

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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IN RE SUBPOENA TO VERIZON
INTERNET SERVICES, INC.)
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_____)

Misc. Act. No. 03-MC-804-HHK/JMF

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)
RECORDING INDUSTRY ASSOCIATION
OF AMERICA,)
Plaintiff,)
)

v.)

)
)
VERIZON INTERNET SERVICES, INC.,)
Defendant.)
_____)

SECOND DECLARATION OF JONATHAN WHITEHEAD

I, Jonathan Whitehead, hereby declare as follows:

1. My name is Jonathan Whitehead. I am employed by the Recording Industry Association of America (RIAA) as Vice President and Counsel, Online Copyright Protection. The RIAA is the trade group that represents the United States recording industry. RIAA's member record companies comprise the most vibrant national music industry in the world, and create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

2. As part of my responsibilities, I am in charge of and supervise all RIAA investigations regarding infringement of our member companies' sound recordings in online or networked environments, including the Internet. I have personally directed, supervised or

reviewed the results of each of the investigations and analyses discussed herein. If called upon to do so, I could and would testify competently to the facts set forth in this declaration.

3. I have reviewed the papers filed in this Court on behalf of the person identified as nycfashiongirl@KaZaA.com (“nycfashiongirl”), including the so-called “Offer of Proof” submitted by her attorneys. (As nycfashiongirl’s attorneys refer to nycfashiongirl as a woman, for purposes of this declaration, I will as well.) In both the Offer of Proof and the Motion for Leave to Intervene, nycfashiongirl represents to the Court as follows regarding her activities on the file distribution system known as Kazaa:

“Jane Doe and her family use their home computer for personal use.[] They use the computer for, among other things, playing music, sending and receiving email, internet research, and word processing. Jane Doe lawfully purchased a number of compact discs containing sound recordings and transferred some of those sound recordings onto the family computer. A number of sound recordings were also present on the computer when it was first purchased. In order to listen to these sound recordings, Jane Doe used software called KaZaA Media Desktop. Jane Doe listened to these recordings when the computer was connected to the Internet and at times when it was not. ... When connected to the Internet, Jane Doe formerly participated in the peer to peer file sharing community known as KaZaA. On more than one occasion Jane Doe took steps to ensure that no other KaZaA user could access any of the folders on her family’s computer. Access may have occurred, however, without her consent.”

4. In many ways, these representations seem designed to create the impression that nycfashiongirl used Kazaa only as a media player to listen to songs copied from her own CDs, and only “accidentally” (if at all) distributed those songs to other users on the Kazaa system. That characterization of nycfashiongirl, or her activities on Kazaa, is demonstrably untrue.

5. Our independent technical investigation, and other facts omitted from nycfashiongirl’s Offer of Proof, described below, reveal that nycfashiongirl is a major, active user of the Kazaa file trading system for uploading and downloading (*i.e.*, distributing and

reproducing) copyrighted sound recordings, and other works. She is hardly an unwitting or passive participant in the events that involve her computer.

6. First, nycfashiongirl's Kazaa "share" folder (the folder of files available for download by others) did not contain just a few sound recordings – it contained almost 1100 files, including well over 900 music files, as well as video files, image files and software files. Nearly all of the music files are infringing. Many of the video and software files also appear blatantly to infringe the rights of the legitimate copyright holder. A true and correct copy of the entirety of nycfashiongirl's Kazaa "share" folder is attached as Exhibit A hereto. (Exhibit A is a series of images or pictures, called "screen shots," of nycfashiongirl's Kazaa "share" folder exactly as it appeared on our investigator's computer screen, which is how it would have appeared to any other user on the Kazaa system. The notation in the bottom, right-hand corner – that says "Not sharing any files" – does not refer to nycfashiongirl. Rather, that refers to our investigator, who followed the simple steps described below in ¶ 17 to disable file-sharing. Had nycfashiongirl elected to disable file-sharing, neither our investigator nor any other user would have been able to access her "share" folder, for viewing or downloading.)

7. Second, as part of a general educational campaign, the RIAA sent "instant messages" (or IM's) to thousands of Kazaa users who were observed to be infringing our members' copyrighted sound recordings. (Instant messages are electronic messages that automatically pop-up on a user's computer screen, meaning the user does not have to access them like e-mail. The ability to send IM's to users is a functionality built into the Kazaa software.) The text of the message we sent to these Kazaa users is as follows:

COPYRIGHT INFRINGEMENT WARNING:

It appears that you are offering copyrighted music to others from your computer. Distributing or downloading copyrighted music on the Internet

without permission from the copyright owner is ILLEGAL. It hurts songwriters who create and musicians who perform the music you love, and all the other people who bring you music.

When you break the law, you risk legal penalties. There is a simple way to avoid that risk: DON'T STEAL MUSIC, either by offering it to others to copy or downloading it on a "file-sharing" system like this.

When you offer music on these systems, you are not anonymous and you can easily be identified. You also may have unlocked and exposed your computer and your private files to anyone on the Internet. Don't take these chances. Disable the share feature or uninstall your "file-sharing" software. For more information on how, go to http://www.musicunited.net/5_takeoff.html. This warning comes from artists, songwriters, musicians, music publishers, record labels and hundreds of thousands of people who work at creating and distributing the music you enjoy. We are unable to receive direct replies to this message. For more information about this Copyright Warning, go to www.musicunited.net.

After reading nycfashiongirl's Offer of Proof, we searched our database of IM's sent. That search reveals that twice – on June 30 and again on July 3, 2003 – the RIAA sent instant messages with the text quoted above to the user identified as "nycfashiongirl@KaZaA," who the RIAA determined to be infringing our members' rights. In addition, since the Fall of 2002, the recording industry has been engaged in a major publicity campaign to advise users of pirate peer-to-peer networks that their activities were in violation of copyright laws and that they could be subject to civil lawsuits if they continued.

8. Third, an analysis of the "metadata" from the files in nycfashiongirl's Kazaa "share" folder makes abundantly clear that, by and large, nycfashiongirl did not merely copy her own CDs onto her computer and place the individual recordings into the Kazaa "share" folder. Nor were any significant number of those files of the sort that might come "pre-loaded" on a consumer-level computer as part of a marketing or promotional campaign. To the contrary, the metadata analysis demonstrates that nycfashiongirl downloaded most of the files from other users, without authorization from the copyright owner and thus in violation of the Copyright Act.

9. By way of background, many types of media files, including audio and video files, carry with them what is known as “metadata.” Metadata is essentially information that is associated with a file (such that when you upload or download the file the metadata travels with it) which provides descriptive information about the contents of the file. The file name is one form of metadata. For an MP3 music file, the metadata will often include the artist and the song title, and perhaps the album from which the song comes, the length of the song, the “bit rate” at which the song was encoded (a general indicator of encoding quality), and other information. Many files contain metadata indicating the brand of software that was used to extract the digital audio from a CD and copy it onto a computer (a process referred to as “ripping”) or to convert the “ripped” file into the MP3 format (a process known as “encoding”). Some files contain metadata indicating the Internet website from which the file originally was downloaded. Users also can add to the metadata, to include other information of their choosing. On systems like Kazaa, many users do this to include “keywords” – so that their files will show up when another user searches for any of the specified keywords. Some users also include their online name in the metadata (a practice referred to as “tagging” the file) to announce to others that they ripped, encoded and/or uploaded the file – almost like a stamp of quality assurance or perhaps for bragging rights. In any event, metadata contains a wealth of information.

10. In response to nycfashiongirl’s claims in this proceedings, we undertook an expedited review of the files in nycfashiongirl’s Kazaa “share” folder. The metadata shows that most of the files in nycfashiongirl’s Kazaa “share” folder have been downloaded from other users. The results of the metadata review are inconsistent with – and, frankly, flatly contradict – the claim that nycfashiongirl simply ripped some of her own CDs onto her computer and put them into the Kazaa “share” folder so she could use the Kazaa media player to listen to them. A

true and correct copy of excerpts of the metadata from the files in nycfashiongirl's Kazaa "share" folder is attached as Exhibit B hereto.

11. By way of partial illustration only, the metadata from the files in nycfashiongirl's Kazaa "share" folder reveals the following:

(a) Numerous files from nycfashiongirl's Kazaa "share" folder contain, in the metadata, explicit claims of having been originally ripped, encoded and/or uploaded by someone other than nycfashiongirl. For example, "Created by Grip" [Ex. B, p. 20], "uploaded by ray" [Ex. B, p. 25], "Tack's MP3 Archive" [Ex. B, p. 35], "Quare's Collection" [Ex. B, p. 37], "Ripped by KHAoTiX" [Ex. B, p. 41], "Property of the COXBOX" [Ex. B, p. 59], "ripped by pbv" [Ex. B, p. 66], "G Spot tunes" [Ex. B, p. 66], "Tagged by CPurple" [Ex. B, p. 70], "Brush Cut – 12/30/1997" [Ex. B, p. 74], "from WeeklyMp3guy's collection" [Ex. B, p. 76], "Ripped by trogger@yahoo.com" [Ex. B, p. 76], "Ripped by SprocksCT" [Ex. B, p. 77], "CD-RiP by FBI" [Ex. B, p. 78], "Bootleg ripped by Toto" [Ex. B, p. 82], "RIPPED BY HARRY CRUMB!!" [Ex. B, p. 82], "Supplied by Jon (ASTE WAREZ)" [Ex. B, p. 82], "Ripped by ATOMIC PLAYBOY 1999!" [Ex. B, p. 83], "From the Collection of MSarge" [Ex. B, p. 83], "Uploaded by Jerome and Rudy" [Ex. B, p. 84], "Ripped by Fionak" [Ex. B, p. 85], "Brush Cut – 04/16/1998" [Ex. B, p. 85], "Tagged by Cain" [Ex. B, p. 87], "uploaded by Ross Depew on July 26, 2002" [Ex. B, p. 88], "Ripped/Encoded by _^NoC^_" [Ex. B, p. 90], "Encoded by GuitarMan" [Ex. B, pp. 93, 122], "Ripped and Packed by Tantrum" [Ex. B, p. 94], "re-encoded by Gdog50" [Ex. B, pp. 96, 102], "by TNPG" [Ex. B, pp. 96, 143], "Uploaded by Smog" [Ex. B, pp. 97, 106], "Supplied by Jon and Tory" [Ex. B, p. 104], "Made by -=Ivan-The-Bigfoot=-" [Ex. B, p. 124], "Ripped by Surreal" [Ex. B, p. 128],

“Ripped by Mr. Scary” [Ex. B, p. 129], “Gridlock’s Archive” [Ex. B, p. 129], “This Track Was Once Downloaded From Speng316” [Ex. B, p. 134], “Ripped by Maverick2k2” [Ex. B, p. 136], “Upped by LiL RoCky” [Ex. B, p. 136], “Uploaded by MSB” [Ex. B, p. 142], “Ripped by Jail '97” [Ex. B, p. 154], “Tagged by Jesus Christ” [Ex. B, p. 161], “Courtesy of Dr. Worm” [Ex. B, p. 173], “served by DimoN HarD” [Ex. B, p. 178], “Encoded by Borame” [Ex. B, p. 190], “Riped by Ingus Neilands” [Ex. B, p. 190], “Chuckie – 06/07/1998” [Ex. B, p. 190], “Ripped by RudeBowyt [RBK]” [Ex. B, p. 211], “Ripped By Rulazig” [Ex. B, p. 211], “rip’d n up’d by Sw0rdz” [Ex. B, p. 214], “Distributed by Robin” [Ex. B, p. 220], “uploaded by tomi” [Ex. B, p. 222], and “Encode by: Quang Tran” [Ex. B, p. 222]. Countless other files in nycfashiongirl’s Kazaa “share” folder have been explicitly “tagged” as having been originally ripped, encoded and/or uploaded by other users on the Kazaa system.

(b) Numerous files from nycfashiongirl’s Kazaa “share” folder indicate expressly that originally they were downloaded from Internet sites – many of which are blatant pirate sites – or that they were otherwise “tagged” by the operators of those Internet sites. For example, the metadata indicates that nycfashiongirl files were downloaded from the following sites, among many others: <http://www.themusiclover.com> [Ex. B, pp. 6, 14, 40, 53, 77, 105], www.simplemp3s.com [Ex. B, p. 12], <http://fly.to/DjViper> [Ex. B, p. 25], <http://www.supermusic.nu> [Ex. B, p. 25], <http://www.mp3c.nu> [Ex. B, pp. 42, 56], <http://i.am/musiclover> [Ex. B, p. 47], <http://zap.to.canna> [Ex. B, p. 51], <http://so-ta> [Ex. B, p. 71], PSJ’s MP3 Download Site [Ex. B, p. 73], www.mp3-2002.com [Ex. B, pp. 74, 93], <http://ownuploads.com> [Ex. B, p. 80], www.mp3wow.com [Ex. B, p. 84], <http://www.vietmusic.net> [Ex. B, p. 86], <http://w3.to.mtc> [Ex. B, p. 91],

<http://coolmp3z.notrix.de> [Ex. B, p. 97], www.supermp3s.net [Ex. B, pp. 105, 124, 136], [HTTP://MOVE.TO/DEEJAY](http://MOVE.TO/DEEJAY) [Ex. B, p. 133], <http://zap.to/mp3terror> [Ex. B, p. 135], <http://abhorrance.iwarp.com> [Ex. B, p. 158], www.KRAZYMP3Z.COM [Ex. B, p. 182], www.music-madness.net [Ex. B, p. 182], <http://welcome.to/pasqua> [Ex. B, p. 188], <http://listen.to/crabdaug> [Ex. B, p. 211], and <http://mp3boy.yeah.net> [Ex. B, p. 221].

(c) Numerous files from nycfashiongirl's Kazaa "share" folder reveal that multiple different brands or versions of "ripping" software were used to make the files, suggesting strongly that the files were ripped by different people. Compare, for example, "Made with RealJukebox (tm)" [Ex. B, pp. 5, 20, 27, 59, 68, 71, 77, 86, 102, 158, 188, 198], "Ripped by CDCOPY" [Ex. B, pp. 20, 80], "MP4 Video Codec" [Ex. B, p. 68], "CD'n'GO! Suite 1.89.851" [Ex. B, pp. 86, 159], "Made with Sonic Foundry ACID 3" [Ex. B, pp. 94, 112], "CD'n'Go Suite 99 1.30.345" [Ex. B, pp. 103, 112, 114], "CD'n'Go! Suite 99 1.55.592" [Ex. B, pp. 113, 198], and "CD'n'Go! Suite 99 1.95.919" [Ex. B, p. 126].

(d) Numerous files from nycfashiongirl's Kazaa "share" folder contain multiple "keywords" added into the metadata. If nycfashiongirl had copied the recordings from her own CDs for her personal listening, there would be no reason to add "keywords" into the metadata. The purpose of keywords is to help other users find the files when searching on a large network such as Kazaa. For example, one nycfashiongirl Kazaa "share" folder file containing the full-length motion picture "Pretty Woman" contains keywords "Romance, Julia Roberts, Richard Gere" [Ex. B, p. 67]. Another containing the Madonna song Die Another Day featured in the James Bond movie contains the word "Bond" in the keyword field [Ex. B, p. 69]. Another file for an Eminem song contains

the following key words: “real slim shady, purple pills, just don’t give a fuck, fight music, my name is, the way i am, 8 mile, cleaning out my closet” [Ex. B, p. 71]. And, another file containing a KC & The Sunshine Band song contains key words “boogie shoes, saturday night live, SNL, oldies, sucks” [Ex. B, p. 117]. Scores of other files in nycfashiongirl’s Kazaa “share” folder contain similar “keywords” that strongly suggest that the files were intended for mass distribution on a file-trading network such as the Kazaa system.

(e) Numerous files from nycfashiongirl’s Kazaa “share” folder contain in the metadata explicit invitations to other users to download or further “share” the files – again contradicting the claim that these were personal CDs copied to her computer for personal listening. For example, one file containing a popular CD burning (copying) application states in the description area of the metadata: “This is the first ever nero 5.5.9.1.4 with all updates and features + Serial and Keygen first ever on P2P! **So PLEASE SHARE!!!** ... Peace ...” [Ex. B, p. 66]. Another for an Eminem song says “this is the track i made with cool edit, **please listen to it** its very good, i need feedback, because i want to try it out, see if i need to get serious!! thanks ya’ll at hackzemup@yahoo.com” [Ex. B, p. 71]. Another file extols users to “**SHARE WITH OTHERS!!!**” [Ex. B, p. 73]. Another says “This is the real song. I’m not lying. **Download it**” [Ex. B, p. 79]. Another says “BFS is a punk band from Denton, TX. **Check ‘em out!**” [Ex. B, p. 88]. Another says : “i love this music video, its about someone, but i dunno!!! **so watch it!!!!**” [Ex. B, p. 107]. Another says “crappy radio rip / **enjoy**” [Ex. B, p. 135]. Another says “best song coldplay have produced great riff and superb tune **download it**” [Ex. B, p. 165]. Another says “**get this** if you liked ‘girl all the

bad guys want' – kia" [Ex. B, p. 178]. (All emphasis added.) Making abundantly clear that the files were intended for widespread distribution on peer-to-peer networks, a couple of other nycfashiongirl files say: "Finally the Real Full CD delivered fresh for everyone on Grokster and Kazaa to Enjoy! --- Compliments of [dmb] ~ {DMB} ~ [dmb]" [Ex. B, p. 182].

(f) Finally, numerous files from nycfashiongirl's Kazaa "share" folder contain other telltale metadata signs that they were not ripped from CDs for personal listening, but rather were intended for mass distribution to other, unknown persons, over a file-trading network such as the Kazaa system. Many of these files contain notes in the metadata for other users, telling them about the technical quality of the file or assuring them that it is the full, real or complete file. (One characteristic of pirate peer-to-peer networks is that, sometimes, files are of poor quality or incomplete or not what they purport to be. Hence, these metadata notes are fairly common.) Other metadata notes to users provide descriptive or other information that one copying her own CDs would not need to include. For example, one file announces "NO DJ CHIT CHAT" and "ACTUALLY the REAL THING!" [Ex. B, p. 69]; another tells other users "Full album version of 'Heaven (Yanou's Candlelight Mix)'" [Ex. B, p. 70]; another promises users "this is real no repeated choruses" [Ex. B, p. 72]; another has the keyword "Napster," the original pirate p2p service [Ex. B, p.77]; another says that the song is "BRAND SPANKIN' NEW!" [Ex. B, p.78]; another proclaims "kick ass band! anyone that says theyre 'pop' is wrong!" [Ex. B, p. 81]; another says "REAL FULL TRACK FROM THERE NEW ALBUM" [Ex. B, p. 82]; another advises other users that "This is the full unedited dirty version of Eminem's 'Without Me' off his upcoming album 'The Eminem Show'" [Ex.

B, p. 96]; another says “THIS VIDEO IS THE BEST EVER!!” [Ex. B, p. 99]; another says “not very good quality! but its ok” [Ex. B, p. 99]; another says “Downloaded off IRC 1.23.03 Movie is REAL and WORKS!!!” [Ex. B, p. 103]; another confirms that the file has been “certified by NoMoreFakes ww.101Thrills.com” [Ex. B, p. 103]; another says “REAL ALBUM” [Ex. B, p. 103]; another says “This is the real version of Phil Collins new track” [Ex. B, p. 112]; another opines that “This is by far ... one of Staind’s best tracks they’ve ever recorded” [Ex. B, p. 115]; another says “Seriously! Real album version! Not a clip!” [Ex. B, p. 120]; another says “FULL VERSION!!! [Ex. B, p. 133]; another says “fully working song” [Ex. B, p. 133]; another says “This is the actual studio vers” [Ex. B, p. 136]; another says “No Crap real CD” [Ex. B, p. 142]; another says “O-Town’s brand new single These Are The Days, NO FAKE!! good quality” [Ex. B, p. 161]; another says “This is the real version, I ripped it from the music video myself” [Ex. B, p. 164]; another says “Real Stuff, no spaces in the music” [Ex. B, p. 165]; another says “Music From Kazaa” [Ex. B, p. 167]; another tells other users that the file contains a “Pre Release” version of the song [Ex. B, p. 183]; referring to a Red Hot Chilli Peppers song, another says “new chli’s song ... Great Brand New MP3” [Ex. B, p. 195]; and, another says “This is monica’s new single So Gone. Good Quality and no loops” [Ex. B, p. 209].

12. In addition, there are organized groups that have as their mission widely distributing sound recordings *before* those recordings are released commercially (such pre-release recordings sometimes are obtained through promotional copies sent to radio stations and/or reviewers, or by stealing them from recording studios.) These are criminal enterprises, and the ring leader of one of them, known as the Apocalypse Crew or APC, recently plead guilty to criminal copyright infringement and faces up to five years in prison. (A news article describing this guilty plea is

attached hereto as Exhibit C.) These organized groups “tag” or identify their files (through the metadata) so others can know that they were the original source of the file. Several of the files in nycfashiongirl’s Kazaa “share” folder contain APC’s tag. For example, “Ripped by MadMan Apc (980227)” [Ex. B, pp. 68, 188], “ripped by sinned soul [aPC]” [Ex. B, p. 125], “[aPC] Apocalypse Productions” [Ex. B, p. 143], and “APC-Ripped By PsxCdr” [Ex. B, p. 211]. Thus, if nycfashiongirl’s Offer of Proof is to be believed, and she is the original source for the recordings in her Kazaa “share” folder, then one would have to conclude that nycfashiongirl was a member of this criminal enterprise. More likely, this evidence reveals that nycfashiongirl is an active downloader from Kazaa; that she downloaded these files – in violation of the Copyright Act – and then made them available for any of the several million other Kazaa users to download from her.

13. A fourth and separate analysis we conducted demonstrates that the original source for many of the files contained in nycfashiongirl’s Kazaa “share” folder was a user on the now-defunct Napster system. As the Court is probably aware, Napster was the first large-scale pirate peer-to-peer network. Because of its facilitation of massive copyright infringement by its users, Napster ultimately was shutdown by order of a federal district court in the Northern District of California (Judge Patel), an order that was affirmed by the Ninth Circuit Court of Appeals. Our analysis reveals that either nycfashiongirl was a Napster user and previously had offered the files for distribution on the Napster system, or that she downloaded the files and that the original source of the files was a former Napster user.

14. We were able to determine this based on another piece of metadata known as a “hash.” A hash is a unique identifier of a file, a “fingerprint” of sorts. It is a computed value based on the properties of the individual bits in a file. The hashes are used by peer-to-peer file-

trading systems to locate other exact versions of a file being downloaded. For example, with Kazaa, if User A is downloading a file from User B but User B disconnects in the middle of User A's download, the system needs a way to find the exact same version of that file from another user in order to enable User A to complete the download. Kazaa uses the hash for this purpose. Napster also used hashes.

15. To conduct our analysis, we took a small sample of files from nycfashiongirl's Kazaa "share" folder, including some of the songs listed in the DMCA notice to Verizon, and compared their hashes to the hashes in a database dating back to May of 2000, created by our investigators from downloads from users on the Napster system. Of the nine nycfashiongirl files included in our hash analysis, six of those files have an exact match in the Napster database. Thus, the original sources of those files almost certainly trace to users of the now-defunct Napster system. Given the viral nature of distribution on peer-to-peer networks – where users who download a file automatically begin offering that file for further distribution to others – those nycfashiongirl files may have been distributed countless times between May 2000, when we downloaded them from Napster users, and the day we downloaded them from nycfashiongirl on the Kazaa system.

16. If nycfashiongirl's Offer of Proof is to be believed, our hash analysis demonstrates that nycfashiongirl was a Napster user and offered these sound recordings to other users to download on both the Kazaa and Napster systems. Again, more likely, what this analysis confirms (particularly in conjunction with the metadata analysis described above) is that nycfashiongirl unlawfully downloaded most of the copyrighted sound recordings from other users, and subsequently made those files available for others to download from her. In any case,

it demonstrates that nycfashiongirl did not simply copy lawfully purchased CDs onto her computer for her personal listening pleasure.

17. nycfashiongirl claims in her Offer of Proof that “on more than one occasion she sought to ensure that no other KaZaA user could access any of the folders on her family’s computer.” That claim is dubious. The Kazaa Media Desktop software that she was using has an option for users to prevent file sharing. It is as simple as checking a box. A user simply would go to “Tools | Options | Traffic” and click a box that disables sharing of files. (Exhibit D hereto contains screenshots of the Kazaa software showing the check box to disable file-sharing.) If nycfashiongirl had elected to disable sharing, the files in her Kazaa “share” folder would not have been made publicly available for download by other users. We previously have verified that when file-sharing has been disabled in this way, files in a user’s Kazaa “share” folder are not accessible to other users, either to view or download. It strains credibility for nycfashiongirl to claim to be computer sophisticated enough to extract the digital audio files from her CDs, encode those files into the MP3 format, and then move the files to the Kazaa “share” folder, while at the same time suggesting that she could not manage simply to click the box that turns off file-sharing.

18. Finally, nycfashiongirl claims that she used the Kazaa Media Desktop application in order to listen to sound recordings that she had ripped from her own CDs. That is, to say the least, a most unusual way to listen to music exclusively copied from one’s own CDs. In order to listen to music on a computer, one needs a “media player,” which is a software application. The Kazaa Media Desktop application, however, is not a media player – it is an application that enables users to participate in a peer-to-peer file distribution network. While the Kazaa Media Desktop contains a rudimentary media player, there is no reason to use it to listen to computer

copies of one's own CDs. The Windows operating system comes pre-bundled with a Windows media player that is far more advanced than the version in Kazaa. Indeed, the media player in Kazaa is simply a scaled-down version of the Windows media player that users get for free with the Windows operating system. Moreover, companies that sell consumer-oriented computers regularly bundle computers with additional software, including media players. If nycfashiongirl, as she claims, purchased a computer with some songs pre-loaded, then of course the computer also would have come with a pre-loaded media player. The fact is, it would be difficult for a consumer to buy a computer without that computer coming pre-loaded with at least one media player software application. Additionally, most ripping software applications (the software nycfashiongirl claims she used to copy her CDs to her computer) also include a media player. All of these, without question, would have been better than the relatively crude media player incorporated into Kazaa. Thus, nycfashiongirl's Offer of Proof begs the question of why she would go through the additional trouble to move the files she claims to have ripped from her CDs into the Kazaa "share" folder simply to take advantage of a media player that undoubtedly is of a lesser quality than the other media player(s) already on her computer.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: August 26, 2003



Jonathan Whitehead