

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

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WHITNEY HARPER,  
*Petitioner,*

v.

MAVERICK RECORDING COMPANY; UMG  
RECORDINGS INC.; WARNER BROTHERS  
RECORDS INC.; SONY BMG  
MUSIC ENTERTAINMENT,  
*Respondents.*

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*On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Fifth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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May 26, 2010

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**QUESTION PRESENTED**

Should the inadvertent innocent infringer defense to copyright infringement be eliminated for all Internet music downloading?

**TABLE OF CONTENTS**

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED ..... 1

STATEMENT ..... 3

REASONS FOR GRANTING THE PETITION .. 13

CONCLUSION ..... 15

APPENDIX

Appendix A: Opinion, In the United States  
Court of Appeals for the Fifth  
Circuit  
(Filed February 25, 2010) ..... 1a

Appendix B: Order, United States District  
Court Western District of Texas  
San Antonio Division  
(Filed September 16, 2008) ... 15a

Appendix C:	Order, United States District Court Western District of Texas San Antonio Division (Filed August 7, 2008) . . . . .	27a
Appendix D:	Statutes	
	17 U.S.C. § 402 . . . . .	48a
	17 U.S.C. § 504 . . . . .	49a

**TABLE OF AUTHORITIES**

**CASES**

*BMG Music v. Gonzalez*,  
430 F.3d 888 (7th Cir. 2005) . . . . . 13

*D.C. Comics Inc. v. Mini Gift Shop*,  
913 F.2d 29 (2d Cir. 1990) . . . . . 8, 13

**STATUTES**

17 U.S.C. § 402 . . . . . 2, 5

17 U.S.C. § 402(a) . . . . . 5

17 U.S.C. § 402(b) . . . . . 5, 11

17 U.S.C. § 402(c) . . . . . 2, 6, 11

17 U.S.C. § 402(d) . . . . . *passim*

17 U.S.C. § 504(a)(2) . . . . . 4

17 U.S.C. § 504(c)(1) . . . . . 4

17 U.S.C. § 504(c)(2) . . . . . 1, 5

28 U.S.C. § 1254(1) . . . . . 1

28 U.S.C. § 1331 . . . . . 4

**OTHER**

S. Rep. 100-352, 1988 U.S.C.C.A.N. 3706 . . . . . 8

## **PETITION FOR A WRIT OF CERTIORARI**

Whitney Harper respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a to 14a) is reported at 598 F.3d 193. The opinion of the district court granting respondents' motion for summary judgment (App., *infra*, 27a to 47a) is unreported. The opinion of the district court denying both sides' motions for reconsideration (App., *infra*, 15a to 26a) is unreported.

### **JURISDICTION**

The judgment of the court of appeals was entered on February 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Copyright Act provides in relevant part that:

“In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.” 17 U.S.C. 504(c)(2).

The Copyright Act also provides that the owner of a copyright in a sound recording published in the United States may place a notice on the publicly distributed phonorecords of that sound recording and that doing so will have certain evidentiary effect. 17 U.S.C. 402. Section 402 provides in relevant part that:

“The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.”  
17 U.S.C. 402(c).

And:

“If a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).” 17 U.S.C. 402(d).

The pertinent provisions of the Copyright Act are reprinted in an appendix to this petition. App., *infra*, 48a to 52a.

**STATEMENT**

1. Petitioner Whitney Harper, age 16 when she downloaded 37 songs using the file-sharing program KaZaA, did not understand the nature of file-sharing networks. She believed that listening to music using a file-sharing network was akin to listening to a noninfringing Internet radio station. She did not realize that listening to music in this way involved copying and distributing copyrighted works without authority from the copyright holders in violation of the Copyright Act.

Harper discovered that her acts constituted infringement only when the respondent recording companies filed this case. The Recording Industry Association of America (RIAA), the recording companies' industry group, discovered Harper's infringement as part of a multi-year campaign to identify and sue individuals who used file-sharing networks to listen to music. This case is one of several such cases now percolating through the federal courts. It would be the first such case to reach this Court.

The RIAA discovered Harper's infringement through the activities of its digital investigating agent, Media Sentry. Media Sentry logged on to the file-sharing network that Harper was using and observed an individual on that network with the username whiterney@fileshare at the IP address 24.174.166.204. Media Sentry traced that IP address to Time Warner Cable, Harper's family's Internet service provider. The RIAA's recording-company members then filed a Doe lawsuit against the unknown infringer behind this username and IP address, subpoenaed Time Warner's



records, and discovered that Time Warner had assigned that IP address to Harper's family.

The respondent recording companies initially sued Steve Harper, Whitney Harper's father. The United States District Court for the Western District of Texas (Judge Xavier Rodriguez) had jurisdiction under 28 U.S.C. § 1331. Once it became clear that Whitney Harper was the KaZaA user who the RIAA had detected, the recording companies amended their complaint to proceed against Whitney Harper only. The recording companies moved for summary judgment, entry of a judgment of \$750 in statutory damages per sound recording for infringement of 37 sound recordings, and entry of an injunction enjoining further infringement.

Harper agreed to the injunction, but contested the amount of the statutory damages. Harper contended that she was an "innocent infringer" entitled to ask a jury to reduce statutory damages to a minimum of \$200 per song. The sole question presented by this appeal is whether Harper — and, with her, the thousands of other young Americans who shared music online — can rely on the defense of innocent infringement when she did not know that what she was doing was infringement and the music files that she copied bore no statutory copyright notice.

2. a. The Copyright Act provides for statutory damages for copyright infringement. *See* 17 U.S.C. 504(a)(2), (c)(1). Ordinarily, an infringer is liable for one award of statutory damages "in a sum of not less than \$750 or more than \$30,000 as the court considers just," 17 U.S.C. 504(c)(1), per work infringed. If the infringer proves that she "was not aware and had no

reason to believe that \* \* \* her acts constituted an infringement,” 17 U.S.C. 504(c)(2), then the low end of this statutory range is reduced to \$200. In particular, § 504(c)(2) provides that:

“In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.” 17 U.S.C. 504(c)(2).

The effect of § 504(c)(2) is to protect, at least in part, infringers who infringe by mistake. The Copyright Act recognizes that copyright holders can take steps to prevent such mistakes by giving notice on copies of copyrighted works that the works are copyrighted. In particular, with respect to sound recordings, the Copyright Act provides that a copyright owner can avoid the defense of innocent infringement by including a statutory notice on the published phonorecords that contain the copyrighted sound recording.

17 U.S.C. 402 governs this statutory notice. Section 402(a) provides generally that: “Whenever a sound recording protected under this title is published in the United States \* \* \* a notice of copyright as provided by this section may be placed on publicly distributed phonorecords of the sound recording.” Section 402(b) specifies the form of the notice: “it shall consist of the following three elements: (1) the symbol (the letter P in a circle); and (2) the year of first publication of the sound recording; and (3) the name of

the owner of copyright in the sound recording.” Section 402(c) requires that “[t]he notice \* \* \* be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.”

Section 402(d) provides that an infringer cannot rely on the innocent-infringement defense if the owner of a copyright in a sound recording includes a § 402 notice “on the published phonorecord or phonorecords to which [the] defendant \* \* \* had access”:

“If a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.” 17 U.S.C. 402(d).

b. The respondent recording companies included § 402 notices on the CD’s that they published and sold. Harper, however, did not infringe by copying and distributing a CD that bore such a notice. She infringed by copying and distributing music files that bore no such notice. Because “the published phonorecord \* \* \* to which [Harper] had access,” that is, the digital music files, did not contain a § 402 notice, the recording companies cannot rely on § 402(d) to prevent Harper from proving that she was an innocent infringer.

This Court has not yet interpreted § 402(d). In particular, this Court has not decided whether a

plaintiff may rely on § 402(d) to avoid a defense of innocent infringement in a case in which the plaintiff included the § 402 notice on the phonorecords on which it published its sound recordings, but the § 402 notice did not appear on the copies of the sound recordings that the defendant used to commit the infringement. This Court should hold that a § 402(d) notice allows a plaintiff to avoid a defense of innocent infringement only when the notice appears on the copy of the copyrighted sound recordings that the defendant used to infringe.

There are two potential readings of § 402(d). Under the first, § 402(d) eliminates innocent infringement whenever the copyright holder's published copies of its sound recording bear the § 402 notice. Under the second, § 402(d) eliminates innocent infringement only when the copy that the infringer used to infringe bears the § 402 notice. As between these two readings, the second is preferable because only notice on the copy that the infringer used to infringe tends to disprove the infringer's innocence. Congress should not be presumed to have required courts to conclude otherwise — in this case, to conclude that notice on a CD in the record store tends to disprove the innocence of an infringer who infringed using only music files on the Internet — in § 402(d) when an alternative reading is equally consistent with the text.

This alternative reading is also to be favored because it is more consistent with innocent-infringement decisions outside the context of sound recordings. Outside the sound-recording context, where the question is whether a copyright notice not drafted pursuant to any special section of the Copyright Act defeats a claim of innocent

infringement, the lower courts have held that such a notice defeats a claim of innocent infringement only if it appears on the copy of the copyrighted work used for the infringement. *See, e.g., D.C. Comics Inc. v. Mini Gift Shop*, 913 F.2d 29, 35 (2d Cir. 1990) (“[T]he district court was presented with evidence that there were no copyright notices on the infringing goods and that a layman would not be able to distinguish between licensed and unlicensed goods based on the style or quality of the art work. This evidence tends to establish that defendants’ infringement was innocent.”).

This makes sense because only a notice that appears on the copy of the copyrighted work used for infringement has anything to do with whether the infringement at issue was innocent, that is, with whether the infringer knew that she was forbidden from copying and distributing the copy of the work before her. *Cf. S. Rep. 100-352*, 1988 U.S.C.C.A.N. 3706, 3741 (“the proprietor must prove that the copies to which the defendant had access bore such notice”). The need to ensure that a notice that eliminates the statutory defense of innocent infringement in fact gives notice that certain conduct would be infringing is at its maximum in a case like this, where a 16-year-old girl was faced with a new technology that was, to her, indistinguishable from legal alternatives such as Internet radio.

3. a. In the district court, the recording companies moved for summary judgment that they were entitled to statutory damages in the amount of \$750 per work, the ordinary statutory minimum. *See App., infra*, 37a.

Harper responded that she was an innocent infringer. She submitted an affidavit in which she averred that she “had no knowledge or understanding of file trading, online distribution networks or copyright infringement”; that “Kazaa and similar products did not inform [her] that the materials available through their service were stolen or abused copyrighted material”; and that she “had no way of learning this information prior to this lawsuit.” App., *infra*, 43a. Both in her affidavit and in her deposition in this case, Harper testified “that she believed using KaZaA and similar products to be akin to listening to radio over the internet and did not know that the Recordings were being either downloaded or distributed.” App., *infra*, 44a to 45a.

The recording companies replied that Harper’s state of mind was irrelevant because they had included the § 402 statutory notice “on each of the containers and on the surface of the compact discs of the Recordings.” App., *infra*, 43a. The recording companies contended that, by doing so, they had “provided notice such that Defendant could have learned that the Recordings were copyrighted,” App., *infra*, 43a, even though no notice appeared on the music files that Harper actually listened to on KaZaA.

The district court held that Harper’s affidavit created a genuine issue of material fact as to whether she was an innocent infringer. App., *infra*, 44a to 45a. The district court found the recording companies’ argument “not completely satisfactory” because, “In this case, there were no compact discs with warnings.” App., *infra*, 44a to 45a. “Although proper notice was provided on the cover of each of the Recordings, a question remains as to whether Defendant knew the

warnings on the compact discs were applicable in this KaZaA setting.” App., *infra*, 44a.

The district court ordered the parties to advise whether they would accept a settlement of \$200 per work, the minimum statutory damages against an innocent infringer. See App., *infra*, 45a. The district court denied the recording companies’ motion for reconsideration and restated its conclusion that Harper’s testimony “that she believed using KaZaA and similar products to be akin to listening to radio over the internet and did not know that the Recordings were being either downloaded or distributed,” App., *infra*, 25a, entitled Harper to a trial on innocent infringement. The district court emphasized that the recording companies “ha[d] not introduced any evidence to contradict that Defendant did not have an understanding of the nature of file-sharing programs and copyright \* \* \* sophisticated enough to have reason to know that her actions infringed Plaintiffs’ copyrights.” App., *infra*, 25a.

b. The United States Court of Appeals for the Fifth Circuit (Judges Edith Brown Clement, W. Eugene Davis, and Jennifer Elrod) reversed. See App., *infra*, 2a. The court of appeals held that, although Harper’s affidavit and deposition testimony created a triable issue of fact as to whether she was an innocent infringer, Harper was nonetheless foreclosed from relying on the defense of innocent infringement by § 402(d). See App., *infra*, 11a to 13a. The court of appeals held that the recording companies’ having placed a § 402 notice on physical CD’s prevented Harper from relying on the innocent-infringer defense as a matter of law. In relevant part, the court of appeals wrote:

“Harper’s reliance on her own understanding of copyright law — or lack thereof — is irrelevant in the context of § 402(d). The plain language of the statute shows that the infringer’s knowledge or intent does not affect its application. Lack of legal sophistication cannot overcome a properly asserted § 402(d) limitation to the innocent infringer defense.” App., *infra*, 12a.

c. The court of appeals was correct in holding that the infringer’s mental state has nothing to do with whether § 402(d) forecloses a defense of innocent infringement. Although the infringer’s mental state is central to the merits of that defense, § 402(d) forecloses assertion of the defense whatever its merits if the copyright owner has provided statutory notice as required by § 402(b)–(c). The court of appeals erred, however, in failing to reach the question whether the recording companies’ placement of § 402 notices on the CD’s containing their sound recordings was sufficient to trigger § 402(d).

The court of appeals simply assumed that placing the § 402 notice on the CD’s sufficed to trigger § 402(d) even though, as the district court held, the infringement in this case did not involve any CD’s, but rather involved only music files on KaZaA. This was error. Section 402(d) requires that the § 402 notice “appear[] on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access.” 17 U.S.C. 402(d). Here, the music files were the copy of the copyrighted work to which Harper had access, and those files did not bear the § 402 notice.



d. The problem is in part the familiar one of interpreting a statute that was not designed to address a new technology, here, a Copyright Act that long predates the advent of file sharing, or even the Internet. Section 402(d) is much clearer where the infringement in question is the copying or distribution of a phonorecord. There, “the published phonorecord \* \* \* to which [the] defendant \* \* \* had access” is the phonorecord from which the defendant made his infringing copies — or some officially published phonorecord in the defendant’s possession. If that copy contains the § 402 notice, then the defendant may not assert that he is an innocent infringer.

The advent of file sharing complicates this picture because the defendant in a file-sharing case may never have had access to a CD corresponding to the music files that she listened to, and thereby copied and distributed, on the file-sharing network. For such a defendant, there either is no relevant phonorecord to which she could have had access so as to trigger § 402(d), or the relevant “phonorecord” is the music file itself, which does not bear any § 402 notice. Either way, § 402(d) does not apply. And either way, the court of appeals erred by failing to address the critical issue in this case, whether a recording company may avoid the defense of innocent infringement under § 402(d) when the § 402 notice appears on its published CD’s, but not on the music files that the defendant downloaded.

If this Court adopts the recording companies’ rule, that copyright notices on CD’s in the record store suffice without more to defeat a defense of innocent infringement, then downloading music on the Internet can never be innocent infringement. If this Court

adopts Harper's rule, that a copyright notice defeats innocent infringement only if it appears on the copy of the copyrighted work that the infringer used to infringe, then infringers like Harper will not necessarily be held to be innocent infringers. But they will at least be able to offer evidence of their state of minds and submit their actual innocence to be decided by a jury. That is the right that Harper was denied in this case.

### **REASONS FOR GRANTING THE PETITION**

1. The circuits are split on whether a plaintiff may avoid the defense of innocent infringement by including a copyright notice on published copies of its copyrighted work even though those copies are not the copies that the infringer used for its infringement. On one hand, the Fifth Circuit in this case and the Seventh Circuit in *BMG Music v. Gonzalez*, 430 F.3d 888, 891–92 (7th Cir. 2005), have held that a defendant who listens to music on a file-sharing network is barred by § 402(d) from claiming to be an innocent infringer. On the other hand, the Second Circuit in *D.C. Comics* held that, where “there were no copyright notices on the infringing good and \* \* \* a layman would not be able to distinguish between licensed and unlicensed goods,” a “defendants’ infringement was innocent.” 913 F.2d at 35. Granting certiorari is appropriate to resolve this conflict among the circuits as to whether a copyright notice must appear on the copy that the infringer used to infringe in order to foreclose an argument that the infringement was innocent.

2. The question in this case is of unusual national importance because of the unprecedented litigation

campaign that the RIAA has been waging against those who listen to music on file-sharing networks. The RIAA's recording-company members have sued or threatened to sue almost 40,000 individuals in the federal courts as part of their campaign against file sharing. The recipients of these threats, many of them, like Harper, students unable to afford counsel, must pay settlements between \$3,000 and \$12,000 or litigate against the RIAA. If they choose to litigate, they face potentially millions of dollars in statutory damages and must shoulder the expense of federal litigation or find *pro bono* counsel.

For this reason, cases like this one will rarely reach judgment in the district courts, even more rarely obtain consideration by the courts of appeals, and almost never arrive at this Court on a petition for certiorari. And this is so even though the relevant rule of law is shaping tens of thousands of cases brought by recording companies against individuals in the lower courts and the primary conduct of millions of other individuals. If this Court agrees with Harper that the question presented by this case — whether copyright infringement by listening to music on the Internet can ever be innocent infringement — is worth resolving correctly, finally, and nationally, then this Court should take the opportunity to do so now. The opportunity is unlikely to come again.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 2010

## **APPENDIX**

**APPENDIX**

**TABLE OF CONTENTS**

Appendix A:	Opinion, In the United States Court of Appeals for the Fifth Circuit (Filed February 25, 2010) . . . . .	1a
Appendix B:	Order, United States District Court Western District of Texas San Antonio Division (Filed September 16, 2008) . . .	15a
Appendix C:	Order, United States District Court Western District of Texas San Antonio Division (Filed August 7, 2008) . . . . .	27a
Appendix D:	Statutes 17 U.S.C. § 402 . . . . . 17 U.S.C. § 504 . . . . .	48a 49a

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**APPENDIX A**

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**IN THE UNITED STATES  
COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**No. 08-51194**

**[Filed February 25, 2010]**

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MAVERICK RECORDING COMPANY,	)
A California Joint Venture;	)
UMG RECORDINGS INC,	)
A Delaware Corporation;	)
ARISTA RECORDS LLC,	)
A Delaware Limited Liability Company;	)
WARNER BROTHERS RECORDS INC,	)
A Delaware Corporation; SONY BMG	)
MUSIC ENTERTAINMENT,	)
A Delaware General Partnership	)
	)
Plaintiffs – Appellees-Cross-Appellants	)
	)
v.	)
	)
WHITNEY HARPER	)
	)
Defendant – Appellant-Cross-Appellee	)

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Appeals from the United States District Court  
for the Western District of Texas

Before DAVIS, CLEMENT, and ELROD, Circuit Judges.  
EDITH BROWN CLEMENT, Circuit Judge:

Ruling on cross-motions for summary judgment, the district court found that appellant Whitney Harper infringed copyrights held by a consortium of record companies in 37 sound recordings. It also found that whether Harper was an “innocent infringer” under 17 U.S.C. § 504(c)(2) was a question for the jury. On Plaintiffs’ motion, the court entered a final judgment against Harper in the amount of \$200 per infringed work, the minimum amount that could be awarded for innocent infringement. Harper appealed and Plaintiffs cross-appealed. We affirm the district court’s finding of copyright infringement but reverse its conclusion that Harper could press the “innocent infringer” defense.

### **FACTS AND PROCEEDINGS**

In June 2004, MediaSentry, a company retained by Plaintiffs to investigate the infringement of their copyrights over the Internet, identified an individual using a file-sharing program to share 544 digital audio files with other users of a peer-to-peer network. The shared audio files included a number of Plaintiffs’ copyrighted sound recordings. By tracing the user’s Internet protocol address, Plaintiffs ultimately identified Harper as the individual responsible for the file sharing.

To ensure that each of the 544 audio files was a downloadable file, MediaSentry initiated a download of the entire group. The company captured screen shots showing all of the files that Harper was sharing. It also captured the metadata associated with each



file, which included the name of the artist and song. This information allowed Plaintiffs to identify those sound recordings on which they held a copyright. MediaSentry fully downloaded six of the audio files from Harper's "shared folder." Subsequent discovery indicated that Harper had downloaded all of the files from the Internet to the computer without paying for them, and that she had not copied, or "ripped," any of the songs from compact discs that she had bought legally.

During discovery, Plaintiffs examined Harper's computer. The examination showed that its operating system had been reinstalled in 2005. As a result, most of the files present on the computer in 2004, when MediaSentry performed its investigation, had been overwritten. The forensic examination did show that three file-sharing programs had been installed and used on the computer, including a program known as LimeWire, which had been used after the operating system was reinstalled. It also revealed a new cache of approximately 700 recordings downloaded since the reinstallation. Fifteen of the copyrights that Plaintiffs' second amended complaint alleged that Harper infringed came from this newly discovered cache.

In August 2008, the district court granted Plaintiffs' motion for summary judgment on their copyright claims for 37 audio files. By agreement of the parties, the court also entered an injunction against Harper.

The district court denied Plaintiffs' request for statutory damages. Plaintiffs had requested the minimum damages of \$750 per infringed work set forth in § 504(c)(1). Harper asserted that her

infringement was “innocent” under § 504(c)(2), which provides that “where the infringer sustains the burden of proving . . . that [she] was not aware and had no reason to believe that . . . her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.” Harper averred that she thought her actions were equivalent to listening to an Internet radio station. The district court found that whether her infringement was “innocent” presented a disputed issue of material fact.

The district court denied each party’s motion for reconsideration. In doing so, it clarified its finding that Harper infringed Plaintiffs’ exclusive rights to both reproduce and distribute the 37 songs on which they held a copyright.

Reserving the right to appeal the district court’s legal conclusion on the innocent infringer issue if Harper appealed, Plaintiffs moved for entry of judgment in the amount of \$200 for each infringed work—the minimum amount due from an innocent infringer. The court granted Plaintiffs’ motion and entered judgment against Harper. Harper appealed, and Plaintiffs cross-appealed.

Harper argues that, for 31 of the 37 recordings, there was insufficient evidence of infringement because the audio files were not found on her computer. She also contends that she did not infringe Plaintiffs’ copyrights by “making available” the audio files and that the Copyright Act’s statutory damages scheme violates due process. Plaintiffs argue that the district court erred by failing to rule out the innocent infringer defense as a matter of law.

## STANDARD OF REVIEW

We review a grant of summary judgment *de novo* and apply the same legal standard as the district court. *Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 (5th Cir. 2008). Summary judgment should be rendered if the record demonstrates that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). “[A]ll facts and evidence must be taken in the light most favorable to the non-movant.” *LeMaire v. La. Dep’t of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007).

## DISCUSSION

### A. Sufficiency of the Evidence

Harper argues that Plaintiffs did not present sufficient evidence for the district court to find that 31 of the 37<sup>1</sup> audio files at issue existed on her computer. She does not contest the existence of the six audio files that MediaSentry downloaded in full over the peer-to-peer file-sharing network in 2004. She also cannot contest the existence of the 15 audio files that were part of the cache of approximately 700 songs discovered on Harper’s hard drive in 2008. The issue, then, is whether Plaintiffs made an undisputed

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<sup>1</sup> In her brief, Harper asserts that the evidence was insufficient to show the existence of 33 out of 39 audio files. That sum reflects a miscalculation. After the district court’s entry of judgment as to 37 audio files, six of which Harper admits were on her computer, she must be challenging the sufficiency of the evidence on 31 audio files.

showing that Harper had downloaded the remaining 16 audio files.

Harper's argument relies on the computer forensic expert's inability to recover complete copies of the 16 contested audio files when the expert searched her computer's hard drive in 2008. That inability was due to the 2005 reinstallation of the computer's operating system, which overwrote most of the audio files present in 2004. Harper asserts that the 2008 forensic evidence is inconclusive and that a jury could find that the file remnants discovered in the 2008 examination were something other than downloaded audio files.

Harper's argument ignores the voluminous and undisputed evidence that she downloaded and shared the 16 contested audio files. MediaSentry's screen shots of Harper's "shared folder" indicate that she was sharing the contested audio files from her computer in 2004. MediaSentry also initiated downloads of the audio files to verify their existence and recovered metadata from which it could identify the artist and song title of each file.

Harper submitted no evidence that calls into question Plaintiffs' showing that she had downloaded the audio files. In her deposition, she did not deny that she had downloaded them. She also testified that she had not copied any of the recordings to her computer from compact discs that she purchased, and she acknowledged using a peer-to-peer file-sharing network and stated that she recognized "some of the songs . . . as music I listened to and may have downloaded to the computer."

The uncontroverted evidence is more than sufficient to compel a finding that Harper had downloaded the files: there was no evidence from which a fact-finder could draw a reasonable inference that Harper had *not* downloaded them or that they were something other than audio files. Harper “cannot defeat a motion for summary judgment merely by claiming some metaphysical doubt as to the material facts.” *Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288, 295 (5th Cir. 2007) (quotation omitted). The district court properly rejected Harper’s argument that the evidence of infringement was insufficient.

#### B. Copyright Infringement

Section 106 of the Copyright Act grants copyright owners the exclusive right “to do and to authorize,” *inter alia*, the reproduction of “the copyrighted work in copies or phonorecords,” the preparation of “derivative works based upon the copyrighted work,” and the distribution of “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. Plaintiffs’ second amended complaint contains one count, for copyright infringement. Plaintiffs alleged that Harper had violated their copyrights in two ways: first, by reproducing the copyrighted audio files, and second, by making them available to others, which Plaintiffs argue is tantamount to “distribution.” The district court found that the undisputed evidence showed Harper had done both.

Harper argues that making audio files available to others by placing them in a “shared folder” accessible by users of a peer-to-peer file-sharing network does not constitute “distribut[ion]” under § 106(3). *Cf. Elektra*

*Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 239-47 (S.D.N.Y. 2008) (collecting cases in which courts have considered but not embraced the “making available” theory of distribution). We need not address the “making available” argument at this time, however, because Harper did not appeal the district court’s finding that she had infringed Plaintiffs’ copyrights by downloading, and hence reproducing, the audio files. Because Plaintiffs only seek minimum statutory damages, the question before the court is whether Harper’s actions violated the Copyright Act, not how or to what extent they violated it. *See* 17 U.S.C. § 504(c)(1) (allowing copyright holders to elect “to recover . . . an award of statutory damages for all infringements involved in the action, with respect to any one work”). Harper’s failure to contest the alternative, independent ground on which the district court found her liable for copyright infringement renders superfluous her argument against the “making available” theory. Even if the court agreed that Harper did not “distribute” the recordings under § 106(3) by making them available to others, the underlying finding of copyright infringement predicated on reproduction would remain.

The district court’s unchallenged ruling that Harper infringed Plaintiffs’ copyrights by downloading the audio files is supported by case law in this and other circuits. In *Alcatel USA, Inc. v. DGI Technologies, Inc.*, this court held that the distribution of a microprocessor card that made copies of an operating system by downloading it caused users to violate the plaintiff’s “exclusive right to reproduce its software.” 166 F.3d 772, 791 (5th Cir. 1999); *see* § 106(1). In *BMG Music v. Gonzalez*, the Seventh Circuit held that a defendant infringed copyrights by

downloading music through a file-sharing network. 430 F.3d 888 (7th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006). *Gonzalez* explained that the foundation of the Supreme Court's holding in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), "is a belief that people who post or download music files are primary infringers." 430 F.3d at 889; *see also In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) ("swapping" music files over the Internet "infringes copyright"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.").

Harper infringed Plaintiffs' exclusive right to reproduce their copyrighted works by downloading the 37 audio files to her computer without authorization. The district court correctly granted summary judgment on the issue of infringement.

### C. Due Process

Harper contends that the statutory scheme of damages for copyright violations outlined in § 504, as applied to her, violates due process by imposing grossly excessive damages. She argues that, at the time of the infringement, she was young and did not know that what she was doing was unlawful, and that fining her several hundred dollars per song for illegal downloading does not comport with substantive due process.

Harper, however, waived her constitutional challenge by failing to raise it below in a manner that would allow the district court to rule on it. "It is well settled in this Circuit that the scope of appellate

review on a summary judgment order is limited to matters presented to the district court.” *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005). “If a party wishes to preserve an argument for appeal,” it “must press and not merely intimate the argument during the proceedings before the district court.” *Id.* at 340 (quoting *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 n.4 (5th Cir. 1995)). “If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal.” *FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994).

In her opposition to Plaintiffs’ motion for summary judgment, Harper stated that she had notified the district court of her intent to challenge the constitutionality of the Copyright Act. She then presented the whole of her constitutional argument: “Whitney Harper believes that the copyright law, as being applied by the plaintiff is unfair and overreaching and exacts an unreasonable punishment.” Harper did not cite any provision of the Constitution or explain why the punishment was so unreasonable that it violated due process. The district court did not rule on her conclusory and unsupported assertion. It was not remiss in failing to do so. The point was simply not pressed in Harper’s brief in a cognizable fashion. Instead, it was “presented in a cursory manner” insufficient to preserve it for appeal. *In re Espino*, 806 F.2d 1001, 1002 (11th Cir. 1986).

#### D. “Innocent Infringer” Defense

In denying Plaintiffs’ motion for summary judgment as to damages, the district court held that there was a genuine issue of material fact as to



whether Harper was an innocent infringer. The innocent infringer defense gives the district court discretion to reduce the minimum statutory damages from \$750 to \$200 per infringed work if it finds that the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2). Harper averred in an affidavit that she did not understand the nature of file-sharing programs and that she believed that listening to music from file-sharing networks was akin to listening to a non-infringing Internet radio station. The district court ruled that this assertion created a triable issue as to whether Harper’s infringement was “innocent” under § 504(c)(2).

Assuming *arguendo* that Harper made a prima facie case that she was an innocent infringer, we hold that the defense was unavailable to her as a matter of law. The innocent infringer defense is limited by 17 U.S.C. § 402: with one exception not relevant here, when a proper copyright notice “appears on the published . . . phonorecords to which a defendant . . . had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.” *Id.* § 402(d).

The district court acknowledged that Plaintiffs provided proper notice on each of the published phonorecords from which the audio files were taken. It found, however, that regardless of Harper’s access to the published phonorecords, such access would not necessarily put her on notice of the copyrights: “a question remains as to whether Defendant knew the warnings on compact discs were applicable in this [file-sharing network] setting.” The court discounted the

argument “that one need only have access to some CD and see that the recording is subject to copyright” for § 402(d) to bar the innocent infringer defense, because knowledge that some CDs are copyrighted does “little to establish that, as a matter of law . . . an individual knew that she was accessing copyright material from an entity that did not have permission to distribute such material.” In her brief opposing summary judgment and brief on appeal, and at oral argument, rather than contest the fact of “access,” Harper contended only that she was too young and naive to understand that the copyrights on published music applied to downloaded music.

These arguments are insufficient to defeat the interposition of the § 402(d) limitation on the innocent infringer defense. Harper’s reliance on her own understanding of copyright law—or lack thereof—is irrelevant in the context of § 402(d). The plain language of the statute shows that the infringer’s knowledge or intent does not affect its application.<sup>2</sup> Lack of legal sophistication cannot overcome a properly asserted § 402(d) limitation to the innocent infringer defense.

This understanding is supported by the historical structure of the copyright law. What is now § 402(d) was amended as part of the Berne Convention Implementation Act (“BCIA”), Pub. L. No. 100-568, 102 Stat. 2853 (1988). Before the Berne Convention was adopted, publishers ran the risk of placing their work

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<sup>2</sup> And copyright infringement itself has no *mens rea* element. 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.02 & n.26.1 (2009).

into the public domain by failing to include a notice of copyright. “Under the BCIA,” however, “notice is no longer required at publication.” 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.02(C)(3) (2009). But the BCIA, in part through § 402(d), “preserves an incentive for use of the same type of copyright notice.” *Id.* That incentive is the bar to the innocent infringer defense. Under this scheme, it would make no sense for a copyright defendant’s subjective intent to erode the working of § 402(d), which gives publishers the option to trade the extra burden of providing copyright notice for absolute protection against the innocent infringer defense. Harper cannot rely on her purported legal naivety to defeat the § 402(d) bar to her innocent infringer defense.

In short, the district court found a genuine issue of fact as to whether Harper intended to infringe Plaintiffs’ copyrights, but that issue was not material: § 402(d) forecloses, as a matter of law, Harper’s innocent infringer defense. Because the defense does not apply, Plaintiffs are entitled to statutory damages. And because Plaintiffs requested the minimum statutory damages under § 504(c)(1), Harper’s culpability is not an issue and there are no issues left for trial. Plaintiffs must be awarded statutory damages of \$750 per infringed work.

## CONCLUSION

The district court correctly found that Harper infringed Plaintiffs’ copyrights by downloading the 37 audio files at issue. It erred, though, by allowing Harper’s innocent infringer defense to survive summary judgment. We AFFIRM the district court’s

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finding of copyright liability, REVERSE its finding that the innocent infringer defense presented an issue for trial, and REMAND for further proceedings consistent with this opinion.

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**APPENDIX B**

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

**Cause No. 507-CV-026-XR**

**[Filed September 16, 2008]**

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MAVERICK RECORDING COMPANY; )  
UMG RECORDINGS, INC.; ARISTA )  
RECORDS LLC; WARNER BROS. )  
RECORDS, INC.; and SONY BMG )  
MUSIC ENTERTAINMENT )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
WHITNEY HARPER, )  
 )  
Defendant. )  

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**ORDER**

On this day, the Court considered Plaintiffs' and Defendant's motions for reconsideration. On August 7, 2008, this Court granted, in part and denied, in part, Plaintiffs' motion for summary judgment. Both sides seek reconsideration of that order.

In the August 7 Order, the Court found that Plaintiffs were entitled to summary judgment on the six (6) recordings listed in Exhibit A of Plaintiffs motion for summary judgment.

Further, the Court found that with regard to the recordings contained in Schedule 1 of Plaintiffs motion for summary judgment, Plaintiffs were entitled to summary judgment on sixteen (16) of the works.

With regard to the recordings listed in Exhibit C of Plaintiff's motion for summary judgment, the Court found that Plaintiffs were entitled to summary judgment on fifteen (15) of the recordings.

Defendant seeks reconsideration, arguing that Plaintiffs only offered evidence to indicate that six songs were downloaded, and that there is no competent summary judgment evidence to establish any of the remaining thirty-one claims of infringement.

In the August 7 Order, the Court found that with regard to damages, a fact issue exists as to whether Defendant was an innocent infringer.

Plaintiffs seek reconsideration of that portion of the August 7 Order, arguing that under 17 U.S.C. § 402(d) if their notice of copyright appeared on the "published phonorecord" to which a defendant in a copyright suit had access, then no weight shall be given to such a defendant's interposition of a defense based upon innocent infringement of actual or statutory damages." Further, Plaintiffs argue that they are entitled to the statutory \$750 per work and that no fact issues remain and judgment should be entered in their favor as a matter of law.

### **Factual Background**

A complete background was provided in the August 7 Order. This Order will only repeat facts relevant to the motions for reconsideration.

On June 5, 2004, Plaintiffs' investigator, MediaSentry, detected an individual with the username "whitney@fileshare" at Internet Protocol ("IP") address 24.174.166.204 using an online file sharing program to distribute Plaintiffs' copyrighted sound recordings. The individual was distributing 544 digital audio files from a "shared folder on the computer to other individuals on the file sharing network. MediaSentry determined that Time Warner Cable was the internet provider that had given this IP address to one of its customers, Steve Harper. Subsequent conversations between Plaintiffs and Steve Harper determined that Defendant Whitney Harper was allegedly responsible for downloading audio files onto the computer.

As part of its investigation on June 5, 2004, MediaSentry downloaded complete copies of the six audio files listed in Exhibit A. In addition, MediaSentry initiated downloads of all 544 audio files in the "shared" folder to ensure that actual audio files existed in all cases. All files were downloaded through the Mesh file sharing program. Defendant stated that she did not remember using Mesh on the computer; however, she did admit that she used KaZaA, a file sharing program that uses Fasttrack, the same peer-to-peer network as Mesh. MediaSentry captured metadata that showed the audio files listed in Exhibit A and Schedule 1 among the files available for

download to other internet users from a shared folder on Defendant's computer.

On March 19, 2005, Windows was reinstalled on Defendant's computer. The reinstallation resulted in most of the 544 files discovered in the original investigation being overwritten; however, some remnants of these files remained after the reinstallation was completed. Plaintiffs completed a forensic investigation of Defendant's computer, which revealed that Mesh was installed on the computer and accessed through the username "whiterney."

The forensic investigation also found file sharing programs KaZaA and Limewire installed on the computer. KaZaA had been removed from the computer prior to the March 19 reinstallation of Windows. LimeWire was installed on the computer in July 2005. The recordings contained in Exhibit C are audio files that were in one of the three shared folders used with the LimeWire file sharing program.

Defendant admitted that the Recordings may have been among audio files that she listened to on the computer. She testified that she did not copy these files from compact discs that she owned. During her deposition, Defendant testified that she used KaZaA to listen to sound recordings but did not know that she was downloading or distributing them. Defendant stated that she had "no reason to doubt" that her actions were "100% free and 100% legal" and that she believed programs like KaZaA "to be similar to online radio stations."



### **Infringement of Copyrights**

With regard to the recordings contained in Schedule 1, Plaintiffs introduced a declaration from Elizabeth Hardwick (“Hardwick”), a Project Manager for MediaSentry. In the declaration, Hardwick declares that a certain exhibit “is a true and correct copy of a compilation of screen shots captured by MediaSentry . . . showing the list of 544 audio files that this computer was distributing to others for download.”<sup>1</sup> Based on the summary judgment evidence, the Court found that Plaintiffs were entitled to summary judgment on sixteen (16) of the works listed in Schedule 1.

Regarding the recordings listed in Exhibit C, based on the summary judgment evidence, the Court found that Plaintiffs were entitled to summary judgment on fifteen (15) of the recordings from Exhibit C.

Defendant argues<sup>2</sup> that her allegedly “making available” the 31 songs in a shared file and allowing

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<sup>1</sup> Defendant did not object to the admissibility of Hardwick’s declaration, and Defendant did not bring any credible summary judgment evidence refuting Hardwick’s contention that all of the files listed in Exhibit B were available for download from her computer.

<sup>2</sup> In her motion for reconsideration Defendant for the first time raises objections to Exhibits A-D and N-T of Plaintiffs’ motion for summary judgment. Those objections should have been raised in response to the motion for summary judgment and are untimely. In addition, the objections to Exhibits N - T are without merit. These exhibits are copies of unpublished opinions issued by other federal courts. They may be non-binding on this court, but they are not objectionable. The objections are overruled.

those files to be accessed by others does not constitute infringement. Relying upon *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp.2d 153 (D. Mass. 2008), Defendant argues that merely making copyrighted works available to the public is not enough evidence for summary judgment purposes to establish that an unauthorized copy of the works actually changed hands. The Court in *London-Sire* recognized that there was a split of authority on this issue.<sup>3</sup> Although the Court in *London-Sire* acknowledged that “the statutory definition of publication can include offers to distribute” and that “sharing music files on a peer-to-peer network does, at least arguably, constitute an offer to distribute them,” it found that “publication” and “distribution” are not identical. *London-Sire*, 542 F. Supp. 2d at 168-169. The Court, however, in ruling on motions to quash subpoenas to internet service providers seeking the identities of certain IP addresses, went on to state the following:

But that does not mean that the plaintiffs’ pleadings and evidence are insufficient. The

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<sup>3</sup> Compare *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (holding that making copyrighted material available is sufficient to constitute a distribution), and *Arista Records LLC v. Greubel*, 453 F. Supp.2d 961, 969-70 (N.D. Tex. 2006) (citing and following *Hotaling*), and *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA051, 2006 WL 2844415, at \*3-\*4 (W.D. Tex. July 17, 2006) (same), with *In re Napster, Inc. Copyright Litig.*, 377 F. Supp.2d 796, 802-05 (N.D. Cal. 2005) (criticizing *Hotaling* as being “contrary to the weight of [other] authorities” and “inconsistent with the text and legislative history of the Copyright Act of 1976”), and *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 99 1 F.2d 426, 434 (8th Cir. 1993) (stating that infringement of the distribution right requires the actual dissemination of copies or phonorecords).

Court can draw from the Complaint and the current record a reasonable inference in the plaintiffs' favor-that where the defendant has completed all the necessary steps for a public distribution, a reasonable fact-finder may infer that the distribution actually took place. As in *Hotaling*, the defendants have completed the necessary steps for distribution, albeit electronic: Per the plaintiffs' pleadings, each individual Doe defendant connected to the peer-to-peer network in such a way as to allow the public to make copies of the plaintiffs' copyrighted recordings. See Compl. at 5 (docket no. 07-cv-10834, document # 1). Through their investigator, the plaintiffs have produced evidence that the files were, in fact, available for download. They have also alleged that sound recordings are illegally copied on a large scale, supporting the inference that the defendants participated in the peer-to-peer network with the intent that other users could download from the defendants copies of the plaintiffs' copyrighted material. See Linares Decl. at 3-4, Ex. A to P1. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5). At least at this stage of the proceedings, that is enough. The plaintiffs have pled an actual distribution and provided some concrete evidence to support their allegation.

*London-Sire*, 542 F. Supp. 2d at 169. In this case, however, we are in the summary judgment context.

First, this Court notes that when granting the summary judgment initially, the Court reviewed Plaintiffs' allegations and summary judgment evidence

that Defendant downloaded the songs in question, they were placed in a shared folder, and that she made the songs available to others.

Defendant's motion for reconsideration does not challenge Plaintiffs' allegations and evidence that Defendant did not copy any songs from properly purchased CDs onto her computer, and that she obtained the songs through the internet. Defendant makes no argument that she paid for any of these songs. Accordingly, the Court need not reconsider its previous ruling.

To the extent that the Court misconstrued Plaintiffs' motion for summary judgment and Plaintiffs only sought judgment on the basis of the "making available" theory, the Court rejects Defendant's argument that merely making copyrighted works available to the public is not enough evidence for summary judgment purposes to establish infringement.

Acknowledging that the Fifth Circuit has not yet ruled on this issue, this Court will follow those other courts that have found a "make available" right in 17 U.S.C. Section 106(3).<sup>4</sup>

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<sup>4</sup> See, e.g., *A & M Records, Inc. v. Napster Inc.*, 239 F.3d 1004, 1014 (9th Cir.2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."); *Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551 (S.D. Tex. 2008) ("Courts have concluded that availing unauthorized copies of sound recordings for download using an online file-sharing system (such as a peer-to-peer network, as is the case here) constitutes an offer to distribute those works, thereby violating a copyright owner's exclusive right to

Defendant's motion for reconsideration is denied (docket no. 61).

### **Damages**

The damages provision of the Copyright Act provides that a plaintiff may elect to seek minimum damages of \$750 per work. 17 U.S.C. § 504(c)(1). However, it also provides that “where the infringer . . . was not aware and had no reason to believe that his or

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distribution. Stated differently, making copyrighted works available for download via a peer-to-peer network contemplates ‘further distribution,’ and thus constitutes a violation of the copyright owner’s exclusive ‘distribution’ right under 17 U.S.C. § 106(3) .... On these facts, it is self-evident that Defendant’s actions in placing Plaintiffs’ Copyrighted Recordings in a shared folder accessible to numerous other persons on KaZaA constituted a “distribution” for the purposes of Plaintiffs’ copyright infringement claim against Defendant. Distributing copyrighted sound recordings without authorization through a peer-to-peer network such as KaZaA is a ‘distribution’ prohibited by the [C]opyright [A]ct.”); *Capitol Records, Inc. v. Koyate*, 2008 WL 2857237 (N.D. Ind. 2008) (“Defendant acknowledges that Plaintiffs have never granted him the authority to copy, download, or make available Plaintiffs’ nine sound recordings. Therefore, Defendant violated Plaintiffs’ exclusive rights to reproduce and distribute the nine sound recordings as listed in Exhibit A, pursuant to 17 U.S.C. § 106(1), (3).”); *Atlantic Recording Corp. v. Howell*, 2007 WL 2409549 (D. Ariz. Aug. 20, 2007); *Motown Record Co., LP v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at \*3 n. 38 (E.D. Pa. Feb.16, 2007) (“While neither the United States Supreme Court nor the Third Circuit Court of Appeals has confirmed a copyright holder’s exclusive right to make the work available, the Court is convinced that 17 U.S.C. § 106 encompasses such a right ....”); *Arista Records LLC v. Greubel*, 453 F. Supp.2d 961 (N.D. Tex. 2006)(discussing numerous cases wherein courts have found that making copyrighted works available to others violated the exclusive right of distribution).

her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.” 17 U.S.C. § 504(c)(2). The defendant has the burden to prove the lack of intent necessary for innocent infringement. *Id.*

As evidence of her “innocent” infringement, Defendant presents a signed affidavit stating that before the lawsuit, she “had no knowledge or understanding of file trading, online distribution networks or copyright infringement.” In addition, Defendant stated that “Kazaa and similar products did not inform me that the materials available through their service were stolen or abused copyrighted material and I had no way of learning this information prior to this lawsuit.”

Plaintiffs contend that by complying with 17 U.S.C. § 402 and placing notices on each of the containers and on the surface of the compact discs of the Recordings, they have provided notice such that Defendant could have learned that the Recordings were copyrighted.

The Copyright Act provides that “[I]f a notice of copyright . . . appears on the published phonorecord . . . to which a defendant had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement” unless the infringement was believed to be fair use, 17 U.S.C. § 402(d). Although the Fifth Circuit has not addressed this issue directly, the Seventh Circuit has found that an innocent infringer defense did not apply in a case where the defendant “readily could have learned, had she inquired, that the music was under copyright.” *BMG Music v. Gonzales*, 430 F.3d 888, 892 (7th Cir.

2005); *see also Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551 (S.D. Tex. Mar. 12, 2008) (rejecting innocent infringer defense because Anderson knowingly placed the songs into a shared folder that allowed for peer-to-peer sharing). As for the argument that one need only have access to some CD and see that the recording is subject to copyright, does little to establish that, as a matter of law, that an individual knew that she was accessing copyright material from an entity that did not have permission to distribute such material.

The Court remains convinced that a genuine issue of material fact is present. Although as stated above, Defendant infringed on Plaintiff's copyright, Defendant claims that she believed using KaZaA and similar products to be akin to listening to radio over the internet and did not know that the Recordings were being either downloaded or distributed. At the summary judgment stage, all factual disputes must be construed in the light most favorable to the non-moving party - in this case, Defendant. Plaintiffs have not introduced any evidence to contradict that Defendant did not have an understanding of the nature of file-sharing programs and copyright sophisticated enough to have reason to know that her actions infringed Plaintiffs' copyrights. Therefore, the Court finds that a fact issue exists as to whether Defendant was an innocent infringer.

**Conclusion**

Plaintiffs' motion for reconsideration is denied (docket no. 60).

Defendant's motion for reconsideration is denied (docket no. 61).

SIGNED this 16th day of September, 2008.

/s/ \_\_\_\_\_  
XAVIER RODRIGUEZ  
UNITED STATES DISTRICT JUDGE



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**APPENDIX C**

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

**Cause No. 5:07-CV-026-XR**

**[Filed August 7, 2008]**

MAVERICK RECORDING COMPANY;	)
UMG RECORDINGS, INC.;	)
ARISTA RECORDS LLC;	)
WARNER BROS. RECORDS, INC.;	)
and SONY BMG MUSIC	)
ENTERTAINMENT	)
	)
Plaintiffs,	)
	)
vs.	)
	)
WHITNEY HARPER,	)
	)
Defendant.	)
	)

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**ORDER**

On this day, the Court considered Plaintiffs' motion for summary judgment (Docket No. 48) and accompanying exhibits (Docket No. 49), as well as Defendant's response (Docket No. 52) and Plaintiffs' reply (Docket No. 54). Jurisdiction is proper under 28

U.S.C. § 1338(a) because the claims in this action arise out of the Copyright Act of 1976. After careful consideration, the Court grants Plaintiffs' motion in part and denies the motion in part.

### **I. Procedural Background**

On January 9, 2007, Plaintiffs Warner Brothers Records, Inc., Sony BMG Music Entertainment, Maverick Recording Company, UMG Recordings, Inc., and Arista Records LLC (collectively "Plaintiffs") filed a petition against Steve Harper alleging the copying and distribution of music recordings in violation of the Copyright Act of 1976 ("Copyright Act"). (Docket No. 1). During discovery, on December 14, 2007, Plaintiffs filed a motion to amend the complaint to add Whitney Harper ("Defendant") as a defendant and dismiss Steve Harper, her father, from the suit. (Docket No. 33). The Court granted the motion on December 19, 2007, and Defendant was substituted for her father as a party to the suit. (Docket No. 34). Plaintiffs filed an amended complaint on December 27, 2007 to reflect the correct parties involved in the suit. (Docket No. 37). Defendant filed an answer to the complaint on February 13, 2008, followed by an amended answer filed with leave of the Court on February 27, 2008. (Docket Nos. 39, 44).

On May 12, 2008, Plaintiffs filed a motion for leave to file a second amended complaint; this motion was granted, and a second amended complaint was entered on June 9, 2008. (Docket Nos. 45, 51). The complaint requested an injunction ordering Defendant destroy all unlawful copies of Plaintiffs' recordings and cease infringing Plaintiffs' copyrights directly or indirectly. (Docket No. 51, at 4). Plaintiffs also requested

statutory damages pursuant to 17 U.S.C. § 504, as well as costs and attorneys' fees. (*Id.*, at 4-5). The June 2008 complaint is the live pleading in the case at this time.

On May 30, 2008, Plaintiffs filed a motion for summary judgment and an appendix of exhibits. (Docket Nos. 48, 49). Plaintiffs requested that the Court grant summary judgment awarding an injunction against Defendant to prevent her from further violating Plaintiffs' copyrights. Additionally, Plaintiffs requested that the Court find that copyright infringement occurred with regard to thirty-nine of Plaintiffs' recordings and award statutory minimum damages of \$750 per infringed work (total of \$28,500). (Docket No. 48, at 2). On June 10, 2008, Defendant filed a response in opposition to summary judgment, including objections to certain exhibits presented by Plaintiffs in support of their motion. (Docket No. 52). Plaintiffs filed a reply on July 3, 2008. (Docket No. 54).

## **II. Factual Background**

Plaintiffs are recording companies that own or control rights to copyrights in sound recordings. (Docket No. 48, at 2). The sound recordings (collectively "Recordings") at issue for purposes of summary judgment are as follows:<sup>1</sup>

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<sup>1</sup> In order to maintain consistency with the terms used in the pleadings and motions, the first six songs will be collectively referred to hereinafter as "Exhibit A." The subsequent seventeen songs will be collectively referred to hereinafter as "Schedule 1." The last sixteen songs will be collectively referred to hereinafter as "Exhibit C." (Docket No. 48, at 2; Docket No. 51, at 7, 9-10).

<b>Copyright Holder</b>	<b>Artist</b>	<b>Song Title</b>	<b>Album Title</b>	<b>SR #</b>
Maverick Recording Company	Michelle Branch	You Get Me	The Spirit Room	303-732
UMG Recordings, Inc.	Ja Rule	6 Feet Underground	Rule 3:36	270-080
Arista Records LLC	Avril Lavigne	I'm With You	Let Go	312-786
UMG Recordings, Inc.	Counting Crows	Hanging Around	This Desert Life	271-316
Warner Bros. Records Inc.	Faith Hill	Just to Hear You Say That You Love Me	Faith	253-752
Sony BMG Music Entertainment	Indigo Girls	Closer to Fine	Indigo Girls	101-524
UMG Recordings Inc.	Counting Crows	Mr. Jones	August and Everything After	172-267
UMG Recordings Inc.	Vanessa Carlton	Ordinary Day	Be Not Nobody	313-943

## 31a

Warner Bros. Records Inc.	Faith Hill	Beautiful	Cry	321-377
Warner Bros. Records Inc.	Madonna	Die Another Day	Die Another Day (single)	314-662
Sony BMG Music Entertainment	Good Charlotte	Little Things	Good Char-lotte	288-305
UMG Recordings, Inc.	Counting Crows	American Girls	Hard Candy	321-021
Sony BMG Music Entertainment	Jessica Simpson	Sweetest Sin	In This Skin	378-700
Sony BMG Music Entertainment	Jennifer Lopez	I'm Real (duet w/Ja Rule)	J. Lo.	293-297
UMG Recordings, Inc.	Musiq	Dontchange	Juslisen	308-859
Arista Records LLC	Dido	White Flag	Life for Rent	340-392
Sony BMG Music Entertainment	John Mayer	Love Song for No One	Room for Squares	305-049

## 32a

Warner Bros. Records Inc.	Fleetwood Mac	Dreams	Rumours	N39857
UMG Recordings Inc.	The Police	Every Breath You Take	Synchronicity	44-862
Sony BMG Music Entertainment	Good Charlotte	Emotionless	The Young and the Hopeless	309-099
Sony BMG Music Entertainment	Jennifer Lopez feat. Styles/Jada kiss	Jenny From the Block	This is Me... Then	322-106
UMG Recordings Inc.	Hanson	Save Me	This Time Around	280-547
UMG Recordings Inc.	Diana Krall	Why Should I Care	Why Should I Care (single)	265-006
Arista Records LLC	Brooks & Dunn	Still in Love With You	Brand New Man	140-290
Arista Records LLC	Brooks & Dunn	She Used to be Mine	Hard Workin' Man	168-005
Arista Records LLC	Brooks & Dunn	My Maria	Borderline	218-735

Arista Records LLC	Phil Vassar	Just Another Day in Paradise	Phil Vassar	284-145
UMG Recordings, Inc.	Vanessa Carlton	A Thousand	Thousand Miles (single)	306-656
UMG Recordings, Inc.	Vanessa Carlton	Ordinary Day	Be Not Nobody	313-943
Sony BMG Music Entertainment	Howie Day	Collide	Stop All the World Now	349-701
UMG Recordings, Inc.	The Killers	Mr. Brightside	Hot Fuss	355-962
Warner Bros. Records Inc.	Green Day	American Idiot	American Idiot	362-125
Sony BMG Music Entertainment	Destiny's Child	Cater 2 U	Destiny Fulfilled	363-786
UMG Recordings, Inc.	Gwen Stefani	Hollaback Girl	Love. Angel. Music. Baby.	364-759
UMG Recordings, Inc.	3 Doors Down	Let Me Go	Seventeen Days	368-870

UMG Recordings, Inc.	Lifehouse	You and Me	Lifehouse	370-643
UMG Recordings, Inc.	Mariah Carey	We Belong Together	The Emancipation of Mimi	370-795
Sony BMG Music Entertainment	Anna Nalick	In My Head	Wreck of the Day	372-028
Sony BMG Music Entertainment	Frankie J	How to Deal	The On	377-949

On June 5, 2004, at 9:16 EDT, Plaintiffs' investigator, MediaSentry, detected an individual with the username "whiterney@fileshare" at Internet Protocol ("IP") address 24.174.166.204 using an online file sharing program to distribute Plaintiffs' copyrighted sound recordings. (Docket No. 48, at 3). The individual was distributing 544 digital audio files from a "shared" folder on the computer to other individuals on the file sharing network. (*Id.*). MediaSentry determined that Time Warner Cable was the internet provider that had given this IP address to one of its customers. (*Id.*).

Plaintiffs filed a "Doe" lawsuit and obtained a court order for expedited discovery to determine the identity of the account holder with the IP address 24.174.166.204. *Priority Records LLC, et al. v. Does*



1-175, No. 05-CV-3173 (S.D.N.Y. Mar. 24, 2005). In response to Plaintiffs' subpoena, Time Warner Cable identified Steve Harper as the subscriber responsible for the IP address in question as of June 5, 2004. (Docket No. 48, at 3). Subsequent conversations between Plaintiffs and Steve Harper determined that Defendant Whitney Harper was allegedly responsible for downloading audio files onto the computer. (*Id.*).

As part of its investigation on June 5, 2004, MediaSentry downloaded complete copies of the six audio files listed in Exhibit A. (Docket No. 48, at 4). In addition, MediaSentry initiated downloads of all 544 audio files in the "shared" folder to ensure that actual audio files existed in all cases. (*Id.*, at 6). All files were downloaded through the iMesh file sharing program. (*Id.*). Defendant stated that she did not remember using iMesh on the computer; however, she did admit that she used KaZaA, a file sharing program that uses Fasttrack, the same peer-to-peer network as iMesh. (*Id.*). MediaSentry captured metadata that showed the audio files listed in Exhibit A and Schedule 1 among the files available for download to other internet users from a shared folder on Defendant's computer. (*Id.*).

On March 19, 2005, Windows was reinstalled on Defendant's computer. (Docket No. 48, at 7). The reinstallation resulted in most of the 544 files discovered in the original investigation being overwritten; however, some remnants of these files remained after the reinstallation was completed. (*Id.*). Plaintiffs completed a forensic investigation of Defendant's computer, which revealed that iMesh was installed on the computer and accessed through the username "whiterney." (*Id.*).

The forensic investigation also found file sharing programs KaZaA and LimeWire installed on the computer. (Docket No. 48, at 8). KaZaA had been removed from the computer prior to the March 19 reinstallation of Windows. (*Id.*, at 8). LimeWire was installed on the computer in July 2005. (*Id.*). The recordings contained in Exhibit C are audio files that were in one of the three shared folders used with the LimeWire file sharing program.

Defendant admitted that the Recordings may have been among audio files that she listened to on the computer. (Docket No. 49, Exhibit G). She testified that she did not copy these files from compact discs that she owned. (Docket No. 49, Exhibit H, at 41). During her deposition, Defendant testified that she used KaZaA to listen to sound recordings but did not know that she was downloading or distributing them. (*Id.*, at 68, 71, 81, 108). Defendant stated that she had “no reason to doubt” that her actions were “100% free and 100% legal” and that she believed programs like KaZaA “to be similar to online radio stations.” (Docket No. 52, Affidavit of Whitney Harper).

Plaintiffs have produced registration certificates for each of the Recordings. (Docket No. 49, Exhibit J). Plaintiffs claim that the album cover of each recording contains a proper notice of copyright pursuant to 17 U.S.C. § 401. (Docket No. 51, at 3). Defendant did not have their authorization to copy, download, or distribute any of the Recordings. (Docket No. 48, at 9). Plaintiffs further claim that Defendant had access to notice sufficient for her to know that her actions constituted infringement. (Docket No. 51, at 3).

### III. Motion for Summary Judgment

In their motion for summary judgment, Plaintiffs contend that they have provided sufficient evidence to establish that Defendant violated their copyrights on each of the Recordings. (Docket No. 48, at 10). They request minimum statutory damages of \$750 for each Recording. (*Id.*). They also request an injunction to stop Defendant from further infringing their copyrights. (*Id.*).

In her response to the motion for summary judgment, Defendant contends that Plaintiffs have failed to prove that she intentionally infringed any copyrights. (Docket No. 52, at 6). She further contends that the summary judgment evidence, at the most, only establishes innocent infringement of the six recordings contained in Exhibit A because Plaintiffs have not proven that the other recordings were available for download. (*Id.*, at 9). In addition, Defendant challenges a number of exhibits included with Plaintiffs' motion, specifically declarations made by Plaintiffs' in-house attorneys, as inadmissible hearsay. (*Id.*, at 6).

### IV. Standard of Review

In order to grant summary judgment, a court must determine that there is no genuine issue of material fact that would warrant further proceedings. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In evaluating a motion for summary judgment, all reasonable doubts

about factual evidence are construed in the light most favorable to the non-moving party. *Id.* at 255.

## V. Analysis

### Evidentiary Challenges

Before proceeding to the evidence of infringement, the Court is first required to address Defendant's objection to the supplemental declaration and expert report of Dr. Doug Jacobson.<sup>2</sup> (Docket No. 49, Exhibit C (hereinafter "Jacobson Declaration"). The Jacobson Declaration presents Jacobson's conclusions based upon the MediaSentry investigation and subsequent forensic examination of the computer, as well as a discussion of the methods used in arriving at those conclusions. (*Id.*). Attached to the Jacobson Declaration is a list of audio files that were recovered from the computer as part of the 2005 forensic examination. (Jacobson Declaration, Exhibit B). Defendant contends that the Jacobson Declaration is unauthenticated and therefore not competent summary judgment evidence. (Docket No. 52, at 2).

As provided for in 28 U.S.C. § 1746, when authentication of the statement of a witness is required, the authentication is acceptable if it includes a statement, signed and dated by the witness, declaring under penalty of perjury the truth and correctness of the statement. 28 U.S.C. § 1746(2). The

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<sup>2</sup> The Court notes that Defendant has also objected to Plaintiffs' summary judgment motion Exhibits A-B, D, and K-T. (Docket No. 52, at 2). However, since none of these Exhibits were considered by the Court in determining the merits of the motion for summary judgment, the Court elects not to rule on these objections.

Jacobson Declaration includes such a statement. (Jacobson Declaration at 10) (“I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct. Executed this 30 [sic] day of April, 2008, at 10:45 AM.”). The Jacobson Declaration is not to be excluded on the basis of authentication.<sup>3</sup> Defendant’s objection in this regard is overruled.

### **Infringement of Copyrights**

According to the Copyright Act, “[a]nyone who violates the exclusive rights of the copyright owner . . . is an infringer[.]” 17 U.S.C. § 501(a). To establish copyright infringement, a plaintiff must establish both ownership of the copyright to the work in question and actionable copying of the work. *Galiano v. Harrah’s Operating Co., Inc.*, 416 F.3d 411, 414 (5th Cir. 2005) (citing *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 367 (5th Cir. 2004)). Defendant does not challenge the fact that Plaintiffs are owners of the copyrights of the Recordings. Plaintiffs have presented the Court with copies of the copyright registration certificates for the Recordings. (Docket No. 48, Exhibit J). Presentation of these certificates establishes a prima facie case of copyright validity. *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 47 (5th Cir. 1995). Defendant has not challenged the validity of these certificates or Plaintiffs’ claim to own the copyrights in question.

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<sup>3</sup> The Court notes that Defendant has not objected to Plaintiffs’ summary judgment motion Exhibit E, the Declaration of Elizabeth Hardwick, and this Exhibit contains a substantively identical authentication statement. (Docket No. 48, Exhibit E, at 4).

Therefore, the only remaining question is whether Plaintiffs have proven actionable copying of the Recordings.

Included among the exclusive rights of copyright holders are the rights to “reproduce the copyrighted work” and “distribute copies . . . of the copyrighted work.” 17 U.S.C. §§ 106(1), 106(3). Proof that a defendant either reproduced or distributed a copyrighted work without the permission of the copyright holder is sufficient to constitute infringement. *Peel & Co., Inc. v. Rug Market*, 238 F.3d 391, 394 (5th Cir. 2001). A defendant’s intent to infringe is irrelevant under the law as far as proving that actionable infringement took place. *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000).

Defendant argues that because MediaSentry only downloaded complete copies of the works contained in Exhibit A and did not download complete copies of any other works, she can be held liable for at most only six counts of infringement. (Docket No. 52, at 9). However, a complete download of a given work over a peer-to-peer network is not required for copyright infringement to occur. *See Warner Bros. Records, Inc. v. Payne*, No. W-06-CA-651, 2006 WL 2844415, at \*3 (W.D. Tex. July 17, 2006) (finding that the presence of an audio file on a list available in KaZaA may be sufficient to constitute copyright infringement); *see also Interscope Records v. Duty*, No. 05CV3744-PHX-FJM, 2006 WL 988086, at \*2 (D. Ariz. Apr. 14, 2006) (“[T]he mere presence of copyrighted sound recordings in [defendant’s] share file may constitute infringement.”). The fact that the Recordings were available for download is sufficient to violate Plaintiffs’ exclusive rights of reproduction and

distribution. It is not necessary to prove that all of the Recordings were actually downloaded; Plaintiffs need only prove that the Recordings were available for download due to Defendant's actions.

In this case, there is no genuine issue of material fact as to the files listed in Exhibit A. All parties involved have accepted that Defendant violated Plaintiffs' copyrights with regard to these six audio files. Plaintiffs are entitled to summary judgment on the six (6) recordings listed in Exhibit A.

With regards to the recordings contained in Schedule 1, Plaintiffs have introduced a declaration from Elizabeth Hardwick ("Hardwick"), a Project Manager for MediaSentry. (Docket No. 49, Exhibit E). In the declaration, Hardwick declares that Exhibit B attached to Plaintiffs' complaint ("Exhibit B") "is a true and correct copy of a compilation of screen shots captured by MediaSentry. . . showing the list of 544 audio files that this computer was distributing to others for download." (*Id.*, at 3). Defendant has not objected to the admissibility of Hardwick's declaration, and Defendant has not brought forth credible summary judgment evidence refuting Hardwick's contention that all of the files listed in Exhibit B were available for download from her computer. Comparing the list of songs found at Exhibit B the list of songs from Schedule 1 for which Plaintiffs are requesting summary judgment with Exhibit B, the Court finds that all of the songs on Schedule 1 are present with one exception.<sup>4</sup> (Docket No. 1, Exhibit B; Docket No.

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<sup>4</sup> Faith Hill's "Beautiful" (SR# 321-377) is not contained in the list at Exhibit B of the complaint. Therefore, the Court finds that

51, Schedule 1). Therefore, Plaintiffs are entitled to summary judgment on sixteen (16) of the works listed in Schedule 1.

Regarding the recordings listed in Exhibit C, Plaintiffs have introduced the Jacobson Declaration including an exhibit of the audio files recovered from Defendant's computer during the 2005 forensic examination. (Jacobson Declaration, Exhibit B). As discussed above, the Jacobson Declaration is competent summary judgment evidence. The list included with the Jacobson Declaration includes all the recordings contained in Exhibit C. (*Id.*, at 2, 7, 8, 12, 16, 17, 19, 21, 28, 30, 42, 48). Defendant has introduced no evidence questioning the authenticity of this list or suggesting that the recordings contained in Exhibit C were not on the computer. Plaintiffs are therefore entitled to summary judgment on fifteen (15) of the recordings from Exhibit C.<sup>5</sup>

### **Damages**

Plaintiffs request the statutory minimum damages of \$750 per work rather than a calculation of actual

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there is still a genuine issue of material fact as to whether Defendant infringed the copyright on this work.

<sup>5</sup> Vanessa Carlton's "Ordinary Day" (SR# 313-943) is included on the list of recordings in both Schedule 1 and Exhibit C. Infringement is based upon the number of individual works infringed, not the number of infringements of a single work. *Mason v. Montgomery Data*, 967 F.2d 135, 144 n.11 (5th Cir. 1992) (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990)). Therefore, Defendant is only liable for infringement of this recording once.



damages. (Docket No. 48, at 21). Defendant contends that due to her age—sixteen years old at the time of the infringement—and technological experience, she did not intentionally violate Plaintiffs’ copyrights and should therefore be considered at most an innocent infringer. (Docket No. 52, at 9).

The damages provision of the Copyright Act provides that a plaintiff may elect to seek minimum damages of \$750 per work. 17 U.S.C. § 504(c)(1). However, it also provides that “where the infringer . . . was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.” 17 U.S.C. § 504(c)(2). The defendant has the burden to prove the lack of intent necessary for innocent infringement. *Id.*

As evidence of her “innocent” infringement, Defendant presents a signed affidavit stating that before the lawsuit, she “had no knowledge or understanding of file trading, online distribution networks or copyright infringement.” (Docket No. 52, at 12). In addition, Defendant stated that “Kazaa and similar products did not inform me that the materials available through their service were stolen or abused copyrighted material and I had no way of learning this information prior to this lawsuit.” (*Id.*, at 13). Plaintiffs contend that by complying with 17 U.S.C. § 402 and placing notices on each the containers and on the surface of the compact discs of the Recordings, they have provided notice such that Defendant could have learned that the Recordings were copyrighted. (Docket No. 54, at 4). This argument is not completely

satisfactory. In this case, there were no compact discs with warnings.

The Copyright Act provides that “[I]f a notice of copyright . . . appears on the published phonorecord . . . to which a defendant had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement” unless the infringement was believed to be fair use. 17 U.S.C. § 402(d). Although the Fifth Circuit has not addressed this issue directly, the Seventh Circuit has found that an innocent infringer defense did not apply in a case where the defendant “readily could have learned, had she inquired, that the music was under copyright.” *BMG Music v. Gonzales*, 430 F.3d 888, 892 (7th Cir. 2005). Defendant, relying on *Electra Entertainment Group v. McDowell*, a case involving a thirteen-year-old girl, argues that her age and knowledge of technology alone should be sufficient to introduce a genuine issue of material fact as to innocent infringement. (Docket No. 52, at 8). The *McDowell* Court held that a genuine issue of material fact was present as to the defendant’s access to the copyright notices. See *Electra Entertainment Group Inc. v. McDowell*, No. 4:06-CV-115 (CDL), 2007 WL 3286622, at \*2 n.2 (M.D. Ga. Nov. 6, 2007).

Although proper notice was provided on the cover of each of the Recordings, a question remains as to whether Defendant knew the warnings on compact discs were applicable in this KaZaA setting. Defendant admitted that she owned compact discs. (Docket No. 49, Exhibit H, at 25). However, both in her affidavit and in her deposition, Defendant claimed that she believed using KaZaA and similar products to be akin to listening to radio over the internet and did not

know that the Recordings were being either downloaded or distributed. (Docket No 49, Exhibit G, at 2; Docket No. 49, Exhibit H, at 68, 71; Docket No. 52, at 13). She further claimed that prior to this lawsuit, she did not have any understanding of copyright infringement. (Docket No. 52, at 12).

At the summary judgment stage, all factual disputes must be construed in the light most favorable to the non-moving party—in this case, Defendant. *Anderson*, 477 U.S. at 255. Defendant has the burden of proving by a preponderance of the evidence that her actions constituted innocent infringement. 17 U.S.C. § 502(c)(2). Plaintiffs have not introduced any evidence to contradict that Defendant did not have an understanding of the nature of file-sharing programs and copyright sophisticated enough to have reason to know that her actions infringed Plaintiffs' copyrights. Therefore, the Court finds that a fact issue exists as to whether Defendant was an innocent infringer. The parties are ordered to advise the Court within ten days of this Order whether they will agree to a settlement of \$200 per infringed work or whether a trial on the issue of damages will be necessary.

### **Permanent Injunction**

Plaintiffs request a permanent injunction to prevent Defendant from further infringing their copyrights. (Docket No. 48, at 23-27). Defendant has agreed to this injunction. (Docket No. 52, at 10). Under 17 U.S.C. § 502(a), any court having jurisdiction over copyright actions may issue permanent injunctions to prevent further copyright infringement. The Court will therefore enjoin Defendant from further

file-sharing in accordance with the agreement of the parties.

### **Conclusion**

For the foregoing reasons, the Court ORDERS the following:

Plaintiffs' motion for summary judgment (Docket No. 48) is GRANTED in part and DENIED in part.

Plaintiffs' proposed injunction is GRANTED. Defendant shall be and hereby is ENJOINED from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, to distribute (*i.e.*, upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

The parties are ORDERED to advise the Court within ten (10) days of this Order whether they will agree to a settlement of \$200 per infringed work or

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whether a trial on the issue of damages will be required.

It is so ORDERED.

SIGNED this 7<sup>th</sup> day of August, 2008.

/s/ \_\_\_\_\_  
XAVIER RODRIGUEZ  
UNITED STATES DISTRICT JUDGE

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**APPENDIX D**

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**STATUTES**

**17 U.S.C. § 402. Notice of copyright:  
Phonorecords of sound recordings**

**(a) General Provisions.**--Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed phonorecords of the sound recording.

**(b) Form of Notice.**--If a notice appears on the phonorecords, it shall consist of the following three elements:

(1) the symbol (the letter P in a circle); and

(2) the year of first publication of the sound recording; and

(3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

**(c) Position of Notice.**--The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.

**(d) Evidentiary Weight of Notice.**--If a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2577; Pub.L. 100-568, § 7(b), Oct. 31, 1988, 102 Stat. 2857.)

**17 U.S.C. § 504. Remedies for infringement:  
Damages and profits**

**(a) In General.**--Except as otherwise provided by this title, an infringer of copyright is liable for either--

- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
- (2) statutory damages, as provided by subsection (c).

**(b) Actual Damages and Profits.**--The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

**(c) Statutory Damages.**--

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages 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, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of



copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

**(3) (A)** In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

**(B)** Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

**(d) Additional damages in certain cases.**--In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

#### CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2585; Pub.L. 100-568, § 10(b), Oct. 31, 1988, 102 Stat. 2860; Pub.L. 105-80, § 12(a)(13), Nov. 13, 1997, 111 Stat. 1535; Pub.L. 105-298, Title II, § 204, Oct. 27, 1998, 112 Stat. 2833; Pub.L. 106-160, § 2, Dec. 9, 1999, 113 Stat. 1774; Pub.L. 108-482, Title II, § 203, Dec. 23, 2004, 118 Stat. 3916.)