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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

METRO-GOLDWYN-MAYER STUDIOS INC., et al.,

Plaintiffs,

v.

GROKSTER, LTD., et al.,

Defendants.

[Continued on Next Page]

Case No. CV 01-09923 SVW (PJWx)
(Consolidated with CV 01-08541 SVW (PJWx))

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS MUSICCITY.COM, INC. (NOW KNOWN AS STREAMCAST NETWORKS, INC.) AND MUSICCITY NETWORKS, INC. IN SUPPORT OF MOTION FOR PARTIAL

JERRY LEIBER, et al.,

Plaintiffs,

v.

CONSUMER EMPOWERMENT BV a/k/a FASTTRACK, et al.,

Defendants.

AND COUNTERCLAIMS.

SUMMARY JUDGMENT REGARDING VICARIOUS INFRINGEMENT; DECLARATIONS OF DARRELL SMITH, STEVEN GRIBBLE AND COLBERN STUART

[Notice of Motion and Motion, Statement of Uncontroverted Facts and Conclusions of Law, and Compendium of Declarations and Exhibits filed concurrently herewith]

Date: December 2, 2002
Time: 1:30 p.m.
Ctrm: 6 (Spring Street)
Hon. Stephen V. Wilson

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Never has a court held a distributor of software vicariously liable for the infringing activities of users of the software in the absence of an ability to control those activities. Never has a court held that, in order to avoid vicarious copyright liability, a software distributor must design its products to the specifications preferred by incumbent copyright industries. Nevertheless, Plaintiffs here invite the Court to unmoor copyright's vicarious liability doctrine from its respondeat superior foundations, hoping to achieve by judicial innovation what has been thus far denied to them by the legislature: the power to control new technologies that disrupt their existing business arrangements.

This motion for partial summary judgment is aimed at resolving a key issue in this case: whether the StreamCast Defendants[1] (hereafter "StreamCast") can be held vicariously liable for purported copyright infringements arising from the use by members of the public of the Gnutella-based versions of the Morpheus software (Morpheus Preview, 1.9 and 2.0) that StreamCast has been distributing since March 2002.[2] As to this aspect of Plaintiffs' vicarious liability claim, StreamCast is entitled to partial summary judgment because the undisputed facts establish that, like software vendors generally, StreamCast has no control over the uses to which its Morpheus software may be put by end-users in the privacy of their own homes on their own computers.

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[1] The StreamCast Defendants are StreamCast Networks, Inc. (formerly known as MusicCity.com, Inc.) and MusicCity Networks, Inc.

[2] Prior versions of the Morpheus software were based on technology known as "Fastrack" licensed from co-defendant Consumer Empowerment. As a result of technological changes made by Consumer Empowerment after a licensing dispute with StreamCast, the vast majority of these earlier versions of the Morpheus software are no longer functional, nor can any user of this Fastrack-based software share files with any Morpheus user utilizing the current Gnutella-based Morpheus software. Declaration of Darrell Smith ("Smith Decl.") at ¶ 11.

In their complaints, Plaintiffs take every opportunity to equate StreamCast with Napster, the pioneer in digital file sharing.[3] *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (hereafter "*Napster*"). Unlike Napster, however, StreamCast does not operate a file-sharing service, nor does it maintain any servers that participate in the exchange of files in any way. Instead, StreamCast distributes a software product that users employ to create an open, publicly-available, peer-to-peer network directly between their own computers. Unlike Napster, StreamCast has no involvement with or control over the subsequent file-sharing activities, whether infringing or not, of these users of the Morpheus software, just as Xerox has no control over what its customers may do with its photocopiers. Because Plaintiffs cannot establish that StreamCast has the "right and ability to supervise the infringing activity" of which they complain, StreamCast is entitled to summary adjudication on Plaintiffs' vicarious liability claim.

II. FACTUAL BACKGROUND

A. The Morpheus Software[4]

The Morpheus software program is a communication tool that allows users to independently connect to one another to form a user network, commonly known as a user-to-user or "peer-to-peer" ("P2P") network.[5] Declaration of Prof. Steven D.

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[3] Plaintiffs also have repeatedly mischaracterized exactly what StreamCast does and what Morpheus is. They incorrectly claim that StreamCast's business is some vague "system and service." But in reality, StreamCast is in the business of distributing a software product. It offers no "services" that are involved in any file-sharing that Morpheus users perform, nor is there any Morpheus "system" per se. The only thing close to a "system" is the network of users of the Morpheus software. However, as explained *infra*, this "system" is not unique to just Morpheus users, and any person running Gnutella-based software is part of that network.

[4] For further historical background relating to StreamCast (formerly known as MusicCity.com, Inc.), see Memorandum of Points and Authority filed in Support of Defendants' Motion for Partial Summary Judgment, attached to the Declaration of Colbern Stuart (hereafter "Stuart Decl.") as Exhibit 1.

[5] As discussed *infra*, Morpheus also performs a number of other functions, including web browsing, on-line shopping, videoconferencing, online e-payments, and instant messaging, but none of these functions is involved in the P2P networking functionality of the software. Gribble Decl. at ¶¶ 6-7.

Gribble (hereafter "Gribble Decl.") at ¶ 4. Using the P2P networking functionality of the software, users may search for and share any kind of computer file, including text, images, audio, video, and software files, with other computer users connected to the network. Smith Decl. at ¶ 12; Gribble Decl. at ¶ 8. The searching and file-sharing functions are entirely decentralized—after downloading and installing the Morpheus software on their computers, users decide for themselves what information to seek out, send and receive with the software, without any further involvement from StreamCast. Smith Decl. at ¶ 37; Gribble Decl. at ¶ 10-13.

Since March 2002, all versions of the Morpheus software have been based on a technology known as "Gnutella." Smith Decl. at ¶ 6, 9-11. Originally developed by employees of Nullsoft (an AOL-Time Warner subsidiary and an affiliate of several Plaintiffs), Gnutella is a simple, open networking protocol intended to enable communications between computers over the public Internet.[6] Gribble Decl. at ¶ 9. Because Gnutella is an open protocol (i.e., publicly disclosed and free for use by all), anyone can build Gnutella-compatible software, and any computer running Gnutella-compatible software can interoperate with any other computer running Gnutella-compatible software, forming a single Gnutella network. *Id*. Morpheus is only one of several Gnutella-compatible products (others include Gnucleus, Limewire, Bearshare and Xolox). A user of any of these products can search and share files with users of any of the others. *Id.* Tens of thousands of computers running Gnutella-compatible software are connected with one another at any given moment, forming a single global Gnutella user network. *Id.*

Decentralization is the hallmark feature of Gnutella-based software products, including Morpheus. Gribble Decl. at ¶¶ 11-12 (detailing technical benefits that flow from network decentralization). After the Morpheus software is downloaded and

[6] For an overview of Gnutella networking principles, *see* Andy Oram (ed.), PEER TO PEER (2001) at 94-123 (describing the history and functional principles behind the Gnutella networking protocol.) The relevant chapter from this text is attached as Exhibit 2 to the Stuart Decl.

installed,[7] a user must connect to the Internet through an Internet Service Provider ("ISP") in order to use the Morpheus software. In order to join Gnutella network for the first time, the Morpheus software must obtain the IP address[8] of at least one other person who is connected to the network, a process known as "bootstrapping." *Id.* at ¶ 22; Smith Decl. at ¶ 14. In order to accomplish this, Morpheus contacts a "host cache,"[9] maintained by third parties unrelated to StreamCast. Gribble Decl. at ¶ 22; Smith Decl. at ¶ 17. The host cache responds with a list of the IP addresses of other computers worldwide that are at that moment running Gnutella-compatible software. Gribble Decl. at ¶ 22. The Morpheus software then uses the IP addresses to contact these other Gnutella users and thereby joins that particular Morpheus user to the global Gnutella network. *Id.*

In order to join to the Gnutella network, Morpheus users are not required to identify themselves with any user-specific "user name" or other word or code. Unlike Napster and many other P2P networks, the Gnutella network does not require user-specific accounts or unique names, and there is no need to "log-in" with any central authority. Smith Decl. at ¶ 22. Nor does StreamCast require such identifiers

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[7] The Morpheus software is available for downloading over the Internet, either from web sites or from the Gnutella network itself. If a person wishes to become a Morpheus user, he may download the software through a third party website, such as CNET Download.com. Gribble Decl. at ¶ 14-16; Smith Decl. at ¶ 29.

[8] An IP, or "Internet Protocol" address is a series of numbers that identifies an individual connection on the Internet, much like a telephone number identifies a specific telephone account. Unlike telephone numbers, however, many internet users do not keep the same IP address from session to session because their ISPs "dynamically" allocate a limited number of IP numbers among users. Gribble Decl. at footnote 5.

[9] A "host cache" is, in essence, a computer that keeps a list of the addresses of the other computers that have contacted it recently, and provides the list to each subsequent computer that asks. Gribble Decl. at ¶ 22. Host caches generally do not receive or store any information regarding the content being transferred or shared by the computers that contact it. *Id.* A number of computers on the Internet serve as host caches for the Gnutella network. *Id*. Morpheus 2.0 also uses a process called "GwebCache," which is similar to a hostcache. Morpheus Preview Edition and version 1.9 did not utilize "GwebCache". Smith Decl. at ¶ 18, Gribble Decl. at ¶22. StreamCast does not and has never maintained a host cache or GwebCache. Smith Decl. at ¶17, 18. Users may also manually input an IP address. Smith Decl. at ¶ 19.

for using the P2P networking functionality of Morpheus. *Id*. The only information required for connecting to the Gnutella network is an IP address of another person using Gnutella-compatible software, which is obtained from sources unrelated to StreamCast. Smith Decl. at ¶ 23. StreamCast does not maintain any log of the IP addresses of users who connect to the Gnutella network.[10] *Id.*

Once a Morpheus user has connected to the Gnutella network, a Morpheus user seeking a particular file must enter a search term into the Morpheus software's search screen on the user's computer. Smith Decl. at ¶ 24; Gribble Decl. at ¶ 28. The Morpheus software then transmits the search request to each of the other computers on the Gnutella network to which it is connected. Smith Decl. at ¶ 24; Gribble Decl. at ¶ 29.

Once a search request is sent, the search process resembles a giant game of "Telephone," with the search request propagating from user to user through the Gnutella network. *Id*. At no time does any search request from a Gnutella client, including any edition of Morpheus, pass through any computer owned or controlled by StreamCast. Smith Decl. at ¶ 24; Gribble Decl. at ¶ 32. Upon receiving a search request, a computer compares the search term against the filenames[11] of the files that the user of that computer has chosen to share. Gribble Decl. at ¶ 29. If the search request matches a filename (or portion thereof) of a file being shared, the receiving computer responds with a "QueryHit" message that contains the title of the matching file and the computer's IP address. *Id.* at ¶ 29. In addition to comparing the query against the filenames of items shared by it, the software also forwards the search

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[10] Indeed, tracking an IP address is an ineffective method for tracking an individuals behavior as IP addresses of individual users tend to be "dynamically" assigned, as discussed above. Gribble Decl. at footnote 5.

[11] Morpheus 2.0 (but not Preview or 1.9) also searches a file's "metadata"—information that is not part of the file's content, but contains information about the file's content, such as author, file formatting, date of original creation, or the like. Smith Decl. at ¶ 24.

request to each of the other computers on the Gnutella network to which it is connected. *Id*. at ¶ 29.

The Morpheus software displays to the user all the "QueryHit" responses in a "Search Results" window within the Morpheus graphical user interface. *Id*. at ¶ 30. To download a file listed in the "Search Results," the user "double-clicks" the desired file in the "Search Results" window. *Id*. This request is sent directly to the IP address of the computer that is sharing the file, and the two computers then establish a direct file transfer connection to accomplish the download. *Id*. at ¶ 33.

Because the Gnutella network is self-organizing, StreamCast has no involvement whatsoever in the P2P networking functions described above. *Id*. at ¶¶ 23, 26, 32, 34 and 35; Smith Decl. at ¶¶ 28, 37. StreamCast does not maintain any file indices,[12] does not process search requests, does not compile search results, does not send search results to a user. *Id.* In fact, Morpheus does not report any information on the content of searches to any StreamCast server. Smith Decl. at ¶ 28; Gribble Decl. at ¶ 32.

Moreover, StreamCast's computer servers do not participate in identifying locations of user files, do not participate in requesting those files for transfer, do not communicate with the host users, do not participate in the transfer files from one user to another, do not control or monitor transfers of files, and do not control or monitor management or use of files. *Id*. at ¶¶ 28, 37. StreamCast's servers receive no information regarding any particular files being transferred among users. *Id.;* Gribble Decl. at ¶ 34. In short, StreamCast has no involvement whatsoever with the search

[12] Morpheus Preview and version 1.9, like several other Gnutella applications, could select users on high-performance computers to serve as "ultrapeers." Smith Decl. at ¶ 24. In this role, the high-performance computer provided indexing services for a number of lesser-performing computers, thereby improving the efficiency of searches in the network. *Id*. The Morpheus software selected ultrapeers by employing its own internal algorithms – StreamCast played no role in promoting or demoting computers to or from ultrapeer status. *Id*.

and transfer of files of users who chose to utilize the P2P networking functions of the Morpheus software.

StreamCast's involvement with the Morpheus software, after its download by the user, is very limited. For example, the first time a user launches the Morpheus software, the user is asked to supply certain demographic information (e.g., email address and connection speed) that is collected by a computer maintained by StreamCast. *Id.* Smith Decl. at ¶ 30. Response to these questions is entirely optional. In addition, while running, the Morpheus software activates several components of the user's Microsoft's Internet Explorer web browser. *Id*. at ¶ 31. These components contact web servers maintained by StreamCast, which provide the background graphics for the user interface of the Morpheus software, as well as banner and pop-up advertisements that appear whenever the user is running the Morpheus software. *Id*. at ¶ 31-32. The Morpheus software also sends a logon notification message to StreamCast's servers when launched, consisting of a unique serial number and the duration of its last session on the network. *Id*. at ¶ 33. Each of these interactions with StreamCast is independent of the P2P networking functionality of the Morpheus software. [13] Smith Decl. at ¶ 36. In fact, if all of StreamCast's servers were disabled and these above-described functions were unavailable, Morpheus users would still be able to join the Gnutella network, conduct searches and share files. *Id*.

None of the interactions between the Morpheus software and StreamCast enable StreamCast to discover, monitor or control what files users search for, choose

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[13] In addition to its P2P networking functionality, the Morpheus software can download and interact with software provided by certain third parties. This software interacts with the Morpheus software and provides convenience features to users, including "chat," shopping programs, and a micropayment system. Smith Decl. at ¶¶ 34-36. None of these independent features are related to the file-sharing functionality of the Morpheus software. *Id*. at ¶ 36. If every third party software provider were to cease operations, it would have no affect on the user's ability to join the Gnutella network, search for, share or download files. *Id*. To the best of StreamCast's knowledge, none of the "bundled" software provides the third party licensors with any ability to discover, monitor or control what files users search for, choose to share, or download. *Id*.

to share, or download. StreamCast also has no ability to remotely alter, disable or upgrade Morpheus once it has been downloaded and installed by the user.[14] Gribble Decl. at ¶¶ 13, 38-40. Once the software leaves the hands of StreamCast, it has no control over what the ultimate user does with it. Smith Decl. at ¶ 37.

In this regard, StreamCast is no different from other software vendors who distribute communications tools capable of being misused. Microsoft, for example, has no ability to control the many unlawful uses to which its Internet Explorer web browser is doubtless put (including locating and downloading infringing works). Similarly, QUALCOMM has no ability to control the uses to which its popular, advertising-supported Eudora email software is put (including sending copyrighted works). Each of these products can and is, without question, used by some individuals to locate, publish and download copyrighted material without authorization.

B. Trends in technology toward increasing user capabilities

The rise of P2P networking is part of a long-standing historical trend in technological innovation: the migration of ever-more powerful publishing tools into the hands of individuals. The trend has been driven by obvious marketplace demand: individuals desire tools that enable the creation, reproduction, and distribution of information.

This demand has spurred technological innovation that has delivered enormous benefits, both for society at large and the copyright industries. Virtually every American has enjoyed the benefits delivered by the audio cassette recorder, the photocopier, the VCR, the personal computer, and the Internet. The copyright industries, meanwhile, have seen the size of their own markets, as well as the value

[14] As with most software manufacturers, StreamCast occasionally makes upgrades of its software available to the general public. When an upgrade to the software is available, users are notified of the availability of the upgrade and given the opportunity to download the newer version. Gribble Decl. at ¶¶ 38-40. Users may decline the upgrade and the file-sharing functionality of the older versions of the Gnutella-based Morpheus software will continue to function indefinitely. *Id*.

of their content libraries, increase enormously in part due to the new markets opened up by these new consumer technologies. Over the last century, new technologies and copyrighted works have been complementary—advances in the former have, over time, invariably increased the value of the latter.

Nevertheless, in the short term, incumbent copyright owners have responded with alarm as the tools of creation, reproduction and distribution become more widely and cheaply available. The proliferation of these tools plainly makes the job of enforcing copyright laws more complex, in no small part because these technologies make it hard to distinguish an infringer from a customer.

Balancing these complex, interrelated social costs and benefits—the long-term benefits that arise from unfettered technological innovation against the short-term challenges faced by incumbent copyright industries—is a task appropriately left to Congress. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 431 (1984) ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted works.")

Congress has *repeatedly* stepped in to arbitrate between new technologies and copyright law. On some occasions, Congress has created compulsory licenses to mediate the tension. *See* 17 U.S.C. §§ 115 (compulsory "mechanical" license, crafted for the player pianos), 116 (jukeboxes), 111 (cable television), 119 (satellite television). On other occasions, Congress has resisted entirely the demands of copyright industries for controls over new technologies. *See* James Lardner, FAST FORWARD (revised ed. 2002) at 269-88 (detailing unsuccessful legislative efforts to impose taxes on blank videocassettes). In a few cases, Congress has crafted narrow technology mandates, designed to put the brakes on new technologies, *see* 17 U.S.C. § 1000, *et seq.* (levies and technology mandates applicable to digital audio recording devices), or granted additional rights to copyright owners who take steps to protect their works, *see* 17 U.S.C. § 1201 (additional protections from circumvention of technical measures used to protect copyrighted works).

Today, industry associations representing many of the Plaintiffs in this action are actively lobbying Congress to adopt a variety of legislative solutions aimed at addressing new Internet technologies, including P2P networks. *See* H.R. 5211, 107th Cong., 2d Sess. (introduced July 25, 2002) (proposed legislation authorizing copyright owners to take technical measures to halt unauthorized P2P file-sharing); S. 2048, 107th Cong., 2d Sess. (introduced March 21, 2002) (proposed legislation to impose federally-mandated content-protection technologies on software and devices).

The copyright industries, however, have not always been content with the legislative recourse afforded to them under our system of government. Instead, they have asked courts to transform copyright's secondary liability doctrines, including vicarious liability, into a mechanism for judicial policy-making. Copyright's secondary liability doctrines are particularly ill-suited to bearing the weight of this policy-making burden, as they are themselves judicial creations crafted to address concerns far removed from challenges of technology policy. *See Sony*, 464 U.S. at 434 ("The Copyright Act does not expressly render anyone liable for infringement committed by another."). In the words of the Supreme Court, "[i]n a case like this, in which Congress has not plainly marked our course, [courts] must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." *Id.* at 431. Courts have repeatedly declined the invitation to expand secondary liability theories beyond their traditional limits. *See id.* at 439 (rejecting "unprecedented" notion that secondary liability should be imposed on VCR manufacturer simply because customers may use it to infringe); *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) (rejecting effort to impose secondary liability on software vendor where software in question was used by some for infringing purposes).

StreamCast respectfully requests that this Court deny Plaintiffs' attempt to perform by judicial fiat what they have thus far been unsuccessful in accomplishing through the legislative process.

III. ARGUMENT

A. Standard for Vicarious Liability

"Vicarious liability is an 'outgrowth' of respondeat superior." *Napster,* 239 F.3d at 1022. Courts, however, have been willing to extend vicarious liability beyond the employer-employee relationship where a defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Id.* (quoting *Fonovisa v. Cherry Auction,* 76 F.3d 259, 262 (9th Cir. 1996)). In the technology context, the Ninth Circuit has further cautioned that any evaluation of the "right and ability to supervise" must be "cabined by the system's current architecture." *Id.,* 239 F.3d at 1024.

Accordingly, in order to establish a software vendor's vicarious liability for the alleged infringements committed by users of its software, a plaintiff must prove (1) that there is an underlying direct infringement; (2) that the software's "current architecture" affords the defendant the "right and ability to supervise" the infringing activities of the users which was not exercised "to its fullest extent"; and (3) that the defendant derives a direct financial benefit from the infringing activities of the users. Each of these elements must be independently shown—a failure as to any one is fatal to a plaintiff's vicarious liability claim. *See Artists Music Inc. v. Reed Publishing,* 31 U.S.P.Q.2d 1623, 1626 (S.D.N.Y. 1994) (rejecting notion that strong showing on control diminishes need to establish financial benefit); *Polygram Int'l Publishing v. Nevada/TIG Inc.,* 855 F.Supp. 1314, 1327 (D. Mass. 1994) ("each and every element" must be established).

This motion focuses solely on the "control" element. Because the undisputed facts here establish that StreamCast lacks the "right and ability to supervise" the

allegedly infringing activities of the users of the Morpheus software product, summary adjudication on Plaintiffs' vicarious liability claim is appropriate.

B. Standard for Summary Judgment

To be successful in a motion for summary judgment, defendants do not need to "negate the opponent's claim . . . [or to] . . . produce any evidence showing the absence of a genuine issue of material fact." *Idema v. Dreamworks, Inc.,* 162 F.Supp.2d 1129, 1141 (C.D. Cal. 2000). Instead, once the defendants have "show[n] – that is, point[ed] out to the district court – that there is an absence of evidence to support the nonmoving party's case," then, under Fed. R. Civ. P. 56(e), the non-moving party must identify specific facts that show there is a genuine issue for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.3d 265 (1986)).

C. Scope of Motion

StreamCast seeks partial summary judgment with respect to Plaintiffs' claims of vicarious liability arising from the use by members of the public of the Gnutella-based versions of the Morpheus software.

Disposition of this question will streamline the issues remaining for trial. It is anticipated that this action will be bifurcated into two phases, with Phase I focusing on liability and potential injunctive relief, and Phase II focusing on damages and other remedies. StreamCast's liability for the continuing distribution of Morpheus is the chief question to be resolved at Phase I, as injunctive relief is not available against prior versions that StreamCast no longer distributes.[15]

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[15] Determination of this issue also makes most sense in light of Plaintiff's repeated statements in open court that this lawsuit is principly about injunctive relief. While Plaintiffs have not been forthcoming about the scope of any injunction they may seek, it is readily apparent that the only effective injunction that could be entered against StreamCast would address the further distribution of its current Gnutella-based Morpheus software.

Versions of the Morpheus software distributed between April 2001 and February 2002, up through version 1.3.3, were based on a different technology, licensed from co-defendant Consumer Empowerment and based on the proprietary "FastTrack" networking protocol. Smith Decl. at ¶¶ 10-11. As a result of technological retaliation by Consumer Empowerment arising from a licensing dispute, the vast majority of these earlier versions of the Morpheus software are not functional today. Smith Decl. at ¶ footnote 1. Accordingly, because injunctive relief against distribution of Fastrack-based versions of Morpheus is now moot, adjudication of any vicarious liability (if any) that may arise from the earlier versions is properly left for Phase II (damages) of this action.

D. The Undisputed Facts Establish That StreamCast Has No Control Over the Peer-to-Peer Usage and Activities, Whether Infringing or Not, of Morpheus End-users

Plaintiffs here are seeking to extend the reach of vicarious liability to hold a software vendor responsible for user activities over which it has absolutely no control. Such an extension is not only unprecedented, but flies in the face of the precedents established by this and other courts.

Courts examining the "control" element of vicarious liability have noted that the cases fall along a spectrum. *See Adobe Systems Inc. v. Canus Productions,* 173 F.Supp.2d 1044, 1053 (C.D. Cal. 2001). At one end of the "control" spectrum is the employer-employee relationship, the heartland and origin of copyright's vicarious liability doctrine. *See, e.g., Screen Gems-Columbia Music v. Mark-Fi Records,* 327 F. Supp. 788, 792 (S.D.N.Y. 1971) (advertising agency employee's involvement in infringing conduct creates vicarious liability for his employer), *rev'd on other grounds,* 453 F.2d 552 (2d Cir. 1972). At the other end is the landlord-tenant relationship, where courts have consistently refused to impose vicarious copyright liability. *See Shapiro, Bernstein & Co. v. H.L. Green Co.,* 316 F.2d 304, 307 (2d Cir. 1963). In certain situations courts have been willing to extend the reach of vicarious

liability along the spectrum of control to include non-employees where there exists a right and ability to supervise and control the allegedly infringing activity. *See id.* (discussing imposition of liability on dancehall owners for the infringing activities of entertainers hired to entertain guests and extending the category to include a department store for its concessionaire's sale of counterfeit recordings).

The Ninth Circuit opinions in the *Napster* and *Fonovisa* cases represent the high water mark for the "control" element of vicarious liability. In *Fonovisa*, the Ninth Circuit was satisfied that the "control" element could be satisfied for pleading purposes by an allegation that swap meet operator Cherry Auction "had the right to terminate vendors for any reason whatsoever and through that right had the ability to control the activities of vendors on the premises." *Fonovisa*, 76 F.3d at 262. In the court's view, a contractual relationship that effectively reserved to the defendant an expansive right to police vendor conduct on the swap meet's premises could be "sufficient to satisfy the control requirement." *Id.* at 263.

In *Napster*, the Ninth Circuit reiterated that a broad reservation of rights, coupled with Napster's ability to block access to its own facilities could satisfy the control requirement. *See Napster,* 239 F.3d at 1023-24. The court, however went on to reprimand the district court for failing to recognize that "the boundaries of the premises that Napster 'controls and patrols' are limited," and cautioned that "Napster's reserved 'right and ability' to police is cabined by the system's current architecture." *Id.* at 1024.

Accordingly, the *Napster* court recognized that, in the technology context, the principles announced in *Fonovisa* are properly bounded by the limitations inherent in the architecture of the technology being challenged; a defendant has the obligation to police only within the "premises" that it controls, and only within the limits of the "current architecture" of the premises in question. In Napster's case, the Ninth Circuit found a substantial likelihood of liability based on the fact that Napster's file

name indices,[16] which resided on Napster's computer servers, were "within the premises that Napster has the ability to police" and that Napster had the right and ability to block infringers from accessing the several indices. *Id*.

Analysis of the control element for vicarious liability under Napster therefore requires analysis of three factors. First, it must be determined what "premises" a software vendor controls and may be required to police; second, it must be determined what rights and abilities to police the relevant premises the vendor maintains; and third, it must be determined whether the vendor failed to police the premises "to the fullest extent."

1. The limited "premises" which StreamCast may be obliged to police militates against a finding of control over any potentially infringing activity

It is axiomatic that a defendant cannot be held liable for alleged infringements that he is powerless to prevent. Unlike Cherry Auction's physical swap meet property or Napster's private computer servers containing file-name indices, StreamCast has very little in the way of "premises" that it can police. In fact, the only "premises" that StreamCast owns or controls are its own computer servers, which *indisputably* contain no copyrighted materials of which Plaintiffs complain and *indisputably* contain no file indices or lists of such files. As discussed in detail above, the Gnutella network itself is created and maintained by millions of individuals and entities that act independently, none of which are affiliated with StreamCast. Moreover, because of the highly decentralized structure of the Gnutella network, no "index" of files ever exists on StreamCast's computers.

[16] Napster's indices were comprised of lists of all the MP3 file names that were available at any moment for download from Napster users. See *Napster*, 239 F.2d at 1011-12.

Accordingly, unlike Napster, StreamCast's "premises" do not contain indices of files that StreamCast may block or "police" and, moreover, are not involved in any way with the allegedly infringing activity about which Plaintiffs complain.

2. StreamCast has neither the right nor ability to police the allegedly infringing conduct about which Plaintiffs complain

StreamCast's relationship to any infringing users is quite different from that of Cherry Auction or Napster. First, StreamCast maintains no contractual relationship with Morpheus users,[17] and hence has no legal right to prevent those who have downloaded the software from using it, whether for infringement or any other purpose. Second, as discussed in detail above, the current architecture of the Morpheus Gnutella-based software makes it impossible for StreamCast to control the file-sharing activities of Morpheus users. Because the Gnutella network is self-sustaining and maintained by individuals and entities not controlled by or affiliated with StreamCast, StreamCast has no ability to control who may or may not have access to the network. Moreover, because the Gnutella protocol does not require users to "log-on" with user specific names or accounts, StreamCast has no ability to restrict access to the network.

Not only do the *Napster* and *Fonovisa* cases fail to support a finding of control here, but other vicarious liability precedents preclude such a finding. For example, in *Ellison v. Robertson*, 189 F.Supp.2d 1051 (C.D. Cal. 2002), Judge Cooper of this Court held that America Online[18] ("AOL") did not have the "right and ability to control" the infringing activity in question, despite having considerably more control over the infringing activity there than StreamCast has here, and despite the direct

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[17] Although StreamCast has no contractual relationship with Morpheus users, the Wuld Media shopping software that is bundled with Morpheus does require that users agree to an "end user license agreement." Smith Decl. at ¶ 40. As discussed *supra*, none of the third party bundled applications is involved in the P2P networking functions of the Morpheus software. *Id*. Moreover, StreamCast itself does not condition use of its software based on any such agreement. *Id.*

[18] AOL is an affiliate of the "Time Warner" Plaintiffs in this action.

involvement of AOL's own servers in content trafficking. *Ellison* involved the unauthorized reproduction of the literary works of author Harlan Ellison on the "alt.binaries.e-books" newsgroup. *See id*. at 1053. Although it was originally a non-AOL subscriber who reproduced and posted the works to the newsgroup, AOL's newsgroup servers automatically reproduced, stored, and made the works available to AOL subscribers. *See id*. at 1054. In ruling against Ellison's vicarious liability claim, the court found that AOL was able to delete or block access to the infringing materials after they appeared on AOL's servers. *See id*. at 1062 (finding that AOL "could delete or block users' access to the infringing posting"). The servers maintained by AOL would thus appear to fall plainly within the "premises" controlled by AOL. Nevertheless, because AOL's right and ability to control did not extend to the "infringing activity at the root level," the court went on to hold this level of control was "insufficient to constitute 'the right and ability to control the infringing activity' as that term is used in the context of vicarious copyright infringement." *Id.*

When compared to AOL's control over its own newsgroup servers in *Ellison*, StreamCast has even less control over the activities of those who use the Morpheus software. StreamCast has no control over the file-sharing activities of its users. As described above, the aspects of the software that StreamCast can influence convey no control to the any infringing uses of the software. If StreamCast were to cease operation and shutter all of its "premises," users of the Morpheus software would continue to be able to join the Gnutella network, perform searches, and share files. StreamCast's own "policies" web page expressly acknowledges this lack of control over users of the software: "Due to the nature of peer-to-peer software, StreamCast Networks is unable to monitor or control the types of files shared within the Morpheus community. If you locate a file being shared by a user who you believe may be in violation of copyright law, please report your concerns to the user directly." Smith Decl. at ¶ 39.

Similarly, StreamCast has less control over those who use the Morpheus software than landlords have over their tenants. As noted above, it is well-established that the landlord-tenant relationship generally will not support a vicarious copyright liability claim. *See Shapiro,* 316 F.2d at 307. This notwithstanding the fact that landlords are in many states able to evict tenants upon discovering that the premises are being used for unlawful activity (presumably including copyright infringement). *See* Restatement (Second) of Property, Land. & Ten. § 12.5; Cal Civ. Code § 1161(4); N.Y. Real Prop. § 231. Landlords are also able to restrict by contract the uses to which a property may be put. StreamCast has no analogous right or ability to dispossess users of the Morpheus software, or otherwise prevent its continued use. As with most other software, from Microsoft's Internet Explorer to QUALCOMM's Eudora email client, once user has installed the software, there is nothing StreamCast can do to control the file-sharing capabilities of the software.

3. Plaintiffs cannot show that StreamCast failed to exercise its limited ability to control its premises "to the fullest extent"

The Ninth Circuit did not impose strict liability on Napster for infringements occurring on its system; instead, it imposed a further burden on Plaintiffs to establish that Napster failed to exercise its right and ability to control of its premises "to the fullest extent." *Napster*, 239 F.3d at 1023 ("To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent.") As discussed above, unlike in *Napster*, there are no central file indices on any computers owned or controlled by StreamCast. It is incontrovertible that any infringing activity Plaintiffs complain of did not occur on StreamCast's "premises." As such, Plaintiffs cannot show that StreamCast failed to exercise its right and ability to control to its fullest extent, as any alleged "failure" of StreamCast to exercise control must be "cabined by the current architecture" of Morpheus. *Id*. at 1024.

IV. CONCLUSION

StreamCast has neither the right nor ability to supervise the activities of Morpheus users. It cannot block access to the Gnutella network, or prevent the trading of copyrighted material. There is no genuine issue of material fact with respect to this element of Plaintiffs' vicarious liability claims. Because the Plaintiffs cannot meet their burden of proof to show StreamCast has this right and ability to supervise infringing activity, partial summary judgment should be entered in favor of StreamCast on Plaintiffs' vicarious liability claims as they relate to the continuing distribution of the Gnutella-based versions of the Morpheus software.

Dated: September 9, 2002

Respectfully submitted,

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TABLE OF CONTENTS