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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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CAPITAL RECORDS, INC., ET AL.,) CV. NO. 03-11661-NG
PLAINTIFFS)
VS.) COURTROOM NO. 2
NOOR ALAUJAN, ET AL.,) 1 COURTHOUSE WAY
DEFENDANTS) BOSTON, MA 02210

JURY TRIAL DAY 4
TESTIMONY OF JOEL TENEBBAUM ONLY

JULY 30, 2009
9:10 A.M.

BEFORE THE HONORABLE NANCY GERTNER
UNITED STATES DISTRICT COURT JUDGE

VALERIE A. O'HARA
OFFICIAL COURT REPORTER

1 A P P E A R A N C E S:

2 For The Plaintiffs:

3 Dwyer & Collora, LLP, by DANIEL J. CLOHERTY, ESQ.,
4 600 Atlantic Avenue, Boston, Massachusetts 02210-2211;

5 The Oppenheim Group, by MATTHEW J. OPPENHEIM, ESQ.,
6 7304 River Falls Drive, Potomac, Maryland 20854;

7 Holme Roberts & Owen LLP, TIMOTHY M. REYNOLDS, ESQ.,
8 1801 13th Street, Suite 300, Boulder, Colorado 80302

9 For the Defendant:

10 Harvard Law School, by CHARLES NESSON, ESQ.,
11 1525 Massachusetts Avenue, Cambridge, Massachusetts
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TESTIMONY OF JOEL TENENBAUM ONLY

JOEL TENENBAUM, having been duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. REYNOLDS:

Q. Good morning, Mr. Tenenbaum. Would you please state your name for the jury.

A. My name is Joel Tenenbaum.

Q. Do you currently live at Commonwealth Avenue in Boston?

A. I do.

Q. And you own your condominium there with your mother?

A. Could you clarify that?

Q. You own your own condominium with your mother?

A. I don't think with my mother.

Q. Your name is on the deed with your mother, is it not? Can I have an answer to that question?

A. I don't know. I'd have to look.

MR. REYNOLDS: Your Honor, may I approach the witness?

THE COURT: Yes, you may.

Q. Mr. Tenenbaum, have you had an opportunity to look at the deed that I've just handed you?

A. Yes.

Q. And that's a deed for your condominium on Commonwealth

1 Avenue?

2 A. Yes.

3 Q. And you are listed as a co-owner with your mother,
4 correct?

5 A. Yes.

6 Q. You're a full-time graduate student at Boston
7 University?

8 A. That's right.

9 Q. You're in the physics department?

10 A. Yes.

11 Q. Is it a bachelor of science from Goucher College?

12 A. It's a bachelor of arts from Goucher College.

13 Q. And Goucher is in Baltimore, Maryland?

14 A. Yes, it is.

15 Q. It's a four-year program?

16 A. It's in a suburb of Goucher.

17 Q. You went to Goucher from 2002 to 2006?

18 A. Yes.

19 Q. And while you were at Goucher, you spent the majority of
20 your time during the summer at your home in Providence,
21 Rhode Island, correct?

22 A. Yes.

23 Q. I want to go over some of the computers you've used
24 during the relevant time period. There was a computer in
25 your bedroom in Providence, Rhode Island, correct?

1 A. Yes.

2 Q. It was a PC desktop?

3 A. Yes.

4 Q. It was purchased in approximately 1999?

5 A. That doesn't sound off.

6 Q. And that computer had access to the Internet through Cox
7 Communications?

8 A. Yes.

9 Q. While you were at school in Maryland or in a suburb in
10 Maryland, as you pointed out, you had a Gateway computer
11 that your mother had purchased for you?

12 A. Yes.

13 Q. And you got that computer in about 2002?

14 A. I think it was late 2002.

15 Q. Your freshman year when you went to school?

16 A. Yes.

17 Q. And while you were at Goucher, that Gateway computer had
18 access to the Internet?

19 A. Yes.

20 Q. Now, at school in Boston here when you're at grad.
21 school, you still had the Gateway computer, correct?

22 A. Yes.

23 Q. And while you were at grad. school, that Gateway
24 computer had access to the Internet at your condo on
25 Commercial Avenue?

1 A. On Commonwealth Avenue, yes.

2 Q. I'm sorry, Commonwealth Avenue, thank you. Your Gateway
3 computer was password protected?

4 A. Yes, it's password protected to start the computer up,
5 yes.

6 Q. And you still have that Gateway?

7 A. Yes, I do.

8 Q. Now, in your first year of grad. school, you also had a
9 Toshiba laptop?

10 A. I continued to have that laptop, yes.

11 Q. But you got it in your first year of graduate school?

12 A. Yes.

13 Q. You've used the sublimeguy14 user name, have you not?

14 A. Yes, I have.

15 Q. And you used it for multiple purposes?

16 A. Yes.

17 Q. You created an Amazon.com profile with it?

18 A. Yes.

19 Q. You posted photos of your Honda Prelude online at I
20 think it was a website Angelfire under the sublimeguy14 user
21 name?

22 A. Yes.

23 Q. And from 2002 to 2007, you had an e-mail address,
24 sublimeguy14@cox.net?

25 A. Yes.

1 Q. You also created the subliméguy14@username?

2 A. Yes.

3 Q. And you created the KazaA account on the computer in
4 your bedroom in Providence?

5 A. Yes.

6 Q. Take a look at Exhibit 13, please. I'd like to publish
7 page 3 to the jury.

8 THE COURT: Is this on the computer or is it on
9 the document camera?

10 MR. REYNOLDS: Computer, your Honor.

11 Q. Now, Mr. Tenenbaum we're just looking at one page here,
12 but you can scroll through all the pages in front of you.
13 There are I believe 40 pages. I'm sorry, it would be in the
14 book, I believe it's volume II of the exhibit notebook.
15 There are three volumes there.

16 A. Where does it start?

17 Q. Exhibit 13, pages 1 through 41.

18 A. Yes.

19 Q. These are screen shots of a KazaA shared folder as seen
20 by MediaSentry on August 10, 2004. They're in evidence, and
21 you recognize the subliméguy14@KazaA user name?

22 A. Yes.

23 Q. That's the user name that you created?

24 A. Yes.

25 Q. And you'd agree with me that these screen shots show the

1 contents of your KazaA shared folder as it existed at one
2 point in time?

3 A. Yes.

4 Q. And this is a collection of the files that were in your
5 KazaA shared folder?

6 A. Yes.

7 Q. And you used the KazaA account in your bedroom in
8 Providence, Rhode Island?

9 A. Yes.

10 Q. And you listened to music regularly at your residence in
11 Providence, Rhode Island?

12 A. Yes, whenever I was home.

13 Q. Now, when you search for a particular song on KazaA, you
14 went out and you did a search like you'd do a Google
15 search?

16 A. Yes.

17 Q. And you typed in the words of the artist and song and
18 you get a list back?

19 A. Yes, that's how you do it.

20 Q. And KazaA would give you multiple sources from which to
21 download files?

22 A. Yeah.

23 Q. And these sources were other computers on the network?

24 A. Yes.

25 Q. And computers just like yours?

1 A. Yes.

2 Q. When you downloaded songs on KazaA, you downloaded whole
3 songs most of the time?

4 A. Yes.

5 Q. And you intended to download whole songs all the time?

6 A. Yes.

7 Q. And when you used KazaA in Providence on the computer
8 that was in your bedroom, you would spend several hours a
9 week on KazaA?

10 A. Yeah, that sound rights.

11 Q. And most of those days you used KazaA, you used it to
12 download music?

13 A. Yes.

14 Q. You also knew when KazaA was running on the computer in
15 your bedroom in Providence, Rhode Island that others were
16 downloading music for you?

17 A. Yes.

18 Q. And, in fact, you saw a traffic tab on KazaA?

19 A. Yes, it's actually in the screen shot right now.

20 Q. The traffic tab. Does it show files being downloaded?

21 A. Well, the tab isn't open.

22 Q. I see. I see. Point out the tab for me, if you would.

23 A. It's just to the right of the selected tab that says
24 search.

25 Q. I see. So when you're looking at the top where it's

1 sort of right below the file, there's some icons where it
2 says "KazaA," then it says "my account," what is that,
3 "theater?" Is that right?

4 A. Yeah, yeah, "web, KazaA, theater, search," then
5 "traffic."

6 Q. And that's a traffic tab and you saw evidence from that
7 traffic tab that other people were uploading songs or you
8 were uploading songs to other people?

9 A. Yes, absolutely.

10 Q. And you looked at the traffic tab on your computer on a
11 more or less regular basis?

12 A. I don't know about half the time. You're not always
13 interested in who's downloading from you.

14 Q. About half the time when you look at your traffic tab,
15 you saw other people were in fact downloading from you?

16 A. Yeah, yeah, it definitely wasn't uncommon for people to
17 be downloading, yes.

18 Q. Now, I'd like to shift gears for a second and talk about
19 when you first became aware of this lawsuit or the fact that
20 there might be claims against you. You first found out
21 about this from your parents; is that correct?

22 A. That's correct.

23 Q. And you discussed this case with your mother over the
24 phone?

25 A. I did.

1 Q. And you discussed who might be responsible?

2 A. Yes.

3 Q. And that was in September of 2005, correct?

4 A. That sounds right.

5 Q. And it was in connection with the letter that the
6 plaintiffs sent to J. Tenenbaum at the Providence address,
7 correct?

8 A. I'm sorry, could you repeat that?

9 Q. The discussion that you had with your mother stemmed
10 from the letter that was sent by my clients to J. Tenenbaum
11 at the Providence, Rhode Island address?

12 A. Yes.

13 Q. And during this conversation you told your mother that
14 "it was impossible for you to know" who was responsible for
15 the infringement at issue? Didn't you say that?

16 A. Yes.

17 Q. And in the course of this case, you testified under oath
18 that it was impossible for you to know because "it exceeded
19 your capabilities as a human being"? Do you remember
20 that?

21 A. Yes, I did say.

22 Q. And you also stated that "you didn't think any human
23 being would have been smart enough to be capable of knowing
24 who was responsible"?

25 A. Yes.

1 Q. And after the case was filed, you put in an affidavit
2 with the Court, did you not, regarding other people who
3 might have used your computer?

4 A. If you have it. I don't remember exactly.

5 Q. Mr. Tenenbaum, did you not state in an affidavit that
6 you believe that people from California, Ohio and Japan
7 might have used your computer?

8 A. Yes.

9 Q. And did you also state in this affidavit that a foster
10 child might have used your computer, foster child who was
11 living in the home?

12 A. Yeah.

13 Q. And you also said in this affidavit that it is not known
14 whether burglars who had broken into your parents' house
15 might have accessed your computer?

16 A. Yes.

17 Q. Now, after this affidavit was filed with the Court, you
18 also responded to some written discovery that the plaintiffs
19 had sent you. Do you recall that?

20 A. I don't know what you mean by written discovery.

21 Q. Some written questions that the plaintiff had sent you
22 that you responded to in writing?

23 A. Again, I'd have to see it to refresh my memory.

24 Q. Ms. Burton, could you pull up Exhibit 34, please, and
25 could you go to page 4. Mr. Tenenbaum, you can turn to

1 Exhibit 34, too. It's in the book in front of you, and it's
2 also on the screen. Ms. Burton, could you pull out
3 interrogatory 10. Mr. Tenenbaum, this is a document that's
4 in evidence. Interrogatory No. 10 asks you to identify all
5 persons who utilized an online media distribution system on
6 the computer during the three years prior to the date the
7 complaint in this case was filed including, but not limited
8 to, any person who downloaded music to the computer.

9 Ms. Burton, could you scroll down to 17, it's at
10 the bottom. No. 17 asks you, "State all users or screen
11 names you have ever used in connection with each online
12 media distribution system you utilized." Do you see
13 those?

14 A. I do.

15 Q. Do you remember responding to those two questions?

16 A. Well, I must have responded to them, but I don't
17 remember the specifics.

18 Q. Could you take a look at Exhibit 33, please,
19 specifically page 4. This document is also in evidence.

20 A. Yes.

21 Q. In response to, Ms. Burton, could you pull out the
22 responses to 9 and 10. In response to interrogatory No. 10,
23 that asks you to identify all persons who had used an online
24 media distribution system on the computer. You stated, "See
25 answer to interrogatory No. 9." Do you see that?

1 A. Yes.

2 Q. And interrogatory No. 9, you stated, "I have no
3 knowledge who downloaded an online media distribution system
4 on the computer during the three years prior to the date the
5 complaint in this action was filed." That was your
6 answer?

7 A. Yes.

8 Q. And this is the answer you gave to plaintiffs?

9 A. Yes.

10 Q. Could you then scroll down, Ms. Burton, to the responses
11 to 16 and 17. And, again, Mr. Tenenbaum, you recall that
12 interrogatory No. 17 asks you to identify all screen names
13 you had used in connection with an online media distribution
14 system, and your answer you wrote here was, "Same as
15 interrogatory No. 16." Do you see that?

16 A. Yes.

17 Q. And your answer to interrogatory No. 16, "I have no
18 knowledge or recollection of online media distribution
19 systems used or any dates." That's your answer?

20 A. Yes.

21 Q. That's the answer you gave to the plaintiffs in the
22 course of the lawsuit?

23 A. Yes.

24 Q. Ms. Burton, could you go back to Exhibit 34.

25 Mr. Tenenbaum, could you turn to Exhibit 34, please, page 5.

1 Ms. Burton, if you could pull out 18 and 19, please, those
2 interrogatories. Mr. Tenenbaum, you were provided two
3 questions, two additional questions from the plaintiffs that
4 asks you to identify who, all persons who have used the
5 screen name subliméguy14@KazaA while connected to an online
6 media distribution system on the computer, and then No. 19
7 asks if you have recorded or burned CDs of any sound
8 recordings that you have downloaded using an online media
9 distribution system. Do you recall providing responses to
10 these two questions to the plaintiff?

11 A. Yes, I imagine they're similar.

12 Q. Similar in the sense that you stated that you didn't
13 have any idea who had used subliméguy14@KazaA?

14 A. Yes.

15 Q. And similar in the sense that you stated that you didn't
16 have any idea of downloading or using an online media
17 distribution system such that you might have burned CDs from
18 it?

19 A. Yes.

20 Q. And those are again the answers you provided to
21 plaintiffs?

22 A. Yes.

23 Q. Could you take a look Exhibit 34, page 18. Ms. Burton,
24 could you pull out the top three numbers, 6, 7 and 8.

25 Mr. Tenenbaum, do you recall that these requests for

1 admissions were sent to you in connection with this lawsuit
2 asking you in No. 6 to admit that an online media
3 distribution system was downloaded to the computer, in 7
4 that you knew an online media distribution system was
5 downloaded to the computer and No. 8 admit that you have
6 used the screen name sublimeguy14@KazaA while connected to
7 an online media distribution system. Do you recall that?

8 A. Yes.

9 Q. And you provided responses to these, correct?

10 A. Yes.

11 Q. Would you take a look at Exhibit 33, page 7.

12 Ms. Burton, could you pull out the responses for No. 6, 7
13 and 8, please. Mr. Tenenbaum, you provided the following
14 responses, correct, to No. 6, you stated, "I have no
15 knowledge of whether or not an online media distribution
16 system was downloaded to the computer," correct?

17 A. Yes.

18 Q. For No. 7, you provided the same answer as No. 6,
19 correct?

20 A. Yes.

21 Q. And for No. 8, which asks you to admit that you had used
22 the sublimeguy14@KazaA user name, you in this answer you
23 denied that, didn't you?

24 A. Yes, Mr. Reynolds.

25 Q. Ms. Burton, could you turn to Exhibit 33, page 4, and

1 Mr. Tenenbaum, would you please do the same. In fact, I
2 think you may have already been there, Mr. Tenenbaum. You
3 see the response to interrogatory No. 16? Ms. Burton, could
4 you pull that out.

5 A. Yes, I do.

6 Q. Again, you wrote, "I have no knowledge or recollection
7 of online media distribution systems used or any dates,"
8 correct?

9 A. Yes.

10 Q. And that statement is not accurate, is it?

11 A. I do have knowledge or recollection of online media
12 distribution systems.

13 Q. Okay. So this statement that you gave here is not
14 accurate, is it?

15 A. No.

16 Q. That is no, it's not accurate?

17 A. No, it's not accurate.

18 Q. You also gave testimony in this case that "More people
19 than you can remember used your subliméguy14@KazaA user
20 account." Do you recall that testimony?

21 A. Vaguely.

22 Q. Do you recall stating that you believed your older
23 sister Abbey Tenenbaum, who's now Abbey Nathan, used your
24 KazaA account?

25 A. I'm sorry, what's the start of that?

1 Q. Do you recall testifying that you believed that your
2 older sister, Abbey Nathan, Abbey Tenenbaum used your KazaA
3 account?

4 A. I remember saying something like that it was possible.
5 I don't know if I said that I believed she had. We could
6 look.

7 Q. Ms. Burton, could you hand me --

8 MR. REYNOLDS: Your Honor, may I open the sealed
9 deposition transcript?

10 MR. FEINBERG: I'll allow him to use the copy.

11 THE COURT: You can use the copy if you want.

12 MR. REYNOLDS: I don't have an extra copy, I
13 apologize.

14 THE COURT: Okay.

15 MR. REYNOLDS: May I approach the witness?

16 THE COURT: Yes, you may.

17 Q. Mr. Tenenbaum, do you recall giving a deposition in this
18 case on September 24th, 2008?

19 A. Yes.

20 Q. And you were represented by Mr. Nesson at that
21 deposition?

22 A. I was.

23 Q. And my colleague, Ms. Burton, took that deposition?

24 A. Yes, she did.

25 Q. And you were under oath?

1 A. Yes.

2 Q. And you agreed to provide full and truthful statements
3 under oath?

4 A. Yes.

5 Q. Could you turn to page 63, please, specifically starting
6 at line 17, question: "Okay. Who else do you believe used
7 your KazaA account at your house?" Answer: "Abbey
8 Tenenbaum." Question: "Who is Abbey Tenenbaum?" Answer:
9 "My sister." Do you recall giving that testimony under
10 oath, Mr. Tenenbaum?

11 A. Yes.

12 Q. You also stated under oath that you believe your younger
13 sister, Tova Tenenbaum, had used your KazaA account?

14 A. Yes.

15 Q. You said you believed a house guest, Dr. Sam Volchenbaum
16 used your KazaA account while he was visiting looking for a
17 home in the area for his family?

18 A. Yes.

19 Q. You said you believed the foster child, also a house
20 guest known as Jonathan Valesquez used the KazaA account?

21 A. Yes.

22 Q. You said that Jimmy Chappel used your KazaA account?

23 A. Yes.

24 Q. You said that Richard Barth used your KazaA account?

25 A. Yes.

1 Q. You said that you believed Robert Barth used your KazaA
2 account?

3 A. Yes.

4 Q. You said that you believed Antonio Franco used your
5 KazaA account?

6 A. Yes.

7 Q. And you said all of that in September of 2008?

8 A. Yes.

9 Q. Now, you've heard the testimony of your sister, both
10 your sisters, Abbey Tenenbaum and Tova Tenenbaum, all of
11 whom deny, both of whom deny using KazaA on your account?

12 A. Yes.

13 Q. And you also heard the testimony of Jimmy Chappel and
14 Antonio Franco denying that they ever used KazaA on your
15 account, right?

16 A. Yes.

17 Q. And, in fact, you never saw your older sister Abbey
18 Nathan use KazaA on your account?

19 A. I did not.

20 Q. You never saw Tova Tenenbaum use KazaA on your
21 account?

22 A. No.

23 Q. You never saw Dr. Volchenbaum use KazaA on your account,
24 did you?

25 A. No.

1 Q. You never saw Richard Barth use KazaA on your account,
2 did you?

3 A. I don't recall any specific observation of it, no.
4 These are events taking place over a big period of time.

5 Q. In fact, when you were asked for the basis for your
6 belief that Richard Barth had used your account, you said
7 that you had seen Mr. Barth listening to recordable CDs and
8 "your general knowledge of him." Do you recall that
9 testimony?

10 A. Yes.

11 Q. And when you asked to explain what you mean by your
12 "general knowledge of Mr. Barth," you said *juno se qua*?

13 A. I do recall that.

14 Q. Could you explain what means?

15 A. It's a certain I don't know what.

16 Q. And you don't know whether you ever saw Robert Barth use
17 your KazaA account?

18 A. Again, I don't have specific recollection of him doing
19 it.

20 Q. Now, with respect to music tastes, you're someone who
21 has a wide range of music tastes?

22 A. I don't know if that's a little proud. I listen to a
23 number of different artists. I don't know if mine are any
24 wider than anybody else's.

25 Q. More than a number of different artists, you listen to

1 more than a number of different artists, more than a
2 handful?

3 A. Yes.

4 Q. You listen to probably a hundred different artists, at
5 least?

6 A. Yeah, there are a lot of songs that have, you know, one
7 artist.

8 Q. Certainly. Some of the artists you like, you've heard
9 testimony from your father and from other people, you've
10 heard testimony, for example, you like Nirvanas?

11 A. Yes.

12 Q. You like the Fugees?

13 A. I like a little bit of them, yeah.

14 Q. You like Green Day?

15 A. Oh, yeah.

16 Q. You like Lincoln Park?

17 A. Uh-hum.

18 Q. You listen to some Red Hot Chili Peppers?

19 A. Yes.

20 Q. You like Beethoven?

21 A. I do.

22 Q. You like Sticks, at least a few songs?

23 A. I like Mr. Roboto.

24 Q. And that song is in your shared folder?

25 A. Yes, it is.

1 Q. And all the artists I just listed are on the shared
2 folder?

3 A. Yes.

4 Q. Rommstein?

5 A. Yes.

6 Q. Shamming Pumpkins, both artists that you like?

7 A. I liked them more at one point, yeah.

8 Q. Outkast is an artist you like?

9 A. Yes.

10 Q. Sublime is an artist you like?

11 A. Absolutely.

12 Q. Nine Inch Nails?

13 A. Yes.

14 Q. Blink 182?

15 A. Yes.

16 Q. Limp Biskit?

17 A. Yes.

18 Q. Death Tones?

19 A. Yeah, these are good artists.

20 Q. Bob Marley?

21 A. Oh, yeah.

22 Q. No Effects?

23 A. Yeah, great band.

24 Q. Goo-Goo Dolls?

25 A. A couple songs from them.

1 Q. Incubus?

2 A. Yes.

3 Q. Feastie Boys?

4 A. Yeah.

5 Q. The Ramones?

6 A. Yeah.

7 Q. Aerosmith?

8 A. Yeah.

9 Q. Beck?

10 A. I really haven't heard a lot of him, I've heard Loser.

11 Q. And that's a song you like?

12 A. My tastes sort of oscillate a little bit. It's a good
13 song.

14 Q. You also like the Matrix sound track, you heard that
15 yesterday?

16 A. Yes.

17 Q. And the Matrix song track has songs by Marilyn Manson?

18 A. Yeah, Marilyn Manson, Death Tones, The Hives, Rommstein
19 I think is on there maybe.

20 Q. Monster Magnet?

21 A. Yeah, Monster Magnet.

22 Q. The song Look To The Oar For The Warning is on there?

23 A. Yes, it's on there.

24 Q. In fact, all the artists we've just listed, those are
25 all in the shared folder we were looking at, Exhibit 13?

1 A. Yes.

2 Q. So you're not surprised that Exhibit 13, that shared
3 folder comprised of 40 pages, I don't know whether it's 816
4 sound recordings has over 50 of the artists that you like
5 and listen to, at least at one point in time did?

6 A. No, no surprise.

7 Q. You agree with that, right?

8 A. Yes.

9 Q. Now, Mr. Tenenbaum, you burned CDs of music from your
10 shared folder, correct?

11 A. Yes.

12 Q. So you took music that was in your KazaA shared folder
13 and you burned it to homemade CDs?

14 A. Yes.

15 Q. And you took some of that music with you to
16 Goucher College?

17 A. Yes, I did.

18 Q. You burned somewhere between 50 and 600 songs from your
19 shared folder to take with you to Goucher College?

20 A. Yeah, that sounds right.

21 Q. Now, when you testified, you didn't say 50 to 600 first.
22 What did you say it was when you were asked how many songs
23 you burned?

24 A. I probably put it in like the order of 10 to the 2.

25 Q. I think you said order of magnitude, 10?

1 A. Yeah.

2 Q. Could you explain that to the jury?

3 A. Okay. It's like a physics way of thinking as you think
4 in orders of magnitude like -- I'm explaining this. Any
5 number between like 1 and 5, for example, you'd say it's
6 like order of magnitude 1, number 10,000, 30,000, 40,000,
7 sort of like you don't really care about the number itself,
8 you care about sort of how many digits it has. It's like a
9 useful thing to think about for physicists.

10 Q. Mr. Tenenbaum, you've also burned CDs to give to
11 friends, correct?

12 A. Yes.

13 Q. And you've also used thumb drives to give and receive
14 music from friends?

15 A. I don't know. I may have. I don't have specific
16 recollection of using a thumb drive to transfer. Actually,
17 yeah, I think I did, yeah.

18 Q. To take music that you had and give it to somebody?

19 A. Yeah, either to give to somebody else or for them to
20 give to me. I think I used a USB stick at one point in
21 time.

22 Q. It's a thumb drive, it's a device outside of your
23 thumb?

24 A. Yeah, USB, thumb drive, I don't know the standard name
25 for it. I don't think there's a standard name.

1 Q. When you were asked the question about the CDs and how
2 many you burned with you to take with you to
3 Goucher College, is there a reason you didn't give a
4 number?

5 A. Well, I tried to give it in the most precise way I could
6 because this is, I mean, it's the best of my memory.

7 Q. And the most precise way to say order of magnitude 10?

8 A. Yes.

9 Q. Mr. Tenenbaum, you have claimed in this case that you
10 uploaded some music CDs to your computer in Providence,
11 Rhode Island?

12 A. Yeah, I copied CDs from my computer, I copied music from
13 my CDs to the computer, yeah.

14 Q. And the term we can agree is ripping, ripping CDs to
15 computer?

16 A. I've seen that term used in like music programs and
17 ripping, but it's never related to common usage, but, sure,
18 we can call it ripping.

19 Q. Okay. Let's do that now. When you ripped songs to your
20 computer, the program that you used, you fill in the artist
21 and the album?

22 A. Are you asking was there a program?

23 Q. Yes, I'm assume you used a program to rip songs?

24 A. Yes.

25 Q. And that program that you used would fill in the

1 artist's name and the name of the album?

2 A. I don't know. I think I used different programs at
3 different points in time. I think some of them would
4 conveniently fill in the associated like data on the file
5 and I think some of them wouldn't. I think some CDs it
6 would work, other CDs it wouldn't.

7 Q. And you didn't add any comments about the songs when you
8 put them, when you put them on your computer, did you?

9 A. Like awesome track or something, no, I don't think so.

10 Q. You never changed any of the metadata that was in
11 there?

12 A. I think I actually did on a few of them. The program I
13 was using, I think the playback program, it would sort by
14 album or artist or whatever, and so sometimes I would go in
15 and I would, you know, make consistent that you would have
16 the same data on a bunch of different files from the same
17 album. It made it easier to find it when I wanted to listen
18 to it.

19 Q. If you would put it in, it would make it consistent?

20 A. Not always. I was very diligent about that.

21 Q. But your goal was to make it consistent, you just
22 said?

23 A. Yes, if I did, that was the reason, yes.

24 Q. And you never added things like descriptions like you
25 said like awesome track or ripped by or anything like

1 that?

2 A. No.

3 Q. You'd no reason to add any of that type of metadata?

4 A. I don't know, the thought that you could express
5 yourself in metadata hadn't occurred to me at the time.

6 Q. And you would have no reason to change or to vary the
7 name of the artist or anything like that, would you?

8 A. No.

9 Q. Now, I'd like to shift gears just a moment and talk
10 about some things that happened while you were at
11 Goucher College. So this would have been your -- I don't
12 know whether it was your freshman year, but before we do
13 that, let me cover one thing. You were born in 1983?

14 A. Yes.

15 Q. So in 2000 you turned 17?

16 A. Yeah, the end of 2000, yes.

17 Q. And 2002 when you went to college, you turned 19?

18 A. Yeah, I turned 19 right after I got to college, a couple
19 months after.

20 Q. And in 2004 when you were caught distributing songs on
21 KazaA, you turned 21?

22 A. I turned 21 at the end of 2004, yes.

23 Q. And in 2007, you were -- you turned 24?

24 A. Yes.

25 Q. So, let's go back to your days at Goucher. So you were

1 19 years old at the time, and do you recall when the
2 Death Tones performed a new single live on the
3 David Letterman show?

4 A. Yeah, it was right before or right coinciding with the
5 Death Tones releasing a new album, which was White Pony.
6 They put out, Death Tones had put out an album, Adrenalin,
7 that was their first one, the second album was Around The
8 Fir, and they were putting out this much anticipated third
9 album, and as part of that promotion, Chino Morano and the
10 Death Tones were going to play on Letterman.

11 Q. And they did play on Letterman?

12 A. They did.

13 Q. And you recorded that broadcast, did you not?

14 A. I did.

15 Q. And you took that broadcast and you posted it to your
16 KazaA account?

17 A. Posted it, yeah, I put it in the KazaA, yeah.

18 Q. You put it in the KazaA shared folder?

19 A. Yes.

20 Q. And after that you went on a forum, I think it was
21 Death Tones fan forum or something like that, and you
22 notified people that they could get that song from you from
23 subliméguy14@KazaA, didn't you?

24 A. Actually I was on the forum before it even happened,
25 that was how I heard about the upcoming forum, that's how I

1 knew it was so hyped. So it was a Death Tones forum, and it
2 was this thing online where you could write posts about the
3 Death Tones, what albums you like, what attributes you like
4 about them, this, this and that, and as part of that, one of
5 the recurring excited topics was this new album coming out,
6 and someone said, well, Dave Letterman, the Death Tones are
7 going to be on Dave Letterman upcoming tonight. And I said,
8 you guys, I'll record that and I'll share that, I'll put
9 that up on KazaA, you can get it from me.

10 Q. You initiated that post on KazaA, that was something you
11 put up first?

12 A. Which post?

13 Q. The KazaA post that you put in your shared folder of the
14 Death Tones being on David Letterman?

15 A. I'm sorry.

16 Q. You took that recording from the David Letterman and you
17 put that recording to be distributed to other people?

18 A. Yes.

19 Q. And you were the first person to do that as far as you
20 knew?

21 A. Yeah, I think, no one else was saying they were doing
22 it, so I figured, yeah I would be the first.

23 Q. Now, in addition to posting that recording, you were at
24 Goucher, you also upload music that you had to a network
25 neighborhood where other people could download it for

1 free?

2 A. Yeah, that's right. There's sort of a standard Windows
3 program, and you have multiple like Windows computers that
4 are connected together, there's an option to share files,
5 and so at Goucher they had this, and I had heard from my
6 older sister at college, that was how it worked, stuff was
7 shared on this network, and that's what we did, we would
8 take our files and whoever would want to would sit there and
9 share it, and there would be these collections of music or
10 movies or whatever is on there that you can get.

11 Q. And you posted somewhere between 600 and 5,000 of your
12 songs on that Goucher file, that Goucher sharing network,
13 network neighborhood?

14 A. I don't think I had 5,000 files, 5,000 music files at
15 the time.

16 Q. Did you not testify --

17 A. I said order of magnitude, I figured I'd be a little
18 more precise.

19 Q. Let me finish my question first.

20 A. I'm sorry.

21 Q. You said order of magnitude 1,000, correct?

22 A. Yes.

23 Q. That would be based on my understanding what you said
24 between 600 and 5,000, if that testimony was testimony?

25 A. Correct.

1 Q. That's what you said at your deposition under oath,
2 correct?

3 A. Yes, it is.

4 Q. And you did that again while you were at Goucher?

5 A. Yes.

6 Q. And those songs that you posted were available for
7 others to download?

8 A. Yes.

9 Q. And you deliberately put that on the network for other
10 people to take?

11 A. Yes.

12 Q. Now, while you were at Goucher, the school put filters
13 in place to stop this type of file sharing, didn't they?

14 A. Yeah, over the course of going to Goucher, I found that
15 every year that I went there there were sort of a few more
16 restrictions what could be shared and what couldn't.

17 Ultimately I think there were I guess so many whatever kind
18 of technical restrictions they had on it that peer-to-peer
19 programs wouldn't work at all.

20 Q. And, again, so by your junior year the network
21 neighborhood program was pretty much useless?

22 A. Yes, I think if you put music up like no one could see
23 it.

24 Q. And that was because of the restrictions that Goucher
25 put in place?

1 A. I assume so. I don't know like how it was done.

2 Q. Mr. Tenenbaum, could you turn to Exhibit 26, page 11.

3 Ms. Burton could you bring up page 11. This is another
4 document that's in evidence.

5 A. Where is it?

6 Q. Exhibit 26, page 11.

7 A. Where is Exhibit 26?

8 Q. It's in the same book you're looking at. It would be
9 between 13 to 34.

10 A. Got it.

11 Q. Page 11 specifically.

12 A. Yes.

13 Q. Actually why don't you go to the first page just for a
14 moment. Ms. Burton, if you could pull up the first page of
15 this. This is a student handbook for information technology
16 at goucher.edu. Do you see that?

17 A. Yes.

18 Q. And down below it says, "Fall, 2003 semester"?

19 A. Yes.

20 Q. Ms. Burton, could you turn to page 11. Could you pull
21 out Section 3.9 all the way at the bottom for the jury.

22 Now, Mr. Tenenbaum, the first -- this Section 3.9 is, "File
23 sharing allowed;" do you see that?

24 A. I do.

25 Q. And this is in the handbook from fall, 2003 at

1 Goucher College?

2 A. Yes.

3 Q. And the first paragraph there specifically warns of RIAA
4 lawsuits brought by members of the industry organization,
5 the RIAA have filed copyright infringement lawsuits against
6 individual college students who have used file sharing
7 programs to share copyrighted material; do you see that?

8 A. Yeah, I see that the RIAA has filed copyrighted lawsuits
9 against individual college students, yes.

10 Q. And the last sentence, "Goucher College wants you to be
11 aware of these issues and situations;" do you see that?

12 A. Yes, I do.

13 Q. The second paragraph, "To avoid the risk of potential
14 lawsuits due to copyright infringement, the college is
15 advising students to carefully restrict the use of file
16 sharing applications to material that is legal to share."

17 Do you see that?

18 A. I see that.

19 Q. "To disable file sharing software"?

20 A. Yes.

21 Q. And then at the bottom, I'll just read the first
22 sentence this is now the third paragraph, "The violation of
23 copyright law can have serious consequences in the area
24 of --" and, Ms. Burton, if you would go to the next page,
25 this paragraph details the consequences of civil liability;

1 does it not?

2 A. Yes.

3 Q. "Persons found to be infringed may be held liable for
4 substantial damages and attorneys fees. The law entitles a
5 plaintiff to seek statutory damages of \$150,000 for each act
6 of willful infringement." Do you see that?

7 A. Where are you reading this from?

8 Q. From the civil liability, very first line, first three
9 lines.

10 A. Okay, yeah.

11 Q. And in the last paragraph of this section, if you go
12 halfway down, there's a sentence that at the end of the
13 line, Ms. Burton, could you highlight it, "In addition, if
14 you violate copyright law --" could you highlight the last
15 five lines. This states that, "In addition, if you violate
16 copyright law by engaging in file sharing, you may be
17 subject to discipline and other applicable college policy."
18 Do you see that?

19 A. Yes.

20 Q. And, again, this handbook and this policy was in effect
21 while you were at Goucher in the fall of 2003?

22 A. Yes.

23 Q. That was your software year?

24 A. Yes, that was the start of my sophomore year.

25 Q. And in that year you turned 20 years old?

1 A. Yeah, at the end, yeah.

2 Q. And you received a copy of this handbook as part of
3 being a student at Goucher College; did you not?

4 A. Yes, I think they put them in the mailbox for
5 everybody.

6 Q. Could you turn to Exhibit 27, please. Ms. Burton, could
7 you pull up the first page. Thank you. Mr. Tenenbaum, this
8 is another document that's in evidence. This is the Goucher
9 student information technology handbook. I believe this one
10 is for the fall, 2004 semester?

11 A. That is correct.

12 Q. This is also a handbook you received?

13 A. Yes.

14 Q. Ms. Burton, could you go to page 12, please, and pull
15 out Section 3.10 again. And, Mr. Tenenbaum, this states
16 substantially or perhaps identically what was stated in the
17 2003 student handbook?

18 A. Yes, it looks the same.

19 Q. And if we turn to page 13, the last paragraph of this
20 section right above 3.11, the last paragraph, page 13, it's
21 Exhibit 27. This also states what we read in the earlier
22 handbook that, "Violation of copyright law by engaging in
23 unauthorized file sharing may subject you to the discipline
24 under the college use policy"?

25 A. Yes, I see that.

1 Q. We didn't look at the page in the last one, but I want
2 to look at it in this one. If you could turn to page 38 in
3 Exhibit 7. Ms. Burton, could you pull out Section 6. This
4 section states that, "Users must abide by all applicable
5 laws and college policies to protect the copyrights and
6 intellectual property rights of others. Copyrighted works
7 may include, texts, cartoons, articles, photographs, songs,
8 software, graphics, and other materials." Do you see
9 that?

10 A. I do see that.

11 Q. And, again, this is the policy at Goucher College when
12 you were there starting in the fall of at least as early as
13 the fall of 2003 and 2004?

14 A. Yes.

15 Q. And then in the middle, there's a sentence. Ms. Burton,
16 could you highlight "It is the responsibility --" Highlight
17 the next three lines. That's fine. All the way over. "It
18 is the responsibility of the user to assume that materials
19 found on the web are copyrighted unless the copyrighted
20 materials contain an express disclaimer to the contrary. Do
21 you see that?

22 A. I do.

23 Q. And, again, this was in the Goucher handbook while you
24 were at Goucher College?

25 A. Yes.

1 Q. Ms. Burton, could you turn to Exhibit 28, and,
2 Mr. Tenenbaum, if you could turn to Exhibit 28, too. Now,
3 Mr. Tenenbaum, Ms. Burton it's kind of hard to pull this one
4 out. I'll attempt to read it for the jury. It states at
5 the top, "Goucher College computer use policy, guidelines
6 for acceptable use of computing resources." Do you see
7 that?

8 A. Yes.

9 Q. And at the bottom, in the bottom left-hand corner it
10 says February, 2001?

11 A. Yes.

12 Q. Could you turn to page 3, please. Ms. Burton, could you
13 pull out again Section 6. So now this is the 2001
14 acceptable use policy for computing resources at Goucher
15 College, and, again, we have the same restriction that, "All
16 Goucher users and students must abide by college policies to
17 protect the copyrights of intellectual property rights of
18 others." Do you see that?

19 A. I do see that.

20 Q. And that policy was in place during your freshman year
21 at Goucher College?

22 A. I assume so if what happens in '01 carries over to '02,
23 yeah.

24 Q. In fact, we saw the same language in '01, we just looked
25 at the 2004, and the language was virtually was identical?

1 A. I assume it carries over.

2 Q. And you received copies of these college handbooks?

3 A. Yeah, they put them in our mailbox, I think.

4 Q. Could you turn to Exhibit 29, please. Ms. Burton, could
5 you pull out the first, the header of from the "from line"
6 all the way through the first full paragraph.

7 Mr. Tenenbaum, this is an e-mail that was sent to "Official
8 students at Goucher College in December of 2004." Do you
9 see that?

10 A. Yes, I do.

11 Q. You were an official student at Goucher College, in
12 2004, were you not?

13 A. I was.

14 Q. And you recall that the subject of this e-mail was that
15 the Goucher student government association, students at
16 Goucher passed a resolution to block peer-to-peer sites?

17 A. I'm sorry.

18 Q. The students, the student governing body at Goucher
19 College passed a resolution to block peer-to-peer sites; do
20 you recall that?

21 A. I do not recall that happening, but I see the letter, so
22 I assumed it happened, yeah.

23 Q. But you became aware subsequently that there was a
24 student initiative to do that?

25 A. I became aware a couple weeks ago that it was student

1 initiative that blocked peer-to-peer programs.

2 Q. And that was at Goucher College while you were there?

3 A. The student initiative?

4 Q. Yes.

5 A. Yes.

6 THE COURT: Why don't we take a break at this
7 point for the morning. All rise for the jury.

8 (A recess was taken.)

9 THE CLERK: All rise for the jury.

10 THE COURT: You can all be seated. Proceed,
11 Mr. Reynolds.

12 MR. REYNOLDS: Thank you, your Honor.

13 Q. Mr. Tenenbaum, do you know what Napster is?

14 A. Yes.

15 Q. And back in 1999 and 2000, that time frame, you agree
16 with me that Napster was a file sharing program somewhat
17 similar to KazaA?

18 A. Yes.

19 Q. Users downloaded and distributed music and other files
20 for free?

21 A. Yes.

22 Q. And you used the Napster file sharing program?

23 A. Yes.

24 Q. And you used that program on the computer in your
25 bedroom in Providence, Rhode Island?

1 A. Yes.

2 Q. You used it to download music?

3 A. Yes.

4 Q. And you switched from Napster to KazaA after Napster was
5 no longer functioning?

6 A. Yes.

7 Q. And you knew that Napster was shut down?

8 A. I knew that Napster wasn't working.

9 Q. You knew that Napster was shut down because there was a
10 lawsuit regarding infringement?

11 A. I don't know what I knew about it, it stopped working,
12 that was the main thing that I remember.

13 Q. You have, I believe, your deposition transcript in front
14 of you. Could you turn to page 108, please. Do you have
15 that in front of you?

16 A. Yes.

17 Q. You recall Ms. Burton asked you questions?

18 A. Yes.

19 Q. And you were prepared by counsel?

20 A. Yes.

21 Q. And you gave these questions under oath?

22 A. Yes.

23 Q. Question: "Was it your understanding that Napster shut
24 down?" Answer: "Yes." Question: "Do you know why it was
25 shut down?" Answer: "I don't know why. I'm not a legal

1 expert, I'm not an expert in legal matters." Question:
2 "What is your understanding?" Answer: "My understanding is
3 some sort of lawsuit against Napster or people who made
4 Napster, whatever, regarding copyright infringement." Do
5 you recall giving those answers at your deposition?

6 A. Yes.

7 Q. And you read about that in the newspapers?

8 A. Yeah, I probably did.

9 Q. And you read about it at the same time it was happening,
10 when Napster was being shut down, did you not?

11 A. Yes.

12 Q. And when Napster was shut down, as you said, you went to
13 KazaA?

14 A. Yes.

15 Q. And you went to KazaA because you continued to want a
16 source for music without paying for it?

17 A. Yes.

18 Q. Now, we were just talking about the computer in
19 Providence, Rhode Island?

20 A. Yes.

21 Q. You switched from Napster to KazaA?

22 A. Yes.

23 Q. Now, let's shift gears and talk about your computer that
24 you used in Maryland and then that you also used here when
25 you were a graduate student at Boston College, and you're

1 still a graduate student?

2 A. Yes.

3 Q. Again, you used a Gateway computer at school?

4 A. Yes.

5 Q. Do you need a moment, Mr. Tenenbaum, water or
6 something?

7 A. No, I'm fine.

8 Q. Now, you installed the Limeware file sharing program on
9 your Gateway computer?

10 A. Yes.

11 Q. And you did that in about 2002 or 2003?

12 A. Yes.

13 Q. And you used the LimeWire file sharing program on your
14 Gateway computer?

15 A. Yes.

16 Q. You used that program to download music off the
17 Internet?

18 A. Yes.

19 Q. And just like on the KazaA network where other KazaA
20 users could download files from you, the same was true of
21 your LimeWire shared folder, others on the LimeWire network
22 could download music from you also?

23 A. Yes.

24 Q. Any music that you downloaded to your LimeWire shared
25 folder was then available to distribution to everyone else

1 on LimeWire?

2 A. Yes.

3 Q. Could you turn to Exhibit 35, and this is an exhibit
4 from Dr. Jacobson's report that we were looking at
5 yesterday.

6 MR. REYNOLDS: Your Honor, just one minute before
7 we pull that up. I'd like to publish this page to the jury,
8 your Honor.

9 MR. FEINBERG: What page?

10 MR. REYNOLDS: Page 1, I'm sorry.

11 THE COURT: Are you on the document camera?

12 MS. BURTON: I'm on the computer.

13 THE COURT: It should be on the screen.

14 MS. BURTON: I was just waiting for your Honor.

15 THE COURT: Yes, go right ahead.

16 Q. Again, Mr. Tenenbaum, this is a list of songs that we
17 were looking at yesterday during the deposition, I'm sorry,
18 during the testimony of Dr. Jacobson who provided testimony
19 that these are lists of song file names that were in the
20 C:\mymusiclimewire shared folder on your Gateway computer.
21 Do you recall that testimony?

22 A. Yes, I do.

23 Q. And you agree with me that you put these files in the
24 LimeWire my music shared folder on your Gateway computer?

25 A. Yes.

1 Q. You used LimeWire on the Gateway computer so that you
2 could download music without paying for it?

3 A. Yes.

4 Q. Just like you've done on KazaA?

5 A. Yes.

6 Q. Now, you also used other file sharing programs such as
7 Audio Galaxy?

8 A. Yes.

9 Q. And you used Audio Galaxy to download music on the
10 Gateway computer?

11 A. Yes.

12 Q. You used a program called iMesh on the Gateway
13 computer?

14 A. Yes.

15 Q. And you used that program to download music as well?

16 A. Yes.

17 Q. And iMesh like KazaA and LimeWire was a program when you
18 downloaded those files, they were being distributed to other
19 users?

20 A. Yes.

21 Q. And you stopped iMesh because ultimately that program
22 was blocked by Goucher College, wasn't it?

23 A. Yes.

24 Q. You also used the file sharing program called Morpheus
25 on the Gateway computer?

1 A. Yes.

2 Q. And you stopped using that program, too, because it was
3 blocked by Goucher College?

4 A. Yes.

5 Q. Mr. Tenenbaum, it's true that you used these various
6 programs at various times so that you could achieve the
7 maximum amount of music downloading and uploading with the
8 least amount of wasted effort?

9 A. Yes.

10 Q. I want to shift gears for a moment and talk about the
11 two computers in this case, both there was a PC desktop
12 computer in your bedroom that we've been talking about that
13 had the KazaA account on it, correct?

14 A. Yes.

15 Q. And that there was the Gateway computer that you've used
16 at college both, undergrad. and graduate?

17 A. I'm sorry, I don't understand which.

18 Q. I want to talk about both of them, I'm just saying there
19 were two.

20 A. Could you say that again?

21 Q. Sure. You had a PC desktop computer that had your KazaA
22 account on it in your bedroom in Providence, Rhode Island?

23 A. Yes.

24 Q. And then you had a Gateway computer at both undergrad.
25 and graduate school in Boston, correct?

1 A. Yes.

2 Q. Could you turn to Exhibit 23, please. Mr. Tenenbaum, if
3 you could look at the monitor screen. This is the copy
4 that's in evidence. Ms. Burton, could you pull out both the
5 header of the letter all the way through the signature, just
6 pull that out. The copy that you have in hard copy in front
7 of you is not in evidence. I want to look at the one on the
8 computer screen, which is in evidence. This is a letter
9 that you sent to the plaintiffs representatives in about
10 November of 2005?

11 A. Yes.

12 Q. And this is about the same time you had this
13 conversation with your mother about who might be responsible
14 for the file sharing in this case?

15 A. Yes.

16 Q. And at the bottom of this letter, "While I do not have
17 access to the computer at college, meaning while you're at
18 college you don't have access to the computer; is that
19 fair?

20 A. To the home computer, yes.

21 Q. You say, "While I do not have access to the computer at
22 college, I will be home on November 22d. If there are any
23 files existing in violation of copyrights, I will destroy
24 them at that time." Do you see that?

25 A. I do.

1 Q. So the desktop computer that you used to download and
2 distribute music on KazaA still existed as of November of
3 2005?

4 A. Yes.

5 Q. And that would have been after are you received the
6 letter from plaintiffs in September of 2005 letter?

7 A. Yes.

8 Q. Now, what you just said now is different from what you
9 said at your deposition, isn't it?

10 MR. FEINBERG: Objection.

11 Q. Do you recall testifying at your deposition,
12 Mr. Tenenbaum, that you told Ms. Burton that the computer
13 that was in your house in Providence, Rhode Island was
14 actually not there in November of 2005?

15 A. I don't understand.

16 Q. Well, let me ask you this: Did you look on the computer
17 for the files?

18 A. I did.

19 Q. Let's shift gears for a minute, Mr. Tenenbaum. Let's
20 shift gears and talk about the Gateway computer that you had
21 at college, okay?

22 A. Okay.

23 Q. You're aware that plaintiffs requested an inspection of
24 that computer in September, 2008?

25 A. Yes.

1 Q. And you objected to that inspection initially, didn't
2 you?

3 A. I imagine I did.

4 Q. And while there was a motion pending in this court, you
5 took the Gateway in for repair at Best Buy?

6 A. I did.

7 Q. And you had the operating system reinstalled?

8 A. Yes.

9 Q. And the hard drive was reformatted in connection with
10 that reinstallation?

11 A. Yes.

12 Q. And this was after the plaintiffs had made a request to
13 inspect the computer?

14 A. Yes.

15 Q. And you have also deleted registry files from that
16 Gateway computer, did you not?

17 A. I have.

18 Q. And you deleted registry files when you were
19 uninstalling programs so the uninstall would be more
20 thorough, right?

21 A. Yes.

22 Q. And you did this on the Gateway computer?

23 A. Yes.

24 Q. Now, just to be clear, while you were getting the
25 Gateway computer, while you took it to Best Buy, you had

1 also had a Toshiba computer, correct?

2 A. Yes, I still have it.

3 Q. And during that time you could have used your Toshiba
4 computer for your graduate studies work, right?

5 A. I do use my Toshiba for graduate studies work.

6 Q. And because you took the Gateway in to be fixed was
7 because you found that to be a convenient time?

8 A. Yes.

9 Q. I want to go back to the testimony you gave. Let me
10 strike that. A moment ago you said you looked at the
11 files -- strike that. Let me go back to the computer you
12 used in Providence, Rhode Island and specifically this
13 letter that we're looking at where you say in November, 2005
14 that you're going to go home and look for files on that?

15 A. Okay.

16 Q. And a moment ago you said that's actually what you did,
17 you went home and you looked for the files on that
18 computer?

19 A. Yes.

20 Q. What did you do with them?

21 A. I'm sorry.

22 Q. What did you do with those files?

23 A. I didn't do anything with them.

24 Q. Did you see them?

25 A. I did.

1 Q. Mr. Tenenbaum, didn't you testify in September of 2008
2 that in fact when you wrote this letter the computer was
3 already gone?

4 A. I think I was talking about a different computer.

5 Q. But you were talking about this letter with Ms. Burton,
6 were you not?

7 A. I'm sorry.

8 Q. Were you not asked the following question: "What did
9 you mean by if there are any files in violation of
10 copyright, I will destroy them at that time?" Answer:
11 "It's a conditional statement. I didn't say that they
12 existed, I said if they did exist that I will destroy them."
13 Question: "Right. But if you have said that the sound
14 recordings at issue were located on the no name computer,
15 you have said that repeatedly throughout the course of the
16 litigation, the computer is gone, the computer is gone. In
17 fact, your counsel represented that at the hearing
18 yesterday? Answer: "Yes." Question: "Yet you said when
19 you got home some days later that you would destroy any of
20 the sound recordings? Answer: "Again, conditional, if they
21 exist."

22 Question: "If you knew the computer was gone and
23 had been destroyed, this statement doesn't make any sense.
24 Can you explain it? If your statement is correct that the
25 computer was no longer in existence, how does that statement

1 make any sense?" "Sure. If A, then B, A doesn't have to be
2 a true statement for if A, then B to be true."

3 Question: "This sentence doesn't make any sense
4 if the computer was already gone, correct?" Answer: "No."
5 Did you not give that testimony, Mr. Tenenbaum?

6 A. I did.

7 Q. Mr. Tenenbaum, could you turn to Exhibit 13 again.
8 Again, this is an exhibit, it's the 40-page exhibit of your
9 KazaA shared folder. Do you see that?

10 A. Yes.

11 Q. Now, you kept these songs in your shared folder,
12 correct?

13 A. Which exhibit was this?

14 Q. Exhibit 13, pages 1 through 41. You could turn to page
15 3 with us. There's an exhibit book, it's a big one, it's
16 got Volume II, I think Exhibits 13 through 44. Now, you
17 kept these songs in your shared folder, correct?

18 A. Yes.

19 Q. And, in fact, you also organized them by album as we saw
20 yesterday, we were able to look at a couple Nine Inch Nails
21 albums and some other albums?

22 A. Yes.

23 Q. And you kept these songs in your shared folder, at least
24 as late as August 10, 2004?

25 A. Yes.

1 Q. Could you turn to Exhibit 43, please. Ms. Burton, could
2 you pull up the first page.

3 MR. REYNOLDS: Your Honor, I believe I can publish
4 this page to the jury. 43.

5 THE COURT: This is the Dr. Jacobson report. Go
6 on.

7 Q. Ms. Burton, could you pull out the first third of this.
8 Now, again, Mr. Tenenbaum now we're talking about the
9 LimeWire shared folder on your Gateway computer. Do you
10 recall Dr. Jacobson's testimony that these, this Exhibit 43
11 are copies of the files or lists of the files that were in
12 your Limeware shared folder, at least as late as February
13 of 2007 and possibly as late as May, 2008?

14 A. Yes, I recall the testimony.

15 Q. And you don't have any reason to dispute Dr. Jacobson's
16 report, do you?

17 A. No, it seems very likely. I trust he's a competent
18 professional.

19 Q. And, Mr. Tenenbaum, I will note here, we were looking at
20 this yesterday, this is a folder, the mymusic folder?

21 A. Yes.

22 Q. That's after the first backslash, it says mymusic; do
23 you see that?

24 A. Yes.

25 Q. And the next, after that, it says, "1, all other rap

1 R & B" and then another backslash?

2 A. Yes.

3 Q. That's a subfolder, right?

4 A. Yes.

5 Q. And you created these subfolders, correct?

6 A. Yes, I did.

7 Q. And you created multiple subfolders for things like,
8 this one says R & B, there was one that says Slow Jams,
9 there's another that says Aerosmith, Green Day, Limp Biskit,
10 Lincoln Park, many, many subfolders in your LimeWire my
11 music folder, correct?

12 A. Yes.

13 Q. Those are ones that you created?

14 A. Yes.

15 Q. And you used those subfolders to organize and store your
16 music?

17 A. Yes.

18 Q. Music that was being distributed to other LimeWire
19 users?

20 A. Yes.

21 Q. Mr. Tenenbaum, you gave an interview outside of this
22 courthouse last night where you made some statements about
23 your conduct in this case, did you not?

24 A. Yes.

25 Q. And you were asked a question, they told you to stop,

1 you don't argue that, and you answered yes to that question,
2 didn't you?

3 A. Yes.

4 Q. And then you were also asked but you kept doing it
5 anyway, and you answered yes to that question, didn't you?

6 A. Yes.

7 Q. Mr. Tenenbaum, at your deposition, you listed five
8 things that you did with the 30 songs that you downloaded in
9 this case, the 30 songs that are listed on Plaintiff's
10 Exhibits 56 and 57, I'm sorry, 55 and 56 that are at issue
11 in this case; do you recall that testimony?

12 A. I'm sorry, do I recall what?

13 Q. At your deposition you listed five different things that
14 you did with the 30 songs that are at issue in this case,
15 the songs that are listed on Exhibits 55 and 56, and one of
16 the things you did with those songs is that you listened to
17 the music you had downloaded, correct?

18 A. Yes.

19 Q. And you also talked about the music that you had
20 downloaded?

21 A. Yes.

22 Q. And the music moved you in some cases?

23 A. Yes.

24 Q. And sometimes you made CD mixes of those, correct?

25 A. Yes.

1 Q. And you also made all 30 songs at issue in this case
2 available for distribution on the KazaA network?

3 A. Yes.

4 MR. REYNOLDS: I have no further questions, your
5 Honor.

6 THE COURT: Counsel.

7 CROSS-EXAMINATION

8 BY MR. NESSON:

9 Q. Joel, where were you born?

10 A. Pittsburgh.

11 Q. And where did you grow up?

12 A. A number of different places, Upstate New York,
13 Minnesota, Providence.

14 Q. When did you get to Providence?

15 A. I got there my sophomore year of high school.

16 Q. And were you into music at that time?

17 A. Yes.

18 Q. Tell us when you first got into music.

19 A. Well, I mean, you could go back, I saw Michael Jackson
20 on the '93 Super Bowl performing at the halftime show. I
21 don't know if that counts. I told my parents I wanted to be
22 a singer like Michael Jackson when I was like nine years
23 old, so it's little things like that.

24 We had CDs, the Dirty Dancing sound track was
25 there, but, I mean, the first time I got into it more

1 seriously was on the bus ride to school in sixth grade. I
2 just moved from New York to Minnesota. I sat next to a
3 friend of mine, his name was Tom, and he had a discman, I
4 didn't have one yet, they were still like 120 bucks, but we
5 had a wire adapter, something that would split the two
6 headphones, so what we would do every morning, we listened
7 to the exact same Sublime CD, exactly the same CD every
8 morning. We would tell how far we were along by what track
9 we got to, and it always got to the same track by the end,
10 and he introduced me to a lot of great music, to No Effects,
11 to Garbage, the band, to sublime, of course, a number of
12 bands, and I assume he got these from his older sister
13 because we were both in sixth grade.

14 Q. Is that where you got the name Sublime and got the idea
15 of thinking becoming sublimегuy at some later point?

16 A. Yes.

17 Q. Was your family a musical family?

18 A. Absolutely.

19 Q. Tell me about that?

20 A. My mom was a professional harpist. She goes around,
21 does weddings, funerals or baby showers. When we buy a new
22 car, we've got to take into account whether or not it holds
23 a harp, this is a very serious concern whether it holds a
24 harp. She plays piano just to get out what she wants to get
25 out of the piano. My dad played bassoon. He played, he

1 didn't do anything professional, clarinet, bassoon. Also my
2 younger sister, I mean, we were all brought up on piano, we
3 diversified into our various instruments. My younger sister
4 went into trumpet, there's that. Then there's me. My
5 parents, like I said, raised us on all piano, they forced
6 us, you got to practice, five minutes that's like five hours
7 when you were a little kid, so I played, and I would really
8 be much more interested in learning the stuff that I liked.

9 Then when I was 12, they let me branch off from
10 piano to a drum, so I took drum lessons for a number of
11 years, and there was a drum teacher who showed me a lot of
12 how you play various songs, taught me a little bit of
13 guitar, how to read tablature, so you've guitar tablature so
14 you can go online and you can type tabs, Hey, Jude, and
15 someone would say what he thinks the best way to play, Hey,
16 Jude on the guitar, so tablature.

17 Then in college my freshman year we all had to
18 take a frontiers course, and frontiers was like this gentile
19 way, I guess, to say like introductory course, so I took
20 frontiers of musicality with this very talented pianoist,
21 Jeffrey Chappel, and I saw him play and was just suddenly
22 interested in getting back into piano, and so every semester
23 afterwards I took private lessons, and that culminated in a
24 recital I had my senior year in piano.

25 Q. And that's the recital your dad talked about?

1 A. Yes.

2 Q. And did your musical interests then continue? Have you
3 written papers of any kind, music?

4 A. I have. I was actually a music minor in college, and
5 along with that obviously a number of papers written. The
6 longer papers I wrote about the instruments about the
7 history of the piano, why the guitar is the only surviving
8 fretted string instrument, things like that, but also I took
9 a computer music course I think it was my sophomore year.
10 We learned about sort of making music tracks on the
11 computer, and it was done with some program that you can
12 only get on a Mac, and so I did that.

13 As a part of the computer music class, we were
14 required to go to at least a couple of the couple music
15 concerts that the other students were giving, show up,
16 listen to the music and write commentary on it, talk about
17 what we thought was effective in the music, did the lyrics
18 seem to coincide with the content, all sorts of thing like
19 that, and then on top of that I took a couple early intra
20 music courses, and it's basic stuff like cord progressions,
21 circle of fifth, stuff like that if anybody does any
22 like-amateur musician stuff.

23 Q. Now, prior to your becoming acquainted with Napster, did
24 you have a means of obtaining and listening to music?

25 A. Well, what was available was that you could physically

1 borrow a CD from a friend, but you borrow something from a
2 friend, you don't know when you're going to get it back, so
3 you could do that. You could head down to the music store.
4 I think there was a Sam Goody or it became a Sam Goody in
5 the mall that would sell it for like 18 bucks, and you could
6 buy like the whole CD.

7 Q. Did you listen to music on the radio?

8 A. Oh, yes.

9 Q. Tell us about that.

10 A. I had sort of a favorite music stations wherever I went.
11 In Minnesota, it was 106.9 KORC. In Providence, it's 99.5,
12 WBRU.

13 Q. Did you record music from the radio?

14 A. I did. I remember one time in particular that one of
15 the radio stations was having like a top 100 songs of the
16 decade or something like that, so I guess 2000 or whatever,
17 and so I was just sitting there just waiting for the songs
18 that I liked ready with my tape deck, ready to record the
19 songs I wanted to record.

20 Q. Did you have a collection of cassette music?

21 A. Yes.

22 Q. And give us some idea of the dimension of that.

23 A. The dimension?

24 Q. How much?

25 A. How much, I think I filled maybe two sides of two tapes

1 just recording off the radio.

2 Q. And did you have at that time a CD collection to any
3 extent of your own, 1999?

4 A. '99, yeah, yeah, I had a small CD collection. What I
5 would do sometimes was I would sort of save up money that I
6 had. I actually when I was 14 started working at
7 McDonald's, I worked there a number of hours a week, I guess
8 like 20 hours or so a week, and every once in a while I
9 would save up money, and I would just go to the record
10 store, and I would just buy everything that I had heard
11 about. So I remember one time going in and just sort of
12 looking at it and seeing the bill like 110 bucks or
13 something like that, and I'd take them home. Some of the
14 CDs would turn out to be really good CDs, and some of them
15 would turn out to be I guess I don't like this artist, I
16 guess they had a pretty good single.

17 Q. What did you find attractive about Napster?

18 A. Napster, so before Napster, what I was actually doing
19 was I'd be going through like search engines like Google or
20 I guess at the time it was Yahoo, and I would type the name
21 of the artist .MP3 to see if that file was up somewhere, and
22 this took a long time just to find a song that would
23 actually up there, and then I got back to my computer at
24 home at one point, and this program Napster was installed.
25 I think one of my older sister's friends installed it first,

1 and I looked at it, and I was like --

2 Q. Would you stop right there. You didn't install Napster
3 on your computer?

4 A. No.

5 Q. Tell us about how it got installed on your computer.

6 A. Well, I think my older sister, she has a friend who
7 comes and visits now and then, and he came, and this is I
8 guess when I wasn't there, and then I looked at the
9 computer, the icons on the desktop were moved around and
10 some programs were installed, and there was Napster.

11 Q. And so that was your introduction to Napster?

12 A. Yes.

13 Q. And what did you find attractive then about using
14 Napster?

15 A. Oh, it was great, it was all this searching that you had
16 done beforehand through websites, and, you know, very low
17 success rate, it was suddenly all there, it was like this
18 giant library in front of you of all sorts of things. If
19 you want to know what you heard on the radio, who sings this
20 and who sings that and you want a song, it pops into your
21 head, it's there. It's like Google, you type the name of
22 the song, whatever you would type into Google, and you have
23 this list of songs and you can get them pretty easily.

24 Q. When you started Google, did you have any sense, excuse
25 me, when you started using Napster, did you have any sense

1 that what you were doing was illegal?

2 A. I guess it wasn't foremost on my mind. I knew it was --
3 I was getting something without paying for it, but it wasn't
4 at the forefront of my mind. Obviously now I'm thinking a
5 lot more about whether downloading music is illegal, but at
6 the time it was just, oh, I got all this music.

7 Q. Was other of your friends into Napster at that time?

8 A. Yes, I think so.

9 Q. As you continued to use Napster, what was your
10 purpose?

11 A. To get music so I could listen to it so I could have it,
12 so I could share it with my friends, so I could share it
13 with my family.

14 Q. Were you interested in any way in hurting the record
15 companies?

16 A. No.

17 Q. Were you interested in any way in hurting the artists?

18 A. Definitely not.

19 Q. Did you at that time have any belief that somehow
20 artists and creators shouldn't be entitled to any kind of
21 return?

22 A. No, I was never thinking that.

23 Q. And is that your position even as you sit here today?

24 A. Yes. I think very much that artists should continue to
25 be paid for what they do. I don't think that artists should

1 do this as necessarily just a hobby because they can't get
2 paid out of it, and I think my views aren't very unusual at
3 all. I think that pretty much everyone of my generation
4 says, yeah, the artists should get paid, they should
5 continue to get paid because they're the ones, they're the
6 ones that are giving so much. I mean, they spend obviously
7 all the time and all the effort to learn the equipment, to
8 learn the instrument as it is just to get the means to
9 express, but what's actually expressed is, you know, it
10 comes right from the artist, it comes right out of them.
11 Some of the artists give so much that there's barely any of
12 them left.

13 Q. Do you have any particular artists in mind?

14 A. Yeah. We know Kurt Cobain. He died, apparently stabbed
15 himself because he said his music wasn't real enough to him
16 anymore.

17 Q. This is Kurt Cobain?

18 A. Of Nirvana.

19 Q. Comes As You Are, Nirvana, one of the five?

20 A. Yes.

21 Q. Yes. Keep going.

22 A. Bradley Nowell of Sublime had an ongoing heroin problem,
23 and eventually he overdosed on it, and if you listen to the
24 songs and you hear the lyrics, the music was his escape, the
25 music was what kept him alive so long, and Trent Resner, in

1 1994, he came out with A Downward Spirel, which was just a
2 magnificent CD, a great, what's the word, sort of a themed
3 piece, the whole CD was on a theme, Downward Spiral, then
4 nothing came out from Trent Resner of Nine Inch Nails for
5 five years. We were wondering what was going on, like, come
6 on, Trent, we need something new. It turned out in the
7 meantime, he had struggled with all sorts of problem, he had
8 a drug addiction, and he was just having serious issues
9 getting to do anything, and apparently it says in Rolling
10 Stone --

11 MR. REYNOLDS: Your Honor, I object. I think
12 there's a lack of foundation and also to the narrative
13 response.

14 THE COURT: Sustained.

15 Q. When you were in Providence, you were starting sophomore
16 year in high school, and you continued through at Classical
17 High School until you graduated?

18 A. Yes.

19 Q. And that's where this friendship group formed?

20 A. Yes.

21 Q. Tell us how wide that friendship group was.

22 A. How many people?

23 Q. Yes, more or less.

24 A. It was about -- it's kind of like Sex In The City in you
25 have a common group of people that are always there and then

1 they're there sometimes, sometimes not. You know, so I
2 guess it would be a half dozen of us were together on a
3 weekly basis.

4 Q. And did you spend time with your friends at your house
5 in Providence?

6 A. Yes, I did.

7 Q. And what are the various activities that you did with
8 your friends?

9 A. A lot of time was spent just driving around in my car
10 looking for skateboard spots, that was our big thing,
11 skateboarding. I basically explored all of Rhode Island
12 just by virtue of skateboarding. What we would do in the
13 car is we would listen to absolutely everything. And so a
14 big part of that was when we were at my computer, we'd say,
15 okay, what do we want to listen to in the car because my
16 car, it didn't have obviously an MP3 player, but I had this
17 elaborate stereo system in there, and so it was a matter of
18 which songs do we want to put on this CD, what do we want to
19 have at our disposal, so I have, I don't know, four CD racks
20 in the visor of the car just to be able to pop something
21 in.

22 Q. Tell us about this car. You have to be 16 to have a
23 license?

24 A. Yes.

25 Q. When did you get this car?

1 A. When I was 14.

2 Q. Tell us about that.

3 A. Okay. So in Minnesota you could actually drive when
4 you're 15, you get a full license when you're 15, something
5 like that, and so my grandma actually, she was basically a
6 used car lot. She had this 1982 Buick Riviera --

7 MR. REYNOLDS: Your Honor, I'd object,
8 relevance.

9 A. Something relevant, I installed a stereo system in it.
10 This is something my dad helped me out with.

11 MR. REYNOLDS: I object to the narrative of the
12 witness testifying without a question.

13 THE COURT: The objection is sustained. Pose
14 another question, please.

15 Q. At some point you obtained a car?

16 A. Yes.

17 Q. Did you buy this car yourself?

18 A. No.

19 Q. This was a gift from your grandmother?

20 A. Yes.

21 Q. You were working at McDonald's at this point?

22 A. Yes.

23 Q. Did you have a money source from any other source?

24 A. Well, my parents obviously paid for food and clothing.

25 Q. In terms of your spending money?

1 A. No, that was my only source.

2 Q. And you worked at McDonald's. What was your rate of
3 pay?

4 MR. REYNOLDS: Your Honor, I object to the leading
5 questions and lack of relevance.

6 THE COURT: Leading questions derived from the
7 fact that he has now been called in your case, so Mr. Nesson
8 can actually lead him. Relevance is another question. I'll
9 allow you a little bit more of this, Mr. Nesson. Go on.

10 Q. I'm merely interested in the electronic equipment that
11 you invested in for your car. Was there such?

12 A. Oh, yes.

13 Q. Tell me how you equipped your car.

14 A. So I had a dual 12 inch subwoofer in the trunk which I
15 had like a 500 watt amp. connected.

16 Q. Wait a second, go slow. Say that again.

17 A. Dual 12 inch subwoofers sitting in the back of the car
18 which I had like a 500 amp. connected to. I had replaced
19 all the factory speakers, the speakers that came with the
20 car, which was terrible quality, probably distorting it
21 anyway, so I replaced it with new front speakers, new rear
22 speakers, and my dad helped me enormously with wiring it.

23 Q. And do I understand then that the trunk of the car
24 actually was occupied with big sound equipment?

25 A. Yeah, this was sort of a recurring issue was if I wanted

1 to be able to carry any amount of stuff in the car, the
2 trunk was actually half taken up with a subwoofer, the trunk
3 of a giant 1982 Buick Riviera dinosaur.

4 Q. So The picture is of a group of kids, skateboarding,
5 riding around the state in your car enjoying music that you
6 have obtained in one fashion or another played on CD
7 player?

8 A. Yeah, that's how it was.

9 Q. And I take it then if the music couldn't be easily put
10 into a CD format, it wasn't that useful to you?

11 A. Right.

12 Q. And so Napster then fits with this picture how?

13 A. Well, on Napster, there was this huge selection of music
14 because it seemed like almost everybody was on Napster, and
15 so there was this just wealth of files that were there, and
16 they were all in MP3 format which you never had any problems
17 putting onto a CD to listen to elsewhere.

18 Q. In other words, the MP3 format that was available
19 through Napster made it completely accessible to you as
20 music that you could use in your environment with your
21 friendship group?

22 A. Yes, very convenient.

23 Q. And so when you say your purpose in downloading from
24 Napster was to listen to music, it was not only to listen to
25 the music but to share it with your friends?

1 A. Yes, to listen to the music, to have it in my
2 collection, to share it with my friends.

3 Q. Did you have any credit card at that point?

4 A. No.

5 Q. And did you at that time begin building a digital music
6 collection?

7 A. Yes.

8 Q. Now, when Napster was taken down, when you found it to
9 be not workable, you shifted to KazaA. Did you download the
10 KazaA program?

11 A. Yeah, I think I did.

12 Q. And you installed it?

13 A. Uh-hum.

14 Q. And you found that it worked pretty much the way Napster
15 did?

16 A. Yeah, it was -- I mean, I've learned a lot from
17 Dr. Jacobson earlier about the inner workings of the stuff,
18 and it's interesting that Napster is different from KazaA,
19 which is different from iMesh, but it was basically the same
20 thing to me, it was a Google search position, and it was
21 music that would come out of it.

22 Q. Now, how did you hear about new music that you might be
23 interested in?

24 A. A variety of sources. I could hear it on the radio.
25 That sort of became less and less relevant. If I would read

1 about it online, Rolling Stone, I had a subscription for
2 Rolling Stone magazine for a while, and on the back of every
3 Rolling Stone magazine, it would say like who the hot
4 artists are in terms of like top college radio artists, top
5 selling at the billboard, stuff like that. I watched MTV, I
6 heard about music that way, I obviously heard it from my
7 friends, the news, anything, anywhere that -- anything that
8 could possibly convey information to you could be telling
9 you about music.

10 Q. When did you first get any intimation from the recording
11 industry that somehow you had been caught?

12 A. That would be the first letter that got sent out to my
13 parents that said we suspect you're copyright infringing.

14 Q. And tell us what happened after that. What did you
15 do?

16 A. So my mom got the letter, and she called me up, and she
17 said, "Joel, there's a letter here, it's talking about
18 copyright infringement. Is this something that has to do
19 with you and your friends and all that?" And I said, "Yeah,
20 that's probably about me." She said, "Okay. What do we do
21 about this?" So, what we did was I think it was within a
22 week or so, drafted a letter, included a money order, sent
23 it to them saying here's settlement.

24 MR. REYNOLDS: Objection, your Honor.

25 THE COURT: Sustained.

1 MR. FEINBERG: Your Honor, may we approach on this
2 issue?

3 THE COURT: No. Go on.

4 MR. REYNOLDS: I move to strike the answer as
5 well.

6 THE COURT: The answer is struck. Next.

7 Q. You're referring to the letter that was shown to you?

8 A. Yes.

9 Q. In which you stated that you would eliminate your music
10 files?

11 A. Yes, that was the letter.

12 Q. And why didn't you eliminate the music files?

13 A. So I went home on college break on the date that I said
14 I was going to home on college break, and there I was in
15 front of my computer, and I couldn't do it, and it wasn't a
16 matter of I don't know how to do it, I knew how to delete
17 the files, you just select everything, you hit the delete
18 key.

19 I looked at it. I couldn't do it. It was this
20 huge collection of music I was making for years. It was
21 everything I listened to, so what I started to do actually
22 was I started taking a piece of paper, write down the names
23 of the artists that were there so I could get them again,
24 so, in the meantime, I was like well, I'll do it next week.
25 They didn't accept -- I didn't get any reply from them, so

1 I'll wait, then the next week and the week after and then I
2 got the reply from the record company and --

3 MR. REYNOLDS: Objection. I object to the
4 narrative response. We'd like a question and answer as
5 opposed to this narrative.

6 THE COURT: Well, I think he's already answered
7 the question that was posed to him, which is why didn't you
8 do it. Why don't you ask him another question. I allow you
9 to lead so you can ask a more pointed question.

10 MR. NESSON: Your Honor, I'd really like to
11 approach the bench on this.

12 THE COURT: No, I want you to proceed.

13 Q. Was there any other reason besides your attachment to
14 the work you had put in in assembling this music collection
15 that led you not to destroy it?

16 A. Yes.

17 Q. And what additional reasons were there?

18 A. The reply from the record company.

19 MR. REYNOLDS: Your Honor, I'm going to object,
20 and we may need a sidebar at this point. I'm not sure what
21 this witness has in mind, but --

22 THE COURT: So the answer is the reply. Your next
23 question would be what was that reply? Okay. Sidebar.

24 (THE FOLLOWING OCCURRED AT SIDEBAR:)

25 THE COURT: What's his answer going to be?

1 MR. NESSON: His answer will be that he got
2 rejected by the recording company when he expressed a
3 willingness to cooperate with them.

4 THE COURT: That's the reason why he didn't destroy
5 the recordings on his computer?

6 MR. NESSON: That together with the fact that he
7 loved them, yes.

8 MR. OPPENHEIM: Wait a minute.

9 MR. FEINBERG: To be clear --

10 THE COURT: Just a second.

11 MR. OPPENHEIM: What happened here was that he
12 sent a money order to try to settle this case.

13 THE COURT: I know.

14 MR. OPPENHEIM: Then it was clearly less than we
15 were willing to accept. We returned it. It wasn't we
16 weren't willing to cooperate, we didn't accept this
17 unilateral for some tiny amount of money. There was no
18 cooperation or discussion on this, so that really misstates
19 what happened here.

20 MR. REYNOLDS: Your Honor, his testimony is
21 directly at odds with this witness' sworn testimony at his
22 deposition.

23 THE COURT: What did he say at deposition?

24 MR. REYNOLDS: He testified under oath at the
25 time, he said in that November 27th letter the computer was

1 already gone, and that's why we were asking him the
2 difference, why did you say it was there if it was gone? He
3 never said that he looked for the files. We asked him what
4 did you do when you got back, did you look for the files?
5 He said no. This is directly at odds. This is designed to
6 get in the settlement discussions through the back door.

7 MR. OPPENHEIM: I don't mean to tag team, you'll
8 remember the very first day Mr. Nesson appeared in this case
9 and we appeared here, Mr. Nesson asked for an immediate
10 trial date. This was back in August of last year. We said,
11 your Honor, we need some discovery, and Mr. Nesson said,
12 well, the deposition is scheduled for tomorrow. We said we
13 need the computer. He said the computer doesn't exist. We
14 took his deposition the next day. He indicated the computer
15 did exist. We then went back and forth whether this
16 computer exists, whether it didn't. It keeps changing and,
17 he shouldn't be allowed to do this.

18 MR. FEINBERG: Judge, let me say three things.
19 There are three reasons, three more reasons why I think this
20 letter should be in not with the money number first, the
21 letter is an offer in settlement. The language that you'd
22 allow in is part of the proposal to settle.

23 MR. REYNOLDS: No.

24 MR. FEINBERG: One can infer -- please, I didn't
25 interrupt.

1 THE COURT: Go on. We've already been over this
2 ground. If we took the number, the jury would be allowed to
3 speculate what the rule doesn't allow, so this is the best
4 of limited alternatives.

5 MR. FEINBERG: The other issue, this is a prior
6 inconsistent statement. They're saying it's inconsistent.

7 THE COURT: What do you mean later?

8 MR. FEINBERG: They later said, he later says the
9 computer didn't exist, this is evidence that it did exist.

10 THE COURT: Wait, what is the statement that would
11 suggest it did exist? The letter, you already have the
12 letter in.

13 MR. FEINBERG: The letter --

14 THE COURT: The letter is in representing that it
15 did exist, so I don't understand. The question here is only
16 why didn't you do what you indicated in the letter, and it
17 seems to me fair to say that he can't say because the record
18 company rejected my settlement. The reason he can't say
19 that is first it looks like completely inconsistent; second,
20 it raises the question, what are the terms of the
21 settlement, which he cannot get into, so at this point the
22 only thing I can think you could say, well, I think you
23 should leave it at that.

24 MR. FEINBERG: May I add one other thing? I
25 thought you said in your ruling settlement discussions --

1 THE COURT: The fact of them.

2 MR. FEINBERG: This is the fact of settlement
3 discussions. This is an offer in settlement, this letter.

4 THE COURT: What he can say is because of the
5 record companies' response to my letter and leave it at
6 that, and you can read it that way.

7 MR. KAMHOLTZ: If I could add something, why
8 couldn't the question be, here the letter we see here in the
9 exhibit is redacted, did you offer to settle the case, yes
10 or no, yes, was your offer accepted or rejected, it was
11 rejected. Why can't that come in?

12 THE COURT: Because that there were settlement
13 negotiations, we could come up with a stipulation there were
14 settlement negotiations that failed, but it seems to me
15 allow this in as an excuse for what he said doing in the
16 letter raises the question of who was settling for what, and
17 it's exactly what we can't get into.

18 MR. OPPENHEIM: We could put in an evidence that
19 we made an offer. We made many offers.

20 MR. FEINBERG: Fine.

21 THE COURT: I have ruled on this already. You can
22 ask the question. He can certainly say he didn't destroy
23 this music in part because he loved it and in part because
24 of the record companies' response. You can do that in terms
25 of a leading question.

1 MR. REYNOLDS: Now, can the witness be told? He
2 wants to get it through the back door. Somehow the witness
3 needs to be instructed he cannot discuss this voluntarily.

4 THE COURT: We'll do this through a leading
5 question, and then you cross-examine him on the
6 inconsistency under oath what he said before and what he's
7 saying now.

8 MR. FEINBERG: One more clarification.

9 MR. OPPENHEIM: The statement you just made and in
10 part because of the record companies' response, I want to
11 make sure that the record companies were suggesting that he
12 shouldn't delete it, right, because that would be very
13 misleading as though we authorized it. I'm not sure why we
14 aren't leaving it.

15 THE COURT: I think you can leave it the demand
16 letter says don't destroy. The objection is sustained. The
17 question and the inquiry is out.

18 MR. FEINBERG: May I ask one other point of
19 clarification? Can Mr. Nesson ask the subsequent question
20 not related to this letter or settlement negotiations?

21 THE COURT: No, you're going to do that by way of
22 stipulation, it seems to me.

23 MR. FEINBERG: Can we read it? I'm not sure you
24 agree.

25 THE COURT: You will agree to a stipulation that

1 will say, well, because we're in the pickle now, you in your
2 opening talked about how --

3 MR. OPPENHEIM: Just say the stipulation.

4 THE COURT: That the litigation strategy was, you
5 know, to file these demand letters and most people settle,
6 very few went to trial. You opened the door. There was a
7 litigation strategy, and it was mostly settlement, so it
8 seems to me both sides should agree to a stipulation there
9 were settlement negotiations which failed. Leave it with
10 that.

11 MR. OPPENHEIM: I'm fine with this.

12 THE COURT: You will not ask of this witness.

13 MR. NESSON: When do I tell the jury that?

14 THE COURT: At the end of the case. You'll put it
15 in before argument.

16 (SIDEBAR CONFERENCE WAS CONCLUDED)

17 MR. NESSON: May I have just a moment?

18 THE COURT: Yes.

19 Q. After you sent this letter and received a reply and
20 didn't destroy your music files, what happened next as far
21 as your interactions with the recording industry?

22 A. The number came with a number to call. It was the
23 settlement information line.

24 THE COURT: Mr. Nesson, this is not where we just
25 agreed you would go.

1 MR. NESSON: I'm sorry, your Honor, I needed
2 to -- forgive me your Honor.

3 THE COURT: Next question.

4 MR. REYNOLDS: Move to strike, your Honor.

5 THE COURT: The answer is stricken, struck.
6 Answer.

7 MR. REYNOLDS: We're fine with either.

8 THE COURT: The answer is gone.

9 Q. So you go off to Goucher College and in between the time
10 that we're talking about and -- well, let me just get to
11 Goucher College. You get to Goucher College. What is the
12 situation at Goucher College as far as music sharing when
13 you first come?

14 A. Again, as I was telling Mr. Reynolds, it was essentially
15 when I got there, there were absolutely no restrictions on
16 anything. You were free to share files as you might share
17 anything, as you might share a paper on the Windows program,
18 and then progressively every year that went by the controls
19 seemed to get stricter and stricter, and fewer and fewer
20 things would work, and finally by my junior year, senior
21 year, the programs didn't work at all.

22 Q. Was there a widespread file sharing at Goucher?

23 A. Yes.

24 MR. REYNOLDS: Objection, foundation, your Honor,
25 vague and ambiguous.

1 THE COURT: To the extent this witness knows, go
2 on, you can have it.

3 Q. How did the file sharing at Goucher work?

4 A. So on the Windows program, the network neighborhood, you
5 couldn't actually search by the artists name or the song
6 name, you couldn't do searches like that, so what you would
7 have to do is you would have to click on an individual's
8 computer name, and you would click on it and what you would
9 have on their music library just opened so you could look
10 and see what was there, so, for example, there was some guy
11 down the hall had a pretty hefty RadioHead collection, and
12 so I discovered RadioHead that way and put that on my
13 computer.

14 Q. Was there any physical sharing of music while you were
15 early at Goucher?

16 A. I don't think so. I think it was mostly on the network.
17 It was already set up, it was kind of slow and pointless to
18 put it on a CD or anything, you just share it, you know, on
19 the network.

20 Q. And as Goucher went forward with its increasing
21 constraints on student file sharing of music, what was the
22 response that you made to that in terms of your sharing
23 behavior?

24 A. Well, I tried to keep sharing, and I tried other
25 programs but ultimately everything was blocked, so I just

1 couldn't do it.

2 Q. And at this time you are still using KazaA?

3 A. At this point I'm not because it doesn't do anything at
4 this point.

5 Q. I don't mean at this point today.

6 A. Okay.

7 Q. At Goucher?

8 A. That's what I mean.

9 Q. Explain.

10 A. So all the file sharing programs by my junior year, none
11 of them worked, none of them did anything, you wouldn't
12 connect to the KazaA server or LimeWire server, so the
13 programs didn't do anything, so I stopped using them.

14 Q. And did you go to any other method of sharing music with
15 friends at that point?

16 A. Well, at that point if I wanted to share music, I'd have
17 to do it with a physical CD or I guess a flash drive or
18 whatever, so my dad and I, for example, passed music back
19 and forth just on CDs themselves.

20 Q. During this period from 1999 until you're at Goucher and
21 actually through Goucher were you buying any CDs?

22 A. Yes, I was.

23 Q. Could you describe that.

24 A. The buying of CDs, sure. So if it became -- I mean,
25 there are all sorts of reasons to be unsatisfied with what

1 you've downloaded so far. You can't get the whole album,
2 and a lot of times it's hard to get the whole album because
3 there's one song or a couple songs that no one is really
4 into, so they're rare, so maybe only one person has it, and
5 you click on it, sometimes the connection doesn't work,
6 sometimes the quality is just terrible, sometimes the song
7 has other song like written over it for some reason, a lot
8 of times you don't get the whole song, it gets cut off like
9 halfway through, so if for whatever reason I wasn't happy
10 with what I got, and this was something I think I remember
11 discussing on the Death Tones forum, it was just basically a
12 lot of times I want to have the physical CD because I have
13 the whole thing, I have the product, I have the booklet, and
14 I have like the tracks as they originally are in this high
15 quality, and it's all there.

16 Q. Have you brought with you your book of CD --

17 MR. REYNOLDS: Objection, your Honor. It's not in
18 evidence, never disclosed to plaintiffs.

19 THE COURT: Sustained.

20 Q. Can you tell us what CDs you purchased, that is,
21 actually laying out your money paying for?

22 A. Yeah. So the immediate one that comes to mind is Nine
23 Inch Nails, The Fragile, it was a double album that came out
24 in '99, and what I actually had done was downloaded two or
25 three songs of that album, and I liked it, and so I was this

1 is definitely worth it, so I actually went out and bought
2 the physical album, which was a double CD, so it's like 20
3 bucks or whatever.

4 Another thing I have, I have Nirvana, I have
5 Nirvana Never Mind. Track 2 is Come As You Are, Track No 1
6 is It Smells Like Teen Spirit. I don't remember if I bought
7 that CD before or after downloading songs or getting songs
8 from other people, but I ended up buying that. A number of
9 CDs I bought over the years.

10 Limp Biskit Significant Other was an album that I
11 had. Limp Biskit Three Dollar Bill was an album that I had
12 purchased at some point, and then that was how it was. Now,
13 if I got a CD, I lost it, sometimes I'd download to replace
14 it. Yeah, so any time I want to have the whole CD and clear
15 the whole thing, I'd go out and buy it.

16 Q. Can you give us how many CDs you purchased?

17 A. Do you mean over the years?

18 Q. Yes.

19 A. Over 100.

20 Q. And would you be able to indicate the different genres
21 of music that you purchased by CD?

22 A. Better than my dad could. So I have a good variety of
23 classical, I have a couple CDs featuring the works performed
24 of Johann Sebastian Bach, Beethoven. I think it was
25 actually I went out and bought online symphonies on CD, and

1 then my uncle went out and bought the same thing, so we
2 actually had two like different versions of Beethoven's nine
3 symphonies.

4 The Beethoven Five Piano Concerti handles a
5 concerti, so classical, we'll just say classical, then, of
6 course, I had some hip-hop R & B, which is mostly stuff that
7 I listened to with my friends, you know, it was what we were
8 into, it was what was on the radio. I still follow, you
9 know, some of it. The majority you can loosely throw under
10 the umbrella of rock, so this is like Death Tones, Nine Inch
11 Nails, punk rock like No Effects, The Ramones, Heavy Metal I
12 guess which would be Marilyn Manson, Rammstein, stuff like
13 that, so it's a whole umbrella of rock, alternative, that
14 kind of stuff.

15 Q. When did you learn that you were really being sued?

16 A. Well, I mean, do you count the letter that I got from
17 them?

18 Q. No, next.

19 A. When the lawsuit was filed.

20 Q. When you hear about the lawsuit.

21 A. Okay. I think that was early August in 2007, I came
22 home to my apartment, and sitting there sort of leaning
23 against the door was this huge stack of papers, I don't
24 know, about 50 papers thick, and that was the complaint, the
25 complaint, which I later found out means like the normal

1 start of the lawsuit, here's what we're claiming against
2 you.

3 Q. And what was the complaint against you, do you recall?

4 A. I mean, I flipped through it trying to figure out what
5 was there, but it seemed that it came down to the stuff that
6 I had interaction with earlier about the letter that they
7 had sent me and phone calls and so forth, so I figured it
8 was about that, and I saw the words "copyright infringement"
9 and so, okay, they're suing me for either downloading or
10 uploading or sharing music.

11 Q. And did you then consult with anyone about that
12 complaint?

13 A. Yes, I talked to my mom.

14 Q. And tell us about that.

15 A. Okay. So my mom, in addition to being a professional
16 harpist, is actually a state paid I guess you'd say child
17 custody attorney for the State of Massachusetts, so she has
18 practice in the overall forum of law where the complaint is
19 and what you have to do to a complaint in order for it not
20 just to be answered, but she was the furthest thing of any
21 sort of technical person. I'm sorry, mom.

22 MR. REYNOLDS: Your Honor, objection. Narrative
23 response and also irrelevant.

24 THE COURT: Overruled. Go on. Go on with the
25 question. Go on with the question, don't go on with the

1 narrative.

2 Q. Did you at that point consult a lawyer besides your
3 mother?

4 A. Yes, there was -- we had a family friend from Minnesota
5 named Caruno Yen, and my mom still keeps in touch with her,
6 and she was a patent attorney there.

7 Q. And did you retain her as a lawyer?

8 A. No, I never did. She talked with us and told us as much
9 was helpful as she knew, which I guess wasn't much, but she
10 was never my lawyer.

11 Q. And tell us how you felt when you received this
12 complaint.

13 THE COURT: Sustained.

14 MR. REYNOLDS: Objection, your Honor.

15 Q. Were you terrified when you received this complaint?

16 MR. REYNOLDS: Objection, your Honor.

17 THE COURT: Sustained.

18 MR. NESSON: On what grounds, your Honor?

19 THE COURT: His reaction to the complaint is
20 irrelevant to the case. Go on, Mr. Nesson.

21 Q. Did you appreciate the threat that this complaint
22 represented to you and your future?

23 A. It seemed like a very serious threat.

24 Q. And did it have impact not only on you but on your
25 family?

1 THE COURT: Sustained.

2 MR. REYNOLDS: I object.

3 Q. Mr. Reynolds began his examination of you by asking you
4 to respond to and react to your responses to
5 interrogatory?

6 A. Yes.

7 Q. Were your interrogatory responses accurate?

8 A. No.

9 Q. Why did you lie at that point?

10 A. It was kind of something I rushed through with my mom,
11 and I figured if you phrase things in a certain way it's not
12 like -- I don't know, it's what seemed the best response to
13 give.

14 Q. You were on the defense, were you not?

15 A. Yes.

16 Q. And you were doing the best you could?

17 A. Yes.

18 Q. Without a lawyer advising you directly on the answers?

19 A. My mom, but --

20 Q. And you then in August, 2008 or was it September were,
21 became represented by me?

22 A. Yes.

23 Q. And almost immediately we were in deposition?

24 A. Yes.

25 Q. And in that deposition you made the responses that

1 Mr. Reynolds also reviewed to you?

2 A. Yes, I did.

3 Q. And would you describe those as less than fully
4 forthcoming?

5 A. Yeah.

6 Q. Were you deposed a second time?

7 A. I was.

8 Q. And at that second deposition, were you likewise
9 defensive and unforthcoming?

10 A. No.

11 Q. Tell me about the second deposition.

12 THE COURT: No. Please ask a question. Don't do
13 a tell me about.

14 Q. What was your posture in the second deposition?

15 THE COURT: Give me a more specific question,
16 Mr. Nesson.

17 Q. In your initial responses to the complaint, as
18 Mr. Reynolds reviewed with you, you were at pains to say how
19 many different people had been in the open environment of
20 your house and had potential access to the machine and could
21 have done whatever they were alleging would be done?

22 A. Yeah, I was jogging my memory for every possible,
23 yeah.

24 Q. At the second deposition, what was your posture with
25 respect to responsibility for what had been downloaded to

1 your machine?

2 MR. REYNOLDS: Objection, your Honor, asked and
3 answered.

4 THE COURT: You mean to say did you take
5 responsibility?

6 MR. NESSON: Yes.

7 Q. Did you take responsibility at a general level for what
8 was downloaded to your machine?

9 A. Yes, and I take responsibility now.

10 Q. So that you're not in the posture now of trying to say
11 someone else did it, the burglar did it or my sister did
12 it?

13 A. If it does, it doesn't matter. This is me, I'm here to
14 answer. I used the computer, I uploaded, I downloaded
15 music, this is what I did, that's how it is, I did it.

16 Q. And you did it starting 1999, and you continued more or
17 less with one program and followed by another program until
18 you desisted when?

19 A. It was some time I think it was 2007, it might have been
20 as late as 2008.

21 Q. And you desisted why?

22 A. A number of reasons. I mean, the whole file sharing
23 downloading music, I mean, I could just best describe it by
24 calling it messy. You have all kinds of adware on the
25 computer, malware. It's screwing the computer up. You have

1 to search through songs to find out which is which. You get
2 spoofs, it's been mentioned a lot before. You can get a
3 song, then you listen to it, what the hell is this? This
4 isn't that.

5 iTunes is what I use, it's what I've been using
6 for the last couple years. There's a very good selection on
7 iTunes now, and I'm signed with that, with my credit card,
8 everyone is doing it that way for a reason, and there's a
9 big library there, and it's just easy, and I know that I'm
10 going to get the song that I ask for and that it will be,
11 you know, at least pretty high quality, very high quality,
12 and it's there and it's simple.

13 Q. And this impending lawsuit coming down on you was also a
14 reason why you desisted?

15 A. Yes, it was also a matter of that that -- I connected
16 the lawsuit was sort of related with this file sharing
17 stuff, and so at some point I decided that, well, it's
18 probably best just to not do that and whatever the
19 consequences of that are going to be when I should show up
20 in court.

21 Q. In August of 2004, August 10th, were you even aware of
22 iTunes at that point?

23 A. I don't think so.

24 Q. Were you aware of any of the digital alternatives?

25 A. I think I had seen Liquid Audio. I didn't really

1 investigate it. I think I heard the name before. I don't
2 think I had heard of iTunes, maybe I heard Music Man or
3 Music Match. I hadn't heard of this Press Play that people
4 are talking about. I may have heard of iTunes. I don't
5 think I had.

6 Q. And were you in any position at that point in August,
7 2004, not only to switch your own musical acquisition
8 practices to digital downloads of these Press Play kinds but
9 also to switch over your friendship group who was also into
10 sharing music?

11 A. It was an imposition to switch my friendship group.

12 Q. Let me focus on you first.

13 A. Okay.

14 Q. Were you -- was it realistic on August 10, 2004 that you
15 would stop using KazaA and switch over to iTunes?

16 MR. REYNOLDS: Objection, your Honor.

17 THE COURT: Sustained.

18 MR. NESSON: May I have a moment, your Honor?

19 THE COURT: Yes.

20 Q. Joel, at any point in this history of you downloading
21 music from the peer-to-peer networks, did you ever do it for
22 the purpose of selling the music to anyone?

23 A. No.

24 Q. Did you ever do it for the sake of using the music to
25 promote any kind of commercial activity?

1 A. No.

2 Q. Was there any commercial aspect whatsoever?

3 MR. REYNOLDS: Objection, your Honor.

4 THE COURT: Overruled.

5 A. No.

6 Q. This was entirely for your pleasure and the pleasure of
7 your friends and family?

8 A. Yes.

9 Q. So completely personal kind of use?

10 A. Yes.

11 Q. Did you consider yourself -- you didn't consider
12 yourself committed only to this form of obtaining music?

13 A. No, as I've said, I went out and bought a number of CDs
14 in the music store, would go down and actually buy the CDs
15 themselves, so it was sort of it was a hybrid approach, it
16 was whatever worked best, whatever was easiest, et cetera.

17 Q. And to objections that somehow you were depriving
18 artists of revenue by using a peer-to-peer, was it the case
19 that your purchasing of CDs put you in a posture as a matter
20 of your personal state of mind where you felt you were being
21 reasonable and fair to the industry?

22 MR. REYNOLDS: Objection, your Honor.

23 Relevance.

24 THE COURT: Sustained.

25 MR. NESSON: May we take the lunch break, your

1 Honor?

2 MR. OPPENHEIM: Your Honor, I only have a few
3 questions.

4 THE COURT: Are you finished now, Mr. Nesson?

5 MR. NESSON: No, I'm not.

6 THE COURT: We'll take a break between one and
7 two. Again, ladies and gentlemen, enjoy your lunch but
8 don't talk to anybody. All rise for the jury.

9 (A recess was taken.)

10 THE CLERK: All rise.

11 THE COURT: You can be seated. Mr. Nesson.

12 Q. Joel, how did you afford Goucher?

13 MR. REYNOLDS: Objection, your Honor.

14 Q. Do you need a minute?

15 A. No, I'm good.

16 MR. REYNOLDS: Objection, relevance.

17 THE COURT: The objection as rephrased is
18 irrelevant. Objection sustained.

19 MR. NESSON: May I have a moment, Judge?

20 THE COURT: Yes.

21 Q. Did you have a scholarship at Goucher?

22 A. Yes.

23 Q. Do you have a scholarship or some sort of tuition help
24 at Boston University?

25 A. Yes, I have full support at Boston University and they

1 pay me a stipend.

2 Q. Was the scholarship at Goucher --

3 MR. REYNOLDS: Objection.

4 THE COURT: Sustained.

5 MR. NESSON: Your Honor, may we approach on this?

6 THE COURT: No.

7 Q. When you took your computer to Best Buy, was it your
8 intention to erase any of your files?

9 A. No, in fact, I was clear when I was thinking, when I was
10 talking to the guy making sure that all the music would be
11 preserved.

12 Q. And why was that?

13 A. Because of this whole proceeding here that you
14 can't -- well, okay, that's part of it, but I didn't want to
15 lose my music, but the other part of this you're not
16 supposed to screw with evidence.

17 Q. Why did you take your computer to Best Buy?

18 A. The thing wouldn't run.

19 MR. NESSON: Thank you. I have no further
20 questions.

21 REDIRECT EXAMINATION

22 BY MR. REYNOLDS:

23 Q. Good afternoon, Mr. Tenenbaum.

24 A. Good afternoon, Mr. Reynolds.

25 Q. You testified that a moment ago or before the break that

1 one of the purposes of peer-to-peer early on was to get
2 music to share with friends?

3 A. Yes.

4 Q. You were not friends with everyone on Napster, right?

5 A. I did not have face-to-face contact, if that's what you
6 mean.

7 Q. You were not friends with everyone on KazaA?

8 A. No.

9 Q. And you were not friends with everyone on LimeWire, were
10 you?

11 A. No.

12 Q. And you also testified you had no iTunes in 2004; do you
13 recall that testimony just before the break?

14 A. Yes.

15 Q. Would you turn to page 89 of your deposition, please.
16 Again, during this deposition you were questioned by
17 Ms. Burton?

18 A. Yes.

19 Q. You were represented by counsel?

20 A. Yes.

21 Q. And you testified under oath?

22 A. Yes.

23 Q. Were you not asked and did you not give the answer to
24 the follow questions, question: "When did you start using
25 iTunes?" Answer: "I don't know." Question:

1 "Approximately?" Answer: "If I had to guess?" Question:
2 "Can you approximate?" Answer: "If I had to approximate, I
3 would say high school." Did you give that testimony at your
4 deposition?

5 A. I did.

6 Q. Further down, line 11, you were asked this question,
7 "Did you have an iTunes account on the computer that was in
8 your room connected to your parents' Internet account?"

9 Answer: "I think so." You gave that testimony as well at
10 your deposition?

11 A. Yes.

12 Q. Mr. Tenenbaum, you said in your testimony before the
13 break that you lied in your written discovery responses to
14 the plaintiffs?

15 A. Yes.

16 Q. And those written discovery responses were prepared with
17 the assistance of your mother, a licensed attorney?

18 A. Yes.

19 Q. An attorney licensed in the State of Massachusetts?

20 A. Yes.

21 Q. And an active member of the Bar?

22 A. Yes.

23 Q. You then said you were less than forthcoming with your
24 answers at your first deposition?

25 A. Yes.

1 Q. You were represented by Mr. Nesson at that deposition?

2 A. Yes.

3 Q. Just to give one example, you have testified here today
4 that after sending this November 25th letter, and
5 Ms. Burton, could you bring up Exhibit 23.

6 MR. FEINBERG: I'm going to object to this line,
7 your Honor.

8 THE COURT: Exhibit 23, let me look at it online
9 for a second. Mr. Reynolds, are you treading on some
10 slippery territory here?

11 MR. REYNOLDS: I do not believe so, your Honor, I
12 merely want to point out that the testimony he gave a moment
13 ago is completely inconsistent with what he said.

14 MR. FEINBERG: Objection to this, sidebar if we're
15 going to have this.

16 THE COURT: I'm going to allow the questioning.
17 Go on. Exhibit 23 can go on the screen.

18 Q. You testified at your deposition regarding this computer
19 that you talked about in this November 21st, 2005 letter?

20 A. Yes.

21 Q. And you gave the following answers to the following
22 questions, "So you had spoken with Caruna before
23 November 21st, 2005," correct?

24 A. Yes.

25 Q. Answer, if this is stamped correctly -- let me back up.

1 Could you please take a look at page 222 of your deposition.
2 Do you have that in front of you? Do you have that in front
3 of you?

4 A. Yes.

5 Q. And I'll be reading from line 17 through line 4 on the
6 next page, actually from line 15 on page 222 through line 4
7 on the next page. Question: "So you had spoken with Caruna
8 before November 21st, 2005, correct?" Answer: "If this is
9 stamped correctly, yes." Question: "And the computer was
10 still in existence at this time, correct?" Answer: "The no
11 name computer?" Question. "Correct." Answer: "I don't
12 think so. Question: "What did you mean by if there are any
13 files in violation of copyright, I will destroy them at that
14 time?" Answer: "It's a conditional statement. I didn't
15 say that they existed, I said that if they did exist, that I
16 will destroy them." Are those the answers you gave to those
17 questions at your deposition?

18 A. Yes.

19 Q. And again on page 225, line 17 through 23, question:
20 "But if you knew the computer was gone, why wouldn't you
21 just say that, the computer that if there were any files
22 existing in violation of copyright, they are now gone as
23 that computer was destroyed"?

24 A. 225?

25 Q. Yes, 225, line 17.

1 A. Okay.

2 Q. I apologize. Again I'll read it. Question: "If you
3 knew the computer was gone, why didn't you just say that,
4 the computer, if there were any files existing in violation
5 of copyright, they are now gone because that computer has
6 been destroyed?" Answer: "Because I said this instead,
7 which is also a true statement." Is that the answer you
8 gave to that question at your deposition?

9 A. Yes.

10 MR. FEINBERG: Please note my objection, your
11 Honor.

12 THE COURT: Overruled.

13 Q. Mr. Tenenbaum, at your second deposition, that's when
14 you claim that you took responsibility for the infringement
15 in this case; is that correct?

16 MR. FEINBERG: Objection, your Honor. This gets
17 into the same issue.

18 THE COURT: Overruled.

19 Q. Is that correct?

20 A. Yes.

21 Q. That second deposition was taken just three weeks ago,
22 wasn't it?

23 A. Yes.

24 Q. On July 8th, 2009?

25 A. Sounds right.

1 Q. And that deposition was taken just after the plaintiffs
2 had inspected your Gateway computer over your opposition and
3 found evidence of infringement on your LimeWire sharing
4 account, correct?

5 A. Yes.

6 Q. Mr. Tenenbaum, on the stand now are you now admitting
7 liability for downloading and distributing all 30 sound
8 recordings that are at issue and listed on Exhibits 55 and
9 56 of the exhibits?

10 A. Yes.

11 MR. REYNOLDS: No further questions, your Honor.

12 RE-CROSS-EXAMINATION

13 BY MR. NESSON:

14 Q. Joel, do you have any explanation of the discrepancy
15 between the recollections about iTunes that Mr. Reynolds
16 just brought out?

17 A. It was six years ago, whatever, 2003.

18 Q. Well, --

19 A. High school is like six or seven years.

20 Q. Did you have iTunes on your computer back then or was
21 that only later that you --

22 A. I don't know. I don't remember that specifically. I
23 don't think I had it on my computer then, but I don't
24 know.

25 Q. So you believe that you just may have been in error in

1 responding?

2 A. Yes. When he said that to me, I looked at the
3 statement, and I was thinking to myself, no, I don't think
4 that's right.

5 Q. Did you have iTunes on your computer as your best
6 recollection now in 2003?

7 A. I don't know. I don't know when I got iTunes on my
8 computer.

9 Q. When you wrote the letter which you were just being
10 examined about, did you consider at that time that you were
11 taking responsibility for what you had done?

12 A. Yes.

13 Q. Did you think -- do you now think that what you did was
14 wrong?

15 A. I think it's a part of the process of growing up and
16 learning things and seeing how you interact with everything
17 around you. I think it's part of the growing up process,
18 and it's certainly nothing I do now or have done in a
19 while.

20 Q. You were aware when you were downloading that the law at
21 least as articulated to you was saying you shouldn't be
22 doing it?

23 A. That was something that progressed over the years as to
24 where I was of the law saying that.

25 Q. And you come now to a situation to a state of mind in

1 which you think about this in a way that leads you not to do
2 it?

3 A. Yes.

4 Q. And not to do it as a matter of your having grown up or
5 just because there's a threat upon you?

6 A. I think if the threat disappeared tomorrow and the
7 RIAA --

8 MR. REYNOLDS: Objection, your Honor.

9 THE COURT: Sustained.

10 MR. NESSON: No further questions.

11 MR. REYNOLDS: Can I have --

12 THE COURT: No, no. Mr. Tenenbaum, you're
13 excused.

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS)
CITY OF BOSTON)

I, Valerie A. O'Hara, Registered Professional Reporter, do hereby certify that the foregoing transcript was recorded by me stenographically at the time and place aforesaid in No. 03-11661-NG, Capital Records, Inc., et al. vs. Noor Alaujan, et al. and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

/S/ VALERIE A. O'HARA

VALERIE A. O'HARA

REGISTERED PROFESSIONAL REPORTER

DATED NOVEMBER 23, 2009