

Case No. 02-4125

**In the
United States Court of Appeals
for the Seventh Circuit**

IN RE: AIMSTER COPYRIGHT LITIGATION

**On Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division**

**Case No. 01-C-8933
The Honorable Marvin E. Aspen**

**MOTION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF**

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The Electronic Frontier Foundation, Streamcast Networks, Grokster, Ltd., Public Knowledge, The Computer & Communications Industry Association, The American Association of Law Libraries, Digital Future Coalition, NetCoalition, and The Music Library Association, the Home Recording Rights Coalition and the Consumer Electronics Association (collectively, “Amici”) hereby move pursuant to Federal Rule of Civil Procedure 29(e) for leave to file the accompanying *amici curiae* brief in the pending appeal captioned *In re Aimster Copyright Litigation*, No. 02-4125 (hereafter “*In re Aimster*”). The brief is neutral as to the outcome of the appeal, and brings to this Court’s attention an important intervening ruling handed down after substantive briefing had closed, as well as additional information regarding the importance of consistent and proper application of secondary copyright infringement principles to innovators and technologists of every stripe, including some of the Amici who are litigants in parallel litigation who may be affected by this Court’s decision in this appeal.

I. Introduction.

Just a few weeks ago, on April 25, 2003, the day appellant’s reply brief was served in this case, U.S. District Judge Stephen Wilson issued his ruling on cross-motions for summary judgment in *Metro-Goldwin Mayer v. Grokster, Ltd.*, __ F.Supp.2d ___, 2003 WL 1989129, No. CV 01-08541 (C.D. Cal. April 25, 2003). The *MGM v. Grokster* litigation is plainly relevant to this Court’s consideration of the appeal in *In re Aimster*—both cases involve “file-sharing” software, include a largely overlapping set of entertainment industry plaintiffs, and turn on the application of the same controlling questions of law.

Not only are these two cases closely related, but both arise in a larger national context of recent lawsuits that have been brought by entertainment industry plaintiffs to challenge and extend secondary liability principles in copyright law. Amici, who include the prevailing defendants in the *Grokster* case, are uniquely suited to illuminate the larger copyright and technology policy context in which *In re Aimster* arises, and will be

affected by this Court's decision in this case.

None of the briefs filed by the parties in this case has addressed the recent ruling in *MGM v. Grokster*, nor have they addressed the larger importance to technology innovators generally of consistent and proper application of secondary copyright liability principles.

II. Parties Amici Curiae.

Amici are united by their strong interest in seeing that secondary copyright liability principles be consistently and properly applied to technologists across the federal courts.

StreamCast Networks, Inc., is the creator, owner or licensee of the Morpheus software product, and is a leading global communications technology company that continues to revolutionize Internet digital media distribution and communications by way of a unique software-driven solution that enables users to communicate with one another efficiently on a decentralized network. The Morpheus software product allows users to connect together on a decentralized basis with other users of the Morpheus software as well as other decentralized peer-to-peer technologies to form a decentralized user network.

Grokster, Ltd. distributes the Grokster file sharing product, which allows seamless, decentralized exchange of any form of information across the internet. Grokster provides a virtually cost-free solution for the distribution of works by thousands of independent musicians and artists, who otherwise would be unable to reach a worldwide audience.

The Electronic Frontier Foundation is a membership-supported nonprofit group devoted to protecting free expression and civil liberties in the digital age. Among the interests EFF represents are those of individual hobbyists and technologists whose freedom to innovate can be stifled by overbroad application of copyright laws. As part of its mission to ensure consistent and balanced application of secondary copyright

infringement principles to new technologies, EFF has served as pro bono counsel to Streamcast Networks in the *MGM v. Grokster* litigation since October 2001.

Public Knowledge is a Washington, D.C. based public-interest advocacy and research organization dedicated to fortifying and defending a vibrant “information commons” – the shared information resources and cultural assets that we own as a people. It works with diverse creators, consumers, civic groups, and enlightened businesses to ensure that public access, creativity, and competition are embodied in the digital age. One of its core goals is to ensure that intellectual property law and policy reflect the cultural bargain intended by the framers of the Constitution: providing an incentive to creators and innovators while benefiting the public through the free flow of information and ideas.

The Computer & Communications Industry Association ("CCIA") is a trade association that has represented computer technology and telecommunications companies for nearly 30 years. CCIA's member companies, listed on the association's website at www.cciagnet.org/membership.php3, range from small start-ups to global leaders that operate in all aspects of the high-tech economy. CCIA's members include computer and communications companies, equipment manufacturers, software developers, service providers, resellers, integrators and financial services companies.

The American Association of Law Libraries (AALL) is a nonprofit educational organization with 5,000 members dedicated to providing leadership and advocacy in the field of legal information and information policy.

Digital Future Coalition (DFC) is committed to striking an appropriate balance in law and public policy between protecting intellectual property and affording public access to it. The DFC is the result of a unique collaboration of many of the nation's leading non-profit educational, scholarly, library, and consumer groups, together with major commercial trade associations representing leaders in the consumer electronics, telecommunications, computer, and network access industries. Since its inception in

1995, the DFC has played a major role in the ongoing debate regarding the appropriate application of intellectual property law to the emerging digital network environment.

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies on the key legislative and administrative proposals affecting the online world. NetCoalition provides creative and effective solutions to the critical legal and technological issues facing the Internet. By enabling industry leaders, policymakers, and the public to engage directly, NetCoalition has helped ensure the integrity, usefulness, and continued expansion of this dynamic new medium.

The Music Library Association is the professional organization in the United States devoted to music librarianship and to all aspects of music materials in libraries. Founded in 1931, MLA provides a forum for study and action on issues that affect music libraries and their users. MLA and its members make significant contributions to librarianship, publishing, standards and scholarship, and the development of new information technologies. In the forefront of contemporary librarianship, MLA assures that users of music materials will be well served by their libraries.

The Home Recording Rights Coalition, founded in 1981, is a leading advocacy group for consumers' rights to use home electronics products for private, non-commercial purposes. The members of HRRC include consumers, retailers, manufacturers and professional servicers of consumer electronics products.

The Consumer Electronics Association (CEA) represents more than 1,000 corporate members involved in the design, development, manufacturing, distribution and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. Combined, CEA's members account for more than \$85 billion in annual sales. CEA's resources are available online at www.CE.org, the definitive source for information about the consumer electronics industry. CEA also sponsors and manages the International CES - Defining Technology's

Future.

III. Statement of Relevant Facts

In re Aimster is a suit brought by the a number of entertainment industry entities against defendants John Deep, AbovePeer Inc. and BuddyUSA Inc. (collectively, “Aimster Defendants”) in an effort to hold them liable for the infringing activities of those who use the Aimster (later known as Madster) peer-to-peer file-sharing technology developed by the Aimster Defendants, which the plaintiffs liken to the now-defunct Napster.

The instant appeal is from the grant of a preliminary injunction by the district court in favor of a subset of the plaintiffs (collectively, “Music Industry Plaintiffs”) against the Aimster Defendants. Briefing on the merits of the appeal by the parties began on March 14, 2003 and was completed on April 28, 2003. This Court has set oral argument for June 4, 2003.

The *MGM v. Grokster* litigation is currently pending before Judge Wilson in the Central District of California. Just as in *In re Aimster*, that litigation was brought by a number of entertainment industry entities seeking to impose contributory and vicarious copyright liability on several technology companies that produce peer-to-peer “file sharing” software. The plaintiffs in both actions overlap considerably, and these parties, in turn, have employed a number of the same counsel in both cases.

The *MGM v. Grokster* litigation is considerably further along than the *In re Aimster* action, which has been slowed by the bankruptcy of the Aimster Defendants. On April 25, 2003, Judge Wilson granted partial summary judgment in favor of Amici Streamcast Networks and Grokster. *See MGM v. Grokster*, 2003 WL 1989129. In the course of his ruling, Judge Wilson considered and rejected many of the same arguments that the Entertainment Plaintiffs have made in the *In re Aimster* appeal before this Court.

Upon reviewing the ruling in the *MGM v. Grokster* ruling, Amicus EFF concluded that it would be relevant to this Court’s consideration of the *In re Aimster*

appeal. Accordingly, EFF began the process of seeking pro bono counsel to assist with the drafting of an amicus curiae brief and soliciting the participation of other amici.¹ See von Lohmann Decl. at ¶ 2. Qualified pro bono counsel was ultimately retained, and the accompanying brief prepared in as expeditious a manner as was practical.

Once counsel had been retained, the parties to the *In re Aimster* appeal were notified on May 15, 2003 of Amici's intention to file an amicus curiae brief. See von Lohmann Decl. at ¶ 3. Counsel representing Plaintiffs-Appellees responded to the notice the same day, indicating their "strong opposition." See von Lohmann Decl. at ¶ 4. The Aimster Defendants have consented to the filing of Amici's brief. See von Lohmann Decl. at ¶ 5.

IV. Legal Standard.

Whether to accept an amicus curiae brief rests with the discretion of the Court. See *Nat'l Org. of Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000); *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir.1997) (chambers opinion). While Federal Rule of Appellate Procedure 29 provides that "[a]n amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed," the rule also empowers the Court to grant leave for later filing, specifying the time within which an opposing party may answer. See F.R.A.P 29(e).

While it is not the policy of this Court "to grant rote permission to file an amicus curiae brief," such briefs are appropriate "when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." *Nat'l Org. of Women v. Scheidler*, 223

¹ As a membership-supported nonprofit organization, EFF's limited resources did not permit the retention of private counsel except on a pro bono basis.

F.3d at 617; *accord Ryan v. CFTC*, 125 F.3d at 1063.

V. Argument

By bringing Judge Wilson’s April 25 opinion in *MGM v. Grokster* to the attention of the Court and placing that ruling in context, Amici offer “information[] that can assist the court of appeals beyond what the parties are able to do.” *Id.* Because the ruling was issued after substantive briefing in *In re Aimster* was completed, the parties were not able to bring the case to the attention of this Court.²

Judge Wilson’s April 25 ruling is plainly relevant to this Court’s consideration of the *In re Aimster* appeal. As noted above, both cases are copyright infringement actions brought against developers of “file-sharing” software, involve overlapping parties and counsel, and ultimately turn on the proper application of the same secondary copyright liability principles. In fact, in his ruling, Judge Wilson specifically discusses the district court’s ruling in *In re Aimster*. *See at **.

In addition to the ruling itself, Amici are able to relate to the Court additional relevant information relating to the *MGM v. Grokster* litigation. In particular, the Aimster Plaintiffs have reprised in their briefs to this Court many of the very same arguments they made in pressing their motion for summary judgment in *MGM v. Grokster*.

Finally, two of the Amici, Streamcast Networks, Inc. and Grokster, Limited, have “a direct interest in another case, and the case in which they seek permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest.” *See NOW v. Scheidler*, 233 F.3d at 617. The plaintiffs in *MGM v. Grokster* have announced their intent immediately to appeal Judge Wilson’s ruling to the Ninth Circuit. While a Seventh Circuit ruling in *In re Aimster* would not be binding on the

² Although the Aimster Defendants did not file their reply brief with this Court until April 28, Amici have been informed that the substantive drafting had to be completed on the morning of Friday, April 25 in order to leave adequate time to complete the filing on Monday, April 28. Accordingly, counsel for the Aimster Defendants was not able to address Judge Wilson’s ruling in the briefs submitted to this Court.

Ninth Circuit in the eventual appeal of *MGM v. Grokster*, any intervening ruling by this Court is certain to exert an important precedential influence on the Ninth Circuit. Accordingly, as parties to that appeal, this Court's ruling in *In re Aimster* will materially affect the interests of Amici Streamcast and Grokster.

Participation by Amici is also appropriate insofar as Amici are able to illuminate the larger national context in which *In re Aimster* is playing out in a way that the Aimster Defendants are not. The proper application of secondary copyright liability principles to new Internet technologies has been hotly in dispute ever since litigation against the infamous Napster erupted in 1999. Many of the Music Industry Plaintiffs have been involved in a variety of cases nation-wide intended to shape the jurisprudence of secondary copyright infringement, of which *In re Aimster* is only one of the more recent.

Amici represent the interests of a wide array of technologists, all of whom depend upon a consistent and proper application of secondary copyright liability principles in order to structure their businesses and protect their interest in innovation. Accordingly, Amici have been following the array of recent secondary liability cases closely, as well as the long-term impact of secondary copyright liability principles on the technology sector generally.

Amici are better positioned than counsel for the Aimster Defendants to shed light on the larger national legal context in which *In re Aimster* arises. Counsel for the Aimster Defendants have not had the benefit of closely monitoring these nation-wide jurisprudential developments, as have Amici, nor of exploring the potential impact of these developments on the technology industry generally. In fact, the bankruptcy of the Aimster Defendants suggests that counsel may have been restricted by the dwindling resources of their clients.

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VI. Conclusion

For the reasons set forth above, Amici respectfully seek leave to file the accompanying amicus curiae brief.

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