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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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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND SUMMARY OF ARGUMENT

3 *"Morpheus has such a high media content with almost every user*
4 *interested in music in many capacities. If someone were to download a*
5 ***Pearl Jam** song, and then see a banner ad featuring Spin's cover story*
6 *on **Pearl Jam**, the probability of them clicking on that ad are through*
7 *the roof."*

8 MusicCity sales executive soliciting advertising from
9 Spin magazine SUF 3(l); 33782(emphasis added)¹

10 * * *

11 *Q: "I downloaded fast and the furious and mummy returns and i can*
12 *only hear the sound, i can't watch the video. What would i have to*
13 *download to watch movies."*

14 *A: Grokster uses Windows Media Player as its media player. Please*
15 *get it and install from: [link provided]"*

16 Grokster Support response to a user inquiry SUF
17 3(p); GR07574 (emphasis added)

18 This Court has articulated the appropriate framework for analyzing this case:
19 are Defendants' systems more like the infringing Napster system that was enjoined in
20 2001, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) ("Napster
21 I"), or the video recorder product used for time-shifting of free, over-the-air television
22 broadcasts at issue in Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 104
23 S. Ct. 774, 78 L. Ed. 2d 574 (1984) ("Sony-Betamax")? See 6/13/02 Tr. at 3. The
24 uncontroverted facts all point to the inescapable conclusion: Defendants' systems
25 were designed and intended first to emulate Napster and then to surpass it.
26 Defendants have succeeded beyond their wildest dreams. Their systems have more
27 users than Napster (tens of millions by last report) and distribute and copy more types
28 of copyrighted media files than Napster. Defendants also have more of an ongoing
relationship with their users, enable and facilitate much more rampant infringement

1 Citations to Supporting Facts in Plaintiffs' Statement of Uncontroverted Facts are referred to as "SUF." Documents and deposition excerpts are attached to the Borkowski Declaration.

1 of Plaintiffs' songs and movies, and reap far more financial benefit than Napster ever
2 did. Defendants succeeded in reaching their goal: to "Do Napster Better." Hardison
3 Depo. 147:20-24 & Ex. 126; SUF 3(c).

4 The similarity between Defendants' systems and Napster is not accidental.
5 Their systems were designed to "fill the void" left by Napster's shutdown. KZ1448-
6 52; SUF(f). Over time, Defendants have evolved Napster's basic business model – to
7 use pirated copyrighted content as a draw to attract a huge, valuable user base. This
8 is how Defendants make money: they earn advertising revenue by attracting millions
9 of users to their systems by offering them a treasure trove of pirated music, movies,
10 and other copyrighted media for free without any compensation to the copyright
11 owners. Like Napster, Defendants built and are profiting from businesses where
12 infringing content is the "glittering object" that attracts users to Defendants' systems.
13 See A&M Records, Inc. v. Napster, Inc., 114 F. Supp.2d 896, 922 (N.D. Cal. 2000).

14 The undisputed facts (which have come to light in discovery that Defendants
15 sought to foreclose by filing their original, premature motion for summary judgment)
16 demonstrate incontrovertibly that Defendants created, operate, and control
17 sophisticated systems that overwhelmingly are used for copyright infringement.
18 Defendants remain in continuous contact with their users, providing them with the
19 tools for infringement and the anonymity in which to infringe with impunity. In their
20 own words, Defendants provide "an interactive community" – "a community of users
21 not just [a software] application[.]" MJT0374; SUF 8(b). Defendants have refused to
22 take meaningful steps to limit infringement in any way, while at the same time adding
23 features to filter pornography and "offensive content" when it served their business
24 interests. Defendants – who supervise and control their systems – could do much
25 more, but they have deliberately chosen to turn a blind eye to the massive
26 infringement their systems enable, facilitate, and encourage. Instead, "Defendants
27 manage to do everything but actually steal the music [and movies] off the store shelf
28

1 and hand" them to their users. In Re: Aimster Copyright Litigation, slip op. MDL
2 No. 1425 (N.D. Ill., September 4, 2002), at 24.²

3 Rather than seeking authorization from copyright owners to exploit their
4 works, Defendants seek what amounts to a permanent, free license for their
5 infringement. They ask the Court to adopt an unprecedented expansion of the "staple
6 article of commerce" doctrine articulated in Sony-Betamax. However, in the eighteen
7 years since it was decided, Sony-Betamax has never been held to be a defense in any
8 circumstance remotely similar to these or to any online infringing system and
9 network. To the contrary, the Ninth Circuit in Napster I, 239 F.3d at 1020, held
10 Sony-Betamax *inapplicable* to an online infringing system and network, as did the
11 Court in Aimster, at 25-28.

12 Stripped of the Sony-Betamax defense, Defendants' liability is manifest. First,
13 they are liable for contributory infringement because they materially facilitate their
14 users' infringement of Plaintiffs' copyrighted works. Infringement of such staggering
15 proportions would be impossible without the systems and tools Defendants created,
16 maintain, and continue to provide. Defendants also know (actual and constructive
17 knowledge) exactly what their users do on their systems – they infringe massively.
18 Second, Defendants separately are vicariously liable because they benefit financially
19 from the infringement rampant on their systems, and refuse to exercise their reserved
20 right and ability to police and supervise their systems to prevent that infringement.
21 The material facts are few, and they are undisputed or indisputable. Accordingly,
22 Plaintiffs are entitled to summary judgment on the issue of Defendants' liability for
23 both contributory and vicarious infringement.

24
25
26 ² Just last week, Chief Judge Aspen in the Northern District of Illinois issued a
27 preliminary injunction against Aimster, another infringing system that followed in
28 Napster's footsteps and that is very similar to Defendants' systems. In his detailed
opinion, Judge Aspen rejected the same arguments Defendants here are advancing or
could advance. The slip opinion is attached as Ex. 74 to the Borkowski Decl.

1 **II. THE UNDISPUTED FACTS**

2 As demonstrated in the accompanying Statement of Uncontroverted Facts and
3 Conclusions of Law and the evidence that it cites, Defendants' systems enable and
4 facilitate tens of millions of their users to distribute digital files containing Plaintiffs'
5 copyrighted sound recordings, musical compositions, motion pictures, and other
6 filmed entertainment from their personal computers for copying by other users. A
7 user sitting at his computer today may use any of Defendants' systems easily to find,
8 make, and distribute illegal copies of hit motion pictures that are in first-run theatrical
9 release, and of an endless variety of musical works owned by Plaintiffs yet provided
10 for free by Defendants. SUF 2(a)-(c), (e), (f). Users who search for and copy those
11 songs and movies by downloading them into their own computers then make these
12 new copies available for further distribution to even more users in an ever-expanding
13 cycle of infringement. The user experience, and the resulting massive infringement,
14 is the same on Defendants' systems as it was on Napster, except on an even greater
15 scale, and extending well beyond music. See A&M Records, 114 F. Supp. 2d at 905-
16 07; Napster I, 239 F.3d at 1011-12 (descriptions of Napster system); Kleinrock Decl.
17 ¶¶ 17-23 (same).

18 **A. Defendants Modeled Their Systems On Napster's Infringing System.**

19 From their inception, Defendants modeled their systems on the infringing
20 Napster system. SUF 3 (c) Around the time that Napster was enjoined by the Ninth
21 Circuit and began to take steps to block some infringing content from its system,
22 Defendants went into business to fill Napster's shoes. They first built and operated
23 some of the largest infringing "openNap" systems – essentially Napster clones that
24 Defendants based on unauthorized versions of Napster software. SUF 3(c); Ex.
25 145/ID171303 ("We have put this network in place so that when Napster pulls the
26 plug on their free service (or if the Court orders them shut down prior to that), we will
27 be positioned to capture the flood of their 32 million users that will be actively
28 looking for an alternative."); KVO000040-43 ("Initially, we launched our Alternative

1 Napster Network so there could be a solid network that could handle the load of
2 disenfranchised Napster users"); ID171405 ("We have commandeered nearly 35% of
3 all the alternative Napster users."); ID171405 (MusicCity's then-CEO reports to
4 board member that MusicCity's OpenNap "client has similar functionality to the
5 Napster client."); Kleinrock Decl. ¶ 24.

6 Based directly on Napster, Defendants' systems offered users massive amounts
7 of infringing content. MusicCity operated "the largest single non-corporate Napster
8 server in existence," which it promoted as "The #1 Alternative to Napster." SUF
9 3(c); ID281607/Ex. 116; ID171327 (MusicCity refers to their network as "Our
10 'MusicCity OpenNap Alternative Napster Network'"); ID281520, ID281525,
11 ID169135; Hardison Depo. 58:11-22. It openly bragged about this in its advertising
12 and in presentations designed to secure investment capital: "When the lights went off
13 at Napster . . . where did the users go? MusicCity.com"; "Frustrated Napster fans can
14 turn to MusicCity.com"; and "Napster meet MusicCity." Exs. 113, 250; Ex.
15 146/ID169022. MusicCity's openNap system experienced "staggering growth." SUF
16 3(c); Griffin Depo. 117:16-24 & Ex. 250. Grokster's principals similarly operated a
17 large "openNap"-based system under the accurately descriptive name "Swaptor." M.
18 Rung Depo. 17:6-18:14; 22:14-22; D. Rung Depo. 36:24-37(5); Kleinrock Decl.
19 ¶¶ 25-26.

20 Defendants ultimately recognized the risk in operating a blatantly infringing
21 openNap system. As MusicCity's own lawyer warned it: "I recommend taking the
22 current service down *now*. In my view, the service, which has always been risky, is
23 now unbelievably risky." [KV062 (emphasis in original)]. Thus, after they
24 accumulated millions of users to their systems, Defendants "migrated" their users to
25 the even more efficiently infringing "FastTrack"-based system. SUF 3(e); see Griffin
26 Depo. 148:18-24; 152:3-8; Weiss Depo. 598:8-599(3); D. Rung Depo. 221:5-222:24;

27
28

1 M. Rung Depo. 31:10-17. FastTrack was developed by or at the direction of Kazaa³,
2 and licensed by Kazaa to Defendants MusicCity and Grokster. MusicCity (which
3 called its system "Morpheus"), Grokster, and Kazaa all initially ran their systems
4 interoperably on the FastTrack network. M. Rung Depo. 77:80-78:11 (Music City,
5 Grokster, and Kazaa are "pretty much all clones of each other"); Kleinrock Decl.
6 ¶ 31. More and more users flocked to Defendants' infringing systems, which
7 Defendants recognized were competitors of Napster's. Hardison Depo. 12-18; Ex.
8 311 ("I am bringing 5 or 6 Napster users a night into [MusicCity's] Morpheus").
9 Defendants reportedly now have *tens of millions of users* – many of whom are
10 former Napster users –trafficking in *billions* of infringing copyrighted files. SUF
11 5(a).

12 MusicCity recognized that "if we do not get the consumers migrated we do not
13 have a company[.]" Griffin Depo. 166:20-167:3 & Ex. 262; ID172786 ("Since
14 data/content on a P2P network is solely dependent upon peers [users], you can have
15 the best technology in the world, but it is of no value without peers and data").
16 MusicCity retained a public relations firm to help migrate existing openNap users to
17 FastTrack "as quickly as possible." SUF 3(e); MUS014521; see also ID174571
18 (MusicCity e-mail to openNap users urging them to make the switch to FastTrack,
19 promising among other things that "[e]verything is FULLY ENCRYPTED to protect
20 privacy"); T001083-85 (MusicCity's then-CEO to a board member: "88% of Napster
21 users polled (sample 3,000) will not pay to use Napsters subscription service and will
22 turn to other 'free' file swapping services ... we are the logical choice to pick up the
23 bulk of the 74 million users that are about to 'turn Napster off'."). Even after
24 Defendants evolved to FastTrack-based systems, they continued to market themselves
25 through comparisons to Napster (although perhaps a bit more coyly, no less

26
27 ³ The evidence in support of this motion is drawn from, inter alia, the discovery
28 obtained from defendants MusicCity and Grokster, but almost entirely not from
defendant Kazaa. Kazaa has refused to obey the Court's July 12, 2002, Order.

1 blatantly). For example, in its media kit, MusicCity promotes its system with
 2 reference to the following press article headlines: "Morpheus: The Better Napster";
 3 "As Napster Shuts, Others Carry The Tune"; "A Possible Successor To Napster"; and
 4 "Napster Users Fall In The Arms Of Morpheus." SUF 3(f); Exs. 384-389.

5 Once they arrived at Defendants' systems, users found a candy store of free
 6 music, movies, and other copyrighted works free for the taking. As Kazaa boasted on
 7 its web site: "Welcome to the Kazaa community! . . . You can find your favourite
 8 music, movies, pictures, artists, documents and more." Borkowski Decl. Ex. 32. And
 9 indeed, that promise was fulfilled. As Defendants well-know, popular motion
 10 pictures and music abound on Defendants' systems. SUF 2. Songs by top-selling
 11 artists, such as Garth Brooks, Madonna, The Eagles, Jennifer Lopez, Janet Jackson,
 12 Staind, and Eminem are all available with the click of a mouse, as is music that has
 13 not yet been released to the public. SUF 2(a). Motion pictures, many of them still
 14 playing in first-run theaters, also are available, including *Signs*, *Blue Crush*, *Lilo &*
 15 *Stitch*, *Lord of the Rings*, *The Matrix*, *Gladiator*, and many others. Cole Decl. ¶ 4.

16 MusicCity even developed promotional materials featuring infringing content:

