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6 Attorneys for Plaintiffs

7 UNITED STATES DISTRICT COURT

8 DISTRICT OF ARIZONA

|   |   |                                 |
|---|---|---------------------------------|
| 9 Atlantic Recording Corporation, et al., | ) | Case No.: 2:06-cv-02076-PHX-NVW |
| 10 Plaintiffs,                            | ) |                                 |
| 11 vs.                                    | ) | <b>PLAINTIFFS' REPLY IN</b>     |
| 12 Pamela and Jeffrey Howell,             | ) | <b>SUPPORT OF MOTION FOR</b>    |
| 13 Defendants.                            | ) | <b>SUMMARY JUDGMENT</b>         |
| 14  | ) |                                 |

15 Plaintiffs respectfully submit their Reply in Support of Motion for  
16 Summary Judgment ("Motion") on their claim of copyright infringement against  
17 the Defendants, and state as follows:

18 **INTRODUCTION**

19 Plaintiffs filed their motion for summary judgment against Defendants  
20 ("Motion") and statement of facts in support thereof on July 5, 2007. (Doc. Nos.  
21 30 and 31). Therein, Plaintiffs set forth both facts and law sufficient to support  
22 their request for summary judgment. On July 19, 2007, Defendant Jeffrey Howell  
23 filed a motion to dismiss ("Response") in response to Plaintiffs' Motion. (Doc.  
24 No. 33). Per the Court's August 2, 2007 Order, the motion to dismiss filed by  
25 Defendant is to be treated as a response to Plaintiffs' Motion, and not as a separate  
26 dispositive motion. (Doc. No. 34). In his Response, Defendant does not dispute  
27 any of the facts or law set forth in Plaintiffs' Motion. Rather, Defendant alleges  
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1 six unsubstantiated, irrelevant facts that, even if true, do not have any affect on the  
2 analysis set forth in Plaintiffs' Motion. For the reasons set forth in Plaintiffs'  
3 Motion and below, Plaintiffs respectfully submit that they are entitled to judgment  
4 as a matter of law.

5 **ARGUMENT**

6 **A. Summary Judgment Is Appropriate Because There Is No Issue Of**  
7 **Material Fact Concerning Defendants' Liability For Copyright**  
8 **Infringement.**

9 As set forth in Plaintiffs' Motion, the elements of a cause of action for  
10 copyright infringement are (1) that Plaintiffs own the copyrights in the sound  
11 recordings; and (2) that Defendants violated one or more of their exclusive rights  
12 under the Copyright Act. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S.  
13 340, 361 (1991). In their Motion, Plaintiffs set forth facts, and evidence in support  
14 thereof, to establish that Plaintiffs own the copyrights at issue and that Defendant  
15 engaged in infringing activity by distributing Plaintiffs' sound recordings to  
16 millions of individuals via the Internet. (Motion at 6-10). As such, summary  
17 judgment should be entered against Defendants here.

18  
19 Specifically, nowhere in his Response does Defendant Jeffrey Howell  
20 dispute or deny that Plaintiffs own valid copyrights in the recordings at issue. Nor  
21 does Defendant take issue with any of the facts or law set forth by Plaintiffs in  
22 support of their contention that Defendants infringed Plaintiffs' exclusive rights  
23 under the Copyright Act by distributing the sound recordings at issue over the  
24 Internet through KaZaA, a file-sharing program that he used to share files.  
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1 In his Response, Defendant Jeffrey Howell fails to challenge any of the  
2 facts or law set forth in Plaintiffs' Motion. (*See* Response). Accordingly, there  
3 are no genuine issues as to any material fact, and Plaintiffs are entitled to  
4 judgment as a matter of law. *See* Fed. R. Civ. P. 56(c) (Where "there is no  
5 genuine issue as to any material fact and [...] the moving party is entitled to a  
6 judgment as a matter of law," summary judgment shall be rendered.)

8 **B. The Facts Alleged by Defendant, Even if True, Are Immaterial**

9 In his Response, Defendant Jeffrey Howell sets forth six factual  
10 contentions, none of which are properly supported by sworn statements. Because  
11 Defendant's general allegations are not evidence properly before the Court,  
12 Plaintiffs respectfully submit that they should not be considered. *See* Fed. R. Civ.  
13 P. 56(e) ("When a motion for summary judgment is made and supported [by  
14 affidavits], an adverse party may not rest upon the mere allegations or denials of  
15 the adverse party's pleading..."). Even if the facts alleged in Defendant's  
16 Response were verified, however, they do not relieve him of liability for the  
17 infringement of Plaintiffs' copyrights.

18 First, Defendant's allegation that his computer had multiple users,  
19 including children (Response at 2) is irrelevant. As set forth in Plaintiffs' Motion,  
20 Defendant has admitted to uploading his music collection to his computer,  
21 downloading KaZaA to his computer, and making the affirmative choice to use  
22 KaZaA to share files. (*See* Motion at 8). Furthermore, Defendant has  
23 acknowledged that, as a result of these actions, he was distributing Plaintiffs'  
24 copyrighted sound recordings over the Internet. (*See id.*). That other individuals  
25 may have used the computer has no bearing whatsoever on Defendant's liability  
26 for the acts he has admitted to committing.

1 Second, Plaintiffs' Motion makes it clear that Plaintiffs are seeking  
2 damages for the infringement of Plaintiffs' copyrighted *sound recordings*.  
3 (Motion at 3). Plaintiffs' Motion contains a list of the specific sound recordings at  
4 issue. (See Motion, SOF Ex. 1). Therefore, Defendant's assertion that Exhibit B  
5 to Plaintiffs' Complaint contains multiple file types is irrelevant to Plaintiffs'  
6 Motion and Defendants' liability for infringement of Plaintiffs' sound recordings.

7 Third, Defendant's claim that he was working at the time that Plaintiffs'  
8 investigator observed and collected evidence of his infringing activity also has no  
9 bearing on the issue of his liability. In fact, once file-sharing programs like  
10 KaZaA are installed, they generally run constantly and files are being shared  
11 continuously -- 24 hours a day, 7 days a week -- whether or not the user is in front  
12 of the computer and whether or not the program appears to be open. (See  
13 *Declaration of Doug Jacobson*, attached hereto as Ex. A). By deliberately  
14 choosing to use the KaZaA program to share files, Defendant was distributing the  
15 sound recordings in his "shared" folder to other KaZaA users whenever the  
16 program was running, whether he was home or not.

17 Fourth, the fact that Plaintiffs' expert never examined Defendant's  
18 computer is irrelevant. Defendant has admitted that the sound recordings at issue  
19 are on his computer and were being distributed from his computer's shared folder  
20 via a file-sharing program that he intentionally used to share files. (Motion at 8).  
21 Plaintiffs' expert did not base his opinions on a review of Defendant's computer,  
22 and did not need to, because the undisputed evidence collected by Plaintiffs'  
23 investigator established Defendants' liability in this case. Specifically, on January  
24 30, 2006, Plaintiffs' investigators found the audio files in Exhibit B to the  
25 Complaint—including Plaintiffs' copyrighted sound recordings—being distributed  
26 from a shared folder on a computer that connected to the Internet using Internet  
27 Protocol ("IP") address 68.110.64.47. (See Motion at 4-5) Defendant's Internet  
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1 Service Provider identified Defendant as the person responsible for this IP address  
2 on January 30, 2006, and Defendant Jeffrey Howell admitted that the screen name  
3 witnessed by Plaintiffs' investigators, "jeepkiller@KaZaA," is his screen name.

4 Fifth, the fact that Defendant supplied Plaintiffs with photographs of his  
5 music collection is irrelevant. The fact is that Defendant intentionally uploaded  
6 digital music files to his computer, and those files were being distributed to other  
7 KaZaA users without Plaintiffs' permission in violation of the Copyright Act.<sup>1</sup> As  
8 demonstrated in Plaintiffs' Motion, Plaintiffs need not demonstrate Defendant's  
9 intent to infringe, or even knowledge of infringement, in order to prove copyright  
10 infringement. (*See* Motion at 6).

11 Finally, Defendant's contention that "a malfunction or tampering by a third  
12 party is responsible for [his] personal files being available on the internet"  
13 (Response at 2) is also without merit and does not save him from summary  
14 judgment. Defendant offers no evidence whatsoever to support this contention,  
15 and it is undisputed that Defendant intentionally put the sound recordings on his  
16 computer, that he intentionally downloaded the KaZaA program for the purpose of  
17 sharing files with other KaZaA users, and that Plaintiffs' sound recordings were  
18 being distributed from the KaZaA shared folder that Defendant installed on his  
19 computer.

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20  
21 <sup>1</sup> Although not material to Plaintiffs' Motion, Plaintiffs' evidence shows  
22 that Defendant's claim that he uploaded all of the music in his shared folder from  
23 his own CD collection is without merit. Specifically, the metadata captured by  
24 Plaintiffs' investigator shows that many of the sound recordings in Defendant's  
25 shared folder were likely downloaded from the Internet, and did not come from his  
26 own CD collection as he claims. (*See* Motion, SOF Ex. 12 at 6). Because  
27 Plaintiffs' Motion focuses only on Defendants' unlawful distribution of Plaintiffs'  
28 sound recordings, however, the question of whether Defendant also downloaded  
the sound recordings in violation of the Copyright Act is not relevant to Plaintiffs'  
Motion.

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## CONCLUSION

In light of the foregoing, and for the reasons stated in their motion for summary judgment, Plaintiffs respectfully request entry of summary judgment against Defendants Pamela and Jeffery Howell.

Respectfully submitted this 10<sup>th</sup> day of August 2007.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 10, 2007, a copy of the foregoing document was served upon the Defendants via United States Mail at the following address:

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

s/ Ira M. Schwartz