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Kenyon & Kenyon LLP

## Jury awards \$222K verdict in novel file-sharing case

In a closely followed file-sharing case, *Capitol v Thomas*, a federal jury in Minnesota has returned a \$222,000 verdict against Jammie Thomas for making 24 copyrighted sound files merely available for download on the file-sharing program [KaZaA](#). In response, Thomas has filed a motion for a new trial or alternatively for the judge to reduce the award, claiming it excessive.

If her motion is not granted, Thomas has indicated that she will appeal the jury verdict. The appeal would likely turn on whether merely making a copyrighted work available for download over a peer-to-peer (P2P) network constitutes 'distribution' under US copyright laws.

Critical to the case was a jury instruction that equated making a file available with distributing a copyrighted work. If the verdict is thrown out due to an incorrect jury instruction, the case will be re-tried. In her appeal, Thomas is likely to argue that the burden is on the plaintiff record companies to prove that someone actually downloaded a music file from her computer.

Barring a new trial on the issue of damages or a radical reduction of the award, the Eighth Circuit Court of Appeals may be the first federal appellate court to address whether the act of merely making a file available on a P2P is, by itself, copyright infringement.

Of the few US judges who have addressed this issue in pretrial rulings, most have held that making a file available on a P2P network is the legal equivalent of distribution as defined by Section 106(3) of the Copyright Act.

However, on December 22 2006 in *UMG v Lindor* a New York federal court ordered that the plaintiff record companies would have to show at trial that the defendant "actually shared sound files", which is a higher burden than merely showing that the defendant made the files available for download. Thus, the question of whether making a copyrighted file available for download constitutes copyright infringement is far from settled.

For further background, see "[RIAA found liable for defendant's costs in file-sharing case](#)", "[Default judgment issued against daughter of famous P2P defendant](#)", "[BitTorrent user hit with \\$35,000 default judgment](#)", "[Downloaders and the entertainment industry - the battle rages](#)" and "[File-sharing lawsuits and the law of unintended consequences](#)".

*James E Rosini, Michelle Mancino Marsh and Mimi Rupp, Kenyon & Kenyon LLP, New York*