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19 **UNITED STATES DISTRICT COURT**

20 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

21 METRO-GOLDWYN-MAYER  
22 STUDIOS INC., et al.,

23 Plaintiffs,

24 v.

25 GROKSTER, LTD., et al.,

26 Defendants.

27 [Continued on Next Page]

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

~~[CONFIDENTIAL - FILED UNDER SEAL]~~

**REPLY OF DEFENDANTS  
MUSICCITY.COM, INC. (NOW KNOWN  
AS STREAMCAST NETWORKS, INC.)  
AND MUSICCITY NETWORKS, INC. IN  
SUPPORT OF MOTIONS FOR PARTIAL  
SUMMARY JUDGMENT**

[Compendium of Reply Declarations of Steven  
D. Gribble, Matthew Lapple and Darrell Smith  
Filed Herewith]

REPLY OF DEFENDANTS MUSICCITY.COM AND MUSICCITY NETWORKS  
IN SUPPORT OF MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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JERRY LEIBER, et al.,  
Plaintiffs,  
v.  
CONSUMER EMPOWERMENT  
BV a/k/a FASTTRACK, et al.,  
Defendants.

Date: December 2, 2002  
Time: 1:30 p.m.  
Ctvm: 6 (Spring Street)  
Hon. Stephen V. Wilson

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AND COUNTERCLAIMS.

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**TABLE OF CONTENTS**

	<u>Page #</u>
I. INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
II. ARGUMENT.....	2
A. Plaintiffs’ Contributory Infringement Claim is Foreclosed By <i>Sony-Betamax</i> .....	2
1. Plaintiffs’ Cannot Show that StreamCast Had Both Specific Knowledge of, and the Capacity to Prevent Acts of Direct Infringement. ....	2
2. Plaintiffs have Failed to Come Forward with Any Knowledge Evidence Sufficient to Trump <i>Sony-Betamax</i> .....	6
3. Plaintiffs Recitation of “Many Additional Reasons” to Ignore the Supreme Court’s Binding Precedent of <i>Sony-Betamax</i> are Unavailing. ....	7
4. Because Morpheus is Capable of Substantial Noninfringing Uses, Partial Summary Judgment on Contributory Infringement is Appropriate.....	8
B. Plaintiffs’ Vicarious Liability Claim Fails Because StreamCast Lacks the Ability to Control the Allegedly Infringing Activities of Morpheus Users.....	9
C. The Ability to Redesign a Product Does not Constitute Control over the Activities of Users. ....	11
III. CONCLUSION .....	12

**TABLE OF AUTHORITIES**

Page #

Cases

*A&M Records, Inc. v. Napster, Inc.*,  
239 F.3d 1004 (9<sup>th</sup> Cir. 2001) ..... 1

*Adobe Systems Inc. v. Canus Prods.*,  
173 F. Supp.2d 1044, 1053 (C.D. Cal. 2001) ..... 9, 12

*Artists Music v. Reed Publishing*,  
31 U.S.P.Q.2d 1623, 1627 (S.D.N.Y. 1994)..... 12

*Cybiotronics, Ltd. v. Golden Source Elec., Ltd.*,  
130 F. Supp. 2d 1152, 1155-56 (C.D. Cal. 2001) ..... 8

*Ellison v. Robertson*,  
189 F. Supp.2d 1051 (C.D. Cal. 2001) ..... 2, 9, 12

*Fonovisa, Inc. v. Napster, Inc.*,  
2002 WL 398676 (N.D. Cal. Jan. 28, 2002)..... 4, 9

*In re Aimster Copyright Litigation*,  
2002 WL 31006142 (N.D.Ill. Sept. 4, 2002) ..... 5, 7, 8, 9

*Religious Technology Center v. Netcom On-Line Communication  
Services, Inc.*,  
907 F. Supp. 1361 (N.D. Cal. 1995)..... 3

*Universal City Studios, Inc. v. Sony Corp. of Amer.*,  
480 F. Supp. 429, 459 (C.D. Cal. 1979) ..... 1, 3, 5, 12

*Vault Corp v. Quaid Software, Ltd.*,  
847 F.2d. 255 (5<sup>th</sup> Cir. 1988)..... 3, 7

Statutes

17 U.S.C. 512(l)..... 12

Other Authorities

S. Rep. 105-190, 105<sup>th</sup> Cong., 2d Sess. (May 11, 1998) at 55..... 12  
Senator Hollings’ Consumer Broadband and Digital Television  
Promotion Act,  
S. 2048, 107<sup>th</sup> Cong., 2d Sess. (introduced March 21, 2002) ..... 12

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 As the Supreme Court recognized in *Sony Corp. v. Universal City Studios*, 464  
3 U.S. 417 (1984) (“*Sony-Betamax*”), every expansion of copyright’s secondary  
4 liability doctrines in the technology context effectively expands copyright’s statutory  
5 monopoly, granting to copyright owners exclusive dominion over the technology in  
6 question. *See id.* at 441 n.21. Called upon to apply judge-made doctrines of  
7 secondary copyright liability to a new technology, the Court counseled restraint.  
8 “The judiciary’s reluctance to expand the protections afforded by the copyright  
9 without explicit legislative guidance is a recurring theme. Sound policy, as well as  
10 history, supports our consistent deference to Congress when major technological  
11 innovations alter the market for copyrighted works.” *Id.* at 431 (internal citations  
12 omitted). In opposing the motions for partial summary judgment brought by  
13 Defendants StreamCast Networks, Inc. and MusicCity.com (collectively,  
14 "StreamCast"), by contrast, Plaintiffs urge this Court to expand dramatically the  
15 reach of copyright's secondary liability doctrines in their effort to stamp out a  
16 technology that has, unfortunately, been used by some to infringe their copyrights.

17 **Contributory liability**: Plaintiffs argue that the “staple article of commerce”  
18 doctrine set out in *Sony-Betamax* evaporates in the face of “[g]eneral knowledge that  
19 users are engaged in infringement.” Plaintiffs’ Memorandum in Opposition to  
20 Defendants’ Motions for Summary Judgment (“Pls. Opp.”) at 10:20-21.<sup>1</sup> *A&M*  
21 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001) (“*Napster II*”) and *Sony-*  
22 *Betamax* reject this standard and make it clear that, where a technology capable of  
23 substantial noninfringing uses is involved, a copyright owner must demonstrate that  
24 the defendant had **both** *specific knowledge* of the infringing activities of end-users  
25 **and** *the capacity to act on such knowledge to prevent the infringement.*

26 <sup>1</sup> Plaintiffs’ contend that “where the defendant’s knowledge of infringement is  
27 shown by evidence other than the mere capacity of its technology for infringing use, it  
28 does not matter how substantial the noninfringing uses are or may someday be.” Pls.  
Opp. p. 12:7-9. The *Sony Betamax* itself could not have survived under such a rule, nor  
could myriad other technologies, including photocopiers, CD burners, audio cassette  
recorders, digital scanners, email software and even the pencil.

1           **Vicarious liability**: Unable to produce any evidence that StreamCast is able to  
2 control or supervise the searching, sharing and downloading activities of Morpheus  
3 users, Plaintiffs ask this Court to be the first to hold that the “control” element of  
4 vicarious liability is satisfied whenever a technology vendor could have designed the  
5 accused technology differently. Such an interpretation would effectively empower  
6 copyright owners to demand that any technology capable of infringing a copyright be  
7 redesigned to their specifications. Plaintiffs’ expansive view of “control” for  
8 vicarious liability is foreclosed by *Napster II*, *Ellison v. Robertson*, 189 F. Supp.2d  
9 1051 (C.D. Cal. 2001) and other authorities that require that Plaintiffs show that the  
10 *existing* versions of Morpheus afford StreamCast the right and ability to control *the*  
11 *allegedly infringing activities* – the searching, sharing and downloading Plaintiffs’  
12 works – of Morpheus users.

## 13 **II. ARGUMENT**

### 14 **A. Plaintiffs’ Contributory Infringement Claim is Foreclosed By Sony-** 15 **Betamax.**

#### 16 **1. Plaintiffs’ Cannot Show that StreamCast Had Both Specific** 17 **Knowledge of, and the Capacity to Prevent Acts of Direct** 18 **Infringement.**

19 Plaintiffs’ effort to resist summary judgment on contributory infringement  
20 rests on a single mistaken legal premise: that the *Sony-Betamax* “staple article of  
21 commerce” doctrine is to be brushed aside whenever a technology vendor has  
22 knowledge, however general and from whatever source, of infringing activity by  
23 users of its products and regardless of its capability to act on that knowledge. *See* Pls.  
24 *Opp.* at 11-12.

25 Plaintiffs’ view can neither be squared with *Sony-Betamax*, nor with  
26 subsequent precedents. If tested against Plaintiffs’ proposed standard, Sony itself  
27 would have been held contributorily liable in *Sony-Betamax*, as its own executives  
28 admitted to having *actual* knowledge of infringing activity by Betamax owners. *See*  
*Universal City Studios, Inc. v. Sony Corp. of Amer.*, 480 F. Supp. 429, 459 (C.D. Cal.

1 1979); *see also Vault Corp v. Quaid Software, Ltd.*, 847 F.2d. 255 (5<sup>th</sup> Cir. 1988)  
2 (defendant had actual knowledge<sup>2</sup>). Indeed, Sony included a caution against  
3 infringing use in the owner’s manual for the device. *See Universal*, 480 F. Supp. at  
4 429, 436. Under Plaintiffs’ distortion of *Sony-Betamax*, moreover, the motion picture  
5 studios would be entitled to refile their contributory infringement claim against Sony  
6 at any time, so long as they included in their complaint a few news reports and user  
7 surveys regarding the infringing activities of VCR users. *See Pls. Opp.* at 12:7-9  
8 (general knowledge from any source is enough to defeat *Sony-Betamax*). This  
9 reading of *Sony-Betamax* is entirely inconsistent with common sense and the breadth  
10 of both the majority and minority opinions. *See Sony-Betamax*, 464 U.S. at 421  
11 (“Given these findings, there is *no basis* in the Copyright Act upon which  
12 respondents can hold petitioners liable for distributing VTRs to the general public.”)  
13 (emphasis added); *id.* at 486-93 (Blackmun, J., dissenting).

14 Plaintiffs’ diminution of the *Sony-Betamax* ruling also cannot be squared with  
15 the Ninth Circuit’s ruling in *Napster II*, where the court went out of its way to  
16 recognize and uphold the central tenets of *Sony-Betamax*. *See Napster II*, 239 F.3d at  
17 1020-22. Although the court affirmed the district court’s findings regarding the  
18 varied forms of general knowledge possessed by Napster, it did not end its analysis  
19 of contributory infringement there (as Plaintiffs would have this Court do). Rather,  
20 the Ninth Circuit specifically reprimanded the district court for failing to take the  
21 “staple article of commerce” doctrine adequately into account. *See id.* After  
22 discussing *Sony-Betamax* and *Religious Technology Center v. Netcom On-Line*  
23 *Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), the court  
24 concluded that a plaintiff must show more than general knowledge of infringing

---

25  
26 <sup>2</sup> Plaintiffs attempt to distinguish *Vault* by arguing that the defendant’s actual  
27 knowledge in that case was merely that its product was being used to make  
28 “unauthorized” (rather than infringing) copies of copyrighted software. *See Pls. Opp.* p.  
12, fn. 8. As the remainder of the opinion makes clear, however, the court’s application  
of the staple article of commerce doctrine did not depend on a prior conclusion that the  
defendant’s knowledge was limited solely to noninfringing unauthorized uses. *See*  
*Vault*, 847 F.2d at 264.

1 activity. *See id.* In the end, the Ninth Circuit expressly conditioned Napster’s  
2 contributory liability on the conjunction of *specific knowledge* and *a capacity to act*:  
3 “Napster has *actual* knowledge that *specific* infringing material is available using its  
4 system, that it could block access to the system by suppliers of the infringing  
5 material, and that it failed to remove the material.” *Id.* at 1022 (emphasis in original).

6 The district court’s later ruling in *Fonovisa, Inc. v. Napster, Inc.*, 2002 WL  
7 398676 (N.D. Cal. Jan. 28, 2002)(“*Napster IV*”) is not to the contrary. That ruling  
8 involved a motion to dismiss, in which Napster argued that evidence of actual  
9 knowledge was necessary to pierce the protection of the *Sony-Betamax* shield. The  
10 district court disagreed, noting that either actual or constructive knowledge can be  
11 enough for contributory infringement. *See id.* at \*7. StreamCast here does not  
12 challenge this ruling. The crucial question raised by StreamCast’s motion for  
13 summary judgment is not whether the relevant knowledge standard is subjective or  
14 objective, but rather whether Plaintiffs have presented any evidence that StreamCast  
15 had *any* knowledge (whether actual or constructive) *of the relevant sort* – that a  
16 particular Morpheus user was engaging in infringing activity – *at the relevant time*  
17 (when it had the capacity to act upon it). This was precisely the sort of knowledge  
18 that Napster had. Because its centralized file index processed users’ search requests  
19 and kept a real time record of what files were being offered for downloading,  
20 Napster had actual knowledge that particular users were engaged in infringement  
21 when it could prevent it.

22 In other words, Judge Patel’s ruling in *Napster IV* supports StreamCast’s  
23 position: Plaintiffs have the burden of showing that StreamCast knew (actual  
24 knowledge), or reasonably should have known (constructive knowledge), that a  
25 particular Morpheus user was engaging in infringing activities (specific knowledge)  
26 at a time when it could have taken steps to prevent such activities (capacity to act).  
27 Nowhere does the opinion suggest that generalized knowledge that Napster was

28 ///



1 being used for infringement was enough to trump *Sony-Betamax*.<sup>3</sup> See also  
2 *Universal*, 480 F. Supp. at 459-60 (rejecting movie studios' suggestion that general  
3 knowledge could be basis for contributory infringement liability). Rather, Judge  
4 Patel specifically noted that, where a technology capable of substantial noninfringing  
5 uses is concerned, the Ninth Circuit had made it clear that liability requires both  
6 *specific knowledge* and a *capacity to act*. See *id.* at \*7 (“This combination of  
7 knowledge and failure to act trumped *Sony-Betamax* concerns.”).

8 Plaintiffs' extensive reliance on *In re Aimster Copyright Litigation*, 2002 WL  
9 31006142 (N.D.Ill. Sept. 4, 2002), is also misplaced. There, the court expressly  
10 noted it did not treat the *Napster* decisions as binding precedent. See *Aimster*, at \*2  
11 fn.3. This may explain the court's mistaken view of the kind of knowledge required  
12 in the contributory infringement context. See *id.* at \*13. (“[T]here is absolutely no  
13 indication in the precedential authority that such specificity of knowledge is required  
14 in the contributory infringement context”) (first emphasis added). Notwithstanding  
15 the *Aimster* court's attitude toward the *Napster* opinion, however, it would appear  
16 that *Aimster* had specific knowledge, in the form of individual users being identified  
17 by “buddy” name, and because *Aimster* actively assisted its users in locating top 40  
18 hits. See *id.* at \*13. Furthermore, because *Aimster* could effectively block users from  
19 accessing the *Aimster* network, *Aimster* also had the capacity to act on the  
20 knowledge. See *id.* at \*16. Accordingly, the ruling in *Aimster* addressed a set of facts  
21 far more similar to those in *Napster* (where all infringing traffic went through  
22 *Napster*'s servers) than those of the instant case.<sup>4</sup>

23 \_\_\_\_\_  
24 <sup>3</sup> Judge Patel's example of the kind of evidence that might show constructive  
25 knowledge sufficient to trump *Sony-Betamax* is also instructive. The court opined that if  
26 *Napster* extended *an individual invitation to a specific individual* with a large collection  
27 of music in order to supplement the stock of files available, such conduct could support  
28 a finding of constructive knowledge sufficient to overcome *Sony-Betamax*. *Napster IV*  
at \*7. The constructive knowledge in the court's example is both *specific* as to a  
particular individual's infringing conduct, and admits of *Napster*'s capacity to act upon  
such knowledge in the form of blocking the user from accessing the network.

<sup>4</sup> Additionally, the *Aimster* opinion was a determination of a preliminary  
injunction motion under a surprisingly low standard. In the Seventh Circuit the plaintiff  
need only demonstrate “some likelihood of success on the merits.” *Id.* at \*9.

1                                   **2. Plaintiffs have Failed to Come Forward with Any Knowledge**  
2                                   **Evidence Sufficient to Trump *Sony-Betamax*.**

3                                   Plaintiffs have failed to come forward with any evidence showing that  
4 StreamCast had specific knowledge of infringing activity together with the capacity  
5 to do something about it. Instead, much as in their opening brief seeking summary  
6 judgment, Plaintiffs cite to a large collection of irrelevant evidence, none of which  
7 establishes specific knowledge or failure to act with respect to any allegedly  
8 infringing activities by users of the Gnutella-based versions of Morpheus.

9                                   First, Plaintiffs cite to evidence relating to users of earlier StreamCast  
10 products.<sup>5</sup> Pls. Opp. at 6-7. Such evidence, even if admissible<sup>6</sup>, cannot give rise to  
11 specific knowledge with respect to infringing activity on the part of particular  
12 Morpheus users after the transition to the Gnutella-based version in March 2002.<sup>7</sup>

13                                   Second, Plaintiffs invoke precisely the sorts of general knowledge evidence  
14 that the Ninth Circuit in *Napster II* found insufficient to overcome *Sony-Betamax*.  
15 Pls. Opp. at 7-8. The sophistication of StreamCast executives, the fact that they have  
16 acted to protect StreamCast's own intellectual property, and the existence of press  
17 reports comparing Morpheus to Napster—none of these categories of evidence create  
18 any specific knowledge of infringing activity by any particular user of the Gnutella-  
19 based Morpheus software. *See Napster II*, 239 F.3d at 1020-21 (after affirming  
20 district court's finding regarding knowledge, going on to require specific knowledge

21 \_\_\_\_\_  
22 <sup>5</sup> This applies to Plaintiffs' evidence regarding OpenNap, Pltfs. SUF 3(c)-(e), the  
23 inadvertent collection of the search requests of some users of Morpheus v. 1.2, Pltfs.  
24 SUF 3(h), messages posted to bulleting boards prior to March 2002, Pltfs. SUF 3(j),  
email sent to users prior to March 2002, Pltfs. SUF 3(p), promotional efforts prior to  
March 2002, Pltfs. SUF 3(l) & 3(n), and use of earlier versions of the software by  
StreamCast employees and executives, Pltfs. SUF 3(i).

25 <sup>6</sup> StreamCast has disputed the majority of this evidence in its Statement of  
Genuine Issues, and also intends to file evidentiary objections prior to the hearing.

26 <sup>7</sup> Contrary to Plaintiffs' suggestion, StreamCast does not contend that the shift to  
27 the Gnutella-based product "magically cleanse[d]" it of knowledge. Pls. Opp. at 8. This  
evidence, however, relates to liability (if any) that might arise from distribution of the  
earlier versions of Morpheus, which is outside the scope of the instant motion for  
summary judgment. Certainly it cannot be the case that knowledge of infringement  
28 relating to an earlier product will forever taint an enterprise, making it liable for every  
infringement by an end-user using any subsequent product.

1 and capacity to act after applying *Sony-Betamax*).

2 Plaintiffs, then, are left to establish knowledge with the “infringement notices”  
3 delivered to StreamCast since March 2002. As discussed in StreamCast’s opening  
4 brief, it is undisputed that these notices come too late, at a time when StreamCast had  
5 no ability to act on them. *See*, StreamCast’s Contributory Motion at 14-18. Rather  
6 than introduce contrary evidence, Plaintiffs merely reference their vicarious liability  
7 argument. Pls. Opp. at 9.<sup>8</sup> Nothing cited therein, however, demonstrates any capacity  
8 on the part of StreamCast to prevent infringing activity by any Morpheus user  
9 identified in Plaintiffs’ infringement notices either, absent redesigning the Morpheus  
10 software. Plaintiffs’ own expert admits that StreamCast (unlike Napster or Aimster)  
11 has no ability to “block” Morpheus users from joining the global Gnutella network,  
12 nor to monitor, or control a Morpheus users’ ability to search for, share, or download  
13 files.<sup>9</sup>

14 **3. Plaintiffs Recitation of “Many Additional Reasons” to Ignore**  
15 **the Supreme Court’s Binding Precedent of *Sony-Betamax* are**  
16 **Unavailing.**

17 Plaintiffs’ notion that defendants must first clear numerous “hurdles” before  
18 invoking the *Sony-Betamax* doctrine lacks support in any of the leading cases  
19 applying the doctrine. *See Sony-Betamax*, 464 U.S. at 434-42 (no discussion of  
20 “prerequisites” in applying the “staple article of commerce” doctrine); *Vault*, 847  
21 F.2d at 263-67 (same); *Napster II*, 239 F.3d at 1020-21 (same). For the reasons  
22 discussed in StreamCast’s Opposition to Plaintiffs’ motion for summary judgment,  
23 Plaintiffs’ arguments should be rejected here as well. StreamCast’s Opposition at  
24 ///

25 <sup>8</sup> To the extent Plaintiffs meant to suggest that StreamCast could redesign the  
26 Morpheus software to enable somehow the ability to centrally police individual end-user  
27 conduct, this argument fails for the reasons discussed below at pp. 9-13.

28 <sup>9</sup> *See* Horowitz Depo. 152:15-154:12; 155:11-156:18; 156:19-157:20; 158:10-  
159:5; 159:7-162:1; 162:10-163:5; 163:13-19; 163:21-165:10; 129:7-132:15; 135:19-  
136:14; 136:16-137:13; 137:18-138:13; 142:5-143:10; 143:25-146:11; 146:18-147:16;  
147:22-148:19, attached to the Reply Declaration of Matthew Lapple as Ex. 1 (“Lapple  
Reply Decl.”); *see also* Gribble Decl. ¶ 34, filed with StreamCast’s Vicarious Motion.

1 27-30; *see also* Brief of *Amicus Curiae* Consumer Electronics Association at 7-9.<sup>10</sup>

2 **4. Because Morpheus is Capable of Substantial Noninfringing**  
3 **Uses, Partial Summary Judgment on Contributory**  
4 **Infringement is Appropriate.**

5 Plaintiffs have the burden of proving that Morpheus is incapable of any  
6 substantial noninfringing uses. *See Sony-Betamax*, 464 U.S. at 434. This is made  
7 clear in the patent context, from whence the Supreme Court adopted the “staple  
8 article of commerce” doctrine. *See Cybionics, Ltd. v. Golden Source Elec., Ltd.*,  
9 130 F. Supp. 2d 1152, 1155-56 (C.D. Cal. 2001). Plaintiffs have not shouldered their  
10 burden here.

11 Morpheus is plainly capable of (and is, in fact, being used for) substantial  
12 noninfringing uses. *See StreamCast’s Contributory Motion* pp. 4-8. Contrary to  
13 Plaintiffs’ gloss on the undisputed evidence, a number of the current noninfringing  
14 uses of Morpheus are commercial in nature. *See Ian Decl.*<sup>11</sup> ¶ 8 (increase in revenue  
15 to performer results from P2P distribution), *Mayers Decl.* ¶¶ 2, 6-8 (for profit  
16 business built on promoting copyrighted content on P2P networks), *Prelinger Decl.*  
17 ¶¶ 6, 12-18 (for-profit business generates leads from wide redistribution). Other  
18 current noninfringing uses, while perhaps not narrowly “commercial,” are  
19 nevertheless “substantial” insofar as they further important public policy goals, such  
20 as dissemination of public domain works. *See Kahle Decl.* ¶¶ 7, 14-18, *Newby Decl.*  
21 ¶¶ 4, 10-12. Although invocation of *Sony-Betamax* requires a showing of “mere  
22 capability,” the undisputed evidence shows that a number of the noninfringing uses  
23 are actual and already underway on the global Gnutella network. *See Hoekmann*  
24 *Decl.* ¶¶ 4-6, 9 (verifying availability of Gutenberg, J!VE files, and certain NASA  
25 video files).<sup>12</sup>

25 <sup>10</sup> To the extent that *Aimster* suggests otherwise, it does so in dicta (because  
26 *Aimster* had specific knowledge of direct infringement and failed to act on it) and  
represents an erroneous reading of the relevant precedents.

27 <sup>11</sup> The cited declarations in this section were all originally filed as part of  
*StreamCast’s Contributory Motion*.

28 <sup>12</sup> Even record company executives acknowledge in the press that P2P has the  
potential for substantial commercial noninfringing uses. *See Lapple Reply Decl.* Ex. 3.

1           **B. Plaintiffs’ Vicarious Liability Claim Fails Because StreamCast**  
2           **Lacks the Ability to Control the Allegedly Infringing Activities of**  
3           **Morpheus Users.**

4           To defeat StreamCast’s motion for partial summary judgment with respect to  
5           vicarious liability arising from the Gnutella-based versions of Morpheus, Plaintiffs  
6           must point to evidence demonstrating that StreamCast has “the right and ability to  
7           supervise the infringing activities” of Morpheus users—in other words, the  
8           searching, sharing and downloading of Plaintiffs’ copyrighted works. *Fonovisa, Inc.*  
9           *v. Cherry Auction, Inc.*, 76 F.3d 254, 262 (9th Cir. 1996); *see* StreamCast’s  
10          Vicarious Motion at 8-9.

11          Although Plaintiffs point to a mountain of irrelevant evidence, there is no  
12          dispute that, within the existing architecture of Morpheus, StreamCast has no right or  
13          ability to control what particular users search for, share or download.<sup>13</sup> Plaintiffs’  
14          own expert candidly admitted as much in his deposition. *See* Lapple Reply Decl. Ex.  
15          1, cited *infra* at 7.

16          Rather than dispute this, Plaintiffs point to StreamCast’s ability to influence  
17          certain characteristics of all instances of the Morpheus software generally. To the  
18          extent much of this evidence is addressed in StreamCast’s Opposition Brief, those  
19          arguments will not be reiterated here. *See* StreamCast’s Opp. pp. 9-16. In short, the  
20          difficulty with this evidence is its irrelevance to the central issue—whether  
21          StreamCast has the ability to control the activities of particular Morpheus users. *See*  
22          *Adobe Systems Inc. v. Canus Prods.*, 173 F. Supp.2d 1044, 1053 (C.D. Cal. 2001)  
23          (“control” element not met despite control over general characteristics of trade  
24          show); *Ellison v. Robertson*, 189 F. Supp.2d 1051, 1062 (AOL’s control over general  
25          characteristics of its newsgroup servers insufficient to satisfy “control” element).

26          In their Opposition Brief, however, Plaintiffs raise two new categories of  
27          evidence in their effort to forestall partial summary judgment. First, Plaintiffs make

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28          <sup>13</sup> This is stark contrast to the facts in both *Napster* and *Aimster*, where the  
defendants had the ability to control file sharing activities by blocking those users  
accused of infringement from “logging in” and accessing the network. *See Napster II*,  
239 F.3d at 1023; *Aimster* 2002 WL 31006142, at \*16.

1 much of the “auto.xml” file, which is a text file stored on StreamCast’s servers that is  
2 read by the Morpheus 2.0 software on a regular basis while it is running. In essence,  
3 this file automatically imparts certain technical information when queried by the  
4 Morpheus software. Plaintiffs claim that StreamCast “controls” its users through this  
5 auto.xml file because StreamCast can cause the Morpheus software to act differently.  
6 Plaintiffs’ own expert, however, admits that nothing in the functioning of the  
7 “auto.xml” file affords StreamCast any ability to control what any particular user  
8 searches for, shares or downloads. *See* Horowitz Depo. 130:11-14, Ex. 1 to Lapple  
9 Reply Decl.; *see also* Gribble Reply Decl. ¶¶ 11-14.

10 In addition, Plaintiffs state that StreamCast can “force” an upgrade on existing  
11 Morpheus users, and could thereby control infringing activity by altering the  
12 software and forcing it upon users. The record incontrovertibly establishes that  
13 Plaintiffs are mistaken.<sup>14</sup> While it is true that StreamCast could, by using the  
14 “auto.xml” file, download software to a user’s PC and invoke one of the standard  
15 installer programs bundled with Windows, Plaintiffs’ own expert admits that the user  
16 can abort the installation process prior to the full installation of this software. *See*  
17 Horowitz Depo. 210:21-211:8, 215:17-20. As a result, the “auto.xml” file can require  
18 that an upgrade be downloaded by an existing Morpheus user, and can begin the  
19 installation process, but cannot *require* that a user actually complete the installation  
20 process.<sup>15</sup> *See* Gribble Reply Decl. ¶¶ 9-10.

21 Second, Plaintiffs contend that Morpheus somehow “takes control” of files  
22 that reside in the Kazaa “shared folder” (for Morpheus users who have previously  
23 installed Kazaa on the same PC), forcing users to share these files despite the setting  
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25 <sup>14</sup> As an initial matter, Plaintiffs have introduced no evidence to contradict  
StreamCast’s assertion that this has never been done.

26 <sup>15</sup> StreamCast notes that the issue of whether StreamCast can force a download  
27 and begin (but not complete) an installation has been muddied by the fact that  
StreamCast’s witnesses, Darrell Smith and Dr. Gribble, examined and testified about  
28 Morpheus version 2.0.1.6, whereas Plaintiffs’ expert opined regarding Morpheus  
version 2.0.1.8. This apparent discrepancy is clarified in the accompanying reply  
declaration of Darrell Smith. Smith Reply Decl. ¶¶ 5-12.

1 of contrary preferences in Kazaa. Pls. Opp. at 22. Even if true, this evidence would  
2 fail to raise a material issue of fact, as it does not establish any ability on the part of  
3 StreamCast to control what files users search for, share, and download. Gribble  
4 Reply Decl. ¶¶ 11-15.

5 Similarly, Plaintiffs' claim that StreamCast's "pervasive participation" is  
6 sufficient to support the imposition of vicarious liability is built on a foundation of  
7 irrelevancies. Nothing presented by Plaintiffs demonstrates that StreamCast  
8 "participates" in the *infringing activities* of Morpheus users—namely, the searching  
9 for, sharing, and downloading of files. In fact, all of the evidence supports the  
10 opposite conclusion—it is undisputed that none of the search requests, search results,  
11 or file transfers accomplished by Morpheus users ever traverses any StreamCast  
12 servers. Gribble Decl. ¶ 34; Gribble Reply Decl. ¶¶ 11-14; Kleinrock Dep. 89:5-16,  
13 Lapple Reply Decl. Ex. 2.

14 C. **The Ability to Redesign a Product Does not Constitute Control over**  
15 **the Activities of Users.**

16 When shorn of irrelevant evidence, Plaintiffs are left with the argument that  
17 StreamCast has the right and ability to control the allegedly infringing activities of  
18 Morpheus users because StreamCast could redesign the software to enable such  
19 control.<sup>16</sup> This expansive reading of the vicarious liability doctrine unmoors it from  
20 its respondeat superior foundations, transforming it into an affirmative duty on the  
21 part of technology vendors to design technology so as to protect the interests of  
22 copyright owners. This effort by Plaintiffs to obtain by judicial fiat what has been

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26 <sup>16</sup> In fact, Plaintiffs' new expert, Dr. Horowitz, stated that simply having the  
27 ability to modify a program's source code, and then release an updated version of the  
28 program to the public is, in his view, equivalent to the ability to control users of that  
software program. Dr. Horowitz went so far as to agree that, under this view, Microsoft  
has control over the browsing habits of users of Internet Explorer, simply because  
Microsoft wrote Internet Explorer and could modify that program source code at will.  
Horowitz Depo. 92:7-98:12.

1 denied to them in legislation<sup>17</sup> runs counter to a variety of precedents. *See Napster II*,  
2 239 F. 3d at 1024 (vicarious liability analyses must be “cabined by the system’s  
3 current architecture); *Universal*, 480 F. Supp. at 462 (rejecting evidence offered to  
4 show that Sony could have added a “jamming” system to the Betamax); *Ellison v.*  
5 *Robertson*, 189 F. Supp.2d at 1060-62 (AOL did not have control over the infringing  
6 activities of its subscribers, notwithstanding the fact that it had the ability to redesign  
7 its system). *See also* StreamCast’s Opposition pp. 17-20; *Adobe v. Canus*, 173 F.  
8 Supp.2d at 1054-55 (court evaluates “control” in light of the security force defendant  
9 trade show had hired, notwithstanding the fact that trade show could have hired  
10 more, better trained security staff); *Artists Music v. Reed Publishing*, 31 U.S.P.Q.2d  
11 1623, 1627 (S.D.N.Y. 1994) (vicarious liability imposes no duty on trade show to  
12 hire copyright-savvy security staff).<sup>18</sup>

### 13 **III. CONCLUSION**

14 For these reasons, StreamCast requests that the Court grant its Motions for  
15 Partial Summary Judgment as to Contributory and Vicarious Liability.

16 Dated: November 4, 2002

Respectfully submitted,

17 BROBECK, PHLEGER & HARRISON LLP

18  
19 By \_\_\_\_\_

Charles S. Baker

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

23 \_\_\_\_\_  
24 <sup>17</sup> Industry associations representing many of the Plaintiffs have publicly  
25 supported legislative proposals, such as Senator Hollings’ Consumer Broadband and  
26 Digital Television Promotion Act, S. 2048, 107<sup>th</sup> Cong., 2d Sess. (introduced March 21,  
27 2002), that would have imposed exactly this obligation on digital technology vendors.  
28 As yet, the measure has not made any progress in Congress.

<sup>18</sup> Plaintiffs also press the rather puzzling argument that congress meant to  
address the question of secondary liability for technology vendors in the “safe harbor”  
provisions of the Digital Millennium Copyright Act (“DMCA”). Pls. Opp. at 31. This  
argument is foreclosed by the plain language of the statute and accompanying  
legislative history, where Congress made it quite plain that it did not intend to alter the  
underlying law of secondary liability in any way. *See* 17 U.S.C. 512(i); S. Rep. 105-190,  
105<sup>th</sup> Cong., 2d Sess. (May 11, 1998) at 55.



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