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11 **UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF ARIZONA**

14 Atlantic Recording Corp., et al.,

15 Plaintiffs,

17 v.

18 Pamela and Jeffrey Howell,

19 Defendants.

No. CV 06-02076 PHX NVW

**AMICUS CURIAE BRIEF OF THE  
ELECTRONIC FRONTIER  
FOUNDATION IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

HEARING DATE: January 24, 2008  
TIME: 2:00 p.m.

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1 unauthorized, actual dissemination of copies of a copyrighted work.<sup>3</sup> Because the only evidence  
2 here consists of downloads by Plaintiffs' own, authorized investigators, Plaintiffs have failed to  
3 shoulder their summary judgment burden, and their motion should be denied.

#### 4 STATEMENT OF INTEREST

5 EFF is a member-supported, nonprofit public interest organization devoted to maintaining  
6 the traditional balance that copyright law strikes between the interests of copyright owners and the  
7 interests of the public. Founded in 1990, EFF represents more than 13,000 dues-paying members  
8 including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and  
9 researchers united in their reliance on a balanced copyright system that ensures adequate protection  
10 for copyright owners while ensuring broad access to information in the digital age. Because a  
11 ruling on this motion may have implications for consumers and new technology innovators, EFF  
12 has a strong interest in ensuring that the statutorily limited § 106(3) right is correctly applied in this  
13 and other cases.<sup>4</sup>

#### 14 ARGUMENT

##### 15 **I. The Plain Language of § 106(3) Requires Actual Dissemination of Phonorecords or 16 Copies.**

17 As the Supreme Court has explained, “[a] copyright, like other intellectual property,  
18 comprises a series of carefully defined and carefully delimited interests to which the law affords  
19 correspondingly exact protections.” *Dowling v. United States*, 473 U.S. 207, 216 (1985). As with

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20 <sup>3</sup> EFF expresses no view regarding the merits of Plaintiffs' remaining claims for infringement of  
21 the reproduction right, nor on any fair use or other defenses that Mr. and Mrs. Howell may have  
with respect to those reproduction claims.

22 <sup>4</sup> EFF has appeared as *amicus curiae* in three other district court cases that have addressed the  
23 scope of the distribution right, *Elektra Enter. Group v. Barker*, No. 05-CV-7340 KMK (S.D.N.Y.  
24 brief filed Feb. 23, 2006); *Fonovisa v. Alvarez*, No. 1:06-CV-011 (N.D. Tex. brief filed June 1,  
25 2006); and *Elektra v. Dennis*, No. 07-CV-39 DPJ JCS (S.D. Miss. brief filed Apr. 6, 2007). As in  
26 the instant case, those cases also involve individuals accused by record labels of downloading and  
27 uploading music over the Internet. In *Barker*, the motion focusing on the proper scope of § 106(3)  
remains pending, having drawn *amicus* filings from the Motion Picture Association of America  
28 (MPAA), the Computer & Communications Industry Association (CCIA), the U.S. Internet  
Industry Association (USIIA), EFF, and the United States. In *Alvarez*, the defendant's motion to  
dismiss was denied pending further factual development. *Fonovisa v. Alvarez*, No. 1:06-CV-011,  
2006 U.S. Dist. LEXIS 95559 (N.D. Tex. July 24, 2006). In *Elektra v. Dennis*, the plaintiffs  
voluntarily dismissed their claims without prejudice.

1 other statutory regimes, “[i]f the text of the statute is clear, [a] court looks no further in determining  
2 the statute's meaning.” *K and N Engineering, Inc. v. Bulat*, \_\_\_ F.3d \_\_\_, 2007 WL 4394416 at \*1  
3 (9th Cir. Dec. 18, 2007). Careful attention to the statute is particularly important where the  
4 Copyright Act is concerned, as it represents a painstaking set of legislative compromises aimed at  
5 balancing the interests of both owners and users of copyrighted works. *See Sony Corp. v. Universal*  
6 *City Studios*, 464 U.S. 417, 429 (1984).

7 Section 106 of the Copyright Act defines the limited exclusive rights granted to copyright  
8 owners. See 17 U.S.C. § 106. Although copyright lawyers frequently refer to these rights by the  
9 shorthand terms “reproduction, public performance, public display, distribution, and adaptation,”  
10 the statute defines the scope of the rights with more specificity. Moreover, the scope of each  
11 exclusive right is further defined by a web of statutory exceptions, many of which apply differently  
12 depending on which exclusive right is implicated.<sup>5</sup> In addition, because each exclusive right can be  
13 separately assigned or licensed, many copyright owners and licensees control only a subset of the  
14 exclusive rights, which in turn means that many contractual licensing arrangements between  
15 private parties depend on a careful parsing of the exclusive rights. Precisely because so much in the  
16 copyright system turns on a clear understanding of which exclusive rights are implicated by any  
17 particular activity, it is critical that courts attend closely to the statutory scheme, rather than freely  
18 embroidering on it based on the equities of any particular case.

19 **A. The Statutory Language and Controlling Ninth Circuit Precedent Make It**  
20 **Clear that § 106(3) Requires Actual Dissemination of Copies to the Public.**

21 Section 106(3) bestows on the owner of a copyright the exclusive right “to distribute copies  
22 or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by  
23 rental, lease, or lending.” 17 U.S.C. § 106(3). As this language makes clear, the exclusive right  
24 granted by § 106(3) encompasses only the distribution of *certain things* (“copies or  
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26 <sup>5</sup> See, e.g., 17 U.S.C. §§ 109 (first sale limitation on distribution right); 110 (exceptions to public  
27 performance right); 111 (statutory license for public performance by cable television); 114  
28 (statutory license for public performance by webcasters); 118 (statutory license for public  
performance by nonprofit broadcasters).

1 phonorecords”<sup>6</sup>), to *certain people* (“the public”), in *certain ways* (“by sale or other transfer of  
2 ownership, or by rental, lease, or lending”). The language of § 106(3) does not include any  
3 prohibitory language pertaining to *offers* to distribute, *attempts* to distribute, or the “making  
4 available” of copyrighted works.<sup>7</sup>

5 Plaintiffs’ effort to rewrite § 106(3) to reach such acts, moreover, is squarely foreclosed by  
6 Ninth Circuit authority. In *Perfect 10 v. Amazon.com*, the Ninth Circuit concluded that  
7 “distribution requires an ‘actual dissemination’ of a copy.” *Perfect 10 v. Amazon.com*, 2007 WL  
8 4225819, slip op. at 15463, *affirming in relevant part, Perfect 10, Inc. v. Google Inc.*, 416  
9 F.Supp.2d 828, 844 (C.D. Cal. 2006). In coming to this conclusion, the Ninth Circuit joins a  
10 number of other courts that have addressed this issue in the digital context. *See National Car*  
11 *Rental Sys., Inc. v. Computer Assoc. Int’l*, 991 F.2d 426, 434 (8th Cir. 1993); *In re Napster, Inc.*  
12 *Copyright Litig.*, 377 F.Supp.2d 796, 802 (N.D. Cal. 2005) (collecting authorities); *Arista Records,*  
13 *Inc. v. Mp3Board.com, Inc.*, No. 00-Civ.-4660-SHS, 2002 WL 1997918 at \*4 (S.D.N.Y. Aug. 29,  
14 2002). The leading copyright law commentators also unanimously agree that “an actual transfer  
15 must take place; a mere offer for sale will not infringe the right.” Paul Goldstein, 2 GOLDSTEIN ON  
16 COPYRIGHT § 7.5.1 (3d ed. 2007); *accord* Melville B. Nimmer & David Nimmer, 2 NIMMER ON  
17 COPYRIGHT § 8.11[A] (2007); William F. Patry, 4 PATRY ON COPYRIGHT § 13:9 (2007) (“[W]ithout  
18 actual distribution of copies..., there is no violation of the distribution right.”).

19 Against these controlling authorities, Plaintiffs nevertheless insist that “[infringement of]  
20 the distribution right does not require a consummated transfer of the copyrighted work at issue.”

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21 <sup>6</sup> The statute further defines “copies or phonorecords” as limited to “material objects,” *see* 17  
22 U.S.C. § 101, thereby excluding all electronic transmissions from the scope of the distribution  
23 right. *See* R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to*  
24 *the Controversy Over RAM Copies*, 2001 U. OF ILL. L. REV. 83, 126-35 (2001). This provides an  
25 independent reason to reject Plaintiffs’ distribution claim, for the same reasons set forth in EFF’s  
26 *amicus* brief in *Elektra v. Barker*, appended as Exhibit 1 to Defendants’ Reply in Support of  
27 Motion for Reconsideration, Doc. # 51.

28 <sup>7</sup> In both the copyright and patent contexts, when Congress means to prohibit *offers to act*, as well  
as the *acts* themselves, it has done so expressly. *See, e.g.*, 17 U.S.C. § 901(a)(4) (where  
semiconductor mask works are concerned, “to distribute means to sell, lease, bail, or otherwise  
transfer, or **to offer to** sell, lease, bail or otherwise transfer”); 35 U.S.C. § 271(a) (exclusive right  
of a patent owner reaches anyone who “without authority makes, uses, **offers to sell**, or sells any  
patented invention....”).

1 Plfs. Supp. Br. at 5. Plaintiffs’ view of the distribution right would effectively transform it into an  
2 unbounded form of civil attempt liability, where the mere possibility of a dissemination would  
3 trigger infringement liability, even where no copies had ever been distributed and thus no harm  
4 ever inflicted on the copyright owner. This is not the law.<sup>8</sup>

5 **B. The Statute Will Not Support Plaintiffs’ “Making Available” Conception of §**  
6 **106(3).**

7 Turning first to the language of the Copyright Act, Plaintiffs contend that the  
8 “authorization” clause contained in Section 106 somehow expands direct infringement liability to  
9 reach those who merely offer or make available copyrighted works. Plfs. Supp. Br. at 5. Not so.  
10 Congress intended the “authorization” clause to provide a statutory foundation for secondary  
11 liability, not to expand the scope of direct infringement liability. *See* H.R. Rep. 94-1476 at 61,  
12 *reprinted in* 1976 U.S.C.C.A.N. 5674 (“Use of the phrase ‘to authorize’ is intended to avoid any  
13 question as to the liability of contributory infringers.”); *Venegas-Hernandez v. ACEMLA*, 424 F.3d  
14 50, 57 (1st Cir. 2005). In the words of the First Circuit,

15 Mere authorization of an infringing act is an insufficient basis for copyright  
16 infringement. Infringement depends upon whether an infringing act, such as copying  
or performing, has occurred. Therefore, to prove infringement, a claimant must  
show “an infringing act after the authorization.”

17 *Latin Amer. Music Co. v. Archdiocese of San Juan*, 499 F.3d 32, 46 (1st Cir. 2007) (citing  
18 *Venegas-Hernandez*, 424 F.3d at 57-59) (internal citations omitted); *accord Resnick v. Copyright*  
19 *Clearance Center, Inc.*, 422 F.Supp.2d 252, 259 (D. Mass. 2006) (“[W]rongful authorization alone  
20 cannot constitute infringement under the statute.”) (internal quotes omitted). In other words,  
21 without a direct infringement of § 106(3)—an actual “distribut[ion] of copies or phonorecords of  
22 the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or  
23 lending”—there can be no claim for “authorization” of distribution. *See* 4 PATRY ON COPYRIGHT §  
24 13:9.

25 \_\_\_\_\_  
26 <sup>8</sup> There is no civil or criminal liability for attempted copyright infringement. The Department of  
27 Justice recently proposed amending the criminal provisions of the Copyright Act to provide for  
28 attempt liability, but no bill has been yet been introduced. *See* Declan McCullagh, *Gonzales*  
*Proposes New Crime: ‘Attempted’ Copyright Infringement*, CNET NEWS, May 15, 2007 (available  
at <[http://www.news.com/8301-10784\\_3-9719339-7.html](http://www.news.com/8301-10784_3-9719339-7.html)>).

1 Plaintiffs also point to the statutory definition of “publication” (which expressly  
2 encompasses “offering to distribute”), asserting that “publication” and “distribution” have been  
3 treated as synonymous for some purposes by some courts and therefore that the definition of  
4 “publication” expands the meaning of “distribute.” Contrary to Plaintiffs’ view, the inclusion of  
5 “offering to distribute” in the definition of “publication” actually underscores the fact that  
6 Congress knew how to reach mere offers when it wished to do so. In this respect, the two terms are  
7 not synonymous, as noted by a leading copyright commentator:

8 This statement [that “publication” and “distribution” are synonymous] is not found  
9 in any of the legislative reports, and in at least one important respect is incorrect;  
10 while the mere offering to sell copies of a novel to bookstores for subsequent sale to  
11 customers constitutes publication *due to the statutory definition of publication*,  
12 without actual distribution of copies of the novel, there is no violation of the  
13 distribution right.

14 4 PATRY ON COPYRIGHT § 13:9 (emphasis in original).

15 In addition, if “publication” and “distribution” are truly synonyms, then Plaintiffs’ case  
16 fails outright, because the legislative history makes it clear that “publication” is limited to  
17 distribution of tangible, material objects. *See* H.R. Rep. 94-1476 at 138, *reprinted at* 1976  
18 U.S.C.C.A.N. 5754 (“[A]ny form or dissemination in which a material object does not change  
19 hands—performances or displays on television, for example—is not a publication no matter how  
20 many people are exposed.”). Defendants here are not accused of distributing physical goods.

21 Nor does Plaintiffs’ selective citation to a letter written by the U.S. Copyright Office to  
22 Congress support their statutory argument.<sup>9</sup> Plfs Supp. Br. at 6 & Exh. D. Nothing in the letter  
23 expresses any view on whether actual dissemination must be proven in order to establish direct  
24 infringement of the distribution right. In fact, if anything, the Register of Copyrights, Marybeth  
25 Peters, expresses the opposite view:

26 Making a work available in this context [i.e., uploading to a peer-to-peer network]  
27 constitutes an infringement of the exclusive distribution right, as well as the  
28 reproduction right (*where the work is uploaded* without the authorization of the  
copyright holder.)

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<sup>9</sup> Opinion letters from the Copyright Office to Congress on matters of statutory interpretation are non-binding and “entitled to respect only insofar as they are persuasive,” *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 778 (6th Cir. 2005).

1 See Plfs. Supp. Br., Exh. D (emphasis added). In other words, contrary to Plaintiffs' contention, the  
2 Register does not endorse the notion that the distribution right is infringed where a file is merely  
3 offered via a P2P network, but never actually uploaded or transmitted to another user.

4 **C. The Judicial Authorities Cited by Plaintiffs Are Either Inapposite or**  
5 **Unpersuasive.**

6 Plaintiffs' citations to judicial precedents fare no better. Plaintiffs begin by citing the Ninth  
7 Circuit's recent ruling in *Perfect 10 v. Amazon.com*. But rather than buttressing Plaintiffs' position,  
8 that case fatally undermines it. In that case, the copyright owner sought a preliminary injunction  
9 against Google, arguing (among other things) that Google directly infringed its distribution rights  
10 by indexing and linking to infringing photographs posted by third parties on the Internet. The  
11 district court disagreed, holding that:

12 A distribution of a copyrighted work requires an "actual dissemination" of copies.  
13 See *In re Napster, Inc. Copyright Litig.*, 377 F.Supp.2d 796, 802-04 (N.D. Cal. 2005); accord Nimmer § 8.11[A]. In the Internet context, an actual dissemination  
14 means the transfer of a file from one computer to another.

15 *Perfect 10 v. Google*, 416 F.Supp.2d at 844. On appeal, the Ninth Circuit affirmed the district  
16 court:

17 The district court reasoned that distribution requires an "actual dissemination" of a  
18 copy. Because Google did not communicate the full-sized images to the user's  
19 computer, Google did not distribute these images. Again, the district court's  
20 conclusion on this point is consistent with the language of the Copyright Act.

21 *Perfect 10 v. Amazon.com*, 2007 WL 4225819, slip op. at 15463 (emphasis added, internal citations  
22 omitted). Accordingly, far from approving Plaintiffs' argument that a mere "making available"  
23 infringes the distribution right, *Perfect 10 v. Amazon.com* forecloses it.

24 Faced with *Perfect 10 v. Amazon.com*, Plaintiffs cling to one line of *obiter dicta* in the  
25 Ninth Circuit's earlier ruling in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir.  
26 2001) ("Napster users who upload file names to the search index for others to copy violate  
27 plaintiffs' distribution rights."). Plaintiffs contend that this statement establishes a "deemed  
28 distribution" theory that spares a copyright owner from having to prove that any actual  
distributions of copyrighted materials ever took place. Plfs. Supp. Br. at 8.

This view misreads *A&M Records v. Napster*. In that appeal, the defendant did not dispute

1 evidence that millions of Napster users were actively trading copyrighted materials. *See Napster*,  
2 239 F.3d at 1013. Moreover, because the appeal turned on application of secondary liability  
3 principles, there was no need for the court to inquire into the circumstances of any particular  
4 Napster user—it was enough that millions were actively swapping files, thus providing direct  
5 infringements for which Napster could be held secondarily liable. In this context, it was  
6 unnecessary for the court to opine on whether a Napster user who merely offered, but never  
7 actually disseminated, any copyrighted material was infringing the distribution right. In other  
8 words, in *Napster*, the court and parties alike assumed the existence of an avalanche of actual  
9 disseminations, making it unnecessary to express any view on whether *merely* “making available,”  
10 without more, could infringe the § 106(3) distribution right. In subsequent rulings that have  
11 squarely faced that issue, as explained above, the Ninth Circuit and lower courts in this circuit have  
12 repeatedly rejected the broad “making available” theory pressed by Plaintiffs. *See Perfect 10 v.*  
13 *Amazon.com*, 2007 WL 4225819, slip op. at 15463; *In re Napster*, 377 F.Supp.2d at 802-04.

14 Plaintiffs’ remaining out-of-circuit citations are either inapposite or unpersuasive. For  
15 example, Plaintiffs’ reliance on *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007), is entirely  
16 misplaced. That case involved a criminal statute unrelated to copyright prohibiting the distribution  
17 of child pornography. The court there was not called on to construe “distribution” as defined and  
18 delimited in 17 U.S.C. § 106(3). In *Sony Pictures Home Entertainment, Inc. v. Lott*, 471 F.Supp.2d  
19 716 (N.D. Tex. 2007), the *pro se* defendant appears not to have raised any arguments relating to the  
20 proper scope of the distribution right, relying instead on a “mistaken identity” defense. *See id.* at  
21 721. Plaintiffs’ citation to a jury instruction obtained in *Capitol Records, Inc. v. Thomas*, No. 06-  
22 CV-1497 (MJD/RLE) (D. Minn. 2007), sheds no light on the reasoning employed by the court, the  
23 evidence presented at trial, nor the arguments raised by the defendant. Plfs. Supp. Br. at 7-8 & Exh.  
24 E.

25 Plaintiffs finally fall back on the Fourth Circuit ruling in *Hotaling v. Church of Jesus Christ*  
26 *of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997). In that case, a copyright owner sued a number  
27 of libraries that had made infringing copies of a microfiche work. Because the plaintiff’s  
28 reproduction claims were time-barred, she was left with only a distribution claim. Because the

1 libraries had no records of loans to patrons, the plaintiff was also unable to prove any actual loans  
2 to the public. The Fourth Circuit nevertheless found that the plaintiff could proceed with her  
3 distribution claim, reasoning that “a library distributes a published work, ... when it places an  
4 unauthorized copy of the work in its collection, includes the copy in its catalog or index system,  
5 and makes the copy available to the public.” *Id.* at 201. This outcome, perhaps motivated by  
6 sympathy for the plaintiff, *see id.* at 205 (Hall, J., dissenting), simply cannot be squared with the  
7 statutory language of § 106(3) or with the Ninth Circuit authorities discussed above. The opinion  
8 has also drawn the criticism of commentators. *See* 4 PATRY ON COPYRIGHT § 13:9.<sup>10</sup>

9 **II. Expansion of the Distribution Right would have Disruptive Consequences in Other**  
10 **Contexts.**

11 Plaintiffs’ expansive re-imagining of the § 106(3) distribution right would have disruptive  
12 consequences far beyond this case, jeopardizing the legitimate interests of consumers and  
13 technology innovators. For example, many broadcasters rely on compulsory or negotiated licenses  
14 that entitle them to publicly perform copyrighted works over the air. Plaintiffs’ “making available”  
15 conception of the distribution right would call into question whether these broadcasters could now  
16 be forced to seek additional distribution licenses. This concern is not merely hypothetical—several  
17 Plaintiffs here have already brought suit against XM Satellite Radio, alleging that XM is  
18 “distributing Plaintiffs’ copyrighted sound recordings to the public by making available and  
19 automatically disseminating to [its] subscribers copies of sound recordings contained in its satellite

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20  
21 <sup>10</sup> In other cases where their expansive notion of § 106(3) has been challenged, Plaintiffs have  
22 invoked the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The  
23 invocation, however, is unavailing. As an initial matter, international copyright treaties are not self-  
24 executing and thus lack any binding legal authority separate from their implementation through the  
25 Copyright Act. *See* 17 U.S.C. § 104(c) & (d). In addition, these treaties are solely concerned with  
26 ensuring minimum protections for *foreign* copyright holders, and Plaintiffs have not shown that  
27 any of the works at issue here is a foreign work. *See* Jane C. Ginsburg, *International Copyright: From a Bundle of National Copyright Laws to a Supranational Code?*, 47 J. COPYR. SOC’Y U.S.A. 265, 270 (2000) (“[T]he Berne *minima* apply to a Union member's protection of works from other Berne members; no Berne member is obliged to accord its own authors treaty-level protection.”). Finally, as explained by the Copyright Office in the letter cited by Plaintiffs, the WIPO treaties do not require a radical expansion of the distribution right; other U.S. copyright law doctrines (including the exclusive rights of reproduction and public performance, along with secondary liability doctrines), taken together, satisfy the WIPO treaty requirements. Plfs. Supp. Br., Exh. D.

1 radio transmissions.” Complaint ¶ 42, *Atlantic Recording Corp. v. XM Satellite Radio*, No. 1:06-  
2 cv-03733-DAB (S.D.N.Y. filed May 16, 2006) (complaint available at  
3 <[http://eff.org/IP/digitalradio/XM\\_complaint.pdf](http://eff.org/IP/digitalradio/XM_complaint.pdf)>). In this way, a conception of distribution that  
4 encompasses mere “making available” threatens to blur the distinction between public performance  
5 and distribution, potentially exposing broadcasters and webcasters to massive infringement  
6 liability. *See Agee v. Paramount Comm., Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (in rejecting a  
7 distribution claim against a broadcaster, holding that “[i]t is clear that merely transmitting a sound  
8 recording to the public does not constitute a ‘distribution....’”).

9 Similarly, some copyright owners have attempted to use expansive interpretations of  
10 distribution to transform secondary liability claims into direct infringement claims (in order to take  
11 advantage of the strict liability nature of direct infringement claims). In *Perfect 10 v. Amazon.com*,  
12 for example, the plaintiffs argued that Google’s operation of a search engine infringed their  
13 distribution rights by making it possible for users to find infringing photographs posted to the  
14 Internet by third parties, even in the absence of any evidence that users actually copied the photos.  
15 *See Perfect 10 v. Amazon.com*, 2007 WL 4225819, slip op. at 15463. Direct infringement claims of  
16 this kind could also be imagined against other businesses that make tools that help users find  
17 copyrighted works on the Internet, an arena that has, until now, been the realm of secondary  
18 liability. *See A&M v. Napster*, 239 F.3d at 1019-24.

### 19 **III. In Order to Prevail, Plaintiffs Must Present Evidence That Defendants Actually** 20 **Disseminated the Works in Question to Third Parties**

21 As discussed above, the controlling authorities establish that an infringement of the  
22 distribution right requires that a copyright owner demonstrate *an actual dissemination* of the  
23 copyrighted work at issue. Although *amicus* EFF does not have access to the complete factual  
24 record in this case, it does not appear from Plaintiffs’ submissions on summary judgment that they  
25 have shouldered their evidentiary burden.

26 The only evidence of “actual dissemination” of copyrighted works owned by Plaintiffs  
27 consists of a hearsay account supplied by Plaintiffs’ expert, Doug Jacobsen, relating information  
28 gleaned from materials prepared by Plaintiffs’ retained investigator, MediaSentry. Plfs. Supp. Br.

1 Exh. A (decl. of Doug Jacobsen); Statement of Facts in Support of Plaintiffs’ Motion for Summary  
2 Judgment (hereinafter “SOF”), Doc. # 31, Exh. 12. According to this hearsay evidence, on January  
3 30, 2007, MediaSentry downloaded 12 digital files containing sound recordings (only 11 of which  
4 are the subject of this motion) from a computer with the Internet Protocol (IP) address  
5 68.110.64.47. SOF, Exh. 12, ¶18. Responding to a subpoena issued by Plaintiffs, Cox  
6 Communications identified the IP address as one assigned to the Howell residence at the time.  
7 SOF, Exh. 12, ¶ 20.

8         The trouble with this “evidence” of actual distribution is that it derives entirely from the  
9 activities of Plaintiffs’ own investigators. It is axiomatic that a copyright owner cannot infringe her  
10 own copyright. *See Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994). By the  
11 same token, an authorized agent acting on behalf of a copyright owner also cannot infringe any  
12 rights held by that owner. *See Higgins v. Detroit Educ. Television Found.*, 4 F.Supp.2d 701, 705  
13 (E.D. Mich.1998). Accordingly, where the only evidence of infringing distribution consists of  
14 distributions to authorized agents of the copyright owner, that evidence cannot, by itself, establish  
15 that other, *unauthorized* distributions have taken place. If § 106(3) requires that a copyright owner  
16 establish that actual unauthorized disseminations took place, Plaintiffs should not be able to  
17 bootstrap their way to that conclusion simply by hiring an investigator.

18         Of course, evidence gathered by an investigator may be relevant, in appropriate cases, to  
19 prove whether actual infringing distributions may have occurred. For example, it is well-  
20 established that agents of a copyright owner may testify to observed infringements involving third  
21 parties. *See, e.g., Polygram Int’l Publishing v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1319 (D Mass  
22 1994) (investigators observed unauthorized public performances by trade show exhibitors). In  
23 some cases, courts have been willing to accept evidence from investigators who invite defendants  
24 to engage in activity that constitutes direct infringement. *See, e.g., RCA/Ariola Int’l, Inc. v. Thomas*  
25 *& Grayston Co.*, 845 F.2d 773, 777 (8th Cir. 1988) (defendant’s employees actively participated in  
26 infringement). Similarly, in appropriate cases, an investigator’s purchase of infringing material  
27 may provide circumstantial evidence that supports the inference that similar sales have occurred to  
28 third parties. *See, e.g., RCA Records v. All-Fast Systems, Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y.

1 1984) (experience of investigators created sufficient inference of similar activities with third parties  
2 to support preliminary injunction).

3 Plaintiffs' hearsay evidence here, however, does not fit any of these descriptions. Plaintiffs'  
4 investigator, MediaSentry, did not observe Defendant's disseminating any materials to third  
5 parties. Nor do Plaintiffs contend that MediaSentry invited Defendants to make any unauthorized  
6 reproductions. Nor have Plaintiffs established that MediaSentry's downloads constitute  
7 circumstantial evidence that the Howell's computer disseminated copies of the 11 songs in  
8 question to any other KaZaA user. In fact, Plaintiffs' own evidence makes this seem particularly  
9 unlikely. According to Plaintiffs' expert, during the period that MediaSentry performed its  
10 investigation, there were 2,282,954 KaZaA users online, sharing 292,532,420 files. Plfs. Supp. Br.  
11 Exh. A, ¶ 8. Every one of the 11 songs at issue came from multi-platinum hit records. Complaint,  
12 Doc. # 1, Exh. A. Even accepting Plaintiffs' hearsay testimony as true, these facts together suggest  
13 that it is highly unlikely that, among the millions of KaZaA users who are likely to be sharing them  
14 at any time, these 11 songs would have been downloaded from Defendants' computer. At any  
15 instant, KaZaA users are likely to have thousands of sources for these particular songs to choose  
16 from and no reason to choose the Defendants' computer over any other. And while Plaintiffs may  
17 be correct that, in the aggregate, KaZaA users engage in a prodigious amount of infringing activity,  
18 that general statement tells us nothing about the crucial issue in this case: whether *these* Defendants  
19 transmitted (i.e., uploaded) any of *these* 11 songs<sup>11</sup> during the time period in question. Plaintiffs  
20 evidence simply cannot bridge the chasm between "making available" and "actual dissemination"  
21 to anyone other than Plaintiffs' authorized agents.

22 Nor will Plaintiffs' allegations of spoliation by Defendants fill the evidentiary void.  
23 Plaintiffs accuse Defendants of removing the KaZaA software from his computer. Plfs. Supp. Br. at  
24 13. Yet Plaintiffs simultaneously admit that the KaZaA software was unlikely to have yielded any  
25 probative evidence regarding any actual disseminations to third parties: "unless the individual  
26 KaZaA user makes a log of the files that he or she has actually distributed to other KaZaA users, it

27 \_\_\_\_\_  
28 <sup>11</sup> Plaintiffs appear to lack any evidence, circumstantial or otherwise, to suggest that Defendants  
disseminated any of the other 43 sound recordings on which they are seeking summary judgment.

1 is difficult for any third party to determine exactly what files were actually distributed or when.”  
2 Plfs. Supp. Br. at 13 & Exh. A, ¶ 9. In light of this concession, it is difficult to make sense of  
3 Plaintiffs’ assertion that “Defendants’ intentional destruction of [the KaZaA software] severely and  
4 irreparably prejudices Plaintiffs’ ability to prove their claim.” Plfs. Br. at 14. Plaintiffs’ evidentiary  
5 problem is the lack of any evidence regarding actual dissemination of any of the 54 sound  
6 recordings at issue to anyone other than Plaintiffs’ own investigators. Based on Plaintiffs’ own  
7 submissions, neither the KaZaA software nor anything else on Defendants’ computer would have  
8 provided such evidence.<sup>12</sup>

9 In short, the evidentiary difficulties that face Plaintiffs do not appear to be the fault of  
10 Defendants. Rather, they appear to be the result of the design of the KaZaA software (insofar as it  
11 does not log uploads to other users), and Plaintiffs’ choice to bring a summary judgment motion  
12 based solely on their distribution claim. Moreover, while the KaZaA software may not amass and  
13 disgorge evidence as conveniently as Plaintiffs might prefer, the software is no different in this  
14 regard than other personal-use duplication technologies. After all, consider VCRs, cassette decks,  
15 and photocopiers: none keep “logs” of what was copied or to whom copies might have been  
16 distributed.

17 To reiterate, it is not Defendants’ fault that Plaintiffs are unable to produce evidence of  
18 actual distributions beyond the 11 authorized downloads performed by MediaSentry, nor is it their  
19 burden to prove Plaintiffs’ case. Plaintiffs include some of the largest companies in the recording  
20 industry, with nearly limitless resources when compared to Defendants. It is Plaintiffs who have  
21 opted to file more than 20,000 lawsuits against individuals, many whom are unprepared for the  
22 unfamiliar (to a layperson) demands of discovery. It is Plaintiffs who have chosen to target  
23 noncommercial activities that occur in the privacy of the home, thereby injecting themselves  
24 “behind closed doors” where factual investigation can be difficult. Having put themselves in this

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25 <sup>12</sup> Plaintiffs’ expert speculates that “[a] forensic examination [of Defendants’ computer] *might* also  
26 provide indications of particular instances of distribution from the user’s shared folder.” Plfs. Supp.  
27 Br., Exh. A, ¶ 10 (emphasis added). This assertion is entirely unexplained. Moreover, it sheds no  
28 light on what influence, if any, Defendants’ deletion of the KaZaA software might have on the  
possibility that a forensic examination of Defendants’ computer might establish any particular  
instances of actual dissemination to parties other than MediaSentry.

1 position, Plaintiffs ought not be heard to complain that proving their distribution claims poses  
2 evidentiary challenges.

3 **CONCLUSION**

4 For the reasons stated above, this Court should reject Plaintiffs' effort to radically expand  
5 the § 106(3) distribution right and should deny Plaintiffs' motion for summary judgment.

6  
7 DATED: January 11, 2008

8 By \_\_\_\_\_ /s/

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