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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

GROKSTER, LTD., et al.,

Defendants.

CV 01-08541-SVW (PJWx) ✓
CV 01-09923-SVW (PJWx)

ORDER DIRECTING ENTRY OF
PARTIAL FINAL JUDGMENT AND
ALTERNATIVELY CERTIFYING APRIL
25, 2003 ORDER FOR IMMEDIATE
APPEAL

JERRY LEIBER, et al.,

Plaintiffs,

v.

CONSUMER EMPOWERMENT BV a/k/a
FASTTRACK, et al.,

Defendants.

FILED
JUN 21 2003
BY

I. INTRODUCTION

Now before the Court is Plaintiffs' Motion for entry of partial final judgment and for certification of the Court's April 25, 2003 Order ("April 25 Order") for immediate appeal. For the reasons set forth below, the Motion is GRANTED.

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1 **II. ANALYSIS**

2 A. Partial Final Judgment

3 Plaintiffs move first for entry of partial final judgment under
4 Fed. R. Civ. P. 54(b). Rule 54(b) provides that "[w]hen more than
5 one claim for relief is presented in an action . . . , the court may
6 direct the entry of a final judgment as to one or more but fewer than
7 all the claims . . . upon an express direction that there is no just
8 reason for delay and upon an express direction for the entry of
9 judgment." Fed. R. Civ. P. 54(b). Entry of partial final judgment
10 is proper if it will aid in "expeditious decision" of the case.
11 Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797-98 (9th Cir. 1991).

12 Defendant Sharman Networks ("Sharman") objects to this motion,
13 contending that the April 25 Order did not finally resolve any of
14 Plaintiffs' "claims," and thus that entry of judgment under Rule
15 54(b) is not proper.

16 The plaintiffs in each of the consolidated cases allege "single"
17 copyright claims arising from Defendants' past and present conduct.
18 The April 25 Order decided only those aspects of Plaintiffs'
19 copyright claims as they apply to the "current versions" of
20 Defendants Grokster, Ltd.'s ("Grokster") and StreamCast Network,
21 Inc.'s ("StreamCast") software and services. The Court declined to
22 rule on the current record as to the potential liability arising from
23 "past versions" of Defendants' products and services. Sharman's
24 position, therefore, is that the copyright claims have not been fully
25 adjudicated, and are not eligible for entry of judgment under Rule
26 54(b).

27 ///

1 Plaintiffs' response on this point is that a single "count" in a
2 complaint may state more than one "claim," and that Rule 54(b)
3 judgment may properly be entered where a single "claim" is resolved,
4 even if Court does not dispose of the entire count. Plaintiffs note
5 some authority to this effect. See Primavera Familienstiftung v.
6 Askin, 130 F. Supp. 2d 450, 539-40, 542-43 (S.D.N.Y. 2001) (citing
7 Second Circuit for proposition that counts consist of multiple claims
8 if the allegations therein could be parsed into separately
9 enforceable causes of action); Federal Election Comm'n v. Christian
10 Coalition, 52 F. Supp. 2d 45, 98 (D.D.C. 1999).

11 Indeed, the liberal pleading standards of the federal system
12 inevitably give rise to circumstances in which a single count in a
13 complaint may contain more than one legally cognizable claim. See
14 Fed. Rules Civ. P. 8(a), 8(f); Arizona Carpenters Pension Trust Fund
15 v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991) (explaining that
16 "claim" refers to set of facts giving rise to legal rights in a
17 claimant). Because Plaintiffs' copyright claims as they apply to
18 present versus past conduct are factually (and, potentially, legally)
19 distinct, and because the Court's April 25 Order granted summary
20 judgment for Defendants as to the former, partial final judgment may
21 properly be directed.

22 Under Rule 54(b), it remains only for the Court to direct that
23 there is no reason to delay entry of judgment, and that partial final
24 judgment will aid in expeditious decision of the case. Fed. R. Civ.
25 P. 54(b). Because appellate review of the Court's April 25 Order
26 will undoubtedly inform the many remaining components of this case,
27 and absent any persuasive reason for delay, the Court so directs.
28

1 Accordingly, the Court DIRECTS entry of partial final judgment
2 on the claims concerning the "current versions" of Defendants'
3 products and services as to which the April 25 Order granted summary
4 judgment for Defendants Grokster and StreamCast.

5 B. Certification for Appeal

6 In addition, and in the alternative, Plaintiffs move the Court
7 to certify the April 25 Order for interlocutory appeal pursuant to 28
8 U.S.C. § 1292(b). Section 1292(b) allows certification of an
9 interlocutory order where "such order involves a controlling question
10 of law as to which there is a substantial ground for difference of
11 opinion and . . . and immediate appeal from the order may materially
12 advance the ultimate termination of the litigation." 28 U.S.C. §
13 1292(b).

14 1. Controlling Question of Law

15 There is little question that the April 25 Order involved a
16 controlling question of law, as it determined Grokster's and
17 StreamCast's liability for their current products and services, and
18 engaged in legal interpretation that undoubtedly would inform - if
19 not decide - the issues of past liability for these Defendants.

20 2. Substantial Grounds for Difference of Opinion

21 Plaintiffs note a number of bases for a possible difference of
22 opinion as to the correctness of the Court's April 25 ruling.

23 First, Plaintiffs assert that the Court applied the Ninth
24 Circuit decision in A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004
25 (9th Cir. 2001) ("Napster") "more narrowly" than other courts by
26 interpreting the conduct described therein as "necessary" to give
27 rise to copyright liability, rather than simply "sufficient" to do
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1 so. Thus, they maintain, the fact that Grokster's and StreamCast's
2 conduct does not rise to the level of Napster's should not preclude a
3 finding of liability.

4 As the Court then noted, the fundamental question with respect
5 to contributory liability is whether either Defendant materially
6 contributes to the alleged infringement with knowledge of that
7 infringement. (April 25 Order, at 16.) That this accurately
8 reflects the elements of contributory infringement is confirmed by,
9 and not in tension with, the decision purportedly at odds with this
10 Court's Order. See Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676,
11 at *4 (N.D. Cal. Jan. 28, 2002).

12 Further, while the Court necessarily compared the conduct before
13 it with that found potentially sufficient to give rise to secondary
14 liability in Napster, Plaintiffs are incorrect to characterize the
15 April 25 Order as interpreting Napster's conduct to be necessary to a
16 finding of liability. After contrasting Defendants' conduct with
17 that of Napster, the Court proceeded separately to consider at length
18 the evidence adduced by Plaintiffs in support of their allegation
19 that Grokster and StreamCast materially contribute to their users'
20 alleged infringement. (April 25 Order, at 24-27.) The Court
21 concluded that Plaintiffs had adduced *no evidence* that Defendants
22 materially facilitate or contribute to the file exchanges that form
23 the basis of these lawsuits. (See id.) The Court of course agrees
24 with Plaintiffs' legal proposition that a "range of conduct" may give
25 rise to contributory copyright liability, other than "a combination
26 of actual knowledge and failure to block access." Fonovisa, Inc. v.
27 Napster, Inc., 2002 WL 398676, at *7. As was thoroughly elucidated
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1 in the April 25 Order, however, Plaintiffs failed to carry their
2 burden of showing a material dispute as to whether Defendants'
3 conduct falls within that range.¹

4 Second, Plaintiffs point to the district court decision in In re
5 Aimster Copyright Litigation, 252 F. Supp. 2d 634, 2002 U.S. Dist.
6 LEXIS 17054 (N.D. Ill. Sept. 22, 2002). That case is factually and
7 legally distinct. Most significantly, Aimster used copyrighted song
8 titles as pedagogical examples in its user tutorial, provided
9 catalogs of popular copyrighted music to its users, and generally
10 based its service on encouraging the exchange of copyrighted music.
11 Id., at *36, 40-42. The court in Aimster did not rely on the
12 provision of filesharing software and support services alone, but
13 rather pointed specifically to the fact that "Aimster predicates its
14 entire service upon furnishing a 'road map' for users to find,
15 copyright and distribute copyrighted music." Id. at *41-42. Such
16 encouragement of copyright infringement undoubtedly is of a different
17 tenor in the contributory infringement analysis than what was before
18 this Court.

19 Moreover, the Aimster court specifically stated that the Napster
20 decision, "while certainly persuasive on some points, is simply not
21 precedential authority in this circuit [O]ur decision today
22 need not rest on the legal reasoning or factual findings of the
23 Napster courts." Id. at *4. Because the Aimster decision is
24 unmoored from this circuit's binding precedent, it is unclear whether
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26

27 ¹ To the extent that the April 25 Order was not explicit on
28 this point, the Order is amended to incorporate the analysis herein.

1 a contrary conclusion by that court, even if one was reached,
2 constitutes the type of tension contemplated by 28 U.S.C. § 1292(b).

3 Indeed, Plaintiffs point to the Aimster court's analysis of Sony
4 Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S.
5 Ct. 774 (1984), on the issue of whether Defendants' products have
6 substantial non-infringing uses. Yet the Aimster court did not
7 mention the Ninth Circuit's exposition of that issue in Napster (see
8 239 F.3d at 1020-21), by which this Court is bound. (See April 25
9 Order, at 12-13.) Further, Plaintiffs have essentially not disputed
10 that Defendants' software has current and potential future
11 substantial non-infringing uses, and it is curious that Plaintiffs
12 would seek to squarely address this issue for the first time on
13 appeal.

14 Finally, Plaintiffs take issue with the Court's observation that
15 Grokster and StreamCast "may have intentionally structured their
16 businesses to avoid secondary liability for copyright infringement,
17 while benefitting financially from the illicit draw of their wares."
18 (April 25 Order, at 33.) Plaintiffs contend that such efforts should
19 not be countenanced by a finding that no copyright liability accrues.
20 If this Court is correct in its interpretation and application of
21 existing copyright law, however, this position is nothing more than
22 an invitation to judicial policymaking - a course the Supreme Court
23 has specifically warned against in the copyright context. See Sony,
24 464 U.S. at 431; Teleprompter Corp. v. Columbia Broadcasting System,
25 Inc., 415 U.S. 394, 414, 94 S. Ct. 1129 (1974).

26 Nonetheless, as Plaintiffs observe, it is not necessary for the
27 Court to believe it erred for there to exist a "substantial ground
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1 for difference of opinion." So long as the Court's decision is
2 "arguably" in tension with rulings by other courts, Section 1292(b)
3 certification is appropriate. See, e.g., Am Geophysical Union v.
4 Texaco, Inc., 802 F. Supp. 1, 29 (S.D.N.Y. 1992). Given the relative
5 novelty of the claims presented, the potentially contrary decision by
6 the Aimster court, and the lack of controlling authority dispositive
7 of the issues in this case, the Court's ruling clearly is susceptible
8 to substantial differences of opinion.

9 3. Immediate Appeal Would Advance Termination of the Case

10 Because an appellate decision on the April 25 ruling is bound to
11 inform and perhaps direct the Court's resolution of the issues
12 remaining in this case, an immediate appeal is likely to facilitate
13 termination of this litigation.

14 Although the Court's entry of partial final judgment affords
15 Plaintiffs an appeal as of right, the Court alternatively amends the
16 April 25 Order (as otherwise amended herein) to certify it for
17 immediate appeal pursuant to 28 U.S.C. § 1292(b).

18 C. Grokster's Request for Entry of Final Judgment

19 Grokster notes that, unlike StreamCast, it moved for summary
20 judgment without qualification - StreamCast limited its Motion to the
21 current versions of its software - and that the April 25 Order
22 purported to grant Grokster's Motion. Accordingly, Grokster contends
23 that all claims against it have been resolved, and final judgment
24 should be entered in its favor.

25 As noted supra, however, the April 25 Order was expressly
26 limited to the "current versions" of Grokster's and StreamCast's
27 software and services. (See April 25 Order, at 6.) The Order
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1 specifically did not "reach the question whether either Defendant is
2 liable for damages arising from past versions of their software, or
3 from other past activities." (Id.) To the extent that the April 25
4 Order was unclear, it is amended to reflect that Grokster's Motion
5 was GRANTED IN PART as to Plaintiffs' claims arising from the current
6 versions of Grokster's products and services.

7 Grokster further contends that the "past versions" of its
8 software and services are functionally synonymous with the "current
9 versions," and thus that the Court's April 25 Order necessarily
10 resolved all the claims against Grokster. The Court notes that at
11 oral argument on the instant Motion, Plaintiffs suggested a dispute
12 as to whether or not Grokster has previously operated factually
13 distinct file-sharing services. Further, Grokster itself concedes
14 that it at one time operated a "root supernode," and the Court has
15 not ruled on the legal significance of that fact. (See April 25
16 Order, at 21 & n.6.) Finally, even if Grokster is correct as a
17 factual matter that its current and past activities are essentially
18 indistinguishable, the April 25 Order simply did not reach the latter
19 category.

20 Accordingly, the Court declines to enter final judgment as to
21 Defendant Grokster other than as directed supra pursuant to Rule
22 54(b).

23 D. StreamCast's Request to Stay Discovery

24 StreamCast requests that the Court stay discovery on the claims
25 remaining against it pending appeal. The Court declines that
26 request.

1 **III. CONCLUSION**


2 Therefore, the Court HEREBY GRANTS Plaintiffs' Motion for Entry
3 of a Partial Final Judgment Under Fed. R. Civ. P. 54(b) and for
4 Certification of the April 25 Order for Immediate Appeal Under 28
5 U.S.C. § 1292(b).

6 The Court HEREBY DIRECTS entry of final judgment as to
7 Plaintiffs' claims concerning the current versions of Defendants
8 Grokster's and StreamCast's respective products and services.

9 The Court HEREBY AMENDS the April 25 Order (as otherwise amended
10 herein) to certify it for interlocutory appeal pursuant to 28 U.S.C. §
11 1292(b).

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14 IT IS SO ORDERED AND ADJUDGED.

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16 DATED: 5/18/03

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18 _____
19 STEPHEN V. WILSON
20 UNITED STATES DISTRICT JUDGE
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