

## **Federal judge: Making files available for download = distribution**

A judge's ruling in a RIAA file-sharing case may undermine what has become a popular defense.

December 2006

The RIAA's argument that making files available for download constitutes copyright infringement received an important boost from a federal judge. In an decision delivered in October and first reported over the weekend, Judge Ann Aiken found that making songs available for download via a P2P application such as Kazaa is equivalent to distributing the files and forms a sufficient basis for a claim of copyright infringement, the first time that a judge has made such a ruling in a file-sharing case.

The case in question, *Elektra v. Perez*, follows the pattern of the numerous other file-sharing lawsuits brought by the RIAA. After MediaSentry discovered a number of songs in a Kazaa user's download folder, the RIAA filed a "John Doe" lawsuit which was supplanted once the defendant, Dave Perez, was identified by his ISP as the owner of the account allegedly used to share music.

### **What constitutes distribution?**

In his response, Perez denied the accusations of file sharing and said that even if he was responsible for the "perez@kazaa" account, merely making the files available in a shared folder for other Kazaa users falls short of infringement. The argument echoes that made in many other file-sharing cases, including *Elektra v. Barker*: distribution does not take place until someone actually downloads one of the songs from a Kazaa share, and that the RIAA would have to show that someone illegally downloaded the file in order to demonstrate that copyright infringement occurred. In the *Elektra v. Barker* case, the EFF filed an amicus brief outlining its position that sharing music files does not infringe the "distribution right" granted to copyright holders.

It's a difficult question, due in large part to the copyright law's predating the "digital age." As written, US copyright law explicitly says that in order to "distribute" a copyrighted work, an actual, physical exchange of a material object must take place. The EFF and other groups have urged the courts to define "distribution" as necessitating involving physical objects. Oddly enough, that position also embraces the pre-Internet concept of "distribution," even though most would agree that the iTunes Store and other online music services selling purely digital goods engage in the *authorized* distribution of copyrighted works.

Perez, the EFF, and others might use libraries to illustrate their arguments. A public library has a wide selection of copyrighted works available for patrons to use, read, watch, listen to, and even copy, within limits. However, the library is not responsible for what its patrons do once they borrow a book or DVD. In other words, it's not the collection itself and public access to it that causes infringement, it's the actions of those who use items in the collection. There are special provisions protecting libraries from the actions of their users, but online users may be

responsible for what others do, should they even make it possible for others to get access to copyrighted materials.

Judge Aiken ruled in favor of the RIAA. In her order, the judge noted that in a copyright infringement case, the plaintiff needs to do two things: demonstrate ownership of the material and show that the party accused of infringement "violated at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." Making songs available for download fulfills the second requirement, wrote Judge Aiken.

"[P]laintiffs' Amended Complaint refers to 'Exhibit B' attached to the complaint, which allegedly represents music files being shared by user 'perez@KaZaA' at the time plaintiffs' investigator conducted the investigation... I find that Exhibit B, in the context of the allegations in the Complaint, supports plaintiffs' allegation that defendant made copyrighted materials available for distribution," wrote Judge Aiken. "In sum, plaintiffs' amended complaint alleges the necessary elements of a copyright infringement action pursuant to the Copyright Act"

This appears to be the first instance in which a judge presiding over a file-sharing case has ruled that having a shared folder available on Kazaa constitutes copyright infringement. As that particular argument has been widely used in other file-sharing cases, Judge Aiken's ruling may have an effect on those too.

Judges have yet to rule on the other defenses still in play in file-sharing cases, including arguments that the [settlement](#) reached between the RIAA and Kazaa bars recovery of any additional damages from file-sharing defendants and that statutory damages [should be capped](#) at \$2.80 per song. Just last week, another RIAA defendant [sued Sharman Networks](#) for deceptive marketing, saying that the Kazaa application made her music collection available for downloading without her knowledge.

Judge Aiken also denied Perez's request for attorney's fees. Three of his children who have reportedly admitted using Kazaa have been added to the original lawsuit as defendants.