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 7 Kazaa BV (formerly known as Consumer Empowerment BV)

8 UNITED STATES DISTRICT COURT  
 9 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

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

12 Plaintiffs,

13 v.

14 GROKSTER, LTD., et al

15 Defendants.

CASE NO. CV 01-08541 SVW  
 (RNBx)

KAZAA BV'S REPLY IN SUPPORT  
 OF DEFENDANTS' MOTION FOR  
 PARTIAL SUMMARY JUDGMENT

Date: March 4, 2002  
 Time: 1:30 p.m.  
 Dept. 6 (Spring St.)  
 Judge: Hon. Stephen V. Wilson

16  
 17 AND RELATED COUNTERCLAIMS

**BY FAX**

18  
 19 **Introduction**

20 In their opposition papers, the MGM Plaintiffs ("Plaintiffs") have failed to  
 21 offer evidence that controverts the facts set forth in Paragraph Nos. 2-7 of  
 22 MusicCity's Statement of Uncontroverted Facts, which relate to various capabilities  
 23 of the Morpheus software product. Accordingly, while Kazaa remains convinced that  
 24 defendant MusicCity is entitled to the full relief that it has requested in its Motion for  
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1 Partial Summary Judgment,<sup>1</sup> Kazaa and the other defendants are entitled at the very  
2 least to an order deeming Facts 2-7 established for purposes of this case.

### 3 Argument

4 Federal Rule of Civil Procedure 56(d) provides that even if a motion for  
5 summary judgment or partial summary judgment cannot be granted in its entirety, the  
6 court "shall if practicable ascertain what material facts exist without substantial  
7 controversy." Fed. R. Civ. Proc. 56(d). That Rule further directs that the court "shall  
8 thereupon make an order specifying the facts that appear without substantial  
9 controversy." Id. See Diamond Door Co. v. Lane-Stanton Lumber Co., 505 F.2d  
10 1199, 1202 (9<sup>th</sup> Cir. 1974) (where a summary judgment motion cannot be granted in  
11 its entirety, "the court is to make an order specifying the facts that appear without  
12 substantial controversy. . . ."); Goe Eng'g. Co. v. Physicians Formula Cosmetics  
13 Inc., 1997 U.S. Dist. LEXIS 23627, \*76-85 (C.D. Cal. 1997) (J. Keller) (court made  
14 72 "factual findings" regarding facts the court found to "exist without substantial  
15 controversy"); Society of the New York Hosp. v. Associated Hosp. Serv. of New  
16 York, 367 F. Supp. 149, 156 (S.D.N.Y. 1973) (denying summary judgment motion  
17 but issuing order under Rule 56(d) that specifies facts that exist without substantial  
18 controversy).

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21  
22 <sup>1</sup> The Plaintiffs in both the *Leiber* case and the *MGM* case have argued that Kazaa's Joinder  
23 in MusicCity's motion must be denied because Kazaa did not submit a separate Statement of  
24 Uncontroverted Facts. Those responses misunderstand the purpose of Kazaa's motion. Kazaa is  
25 not seeking independent relief for itself. Rather, Kazaa has merely joined in the request for relief  
26 sought by MusicCity (i.e., for a judgment that MusicCity's distribution of its Morpheus software is  
27 not contributory infringement, and for entry of the findings set forth in MusicCity's moving papers).  
28 For this limited purpose, it was perfectly appropriate for Kazaa to join in the motion without  
submitting a full set of moving papers. Indeed, the *MGM* plaintiffs acknowledge at page 3 of their  
Opposition to Grokster's and Kazaa's Joinder that "Grokster and Kazaa can properly join in the  
legal arguments of MusicCity for purposes of judicial economy." As set forth above, that is all that  
Kazaa has sought to do.

1 Applying this Rule, it is appropriate for the Court to enter an Order specifying  
2 that at least the facts set forth in Paragraphs 2-7 of MusicCity's Statement of  
3 Uncontroverted Facts are undisputed, thereby deeming those facts established for  
4 purposes of this case. Paragraphs 2-7 set forth facts relating to the capabilities of  
5 MusicCity's Morpheus Software. More specifically, Paragraphs 2-6 state that "[t]he  
6 Morpheus software product is capable of facilitating the search for, and  
7 communication of"; 1) "public domain materials"; 2) "government documents"; 3)  
8 "media content for which distribution is authorized"; 4) "media content as to which  
9 the rights owners do not object to distribution"; and 5) "computer software for which  
10 redistribution is permitted." Paragraph 7 similarly sets forth that "[t]he Morpheus  
11 software is capable of facilitating the management, display, and play of media files on  
12 a user's computer."

13 While Plaintiffs have objected to certain of the evidence proffered by  
14 MusicCity, they have not offered any evidence to dispute these proposed findings,<sup>2</sup>  
15 nor have they argued that the Morpheus software is incapable of the uses set forth in  
16 the above-referenced paragraphs.<sup>3</sup> Instead, Plaintiffs have merely asserted that these

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18  
19 <sup>2</sup> In fact, Plaintiffs have submitted a declaration from Sean Mayers, Chief Executive  
20 Officer of JIVE Media Technologies, Inc., reiterating that the Kazaa software is capable of  
21 facilitating the search for media content for which distribution is authorized, and confirming that  
22 such content is in fact made available by users of the Software. See Decl. of Sean Mayers  
23 submitted in support of Plaintiffs' Opposition, ¶ 10; ¶ 12, lines 4-8.

24 <sup>3</sup> Plaintiffs' Declaration of Frank Creighton asserts that on February 9, 2002, the RIAA  
25 used the Morpheus software to conduct searches for public domain works identified in the  
26 declarations submitted in support of MusicCity's Motion, and found only a few of those works. See  
27 Decl. of Frank Creighton, ¶¶ 32-33, 36. The fact that the RIAA located several public domain  
28 works *supports* Uncontroverted Facts 2-7, as it is further evidence that the software is *capable* of  
the uses set forth in those paragraphs. The fact that the RIAA did not locate other public domain  
works proves only that persons who might make such works available through their use of the  
software might not have been using the software at the time of the RIAA's search. It does not  
refute the fact that the software is *capable* of facilitating the search for such works. Neither do  
plaintiffs refute the evidence attached as Exhibits C through E to the declaration of M. Tally  
George, demonstrating that George located several public domain and government works by using

1 facts are "not material", or that "[s]uch capability is not substantial or commercially  
 2 significant." However, these particular findings of fact do not purport to address the  
 3 "materiality" or "substantiality" of the uses; they merely address whether the software  
 4 is capable of such uses. On this record, there is no dispute that such capability is  
 5 present in the Morpheus software. Accordingly, under Rule 56(d), Kazaa and the  
 6 other defendants are entitled to a order that these potential uses "exist without  
 7 substantial controversy."

8 In sum, in light of Plaintiffs' failure to controvert the facts set forth in proposed  
 9 Uncontroverted Facts 2-7, there is no doubt that these facts "exist without substantial  
 10 controversy." Accordingly, it is both practicable and appropriate for the Court to  
 11 enter an order under Rule 56(d) deeming these facts established for the purposes of  
 12 this case.

13  
14 Respectfully submitted,

15 DATED: February 25, 2002.

PERKINS COIE LLP

16  
17  
18 By Kenneth B. Wilson

Kenneth B. Wilson

19 Attorneys for Defendant-Counterclaimant  
20 Kazaa BV, formerly known as Consumer  
21 Empowerment BV.  
22  
23  
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27 the Morpheus software. See Decl. of M. Tally George in Support of Defendant's Motion for  
28 Partial Summary Judgment, ¶¶ 5-6, Exhs. C-E.

**PROOF OF SERVICE**

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I, Anna G. Folmer, declare:

I am a citizen of the United States and am employed in the County of San Francisco, State of California. I am over the age of 18 years and am not a party to the within action. My business address is Perkins Coie LLP, 180 Townsend Street, 3rd Floor, San Francisco, California 94107-1909. I am personally familiar with the business practice of Perkins Coie LLP. On February 25, 2002, I served the following document(s):

**KAZAA BV'S REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

by placing a true copy thereof enclosed in a sealed envelope addressed to the following parties:


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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at San Francisco, California.

DATED: February 25, 2002.

  
\_\_\_\_\_  
Anna G. Folmer

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