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14 UNITED STATES DISTRICT COURT

15 CENTRAL DISTRICT OF CALIFORNIA

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

18 Plaintiffs,

19 v.

20 GROKSTER, LTD., et al.,

21 Defendants.

22 JERRY LEIBER, et al.,

23 Plaintiffs,

24 v.

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

26 Defendants.

27 AND RELATED COUNTERCLAIMS.
28

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

**NOTICE OF MOTION AND MOTION
BY PLAINTIFFS FOR SUMMARY
JUDGMENT ON LIABILITY OR,
ALTERNATIVELY, PARTIAL
SUMMARY JUDGMENT AGAINST
DEFENDANTS STREAMCAST
NETWORKS, MUSICCITY
NETWORKS, INC., GROKSTER, LTD.,
AND KAZAA B.V.;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: December 2, 2002

Time: 1:30 p.m.

Ctrlm: The Hon. Stephen V. Wilson

[REDACTED PUBLIC VERSION]

1 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

2
3 PLEASE TAKE NOTICE that, on December 2, 2002, at 1:30 p.m., or as soon
4 thereafter as counsel may be heard, in the Courtroom of the Honorable Stephen V.
5 Wilson, 312 N. Spring Street, Los Angeles, California 90012, all plaintiffs in Case
6 Nos. CV 01 08541 SVW (PJWx) and CV 01 09923 SVW (PJWx) (collectively
7 "Plaintiffs") will and hereby do move the Court pursuant to Federal Rule of Civil
8 Procedure 56 for summary judgment against defendants Streamcast Networks,
9 formerly known as MusicCity.com, Inc., MusicCity Networks, Inc., Grokster, LTD.,
10 and Kazaa B.V., formerly known as Consumer Empowerment B.V. a/k/a FastTrack
11 ("Kazaa") (collectively "Defendants") on the issue of Defendants' liability to
12 Plaintiffs for contributory copyright infringement and/or on the issue of Defendants'
13 liability to Plaintiffs for vicarious copyright infringement.

14 This Motion is made on the grounds that, as to the foregoing, there is no
15 genuine issue as to any material fact and that Plaintiffs are entitled to judgment on
16 those issues as a matter of law.

17 This Motion is and will be based on:

- 18 ▪ this Notice of Motion and Motion;
 - 19 ▪ the accompanying Memorandum of Points and Authorities;
 - 20 ▪ the Statement of Uncontroverted Facts and Conclusions of Law filed
21 concurrently herewith;
 - 22 ▪ the following Declarations filed concurrently herewith (unless otherwise
23 indicated):
- 24 Mark Eisenberg ("Eisenberg Decl.")
25 Richard Cottrell ("Cottrell Decl.")
26 David Seklir ("Seklir Decl.")
27 Michael Ostroff ("Ostroff Decl.")
28 Derek Ferguson ("Ferguson Decl.")

- 1 Wade Leak ("Leak Decl.")
- 2 Claire Robinson ("C. Robinson Decl.")
- 3 Jeremy Williams ("Williams Decl.")
- 4 Ben Zinkin ("Zinkin Decl.")
- 5 Paul J. Vidich ("Vidich Decl.")
- 6 Frank Creighton (Creighton Decl.)
- 7 Prof. Leonard Kleinrock ("Kleinrock Decl.")
- 8 Patrick Breslin ("Breslin Decl.")
- 9 Vance Ikezoye ("Ikezoye Decl.")
- 10 David Hyman ("Hyman Decl.")
- 11 Linda Bodenstein ("Bodenstein Decl.")
- 12 George M. Borkowski ("Borkowski Decl.")
- 13 Melanie Breen ("Breen Decl.")
- 14 Lamont Dozier ("Dozier Decl.")
- 15 Petersen W. Jaegerman ("Jaegerman Decl.")
- 16 Jerry Leiber ("Leiber Decl.")
- 17 Mike Stoller ("Stoller Decl.")
- 18 Irwin Z. Robinson ("I. Robinson Decl.")
- 19 Michael Goldsen ("Goldsen Decl.")
- 20 Jacqueline C. Charlesworth ("Charlesworth Decl.")
- 21 Charles J. Sanders ("Sanders Decl.")
- 22 Jonathan Cole ("Cole Decl.")
- 23 Gordon Shock ("Shock Decl.")
- 24 Michael-Ann Brown ("Brown Decl.")
- 25 Ken Jacobsen ("Jacobsen Decl.")
- 26 Mary McGuire ("McGuire Decl.")
- 27 Jared Jussim ("Jussim Decl.")
- 28 Scott M. Martin ("Martin Decl.")

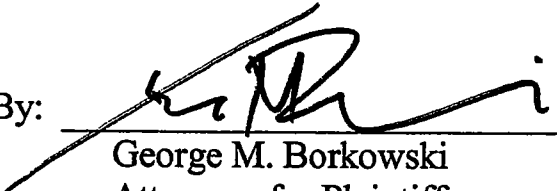
1 Holley Leff-Pressman ("Leff-Pressman Decl.")
2 Patricia Villalobos ("Villalobos Decl.")
3 Michael Moore ("Moore Decl.")
4 the depositions of Steve Griffin ("Griffin Depo."), Darrell Smith ("Smith
5 Depo."), Michael Weiss ("Weiss Depo."), Daniel Rung ("D. Rung Depo."), Matthew
6 Rung ("M. Rung Depo."), William Kallman ("Kallman Depo."), Jeffrey Tung ("Tung
7 Depo."), Kevin Bermeister ("Bermeister Depo."), Anthony Rose ("Rose Depo."), Jeff
8 Hardison ("Hardison Depo.") and certain exhibits thereto, all attached as Exhibits to
9 the Borkowski Declaration;

- 10 ▪ Defendants' Answers and Amended Answers in this Action;
- 11 ▪ Defendants' interrogatory and other discovery responses;
- 12 ▪ all matters of which this Court may take judicial notice;
- 13 ▪ all pleadings and papers on file in this action; and
- 14 ▪ any further evidence and argument presented at or prior to the hearing or
15 ruling on this Motion.

16 This Motion is filed pursuant to this Court's July 12, 2002, Order and,
17 consequently, the pre-motion conference of counsel requirements of Local Rule 7-3
18 do not apply with respect to this Motion.

19
20 Dated: September 9, 2002

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CASES

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