Andrew P. Bridges, State Bar No. 122761
Richard Nessary, State Bar No. 180682
Jennifer A. Golinveaux, State Bar No. 203056
Terri Y. Chen, State Bar No. 209854
Alexander D. MacGillivray, State Bar No. 212770
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 493-6811

Cindy A. Cohn, State Bar No. 145997
Fred von Lohmann, State Bar No. 192657
Robin D. Gross, State Bar No. 200701
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x 123
Facsimile: (415) 436-9993

Joseph R. Taylor, State Bar No. 129933
Jeffrey K. Compton, State Bar No. 142969
Max J. Sprecher, State Bar No. 169285
LINER YANKELEVITZ SUNSHINE & REGENSTREIF
3130 Wilshire Boulevard, Suite 200
Santa Monica, CA 90403
Telephone: (310) 881-2192
Facsimile: (310) 453-5901

Attorneys for Defendants
MusicCity.com, Inc. (now known as
StreamCast Networks, Inc.) and
MusicCity Networks, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

METRO-GOLDWYN-MAYER STUDIOS INC., et al., Plaintiffs, vs. GROKSTER, LTD., et al., Defendants.	Case No. 01-08541 SVW (PJWx) MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANTS STREAMCAST NETWORKS, INC. (FORMERLY KNOWN AS MUSICCITY.COM, INC.) AND MUSICCITY NETWORKS, INC. IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATIONS OF DARRELL SMITH, WILLIAM CLAY SHIRKY, ANDREW P. BRIDGES, GREGORY

NEWBY, M. TALLY GEORGE, SEAN L. MAYERS, JOHN PERRY BARLOW, BREWSTER KAHLE, RICHARD PRELINGER, STEVE W. GRIFFIN AND RICHARD NESSARY IN SUPPORT OF MOTION

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

Date: February 25, 2002
Time: 1:30 p.m.
Ctrm: 6 (Spring Street)
Hon. Stephen V. Wilson

I, Brewster Kahle, hereby declare:

My name is Brewster Kahle. I reside in San Francisco, California.

2. I am a member of the board of directors of the Internet Archive (the "Archive"), which I founded in 1996. I also hold the position of the co-founder, President, CEO, and Chairman of the Board of Alexa Internet, now a wholly-owned subsidiary of Amazon.com. Alexa is a leading provider of Internet navigation and search services.

3. Before founding the Internet Archive, I invented the WAIS (Wide Area Information Server) system and, in 1992, founded WAIS Inc., an electronic publishing company. Before that, I served as senior engineer for Thinking Machines, a parallel supercomputer maker, between 1983 and 1989. I earned a B.S. from M.I.T. in 1982.

4. The Archive is a 501(c)(3) public nonprofit that was founded to build an "Internet library" with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in digital format. The Archive currently maintains the largest collection of text in the world, and these collections are publicly available through the Internet. Physically located in the Presidio of San Francisco, California, the Archive receives data donations from a multitude of resources, including libraries, educational institutions, and private companies.

5. While the importance of the public domain is widely recognized, providing universal public access to this vast cultural resource has, as a practical matter, been difficult. Publishers have been unwilling to keep public domain works in publication. For example, of the 3,470 books published in the United States in 1910, today only 180 titles are available for purchase from any publisher worldwide. The same is true for many of the films of the silent era. Libraries and archives, for their part, have been hampered by limited geographic reach and the costs of acquisition, preservation and storage of physical materials.

6. By harnessing digital technology, however, it has become possible to make the full range of public domain information and knowledge freely and universally available. Recognizing this, governments, libraries, and private corporations around the world have embarked on projects to digitize public domain works.

7. One of the primary aims of the Archive is to harness the unique power of the Internet to make our cultural heritage freely accessible to all. For example, the Archive recently digitized 1,001 important public domain archival films from the collection of the Prelinger Archives. These films are now available at no charge for download on the Internet at http://www. archive.org/movies.

8. During late 2001, the Prelinger films were downloaded from archive.org over one hundred thousand times. In contrast, during the entirety of the year 2000, only 2,000 or so of the Prelinger Archives' collection of 48,000 films were accessed by the public through purchases of stock footage. During that same year, only 200 physical visits to the archives occurred.

9. Digital archiving and distribution of public domain films is particularly valuable at a time when digital technologies are putting new tools of expression into the hands of an unprecedented number of people. For example, today every Apple iMac computer comes bundled with iMovie software that permits individuals to manipulate and edit video footage, including the Prelinger films offered by the Archive.

10. In order to highlight some of these new possibilities, the Archive recently sponsored a filmmaking contest. It asked amateur filmmakers around the world to create a short film showing a perspective on an historical event associated with war. Entrants were asked to limit their resources to public domain content found in archives around the Internet, including the Prelinger films offered by the Archive. Submissions came from around the world, including from a high school class in the District of Columbia and an individual in Sweden. All the

submissions, including the winning entry, can be found at http://ftp.archive.org/html/contest01/gallery.htm. This kind of new use and reuse of public domain content depends upon free public access to public domain film archives.

1 Unfortunately, while the Internet today has great promise as a low-cost, global distribution mechanism, it still leaves much to be desired for digital libraries like the Archive. Currently most media on the Internet is delivered from centralized servers that either permit individuals to make a copy of a file via download or to access the file in near-real-time via streaming. Each approach requires that the Archive bear the costs associated with data storage and bandwidth.

2. With respect to bandwidth costs, in particular, there is the additional cost penalty that comes with popularity. Where a central server is used, the more popular a work is, the more bandwidth expense will be associated with making it available. To take one example, when network traffic to the Archive servers exceeded the bandwidth we had anticipated, the result was a very large "overage" bill from our Internet service provider. This creates perverse incentives, as libraries and archives who would otherwise be eager to make available the most popular public domain works may find themselves hampered by the "popularity penalty."

3. Centralized server solutions have other limitations, as well. For example, efforts to make information globally available from a central server often face the realities of network congestion and capacity limits on trans-national telecommunications conduits. As a result, it is far more effective to distribute copies of files to a global network of servers, maximizing the chances that a requesting party will be able to access a work from a local server. Companies like Akamai Technologies provide this service to the corporate sector, but at a high cost that cannot be supported by free archives.

14. Peer-to-peer file sharing technologies, like those offered by the Morpheus, Grokster and KaZaA software, overcome many of the limitations of centralized download and streaming technologies and constitute a valuable advance in technology for those seeking to provide universal access to public domain material.

5 For example, in a peer-to-peer file sharing network, bandwidth and storage costs are shouldered by the community of users rather than the Archive. This is especially crucial where large multimedia files are concerned, such as the Prelinger films.

6. Peer-to-peer file sharing technologies also can function as a "public Akamai." As a file is downloaded and shared within a peer-to-peer file sharing network, it spreads to locations around the world, thus offering the same sort of global network infrastructure offered by companies like Akamai. Because this global redundancy is a natural outgrowth of peer-to-peer networks, however, this feature is provided at no cost to the originating library or archive.

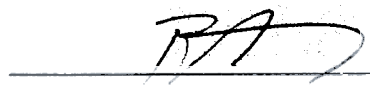
17. Finally, peer-to-peer file sharing technologies also offer a solution to the perverse incentives that arise from the "popularity penalty" discussed above. In a peer-to-peer network, the more popular a work is, the more users will be sharing it. This, in turn, will lower the bandwidth costs to the originating library because the content will be accessible from other members of the peer-to-peer community. These benefits arise organically, without the need for any central administration or expense on the part of the archive or library.

8 There is a striking elegance to the fact that, in a peer-to-peer file sharing network, the costs of providing access to public domain resources is borne by the community of users themselves. Archives and libraries can thus devote a greater share of their resources to digitizing and preserving public domain works, rather than to expenses associated with access and distribution.

19. For these reasons, the Archive has been actively exploring the use of peer-to-peer file sharing technologies. For example, the Archive made the Prelinger films available through a peer-to-peer file sharing network using technology developed by a company called Flycode. While the results were promising, the company failed before many people used that system.

20. The Prelinger films are well-suited to distribution through the community of Morpheus-Grokster-KaZaA users. Those who download the Prelinger films from archive.org are entitled to redistribute those files, and the Archive welcomes their redistribution by the Morpheus-Grokster-KaZaa community of users.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed in San Francisco, California on January 16, 2002, 2002.



Brewster Kahle