribute” the plaintiffs’ copyrighted articles only as part of a compilation. *Id.* at 496-97. The publishers, however, made individual copies of articles available for download from their database. Even though plaintiffs had not proved that the publishers transferred actual digital copies to users of the database, the Supreme Court held that “it is clear” that the defendants “distribute copies” of the plaintiffs’ articles merely by making them available for download. *Id.* at 498, 505. Critically, the Court rejected the argument that defendants were not liable for direct infringement of the right to “distribute” because their *subscribers* were responsible for actually downloading the articles. *Id.* at 504. That ruling leaves no doubt that making articles available for copying by others constitutes infringement of the distribution right.

Similarly, the Register of Copyrights has concluded that “making [a work] available for other users of a peer to peer network to download ... constitutes an infringement of the exclusive distribution right, as well as of the reproduction right.” *See* Letter from Marybeth Peters to Rep. Howard L. Berman at 1, Sept. 25, 2002, *reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 114-15 (2002)*. That interpretation is entitled to particular respect. *De Sylva v. Ballentine*, 351 U.S. 570, 577-78 (1956). Indeed, Congress itself has acknowledged that Section 106 encompasses a right of making available; in the Digital Millennium Copyright Act, Congress specifically authorized copyright owners to issue takedown notices for copyrighted works made available online — and then directs copyright owners to bring suit for infringement if Internet service providers do not take the

infringing work down or put the work back up, regardless of whether there has been an actual transfer. 17 U.S.C. § 512(c), (g).

In similar contexts, courts routinely hold that the plain meaning of the statutory term “distribution” includes making an item available to others, and have rejected the argument that no “distribution” occurs until a physical object actually changes hands. For example, the Tenth Circuit held that a person violates 18 U.S.C. § 2252A, which prohibits the “distribution” of child pornography, by doing nothing more than placing child pornography in a shared folder in KaZaA. *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007). The court reviewed multiple dictionary definitions of “distribute,” which included “to deliver,” “to dispense” and “to disperse,” and expressly rejected the argument that a distribution required proof of an actual download. *Id.* at 1223 (quoting from Black’s Law Dictionary 508 (8th ed. 2005) and Webster’s Third New Int’l Dictionary Unabridged 660 (2002)). To the contrary, the Tenth Circuit held that as “a matter of plain meaning,” the statutory term “distribution” encompassed making copies available. *Id.* at 1223; *accord United States v. Carani*, 492 F.3d 867, 876 (7th Cir. 2007) (“The notion that Carani could knowingly *make his child pornography available* for others to access and download without this qualifying as ‘distribution’ does not square with the plain meaning of the word.”), *cert. denied*, 128 S.Ct. 932 (2008); *United States v. Abraham*, No. Cr. 05-344, 2006 WL 3052702, at * 8 (W.D. Pa. Oct. 24, 2006); *United States v. Christy*, 65 M.J. 657, 664-65 (A. Ct. Crim. App. 2007), *review denied*, 66 M.J. 189 (C.A.A.F. Feb. 13, 2008); *see also Moodie v. School Book Fairs, Inc.*, 889 F.2d 739, 743-44 (7th Cir. 1989) (interpreting “distribute” in state dealership statute to encompass

