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11 SHARMAN NETWORKS LIMITED

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA

15 METRO-GOLDWYN-MAYER, )  
16 STUDIOS INC., et al., )

17 Plaintiffs, )

18 vs. )

19 GROKSTER, LTD., et al., )

20 Defendants. )

21 AND RELATED COUNTERCLAIMS. )  
22

Case No. CV 01-8541-SVW (PJWx)

SHARMAN NETWORKS  
LIMITED'S *CORRECTED* THIRD  
AMENDED ANSWER AND  
COUNTERCLAIMS FOR:

- (1) CONSPIRACY IN RESTRAINT OF TRADE (15 U.S.C. § 1);
- (2) TRUSTS AGAINST PUBLIC POLICY (CAL. BUS. & PROF. CODE §§ 16700, 16726);
- (3) MONOPOLIZATION (15 U.S.C. § 2);
- (4) UNFAIR COMPETITION AND DECEPTIVE ACTS AND PRACTICES
- (5) COPYRIGHT INFRINGEMENT (17. U.S.C. § 501, et seq.)
- (6) BREACH OF CONTRACT

DEMAND FOR JURY TRIAL

1 Defendant Sharman Networks Limited (“Sharman”) for itself alone, and for no  
2 other party, answers the First Amended Complaint (“FAC”) For Damages And  
3 Injunctive Relief For Copyright Infringement of Metro-Goldwyn-Mayer Studios, Inc.,  
4 et al. (“Plaintiffs”) and sets forth its affirmative defenses and counterclaims as  
5 follows:

6 **ANSWER**

7 **NATURE OF THE ACTION**

8 1. Sharman denies the allegations of paragraph 1 of the FAC.

9 **JURISDICTION AND VENUE**

10 2. Sharman admits that the FAC purports to state a cause of action for  
11 copyright infringement. Sharman denies all other allegations contained in paragraph  
12 2 of the FAC.

13 3. Sharman denies the allegations contained in paragraph 3 of the FAC.

14 **THE PARTIES**

15 4. Sharman lacks sufficient knowledge and information to either admit or  
16 deny the allegations contained in paragraph 4 of the FAC and on this basis denies the  
17 allegations of that paragraph.

18 5. Sharman lacks sufficient knowledge and information to either admit or  
19 deny the allegations contained in paragraph 5 of the FAC and on this basis denies the  
20 allegations of that paragraph.

21 6. Sharman lacks sufficient knowledge and information to either admit or  
22 deny the allegations contained in paragraph 6 of the FAC and on this basis denies the  
23 allegations of that paragraph.

24 7. Sharman lacks sufficient knowledge and information to either admit or  
25 deny the allegations contained in paragraph 7 of the FAC and on this basis denies the  
26 allegations of that paragraph.

1           8.     Sharman lacks sufficient knowledge and information to either admit or  
2 deny the allegations contained in paragraph 8 of the FAC and on this basis denies the  
3 allegations of that paragraph.

4           9.     Sharman lacks sufficient knowledge and information to either admit or  
5 deny the allegations contained in paragraph 9 of the FAC and on this basis denies the  
6 allegations of that paragraph.

7           10.    Sharman lacks sufficient knowledge and information to either admit or  
8 deny the allegations contained in paragraph 10 of the FAC and on this basis denies the  
9 allegations of that paragraph.

10          11.    Sharman lacks sufficient knowledge and information to either admit or  
11 deny the allegations contained in paragraph 11 of the FAC and on this basis denies the  
12 allegations of that paragraph.

13          12.    Paragraph 12 of the FAC refers to designations used in the FAC and  
14 requires no response.

15          13.    Sharman lacks sufficient knowledge and information to either admit or  
16 deny the allegations contained in paragraph 13 of the FAC and on this basis denies the  
17 allegations of that paragraph.

18          14.    Sharman lacks sufficient knowledge and information to either admit or  
19 deny the allegations contained in paragraph 14 of the FAC and on this basis denies the  
20 allegations of that paragraph.

21          15.    Sharman lacks sufficient knowledge and information to either admit or  
22 deny the allegations contained in paragraph 15 of the FAC and on this basis denies the  
23 allegations of that paragraph.

24          16.    Sharman lacks sufficient knowledge and information to either admit or  
25 deny the allegations contained in paragraph 16 of the FAC and on this basis denies the  
26 allegations of that paragraph.

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1           17. Sharman lacks sufficient knowledge and information to either admit or  
2 deny the allegations contained in paragraph 17 of the FAC and on this basis denies the  
3 allegations of that paragraph.

4           18. Sharman lacks sufficient knowledge and information to either admit or  
5 deny the allegations contained in paragraph 18 of the FAC and on this basis denies the  
6 allegations of that paragraph.

7           19. Sharman lacks sufficient knowledge and information to either admit or  
8 deny the allegations contained in paragraph 19 of the FAC and on this basis denies the  
9 allegations of that paragraph.

10          20. Sharman lacks sufficient knowledge and information to either admit or  
11 deny the allegations contained in paragraph 20 of the FAC and on this basis denies the  
12 allegations of that paragraph.

13          21. Sharman lacks sufficient knowledge and information to either admit or  
14 deny the allegations contained in paragraph 21 of the FAC and on this basis denies the  
15 allegations of that paragraph.

16          22. Sharman lacks sufficient knowledge and information to either admit or  
17 deny the allegations contained in paragraph 22 of the FAC and on this basis denies the  
18 allegations of that paragraph.

19          23. Sharman lacks sufficient knowledge and information to either admit or  
20 deny the allegations contained in paragraph 23 of the FAC and on this basis denies the  
21 allegations of that paragraph.

22          24. Sharman lacks sufficient knowledge and information to either admit or  
23 deny the allegations contained in paragraph 24 of the FAC and on this basis denies the  
24 allegations of that paragraph.

25          25. Sharman lacks sufficient knowledge and information to either admit or  
26 deny the allegations contained in paragraph 25 of the FAC and on this basis denies the  
27 allegations of that paragraph.

1           26. Sharman lacks sufficient knowledge and information to either admit or  
2 deny the allegations contained in paragraph 26 of the FAC and on this basis denies the  
3 allegations of that paragraph.

4           27. Sharman lacks sufficient knowledge and information to either admit or  
5 deny the allegations contained in paragraph 27 of the FAC and on this basis denies the  
6 allegations of that paragraph.

7           28. Sharman lacks sufficient knowledge and information to either admit or  
8 deny the allegations contained in paragraph 28 of the FAC and on this basis denies the  
9 allegations of that paragraph.

10          29. Sharman lacks sufficient knowledge and information to either admit or  
11 deny the allegations contained in paragraph 29 of the FAC and on this basis denies the  
12 allegations of that paragraph.

13          30. Sharman lacks sufficient knowledge and information to either admit or  
14 deny the allegations contained in paragraph 30 of the FAC and on this basis denies the  
15 allegations of that paragraph.

16          31. Sharman lacks sufficient knowledge and information to either admit or  
17 deny the allegations contained in paragraph 31 of the FAC and on this basis denies the  
18 allegations of that paragraph.

19          32. Sharman lacks sufficient knowledge and information to either admit or  
20 deny the allegations contained in paragraph 32 of the FAC and on this basis denies the  
21 allegations of that paragraph.

22          33. Sharman lacks sufficient knowledge and information to either admit or  
23 deny the allegations contained in paragraph 33 of the FAC and on this basis denies the  
24 allegations of that paragraph.

25          34. Paragraph 34 of the FAC refers to designations used in the FAC and  
26 requires no response.

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1           35. Sharman lacks sufficient knowledge and information to either admit or  
2 deny the allegations contained in paragraph 35 of the FAC and on this basis denies the  
3 allegations of that paragraph.

4           36. Sharman lacks sufficient knowledge and information to either admit or  
5 deny the allegations contained in paragraph 36 of the FAC and on this basis denies the  
6 allegations of that paragraph.

7           37. Sharman lacks sufficient knowledge and information to either admit or  
8 deny the allegations contained in paragraph 37 of the FAC and on this basis denies the  
9 allegations of that paragraph.

10          38. Sharman lacks sufficient knowledge and information to either admit or  
11 deny the allegations contained in paragraph 38 of the FAC and on this basis denies the  
12 allegations of that paragraph.

13          39. Sharman lacks sufficient knowledge and information to either admit or  
14 deny the allegations contained in paragraph 39 of the FAC and on this basis denies the  
15 allegations of that paragraph.

16          40. Sharman lacks sufficient knowledge and information to either admit or  
17 deny the allegations contained in paragraph 40 of the FAC and on this basis denies the  
18 allegations of that paragraph.

19          41. Sharman admits that Sharman is a company registered in Vanuatu and  
20 that it conducts business in Australia. Sharman further admits that LEF Interactive  
21 Pty Ltd. ("LEF") is based in Australia. Sharman denies all other allegations contained  
22 in paragraph 41 of the FAC.

23          42. Sharman denies that either Sharman or LEF engaged in any unlawful  
24 activities, either alone or with the other Defendants. Sharman further denies that it  
25 has aided or abetted, conspired with, acted in concert or combination with, or acted as  
26 an agent of any other Defendant with respect to any matter. Sharman lacks sufficient  
27 knowledge and information to either admit or deny the allegations contained in  
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1 paragraph 42 of the FAC regarding parties other than Sharman and LEF, and on this  
2 basis denies those allegations.

3 43. Sharman admits that it has agreements with certain companies that reside  
4 in California. Sharman denies all remaining allegations contained in paragraph 43  
5 that pertain to it, and denies that this Court has personal jurisdiction over it. With  
6 respect to the activities of Defendants other than Sharman, Sharman lacks sufficient  
7 knowledge and information to either admit or deny the allegations contained in  
8 paragraph 43 of the FAC and on this basis denies the allegations of that paragraph.

9 **BACKGROUND ALLEGATIONS**

10 44. Sharman admits that the Internet is worldwide and is accessed through  
11 computers. Sharman lacks sufficient knowledge and information to either admit or  
12 deny the remaining allegations contained in paragraph 44 of the FAC and on this basis  
13 denies those allegations.

14 45. Sharman denies the allegations contained in paragraph 45 of the FAC to  
15 the extent those allegations are directed to Sharman. With respect to the activities of  
16 Defendants other than Sharman, Sharman lacks sufficient knowledge and information  
17 to either admit or deny the allegations contained in paragraph 45 of the FAC and on  
18 this basis denies the allegations of that paragraph.

19 46. Sharman admits that it makes available software from a website that can  
20 be downloaded on-line at no cost, and admits that the software contains certain code  
21 known as "FastTrack." Sharman denies all other allegations contained in paragraph  
22 46 to the extent those allegations refer to Sharman. To the extent paragraph 46 refers  
23 to any software of others, Sharman lacks sufficient knowledge and information to  
24 either admit or deny such allegations and on this basis denies those allegations.

25 47. Sharman admits that it maintains a website that operates through  
26 computer servers located outside the United States. Sharman further admits that  
27 anyone with access to the Internet desiring to download and thereafter use the Kazaa  
28 Media Desktop ("KMD") software can access the website. Sharman denies that the

1 “FastTrack” software requires connection to a “central computer server” for  
2 operation. Sharman further denies that a “central server” registers, identifies, and/or  
3 logs-in any “users.” Sharman further denies that it operates or controls central servers  
4 that maintain communications with “supernodes” or assist in administering any  
5 “network.” Sharman lacks sufficient knowledge and information to either admit or  
6 deny the allegations relating to the description of a “supernode” contained in  
7 paragraph 47 of the FAC and on this basis denies those allegations. Sharman further  
8 lacks sufficient knowledge and information to either admit or deny the allegations  
9 relating to Grokster, MusicCity, and Kazaa contained in paragraph 47 of the FAC and  
10 on this basis denies those allegations.

11 48. Sharman denies that it has “users of a network” or “users” as described in  
12 paragraph 48 of the FAC. Sharman further denies that it operates or controls a  
13 “network.” Sharman admits that the KMD software allows users of the software to  
14 search for files, and that the software allows for the display of the search results.  
15 With respect to the remaining allegations, Sharman lacks sufficient knowledge and  
16 information to either admit or deny the allegations contained in paragraph 48 of the  
17 FAC and on this basis denies the allegations of that paragraph.

18 49. Sharman denies that it operates or controls a “network,” or that the KMD  
19 software is a “network.” Sharman further denies that it operates or controls a “central  
20 server” or any servers that “communicate” with a “supernode.” Sharman lacks  
21 sufficient knowledge and information to either admit or deny the allegations  
22 contained in paragraph 49 of the FAC regarding encryption, and on this basis denies  
23 those allegations. The remaining allegations in paragraph 49 pertain to parties other  
24 than Sharman. Sharman lacks sufficient knowledge and information to either admit  
25 or deny the remaining allegations contained in paragraph 49 of the FAC and on this  
26 basis denies those allegations.



1           50. Sharman lacks sufficient knowledge and information to either admit or  
2 deny the allegations contained in paragraph 50 of the FAC and on this basis denies the  
3 allegations of that paragraph.

4           51. Sharman lacks sufficient knowledge and information to either admit or  
5 deny the allegations contained in paragraph 51 of the FAC and on this basis denies the  
6 allegations of that paragraph.

7           52. Sharman denies that either Sharman or LEF has “users” (as the term is  
8 described and intended in the FAC) or that they provide “users” with “facilities,”  
9 including online chat rooms and message boards. Sharman denies all remaining  
10 allegations contained in paragraph 52 of the FAC that pertain to it. To the extent  
11 paragraph 52 of the FAC pertains to parties other than Sharman or LEF, Sharman  
12 lacks sufficient knowledge and information to either admits or deny such allegations  
13 and on that basis denies those allegations.

14           53. Sharman denies that either Sharman or LEF has, operates, or controls any  
15 “network” or “networks”. Sharman lacks sufficient knowledge and information to  
16 either admit or deny all remaining allegations contained in paragraph 53 of the FAC  
17 and on this basis denies the allegations of that paragraph.

18           54. Sharman denies the allegations contained in paragraph 54 of the FAC.

19           55. Sharman admits that it entered into agreements for the purchase of  
20 certain assets, including the kazaa.com website, domain name, and logo. Sharman  
21 further admits that it has licensed source code known as “FastTrack,” and that  
22 Sharman pays a royalty for that license. Sharman further admits that the license states  
23 that Sharman has the right to maintain, modify, update, develop, and assign the  
24 FastTrack technology and any improvements to the technology. Sharman further  
25 admits that the licensor agreed not to issue new licenses during the term of the  
26 agreement. Sharman denies all remaining allegations contained in paragraph 55 of  
27 the FAC.

28           56. Sharman denies the allegations contained in paragraph 56 of the FAC.

1                    **CLAIM FOR RELIEF FOR COPYRIGHT INFRINGEMENT**

2            57.    Sharman repeats and hereby incorporates its responses to paragraphs 1  
3 through 56 above.

4            58.    Sharman denies that it participates in, facilitates, materially contributes  
5 to, or encourages any copyright infringement. Sharman lacks sufficient knowledge  
6 and information to either admit or deny the remaining allegations contained in  
7 paragraph 58 and on this basis denies those allegations.

8            59.    Sharman denies the allegations contained in paragraph 59 of the FAC.

9            60.    Sharman admits that it has received revenue resulting from contracts  
10 with companies that advertise. Sharman denies all remaining allegations contained in  
11 paragraph 60 of the FAC.

12           61.    Sharman denies the allegations contained in paragraph 61 of the FAC.

13           62.    Sharman denies the allegations contained in paragraph 62 of the FAC.

14           63.    Sharman denies the allegations contained in paragraph 63 of the FAC.

15           64.    Sharman denies the allegations contained in paragraph 64 of the FAC.

16           65.    Sharman denies the allegations contained in paragraph 65 of the FAC.

17           66.    Sharman denies the allegations contained in paragraph 66 of the FAC.

18           67.    Sharman denies the allegations contained in paragraph 67 of the FAC.

19           68.    Sharman denies the allegations contained in paragraph 68 of the FAC.

20                    **RELIEF REQUESTED**

21           69.    To the extent a response is necessary to Plaintiffs' prayer for judgment,  
22 Sharman denies that Plaintiffs are entitled to the judgment or relief requested in the  
23 FAC, or to any judgment or relief whatsoever.

24                    **AFFIRMATIVE DEFENSES**

25                    **First Affirmative Defense**

26           1.    Plaintiffs' claims are barred or unenforceable based upon the conduct  
27 alleged in the counterclaims under the doctrine of copyright misuse.

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**Second Affirmative Defense**

2. Plaintiffs' claims are barred because the software made available on Sharman's website is capable of substantial non-infringing uses.

**Third Affirmative Defense**

3. Plaintiffs' claims are barred for lack of federal question jurisdiction.

**Fourth Affirmative Defense**

4. Plaintiffs' claims are barred by the political question doctrine.

**Fifth Affirmative Defense**

5. Plaintiffs' claims are barred because they are asserted in violation of Article I, Section 8, Clause 8 of the U.S. Constitution and the doctrine of separation of powers.

**Sixth Affirmative Defense**

6. Plaintiffs' claims are barred to the extent they lack standing to assert claims for each claimed copyright.

**Seventh Affirmative Defense**

7. Plaintiffs' claims are barred by the doctrine of fair use.

**Eighth Affirmative Defense**

8. Plaintiffs have failed to join indispensable parties.

**Ninth Affirmative Defense**

9. Plaintiffs' claims are barred by the doctrine of unclean hands.

**Tenth Affirmative Defense**

10. Plaintiffs' claims are barred to the extent Plaintiffs lack valid registrations of copyrights alleged in the FAC.

**Eleventh Affirmative Defense**

11. Plaintiffs' claims are barred by the Digital Millennium Copyright Act.

**Twelfth Affirmative Defense**

12. Plaintiffs' claims with respect to sound recordings are barred by the Audio Home Recording Act.

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**Thirteenth Affirmative Defense**

13. Plaintiffs' claims are barred to the extent that the copyrights alleged in the complaint are not enforceable outside the United States under any valid treaty.

**Fourteenth Affirmative Defense**

14. Plaintiffs' claims are barred for lack of personal jurisdiction over the Defendants.

**Fifteenth Affirmative Defense**

15. Plaintiffs' claims are barred by the First Amendment to the United States Constitution and the relevant provisions of the California Constitution.

**Sixteenth Affirmative Defense**

16. Plaintiffs' claims are barred by license, consent, acquiescence and waiver.

**Seventeenth Affirmative Defense**

17. Plaintiffs' claims are barred by the first sale doctrine.

**Eighteenth Affirmative Defense**

18. Plaintiffs' claims are barred by their failure to mitigate damages.

**Nineteenth Affirmative Defense**

19. Plaintiffs' claims are barred to the extent they have forfeited or abandoned the copyrights alleged in the complaint.

**Twentieth Affirmative Defense**

20. Plaintiffs' claims are barred in whole or part under the doctrine of judicial abstention.

**Twenty-First Affirmative Defense**

21. Plaintiffs' claims are barred to the extent any persons, based on whose behavior Plaintiffs seek to hold Defendants liable, are innocent infringers.

**Twenty-Second Affirmative Defense**

22. Plaintiffs' claims are barred or unenforceable under the doctrine or equitable estoppel.

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**Twenty-Third Affirmative Defense**

23. Plaintiffs' claims are barred because the controversy between the parties is not of a character which admits of specific and conclusive relief by judgment within the field of judicial determination.

**Twenty-Fourth Affirmative Defense**

24. Plaintiffs' claims are barred by the Uniform Foreign Money-Judgments Recognition Act, §§ 1713 et seq. of the California Civil Procedure Code.

**Twenty-Fifth Affirmative Defense**

25. Plaintiffs' claims are barred under the doctrine of *res judicata*.

**Twenty-Sixth Affirmative Defense**

26. Plaintiffs' claims are barred because of principles of international comity.

**Twenty-Seventh Affirmative Defense**

27. Plaintiffs' claims are barred under the doctrine of collateral estoppel.

**Twenty-Eighth Affirmative Defense**

28. Plaintiffs' FAC fails to state a claim upon which relief may be granted.

**Twenty-Ninth Affirmative Defense**

29. Plaintiffs' claims and relief sought are barred under the Economic Loss Rule.

**Thirtieth Affirmative Defense**

30. Plaintiffs' claims and relief sought are barred because Defendants do not owe a duty to Plaintiffs to re-design or modify the software product that is accessible on Sharman's website and which is capable of substantial non-infringing uses, if at all possible in order to avoid or minimize any purely economic losses allegedly suffered by Plaintiffs allegedly by the subsequent actions of third-party users of that software unknown to and outside the control of Defendants.

1 **Thirty-First Affirmative Defense**

2 31. Plaintiffs' claims are barred under the doctrines of proximate cause and  
3 superseding intervening cause.

4 **Thirty-Second Affirmative Defense**

5 32. Plaintiffs' claims for contributory and vicarious copyright infringement  
6 for each asserted copyright against Defendants are barred for Plaintiff's failure of  
7 proof that specific and identifiable acts of direct copyright infringement of each said  
8 copyright have occurred.

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10 **COUNTERCLAIMS**

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12 **ALLEGATIONS COMMON TO ALL COUNTERCLAIMS**

13 **THE PARTIES**

14 1. Counterclaimant Sharman is a company registered in Vanuatu, with its  
15 management services team based in Australia and Europe. Sharman is asserting these  
16 Counterclaims (1) in its individual capacity and on its own behalf; (2) in its capacity  
17 as the representative, and on behalf of, the unincorporated joint enterprise it formed  
18 with Altnet to digitally distribute licensed musical recordings, motion pictures, and  
19 other data files over the Internet; and (3) in its capacity as the assignee of all claims  
20 and causes of action asserted in these Counterclaims against the named  
21 counterdefendants that may be or are owned by Altnet as well as those of said joint  
22 enterprise. By agreement between Sharman and Altnet, as the principals of their  
23 unincorporated joint enterprise, Sharman has been authorized and assigned the  
24 responsibility to act as the representative of the unincorporated joint enterprise in  
25 pursuing the claims asserted in these counterclaims, and further Sharman has been  
26 assigned any and all claims of Altnet, as well as any and all claims of the  
27 unincorporated joint enterprise, that relate to or arise from the subject matter  
28 addressed in these Counterclaims.

1           2.     Sharman is informed and believes that Metro-Goldwyn-Mayer Studios,  
2 Inc. is a corporation organized and existing under the laws of the State of Delaware  
3 with its principal place of business in California.

4           3.     Sharman is informed and believes that Columbia Pictures Industries, Inc.  
5 is a corporation organized and existing under the laws of the State of Delaware with  
6 its principal place of business in California.

7           4.     Sharman is informed and believes that Disney Enterprises, Inc. is a  
8 corporation organized and existing under the laws of the State of Delaware with its  
9 principal place of business in California.

10          5.     Sharman is informed and believes that New Line Cinema Corporation is  
11 a corporation organized and existing under the laws of the State of Delaware with its  
12 principal place of business in New York, and is qualified to transact business in  
13 California.

14          6.     Sharman is informed and believes that Paramount Pictures Corporation is  
15 a corporation organized and existing under the laws of the State of Delaware with its  
16 principal place of business in California.

17          7.     Sharman is informed and believes that Time Warner Entertainment  
18 Company, L.P. is a limited partnership organized and existing under the laws of the  
19 State of Delaware with its principal place in New York, and is qualified to transact  
20 business in California.

21          8.     Sharman is informed and believes that Twentieth Century Fox Film  
22 Corporation is a corporation organized and existing under the laws of the State of  
23 Delaware with its principal place of business in California.

24          9.     Sharman is informed and believes that Universal City Studios, Inc. is a  
25 corporation organized and existing under the laws of the State of Delaware with its  
26 principal place of business in California.

27          10.    Sharman is informed and believes that Arista Records, Inc. is a  
28 corporation organized and existing under the laws of the State of Delaware with its

1 principal place of business in New Jersey, and is qualified to transact business in  
2 California.

3 11. Sharman is informed and believes that Atlantic Recording Corporation is  
4 a corporation organized and existing under the laws of the State of Delaware with its  
5 principal place of business in New York, and is qualified to transact business in  
6 California.

7 12. Sharman is informed and believes that Atlantic Rhino Ventures, Inc.  
8 d/b/a Rhino Entertainment Company is a corporation organized and existing under the  
9 laws of the State of Delaware with its principal place of business in California.

10 13. Sharman is informed and believes that Bad Boy Records is a joint  
11 venture of Arista Good Girls, Inc. Both Bad Boy Records and Arista Good Girls, Inc.  
12 are corporations organized and existing under the laws of the State of Delaware with  
13 their respective principal places of business in New York, and are qualified to transact  
14 business in California.

15 14. Sharman is informed and believes that Capitol Records, Inc. is a  
16 corporation organized and existing under the laws of the State of Delaware with its  
17 principal place of business in Delaware, and is qualified to transact business in  
18 California.

19 15. Sharman is informed and believes that Elektra Entertainment Group, Inc.  
20 is a corporation organized and existing under the laws of the State of Delaware with  
21 its principal place of business in New York, and is qualified to transact business in  
22 California.

23 16. Sharman is informed and believes that Hollywood Records, Inc. is a  
24 corporation organized and existing under the laws of the State of California with its  
25 principal place of business in California.

26 17. Sharman is informed and believes that Interscope Records is a general  
27 partnership organized and existing under the laws of the State of California with its  
28 principal place of business in California.



1           18. Sharman is informed and believes that LaFace Records is a joint venture  
2 between Arista Ventures, Inc. a corporation organized and existing under the laws of  
3 the State of Delaware, and LaFace Records, Inc. a corporation organized and existing  
4 under the laws of the State of Georgia, and is qualified to transact business in  
5 California.

6           19. Sharman is informed and believes that London-Sire Records, Inc. is a  
7 corporation organized and existing under the laws of the State of Delaware with its  
8 principal place of business in New York, and is qualified to transact business in  
9 California.

10          20. Sharman is informed and believes that Motown Record Company, L.P. is  
11 a California limited partnership that is qualified to transact business in California.

12          21. Sharman is informed and believes that The RCA Records Label, a unit of  
13 BMG Music d/b/a/ BMG Entertainment, is a New York general partnership qualified  
14 to transact business in California.

15          22. Sharman is informed and believes that Sony Music Entertainment, Inc. is  
16 a corporation organized and existing under the laws of the State of Delaware with its  
17 principal place of business in New York, and is qualified to transact business in  
18 California.

19          23. Sharman is informed and believes that UMG Recordings is a corporation  
20 organized and existing under the laws of the State of Delaware with its principal place  
21 of business in New York, and is qualified to transact business in California.

22          24. Sharman is informed and believes that Virgin Records America, Inc. is a  
23 corporation organized and existing under the laws of the State of California with its  
24 principal place of business in California.

25          25. Sharman is informed and believes that Walt Disney Records is a division  
26 of ABC, Inc., a corporation organized and existing under the laws of the State of New  
27 York, and is qualified to transact business in California.

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1           26.   Sharman is informed and believes that Warner Bros. Records, Inc. is a  
2 corporation organized and existing under the laws of the State of Delaware with its  
3 principal place of business in California.

4           27.   Sharman is informed and believes that WEA International, Inc. is a  
5 corporation organized and existing under the laws of the State of Delaware with its  
6 principal place of business in New York, and is qualified to transact business in  
7 California.

8           28.   Sharman is informed and believes that WEA Latina, Inc. is a corporation  
9 organized and existing under the laws of the State of Delaware with its principal place  
10 of business in New York, and is qualified to transact business in California.

11          29.   Sharman is informed and believes that Zomba Recording Corporation is  
12 a corporation organized and existing under the laws of the State of New York with its  
13 principal place of business in New York, and is qualified to transact business in  
14 California.

15                                   **AGENTS AND CO-CONSPIRATORS**

16          30.   Sharman is informed and believes that each of the named parties in this  
17 action was, and is, the agent and co-conspirator of the other in connection with the  
18 concerted conduct alleged in these counterclaims and aided and assisted the named  
19 parties in doing the wrongful acts alleged herein, including but not limited to  
20 conspiring with the named parties to unreasonably restrain trade and making  
21 statements and performing acts in furtherance of the combination and conspiracy  
22 alleged herein, and that Sharman's damages as alleged herein were proximately  
23 caused by them. Sharman is informed and believes that the parties and co-  
24 conspirators have utilized, and continue to utilize, the Recording Industry Association  
25 of America (RIAA), The International Federation of the Phonographic Industry  
26 (IFPI), and the Motion Picture Association of America (MPAA), as well as their  
27 employees, attorneys, representatives, and agents, to plan, coordinate, and perpetrate  
28 the wrongful acts alleged herein. More specifically, Sharman alleges that the named

1 counterdefendants have developed the scheme to monopolize the relevant markets  
2 described herein and to destroy Sharman and its joint enterprise with Altnet  
3 principally through the trade associations of the RIAA and the MPAA, and that the  
4 co-conspirators have perpetrated the acts of the conspiracy through attorneys of the  
5 RIAA, the MPAA, and the named counterdefendants with the specific intention of  
6 using the attorney client privilege to keep secret their acts in furtherance of conduct  
7 that constitutes criminal conspiracy under Title 15 of the United States Code.

8 **JURISDICTION AND VENUE**

9 31. Without waiving Sharman's jurisdictional challenges and defenses to  
10 Plaintiffs' First Amended Complaint, and based on this Court's ruling that it has  
11 personal and federal question jurisdiction over Plaintiffs' claims for relief,  
12 supplemental subject matter jurisdiction exists over Counts I through VI of these  
13 Counterclaims pursuant to 28 U.S.C. § 1367 in that these Counterclaims are so related  
14 to Plaintiffs' claims in this action that the Court has ruled are within the Court's  
15 original jurisdiction, that they form part of the same case or controversy.  
16 Additionally, Counts I and III of these Counterclaims present a civil action arising  
17 under the antitrust laws of the United States of America to remedy the counter-  
18 defendants' violations of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Clayton Act,  
19 15 U.S.C. §§ 15 and 26, and Count V of these Counterclaims presents an action for  
20 copyright infringement arising under the Copyright Act, 17 U.S.C. § 101, et seq.  
21 Accordingly, this Court has original subject matter jurisdiction over Counts I, III and  
22 V of these Counterclaims pursuant to 28 U.S.C. §§ 1331, 1337 and 1338 (a), and 15  
23 U.S.C. §§ 4 and 15. And, supplemental subject matter jurisdiction exists over  
24 California law claims in Counts II, IV and VI pursuant to 28 U.S.C. § 1367 in that  
25 Counts II, IV and VI are so related to Counts I, III and V of these Counterclaims they  
26 form part of the same case or controversy arising under the federal antitrust laws.

27 32. Venue is proper in this judicial district pursuant to 31 U.S.C. §3732(a),  
28 28 U.S.C. § 1391 and 15 U.S.C. §§ 15 and 22, because each of the counter-defendants

1 can be found, and transacts business, in the Central District of California and is  
2 therefore a resident of this judicial district. Further, each counter-defendant has  
3 engaged and continues to engage, within this judicial district, in the wrongful acts that  
4 give rise to these Counterclaims.

5 33. This action is properly assigned to the Western Division because a  
6 substantial part of the events giving rise to Counterclaimant's claims occurred in Los  
7 Angeles County.

8 **THE TECHNOLOGICAL THREAT TO THE RECORD**  
9 **AND MOVIE INDUSTRIES**

10 34. For decades, the music and motion picture industry plaintiffs (the  
11 "Industry plaintiffs") have largely profited, not directly from ownership of copyrights,  
12 but from ownership of the physical products and distribution systems used to deliver  
13 copyrighted content to consumers. The technology of the digital age has changed all  
14 that. Physical records, CDs, film and DVDs are no longer essential for consumers to  
15 own or play copyrighted audio and video content. Manufacturing, shipping, storing,  
16 selling and exhibiting physical products at retail locations or through the mail, are no  
17 longer necessary for consumers to receive copyrighted audio or video content. As a  
18 result of digital technology, consumers are no longer limited in choice and need not  
19 depend exclusively on the physical media products (embodying the desired content)  
20 and distribution channels that historically have been controlled by Industry plaintiffs,  
21 and on which the business and profits of the recorded music and movie industries  
22 have historically been based.

23 35. Three facts have combined to further imperil the Industry plaintiffs'  
24 businesses. The Industry plaintiffs do not own the digital distribution technology that  
25 is rendering their legacy businesses less valuable. Web sites that are popular are not  
26 owned by the Industry plaintiffs traditional retail partners which may cause traditional  
27 retailers to loose business with the shift toward digital distribution. Thirdly, that same  
28 technology that facilitates copying and effortless distribution makes it possible for

1 consumers to share, copy, self-publish and distribute data files of every type, whether  
2 or not those files contain copyrighted material.

3 **THE RECORDED MUSIC AND MOTION PICTURE INDUSTRIES'**  
4 **TRADITIONAL DISTRIBUTION**

5 36. The recorded music industry is highly vertically integrated. Plaintiffs  
6 own the five major recorded music distribution companies (referred to herein as  
7 BMG, EMI, Sony, Universal and Warner). Plaintiffs also own most of the labels that  
8 distribute, and most of the manufacturers that make, the majority of the physical  
9 copies of recordings. These music giants dominate and, when they act in concert,  
10 collectively have monopoly power in the market for the copyright licensed,  
11 distribution of recorded music within the United States.

12 37. The label, manufacturing and distribution segments of the recorded  
13 music industry are highly concentrated and overwhelmingly owned by Plaintiffs. The  
14 combined U.S. market shares of the five major distribution companies exceed 85%.  
15 Nearly all important labels are corporate affiliates of one of the five distribution  
16 companies, making the label segment only slightly less concentrated than the  
17 distribution segment. By contrast, the artistic and traditional retail store segments are  
18 not highly concentrated and generally are regarded as highly competitive.

19 38. The motion picture industry is similarly, highly vertically integrated.  
20 Plaintiffs Metro-Goldwyn-Mayer Studios, Inc., Columbia Pictures Industries, Inc.,  
21 Disney Enterprises, Inc., New Line Cinema Corporation, Paramount Pictures  
22 Corporation, Time-Warner Entertainment Company, L.P., 20th Century Fox Film  
23 Corporation, and Universal City Studios, Inc., will be referred to collectively as the  
24 "Studio Plaintiffs." The Studio Plaintiffs dominate and, when they act in concert,  
25 have monopoly power in the market for the copyright licensed, distribution of first run  
26 major motion pictures in theaters within the United States and thereafter on tape and  
27 DVD format through retailers as well as in pay per view and video on demand  
28 distribution.

1                    **THE DIGITAL REVOLUTION THAT ALTERED THE RECORDED**  
2                    **MUSIC AND MOTION PICTURE INDUSTRIES**

3            39.    Before the digital revolution, a person wishing to copy an audio work  
4 was limited to analog, rather than digital, recording technology. With analog  
5 recording, each successive generation of copies degrades in sound quality. Computer  
6 science provided the means to store music and images digitally. In contrast to analog  
7 recording, digital recording delivers almost no degradation in sound quality, no matter  
8 how many generations of copies are made.

9            40.    Digital recording of music involves the transfer of digital information  
10 comprising musical works. Until recently, the digital information on a single compact  
11 disk of music (CD) required hundreds of computer floppy disks to store, and  
12 downloading even a single song from the Internet took hours. The technology known  
13 as ‘MP3’ was developed and permits rapid and efficient conversion of CD recordings  
14 to computer files easily accessed over the Internet. This is accomplished through the  
15 use of non-proprietary, compression algorithms which make an audio file “smaller”  
16 by limiting the audio bandwidth. The ability of a consumer to copy a digital audio or  
17 video file on his or her hard drive had powerful, commercial consequences when the  
18 general public began to utilize the Internet in the mid 1990s.

19           41.    The Internet is a shared resource; it is a cooperative network built out of  
20 millions of hosts all over the world. Once the domain of the scientific community  
21 alone, the Internet is now used by millions of people around the world in a multitude  
22 of different ways including information gathering, communication and the exchange  
23 of goods and services. Internet search engines such as Google, Alta Vista, Overture  
24 and others provide all Internet users the means to locate and download digital files of  
25 all types, including copyrighted MP3, video and executable files, from millions of  
26 websites around the world. Through the development of “peer-to-peer” technology,  
27 millions of Internet users have started using their computers to connect to each other  
28

1 directly, forming a powerful connected resource that is used for searching, locating  
2 and transporting data.

3 42. There are many centralized software systems that enable users to connect  
4 and exchange material such as MP3 files directly with other users. These systems are  
5 sometimes referred to as peer-to-peer, though many of these applications present a  
6 decentralized face while relying on a central facilitator to coordinate operations. To a  
7 user of an instant messaging system, such as AOL Time Warner's AIM for example,  
8 the application may appear peer-to-peer because the user's friend will receive the  
9 message. But all major instant messaging systems have some sort of central server on  
10 the back end that facilitates nodes talking to each other. The server maintains an  
11 association between the users' name and his or her current IP address, it buffers  
12 messages in case the user is offline, and it routes messages to users behind firewalls.

13 43. Napster provided a peer-to-peer application that was not truly  
14 decentralized. Napster's file sharing itself could be described as decentralized, since  
15 one Napster client downloads a file directory from another Napster client's machine.  
16 However, the application's functionality was not truly decentralized because the  
17 directory of the files was centralized and maintained by Napster. Napster servers  
18 answered search queries and brokered client connections.

19 44. In contrast, Sharman has licensed from Joltid its "FastTrack" software  
20 that is truly decentralized peer-to-peer technology and is incorporated in the KMD  
21 application. Unlike the Napster architecture, the FastTrack application does not rely  
22 on any central server, database or other single point of authority to organize a network  
23 or to broker transactions. With the FastTrack software included in the KMD, every  
24 computer (host) is set to operate as an equal participant, and there are no KMD hosts  
25 with central facilitating or administrative roles that enable users to locate files on each  
26 others' computers. With the KMD application, there are no Sharman servers that  
27 maintain directories of file names to facilitate search requests or to broker client  
28 transactions. No Sharman server assists in the transfer and copying of copyrighted

1 and uncopyrighted works that may be shared by users of the KMD. Users who install  
2 KMD on their computers do so by their own volition and are only able to install the  
3 downloaded KMD application if they first agree not to use the application to infringe  
4 the copyrights of others. Thereafter, those persons make use of KMD in the manner  
5 that they alone choose.

6 **SHARMAN WAS CREATED AND OPERATES WITH THE BUSINESS**  
7 **PURPOSE OF OFFERING DIGITALLY RIGHTS MANAGED CONTENT**  
8 **(“DRM Content”) AS WELL AS OTHER DIGITAL FILES TO**  
9 **INTERNATIONAL USERS OF PEER-TO-PEER SOFTWARE**

10 45. By December 2001, in Sydney, Australia, Nicola Hemming  
11 (“Hemming”) was well aware of peer-to-peer technology and the power of that  
12 technology to distribute audio and video content, computer games, applications  
13 software, and other digital works over the Internet. By that time, Hemming learned  
14 that Altnet, a subsidiary of Brilliant Digital Entertainment (“BDE”), had plans to  
15 develop a search indexing and directory technology that could be used with peer-to-  
16 peer technology to convert wrongful use by users of peer-to-peer software into paying  
17 purchasers of copyrighted works. Operating on a peer-to-peer software platform, and  
18 using digital rights managed technology developed by Microsoft and others, Altnet  
19 technology allowed copyright owners to securely distribute their certified and  
20 encrypted digitized files through decentralized peer-to-peer software whilst retaining  
21 control of this file in order to monetize the market of users of the file regardless of  
22 how many times, or where, it was duplicated and shared.

23 46. Hemming also learned of an opportunity to purchase and license selected  
24 assets of KaZaA BV relating to peer-to-peer technology. She then explored a  
25 business opportunity that would, for the first time, allow copyright owners to be paid  
26 for rights managed content distributed using peer-to-peer software such as the KMD  
27 and to simultaneously reward responsible conduct, discourage infringing conduct, and  
28 benefit from the inherent efficiencies of peer-to-peer technology.



1           47. Convinced of the viability of Altnet's digital rights management and  
2 TopSearch technology when coupled with a peer-to-peer application to distribute the  
3 Industry plaintiffs' works over the Internet for a fee, Hemming incorporated Sharman  
4 in January 2002 with the vision of worldwide distribution of DRM licensed artistic  
5 works using peer-to-peer software.

6                   **SHARMAN ACQUIRES SELECTED KAZAA BV ASSETS**

7           48. In furtherance of Sharman's business plan to promote legitimate uses of  
8 peer-to-peer software, Sharman acquired certain assets from KaZaA BV, a company  
9 located in the Netherlands. Under its agreement with KaZaA BV, Sharman purchased  
10 the graphic user interface comprising the elements of the KMD with which users  
11 interact, Kazaa's name, its website ([www.kazaa.com](http://www.kazaa.com)), and its domain name  
12 ([kazaa.com](http://kazaa.com)). Sharman also obtained from KaZaA BV a license to the FastTrack code  
13 comprising the peer-to-peer protocol that underlies and is distributed as part of the  
14 KMD, which allows for peer-to-peer communications over the Internet.

15           49. Sharman did not elect to assume relationships nor commence new  
16 relationships with any entity that appeared to Sharman to be engaged in infringing or  
17 unethical conduct or which was perceived by Sharman to promote products that  
18 encouraged copyright infringement. Moreover, Sharman advised advertising sales  
19 companies, including those that had worked with KaZaA BV in the past, that it was  
20 Sharman's policy to decline advertisements for businesses which may reasonably be  
21 perceived to promote or encourage infringement.

22           50. Sharman scrupulously pursued its business objectives lawfully, fully  
23 respecting the intellectual property rights of others. Sharman engaged intellectual  
24 property counsel in Australia and in England for that purpose. Sharman set out to  
25 develop a peer-to-peer application that discouraged copyright infringement and  
26 enabled users and copyright holders to distribute their DRM, licensed artistic works,  
27 documents, and files on terms acceptable to the copyright owners.

28

1           51. To accomplish that lawful goal, Sharman shut down the entire KaZaA  
2 BV website immediately after acquiring it to cleanse it of any content that arguably  
3 promoted infringing activity. Sharman replaced it with a single holding page until  
4 attorney approved content and “Terms of Use” provisions were prepared. With the  
5 direct involvement of the intellectual property attorneys Sharman had retained,  
6 Sharman created new and demonstrably different versions of the KMD and the  
7 Kazaa.com website. Sharman eliminated information from the old website, including  
8 all potentially offensive and inappropriate content and advertising. This change  
9 included the elimination of advertisements, messages and chat rooms which could  
10 potentially encourage or promote copyright infringement.

11           52. Utilizing “Terms of Use” provisions its attorneys drafted, Sharman  
12 required potential users to promise not to infringe any copyrights or violate any local  
13 laws before they could install the KMD software. This agreement was largely  
14 unenforceable by Sharman, since international users of Sharman’s software are  
15 usually anonymous, and their specific uses are unknown to Sharman unless such use  
16 is disclosed to Sharman. The terms prohibiting copyright infringement are later  
17 repeated in various places to remind users of their promise. Sharman’s terms of use  
18 provisions prohibiting copyright infringement are substantially similar in content, but  
19 substantially more prominently displayed, than the corresponding terms of use  
20 provisions provided by AOL Time Warner for example, for users of its email and  
21 instant messenger applications which are equally susceptible to copyright infringing  
22 uses.

23           **SHARMAN AND ALTNET ENGAGED IN A JOINT VENTURE FOR THE**  
24           **SOLE PURPOSE OF ACQUIRING RIGHTS AND DISTRIBUTING**  
25           **DIGITAL RIGHTS MANAGED COPIES OF LICENSED**  
26           **COPYRIGHTED WORKS OVER THE INTERNET FOR A FEE**

27           53. Sharman then diligently worked with Altnet to jointly create a product  
28 that made digital rights managed, licensed, copyrighted content available over the

1 Internet for a fee, thereby solving the problem confronted by the Industry plaintiffs.  
2 The Altnet "Top Search" technology integrated into the KMD interface and bundled  
3 with Sharman's licensed FastTrack technology and the Altnet Payment Gateway,  
4 provided that business solution.

5 54. Effective April 30, 2002, Sharman and Altnet entered into a written Joint  
6 Enterprise Agreement ("JEA") documenting the fact that both contributed time,  
7 money and technology to a single business enterprise of providing copyrighted  
8 licensed works, including musical recordings, games, applications and video content  
9 including motion pictures, to consumers over the Internet for a fee. The technological  
10 contribution of each to this joint enterprise was indispensable to the creation of the  
11 service by which licensed, protected, copyrighted content could be distributed over  
12 the Internet. The JEA recited the pre-existing shared business goals of Altnet and  
13 Sharman to create a single enterprise that acted as a joint venture and offered these  
14 services for a fee:

15 WHEREAS, Sharman was created with the intention  
16 of working jointly with Altnet to develop a business by  
17 which the power of peer-to-peer file sharing could be used  
18 to distribute copyright licensed content for profit;

19 WHEREAS, prior to the effect date of this  
20 Agreement, Altnet and Sharman have been sharing revenue  
21 derived from the joint use of Sharman and Altnet's  
22 technology pursuant to oral agreement;

23 WHEREAS, their prior oral agreement and this  
24 Agreement promote and seek to attain the joint commercial  
25 goals of Altnet and Sharman;

26 WHEREAS, the joint commercial goals of Altnet  
27 Sharman could not be attained except through the use and  
28

1 contribution by each of their respective technologies to this  
2 joint enterprise; and

3 WHEREAS, Altnet and Sharman have entered into  
4 this Agreement in order to share the profits created from this  
5 joint enterprise.

6 55. The JEA transferred certain rights and allocated certain responsibilities  
7 between and among Sharman and Altnet in connection with the operation of this  
8 single business enterprise. Among other things:

9 (a) Sharman appointed and Altnet agreed to be the exclusive  
10 representative of Sharman for the sale, license and/or other commercial  
11 exploitation of search results using Sharman's Kazaa Media Desktop ("KMD")  
12 technology. (JEA ¶¶ 2.1, 2.2, 1.10, 1.13);

13 (b) Sharman granted Altnet a worldwide, non-exclusive, limited  
14 license to use Sharman's marks, including, without limitation, "Kazaa." (JEA  
15 ¶ 2.4);

16 (c) Altnet agreed to deliver and display the TopSearch Results to end  
17 users of Sharman's KMD technology (JEA, ¶ 3.1);

18 (d) Sharman agreed to provide its KMD technology for the display of  
19 Altnet's TopSearch Results (JEA, ¶ 3.2);

20 (e) Sharman agreed to use commercially reasonable efforts to  
21 implement such technological modifications as requested by Altnet with  
22 Sharman's peer-to-peer software (JEA, ¶ 3.5); and

23 (f) Altnet agreed that it would use "commercially best efforts" to  
24 solicit licensed content from media and content owners that would then be  
25 distributed by this joint enterprise (JEA, ¶ 4.1).

26 56. The revenue sharing provisions of the JEA also evidenced the fact that  
27 Sharman and Altnet would share equally in the net profits from this single business  
28 enterprise. The JEA provided, among other things, that all net revenue shall be

1 divided equally between Altnet and Sharman (fifty percent [50%] to each Altnet and  
2 Sharman). (JEA, ¶¶ 5.1., 4.7.4.)

3 57. Paragraph 10.6 of the JEA originally stated that the JEA did not create an  
4 agency, partner, or joint venture relationship between Altnet and Sharman. That  
5 paragraph has been amended and changed by agreement of the parties to memorialize  
6 more accurately the relationship between Altnet and Sharman.

7 58. Altnet and Sharman created a joint venture for the sole business purpose  
8 of acquiring, distributing, and selling licensed, digitally rights managed, copyrighted  
9 content over the Internet for a fee. Specifically: (1) the parties intended to form a  
10 joint enterprise to acquire, distribute and sell licensed content; (2) Sharman and Altnet  
11 jointly manage and control the business of the joint enterprise; (3) Sharman and  
12 Altnet jointly share the profits and losses of the joint enterprise derived from the sale  
13 or distribution of licensed content; and (4) Sharman and Altnet each contribute  
14 property, skill and knowledge to the joint enterprise.

15 59. Sharman and Altnet intended to form a joint enterprise for, and limited  
16 to, the distribution and sale of licensed content, as manifested in the terms of the Joint  
17 Enterprise Agreement and in the conduct of the parties pursuant to the JEA.

18 60. Sharman and Altnet jointly manage and control the business of the joint  
19 enterprise. Principals of both Sharman and Altnet regularly communicate to  
20 determine the licensed content and future features to be offered to users of the KMD.  
21 Sharman and Altnet both actively solicit licensed content from media and content  
22 owners that would then be distributed by their joint enterprise. Examples of  
23 Sharman's solicitation of licensed content and actual participation in securing licensed  
24 content to be distributed over the Internet include, among others, the following:

- 25 (a) Sharman negotiated with David McKie at Simple Star to develop  
26 new showcase area on the KMD entitled "Photo Show Deluxe"  
27 that would exhibit photographs and conduct photography contests;  
28

- 1 (b) Sharman engaged in extensive discussions with Juan Ramon  
2 Barrero of Ya TV in pursuit of content partners for its Hispanic  
3 market;
- 4 (c) Sharman has directly solicited and procured an exclusive digital  
5 promotion arrangement with Australian independent recording  
6 label 301 Records for its artists, including "The Honey Palace."  
7 Music from the band "The Honey Palace" will be digitally  
8 wrapped, digitally distributed, and sold on Kazaa for .25¢ a track;
- 9 (d) Sharman has directly solicited movie content to be distributed over  
10 the KMD from Cine-Courts.com, a French movie distribution  
11 company;
- 12 (e) Sharman is engaged and has been engaged in soliciting content  
13 from independent music labels worldwide to be distributed over  
14 the Internet using peer-to-peer technology and Altnet's digital  
15 rights managed solution;
- 16 (f) Sharman is and has been engaged in soliciting movie content to  
17 distribute over the Internet from Mouvis, located in France;
- 18 (g) Sharman is and has been engaged in soliciting movie content to  
19 distribute over the Internet from Monsoon Tsunami;
- 20 (h) Sharman was directly involved in the process by which Altnet  
21 included a content licensing deal with Cornerband in June 2002 to  
22 distribute Cornerband music over the KMD. Cornerband is a  
23 company that allows small, local bands worldwide to DRM encode  
24 music and make it available on the Internet. These bands that are  
25 not signed to any label and which are in search of an audience that  
26 the KMD provides. Cornerband systems personnel worked  
27 diligently with Altnet and Sharman to enable the system that  
28 Cornerband is using to this day; and

1 (i) Sharman is and has been directly engaged in soliciting movie  
2 content to distribute over the Internet from Yash Raj Films,  
3 Bollywood's (India's) largest producer of feature length movies,  
4 who have distributed movie and music trailers and post theatrical  
5 release music videos over the KMD.

6 61. In the course of developing enhancements and features for the KMD,  
7 project managers from Sharman work directly with project managers from Altnet to  
8 identify project goals. Senior management as well as staff members of both Sharman  
9 and Altnet work closely to assure that the shared vision for a desirable user experience  
10 is realized in a manner that simultaneously promotes the business goals of both  
11 Sharman and Altnet. Users do not distinguish between Sharman's KMD and Altnet.  
12 Sharman and Altnet jointly developed their enterprise to achieve that goal. The back-  
13 end systems make little difference to the users, whose only interest is to acquire  
14 licensed digital content.

15 62. Sharman and Altnet jointly share the net profits earned by the joint  
16 enterprise from the distribution and sale of licensed content. Each of Sharman and  
17 Altnet contribute resources to the joint enterprise which will be lost if the enterprise  
18 does not commercially succeed.

19 63. Sharman and Altnet each contribute property, skill and knowledge to the  
20 joint enterprise. The technical enhancements offered to users are the result of  
21 cooperation and contribution by both Sharman and Altnet. Sharman managers work  
22 extensively with Altnet managers to build technology into the KMD that promotes the  
23 rights managed peer-to-peer distribution of licensed content. Teams of tech and  
24 marketing personnel from Sharman and Altnet spend hours a week together on  
25 conference calls co-designing solutions and co-writing technical specifications, sales  
26 documents, and other materials. The mutual contribution of skill, property and  
27 knowledge to the joint enterprise by both Sharman and Altnet is so strategic,  
28

1 pervasive and collaborative, that the following typical developmental process is  
2 followed by Sharman and Altnet:

- 3 (a) Either Sharman or Altnet will develop a specification for a future  
4 feature or enhancement for the KMD relating to the sale or  
5 distribution of licensed content;
- 6 (b) The written specification will be circulated to several officers of  
7 the other company for their review;
- 8 (c) A conference call or meeting will occur between representatives of  
9 both Sharman and Altnet to evaluate the proposal, suggest  
10 alternatives, allocate work among and between the companies,  
11 determine how the project will be marketed or explained to users,  
12 and set time parameters for completion;
- 13 (d) In performing the allocated tasks, the Sharman tech team will  
14 work with the Altnet tech team and the Sharman marketing team  
15 will work with the Altnet marketing team;
- 16 (e) Occasional progress meetings and conference calls are held to  
17 verify deliverables and schedules;
- 18 (f) Project completion occurs when the combined software  
19 enhancements of Sharman and Altnet are functionally tested and  
20 released, and the agreed upon marketing message is conveyed; and
- 21 (g) Sharman and Altnet also work cooperatively to perform marketing  
22 research to establish consumer response to features. Altnet focuses  
23 its analysis within the U.S., Sharman examines consumer response  
24 in other territories.

25 64. This business enterprise, in Altnet's and Sharman's shared view, was  
26 positioned to be highly profitable. Using a new technology called "TopSearch,"  
27 (developed by Altnet, a subsidiary of Brilliant Digital Entertainment and the  
28 co-venturer of Sharman), it was Sharman's and Altnet's joint business plan to



1 (i) populate the shared folders of peer-to-peer software users with digital rights  
2 management controlled (“DRM”) files of copyrighted works, (ii) have those files  
3 appear first on the list of files a user sees in response to a search request, and  
4 (iii) encourage users of the KMD to pay for all copyrighted works or otherwise access  
5 copyrighted works only in accordance with terms of access set by the owners of the  
6 applicable works. By relegating non-DRM files to a subordinate and comparatively  
7 unattractive access location, and by providing additional significant incentives to  
8 encourage users of the KMD to pay for or otherwise permissively use the DRM  
9 content which would result in remuneration (in such form and value as determined by  
10 the copyright owners) to the copyright owners, Sharman intended to promote and  
11 encourage only business appropriate file sharing and to share the net payments for  
12 DRM works lawfully exchanged by users of the KMD software with Altnet.  
13 Frequently, so called “free content” available on the Internet is corrupted or clipped  
14 by careless users or by parties employed by Industry plaintiffs and other copyright  
15 owners to purposely corrupt this “free content.” If users of established, successful,  
16 peer-to-peer software are presented better quality, rights managed, original works for  
17 downloading at a reasonable price to be paid to the copyright owners, if meaningful  
18 incentives are offered for those purchases, and if these products are well marketed,  
19 wrongful conduct will diminish and the availability of infringing files will be  
20 suppressed. Obviously, to test and succeed in discouraging the wrongful use of  
21 Sharman’s KMD technology using the Altnet and Sharman technology, Altnet and  
22 Sharman needed for their business enterprise non-discriminatory, fair, and  
23 competitive access to the Industry plaintiffs’ copyrighted works to digitally wrap and  
24 make available for download and purchase by users of Sharman’s KMD.  
25  
26  
27  
28

1                    **THE INDUSTRY PLAINTIFFS' ANTICOMPETITIVE SCHEME**  
2                    **TO ELIMINATE SHARMAN AND ITS JOINT ENTERPRISE**  
3                    **AS A MARKET PARTICIPANT**

4                    65. For anticompetitive and wrongful purposes, the Industry plaintiffs have  
5                    concerted to participate, refused to do business and have denied Sharman,  
6                    Altnet, and their joint enterprise reasonable access to the copyrighted works they own.  
7                    This boycott was directed at and intended to injure Sharman, Altnet, and their joint  
8                    enterprise because they together owned and operated a service for the digital  
9                    distribution of copyrighted works, which they intended to use to forge a direct  
10                   relationship with KMD users so as to compete directly with Industry Plaintiffs and  
11                   their affiliates in their roles as distributors of copyrighted works.

12                   66. In furtherance of a conspiracy to monopolize and drive Sharman and its  
13                   joint enterprise out of business, the Industry plaintiffs have implemented various  
14                   strategies to control or stop the means by which others, including Sharman and its  
15                   joint venture, offer digital technology useful for sharing digital files. Those strategies,  
16                   detailed below, include (a) targeting Sharman and its joint enterprise with Altnet in an  
17                   effort to drive Sharman and its joint enterprise out of business through boycott and  
18                   concerted exclusionary practices; (b) collusively refusing to license content to any  
19                   digital distributor of content over the Internet on other than a restricted license basis  
20                   aimed at preventing decentralized peer-to-peer file sharing software from distributing  
21                   that licensed content; (c) selectively and concertedly licensing content in a  
22                   discriminatory and anticompetitive manner simultaneously to promote companies  
23                   owned and affiliated with the Industry plaintiffs and to injure companies not owned or  
24                   affiliated with the Industry plaintiffs that distribute digital files through decentralized  
25                   peer-to-peer software; (d) concertedly pressuring advertisers and other vendors and  
26                   customers of Sharman and of the joint enterprise to stop doing business with  
27                   Sharman; (e) concertedly engaging in a massive public relations campaign intended,  
28                   among other goals, to cause universities and corporations to ban the KMD and other

1 peer to peer technologies, and to cause consumers to either cease the use of peer to  
2 peer technology altogether, including the KMD or, to disable the file sharing feature  
3 of their peer to peer application, and (f) engaging in unfair business practices  
4 intending to drive Sharman and any peer-to-peer provider out of business.

5 **INSTANCES OF ANTICOMPETITIVE TARGETING BY THE INDUSTRY**  
6 **PLAINTIFFS AGAINST SHARMAN AND ITS JOINT ENTERPRISE**

7 67. Industry plaintiffs' concerted anticompetitive scheme has been directed  
8 at Sharman because Sharman, through its unincorporated joint enterprise with Altnet,  
9 is a market participant and a competitor of Industry plaintiffs' affiliates in the separate  
10 markets for the digital distribution within the United States of copyrighted  
11 commercially valuable musical works over the Internet for a fee and the market for  
12 digital distribution within the United States of copyrighted major theatrical motion  
13 pictures over the Internet for a fee ("Relevant Markets"). The means by which the  
14 Industry plaintiffs sought to harm Sharman and its enterprise was through a concerted  
15 refusal to deal with Sharman and its joint enterprise to deprive it of licensed,  
16 copyrighted content it could distribute using digitally rights managed (DRM)  
17 technology.

18 68. This concerted conduct was intended to further the Industry plaintiffs  
19 goal of monopolizing the Relevant Markets and promoting the Industry plaintiffs  
20 control of digital distribution of such content. Although exclusive distribution rights  
21 to a copyrighted work are within the bundle of rights received by a copyright owner,  
22 an anticompetitive agreement among multiple copyright owners not to distribute their  
23 content to targeted third parties, such as Sharman, or to destroy the revenue streams  
24 and business of distribution competitors, is not within the limited grant of a copyright  
25 monopoly conferred by the government. The Industry plaintiffs' goal was to  
26 concertedly extend their collective monopoly in the ownership of copyrighted content  
27 into a collective monopoly over the digital distribution of that content by destroying  
28 competitive technology and businesses.

1           69. Specific examples of the Industry plaintiffs' boycotting conduct targeting  
2 Sharman and its joint venture include, among others, the following:

- 3           (a) In furtherance of the Industry plaintiffs' conspiracy, Universal  
4 Music Group in May 2002 terminated an ongoing KMD promotion  
5 of three digital music tracks from artists signed with Island Def  
6 Jam Music Group because Altnet was promoting those tracks on  
7 the Kazaa.com site;
- 8           (b) In late May 2002, representatives of Altnet met with Universal  
9 Music's eLabs division, a "think tank" at Universal Music Group  
10 charged with developing both the technology and strategy for  
11 digital distribution of its copyrighted content. At that meeting and  
12 thereafter, Amanda Marks, a Senior Vice President of Universal  
13 Music Group, told a representative of the Sharman/Altnet joint  
14 venture that under no circumstances would Universal license  
15 content to be distributed on Sharman's KMD. This refusal to deal  
16 was in furtherance of the aforementioned conspiracy;
- 17           (c) In June 2002, in furtherance of the concerted refusal to deal with  
18 the Sharman/Altnet joint enterprise, Warner Brothers Records  
19 refused to do business with the joint enterprise even after Tom  
20 Walley, the Chief Executive Officer of Warner Brothers Records,  
21 had expressed his desire to distribute content via Kazaa using  
22 Altnet's technology;
- 23           (d) In July 2002, Paul Vidich, Vice President of Digital Strategy of the  
24 Warner Music Group of Companies expressed interest in using the  
25 Sharman/Altnet joint enterprise to distribute content but he was  
26 told by his attorneys, in furtherance of the conspiracy among the  
27 Industry plaintiffs, that he was not to do business with Altnet and  
28 Sharman;

- 1 (e) On October 14, 2002, representatives of the joint enterprise met  
2 with a number of persons, including Jimmy Iovine, CEO and  
3 Chairman of Interscope Music. Mr. Iovine wanted to test the KMD  
4 enabled Altnet technology using works from Eminem and others.  
5 In furtherance of the conspiracy among the Industry plaintiffs to  
6 boycott Sharman and its joint enterprise, Mr. Iovine was told that  
7 he could not do business with Altnet because of its association with  
8 Sharman;
- 9 (f) In November 2002, Mike McGinley, a representative of the  
10 Sharman joint enterprise spoke with Tony Dimitriades, the  
11 manager of well known music artist Tom Petty and his band.  
12 Dimitriades wanted to promote Tom Petty on the Kazaa.com home  
13 page using Altnet technology to increase exposure for Petty's latest  
14 album. Altnet and Sharman were willing to perform this request.  
15 Dimitriades approached Tom Walley, Chief Executive Officer of  
16 Warner Records for his approval for such a promotion. In  
17 furtherance the anticompetitive scheme and the alleged boycott,  
18 attorneys for Warner Records instructed Walley that he was not to  
19 do business with Sharman;
- 20 (g) As recounted in an article in the Los Angeles Times on  
21 September 10, 2003, in 2002 the Defendants conspired to sell  
22 songs from all of their companies on two label-owned online  
23 services. The Defendants further agreed to exclude all peer-to-peer  
24 based digital distribution companies, including Sharman and its  
25 joint enterprise, from receiving any access to copyrighted musical  
26 content for licensed distribution; and
- 27 (h) The Studio Plaintiffs have colluded and agreed not to use peer-to-  
28 peer distribution systems to distribute their movie content and

1 specifically have agreed not to use the Sharman/Altnet joint  
2 venture for that purpose. In or around January 2003, Jim Romo of  
3 the firm "Movielink," one of the Studio Plaintiffs' affiliates,  
4 explained to Derek Broes that the reason Movielink would not use  
5 so-called peer-to-peer networks to distribute their films was  
6 because the movie studios had agreed not to use peer-to-peer  
7 technology for their film distribution.

8 **THE INDUSTRY PLAINTIFFS CONCERTEDLY USE**  
9 **"RESTRICTED LICENSES" TO FRUSTRATE AND PREVENT**  
10 **COMPETITION FROM SHARMAN AND OTHERS PROVIDERS**  
11 **OF PEER-TO-PEER DISTRIBUTION MEANS**

12 70. The Industry plaintiffs by agreement are refusing to license their content  
13 to third parties except under so-called "dead end licenses" (hereinafter "DEL") which  
14 are restrictive in their terms beyond restrictions reasonably required for pro-  
15 competitive, profit maximizing purposes. A DEL is a one time license to retrieve a  
16 digital file from a server only. Even though digital rights managed technology exists  
17 to assure the copyright owner is remunerated each time a DRM file is downloaded  
18 from either a peer or a server, the collective decision by the Industry plaintiffs to use  
19 only DELs precludes licensing at all to peer-to-peer platforms such as Sharman's  
20 KMD.

21 71. This concerted business strategy by the Industry plaintiffs is intended by  
22 them, over time, to exercise control and monopolize the Relevant Markets. The first  
23 monopolistic purpose of this conspirational conduct is to drive distributors of content  
24 using peer-to-peer platforms out of business. The second monopolistic purpose is to  
25 limit the means for future digital distribution of either music or major theatrical works  
26 in a way that the Industry plaintiffs can in the future more directly control the  
27 Relevant Markets.

1           72. The Industry plaintiffs with monopolistic intentions are pursuing a digital  
2 distribution “world” without peer-to-peer distribution in which the Industry plaintiffs  
3 achieve a monopoly over the means of digitally distributing content over the Internet.  
4 The exclusive use of DEL’s assures that the Industry plaintiffs effectively license  
5 mere “store fronts,” such as Rhapsody and iTunes for a limited time on a one license  
6 basis. These web based store fronts act just like a retailer, nicely slotted in the  
7 distribution chain, controllable, and immediately terminable. Once such “store front  
8 retailers” have proven out their business model, and expended capital and cash-flow  
9 making mistakes expected to be made in the establishment phase of a controlled  
10 marketing program, the Industry plaintiffs will acquire them for a modest price to  
11 secure the brand equity they will have created, or the Industry plaintiffs can stop  
12 providing content altogether and take over the market space directly. Either way,  
13 control of the distribution of copyrighted content would remain with the Industry  
14 plaintiffs acting in concert with each other who own that copyrighted content.

15           73. Peer-to-peer distribution of digital rights managed files provides the  
16 means for the Industry plaintiffs to generate more revenue from downloads than  
17 server based distribution. This is true because the cost of operation is considerably  
18 less with distributed computing, and peer-to-peer distribution accomplishes greater  
19 market penetration. If peer-to-peer distribution is used, even though the copyrighted  
20 content would be distributed by peers and not a server, a remuneration to the  
21 copyright owner would be required each time a peer provides a digitally rights  
22 managed music file to a new user.

23           74. The Industry plaintiffs’ collective decision to limit third party licenses to  
24 DELs and refuse to license peer-to-peer providers promotes their monopolistic plan.  
25 Using peer-to-peer distribution would not allow the Industry plaintiffs to position  
26 themselves to control retail distribution in the future. Once content is distributed to a  
27 peer, it is distributable by a peer in the future. Although the content owner would be  
28 remunerated each time the file was distributed by a peer, the Industry plaintiffs would

1 lack the means to stop further distribution in order to acquire control of the entity  
2 directly providing digital copyrighted content to the user in the future.

3 **THE INDUSTRY PLAINTIFFS HAVE ENGAGED IN ANTICOMPETITIVE**  
4 **AND DISCRIMINATORY LICENSING PRACTICES FOR AN**  
5 **ANTICOMPETITIVE PURPOSE**

6 75. The Industry plaintiffs have concertedly promoted the distribution of  
7 licensed content through companies in which many of the Industry plaintiffs and their  
8 corporate affiliates have or had direct equity interests, such as Musicnet, Pressplay,  
9 Roxio, and Movielink with the purpose and intent of monopolizing the market for the  
10 digital distribution of copyrighted content over the Internet.

11 76. The Industry plaintiffs have unreasonably and concertedly refused to do  
12 business with the Altnet/Sharman Joint Enterprise in order to harm Altnet and  
13 Sharman in their business or property and to prevent the use of decentralized peer-to-  
14 peer technology for the secure distribution of their licensed, copyrighted content.

15 77. The Industry plaintiffs have collusively engaged in the selective use of  
16 DELs to limit competition in the digital distribution of copyrighted content.

17 **THE INDUSTRY PLAINTIFFS HAVE CONCERTEDLY COERCED**  
18 **ADVERTISERS AND OTHER VENDORS AND CUSTOMERS OF**  
19 **SHARMAN TO STOP DOING BUSINESS WITH SHARMAN**  
20 **AND ITS JOINT ENTERPRISE**

21 78. The conspiratorial acts of the Industry plaintiffs to coerce actual and  
22 potential advertisers, vendors, and customers of Sharman to stop doing business with  
23 Sharman include, among others, the following:

- 24 a. On September 23, 2002, Tiscali, a leading European Internet  
25 Service Provider announced a marketing arrangement with  
26 Sharman whereby Tiscali's broadband Internet service would be  
27 prominently promoted on the Kazaa.com site and to users of the  
28 KMD. Immediately, the music industry attacked Tiscali.



1 Universal Music Group threatened to withdraw from their recently  
2 announced content license agreement with Tiscali, thus stripping  
3 (a music download service created by Tiscali in conjunction with  
4 Peter Gabriel) of critical content unless Tiscali withdrew from its  
5 prominent arrangement with Sharman. As a result of this pressure,  
6 Tiscali was forced to substantially curtail its relationship with  
7 Sharman;

- 8 b. The law firm of Kirkland and Ellis was representing Sharman in  
9 connection with a matter involving a software programmer's  
10 extortion demands upon Sharman. The Kirkland firm withdrew  
11 from the representation because another of its clients, AOL Time  
12 Warner, which is the corporate owner of one or more Industry  
13 plaintiffs, demanded that it do so, even though no conflict  
14 whatsoever existed;
- 15 c. In June 2003, Sharman and Tiscali had agreed to a broadband  
16 promotion on Kazaa. Nicholas Guidalevich of Tiscali, aware of  
17 the Industry plaintiffs' prior conduct in objecting to Tiscali doing  
18 business with Sharman, arranged that the web page containing the  
19 broadband advertisement would not contain the Tiscali logo. On  
20 June 11, 2003 Mr. Guidalevich notified Sharman that, even  
21 without the Tiscali logo on the web page, Tiscali immediately  
22 received an e-mail from a Universal executive complaining about  
23 Tiscali doing business with Sharman. Universal demanded that  
24 the web page be taken down, and Tiscali in turn instructed  
25 Sharman to do so, which it did.
- 26 d. The Industry plaintiffs have collectively required that contracts for  
27 the provision of content to other Internet Service Providers (ISPs)  
28

1 have a clause forbidding those ISPs from doing business with  
2 providers of peer-to-peer software, including Sharman.

3 **THE INDUSTRY PLAINTIFFS HAVE ENGAGED IN UNFAIR BUSINESS**  
4 **PRACTICES INTENDED TO DRIVE SHARMAN OUT OF BUSINESS**  
5 **AND MONOPOLIZE THE RELEVANT MARKETS**

6 79. In furtherance of the Industry plaintiffs' anticompetitive scheme, the  
7 Industry plaintiffs have engaged in, among other things, the following wrongful,  
8 unlawful and unfair conduct:

- 9 a. Violating the copyrights owned by Sharman relating to its KMD  
10 by using unauthorized and unlicensed copied software known as  
11 Kazaalite to secretly obtain information from users of the KMD to  
12 commence copyright infringement actions against them;
- 13 b. Violating the privacy provisions, including Paragraph 2.1 of the  
14 End User License Agreements of the KMD, when the Industry  
15 plaintiffs and their agents, including but not limited to, Big  
16 Champagne, Media Defender, Vidius, Overpeer and BayTSP, used  
17 the Sharman software to secretly obtain information regarding  
18 users of the KMD;
- 19 c. Violating Paragraphs 2.2, 2.3, 2.4 and 2.5 of the End User License  
20 Agreements by transmitting and downloading "spoofed files"  
21 using the KMD;
- 22 d. Violating state and federal personal privacy laws and the Digital  
23 Millennium Copyright Act ("DMCA") anti-hacking provisions by  
24 hacking and exploring the files of KMD users in order to frighten  
25 legitimate users of the KMD;
- 26 e. Falsely claiming that Sharman, Altnet and the KMD promote child  
27 pornography;
- 28 f. Falsely claiming that Sharman and Altnet are "pirates";

- 1 g. Falsely claiming that Sharman is a “smut peddler”;
- 2 h. Falsely claiming that their goal is to deter illegal file sharing, when
- 3 their true motive is to deter all uses, legitimate and illegitimate, of
- 4 peer-to-peer technology;
- 5 i. Threatening users of peer-to-peer technology with potential
- 6 litigation and liability, based upon information obtained by illegal
- 7 means;
- 8 j. Pressuring artists not to license their works to providers of peer-to-
- 9 peer software, such as Sharman, that were not owned or controlled
- 10 by the Industry plaintiffs; and
- 11 k. Refusals to deal with, and boycotts of, Internet Service Providers
- 12 around the world that had entered, or proposed to enter, into
- 13 advertising arrangements with Sharman;

14 80. The Industry plaintiffs, individually and collectively, through the RIAA,  
15 the IFPI, Vidiuz, Overpeer, MediaDefender, BayTSP and other organizations and  
16 companies, have engaged in these unfair business practices, for the specific purpose  
17 of eliminating sources of decentralized peer-to-peer file sharing and acquiring a  
18 monopoly over digital distribution of commercially valuable copyrighted music and  
19 movie content. In fact, these same persons and entities have been both secretly and  
20 publicly engaged in promotion of their own digital distribution technologies which  
21 permitted exchanges of copyright infringing files, such as instant messaging, email  
22 and other similar technologies only, in each case engineering the technologies to use a  
23 central server thus retaining for themselves the same knowledge and control held by  
24 Napster.

25 **COUNT I**

26 **(Conspiracy in Restraint of Trade in Violation of § 1 of the Sherman Act)**

27 81. Sharman realleges and incorporates in this Count the preceding  
28 allegations of this Counterclaim, and further alleges as follows:

1 82. The Industry plaintiffs have contracted, combined and conspired in  
2 unreasonable restraint of trade to boycott Sharman, Altnet and their venture with the  
3 intent to harm Sharman and Altnet, and they have failed to provide Altnet and  
4 Sharman access to copyrighted works on a commercially reasonable basis so they  
5 could be available for distribution by the joint enterprise between Sharman and Altnet  
6 in a DRM form to users of the KMD.

7 83. As a direct and proximate result of this concerted refusal to deal,  
8 Sharman has been and will continue to be injured in its business and property.

9 84. The Industry plaintiffs' unlawful conduct will continue unless enjoined,  
10 and Sharman has no adequate remedy at law for all the effects of such conduct.

11 **COUNT II**

12 **(Trust Against Public Policy in Violation of Cal. Bus. & Prof. Code § 16726)**

13 85. Sharman realleges and incorporates in this Count the preceding  
14 allegations of this Counterclaim, and further alleges as follows:

15 86. As a direct and proximate result of the violations alleged herein,  
16 Sharman has been and will continue to be damaged by the Industry plaintiffs.

17 87. The Industry plaintiffs' unlawful conduct will continue unless enjoined,  
18 and Sharman has no adequate remedy at law for all the effects of such conduct.

19 **COUNT III**

20 **(Monopolization in Violation of § 2 of the Sherman Act)**

21 88. Sharman realleges and incorporates in this Count the preceding  
22 allegations of this Counterclaim and further alleges as follows:

23 89. The Industry plaintiffs other than the Studio Plaintiffs, when they act in  
24 concert, have monopoly power in the relevant market for the digital distribution  
25 within the United States of commercially valuable copyrighted sound recordings over  
26 the Internet for a fee, and have concertedly acted with specific intent to maintain and  
27 exercise that monopoly power to dictate (i) the terms, conditions, and technology by  
28

1 which such works will be digitally distributed, and (ii) the entities allowed to digitally  
2 distribute such works, in violation of § 2 of the Sherman Act.

3 90. The Studio Plaintiffs and their affiliates, when they act in concert, have  
4 monopoly power in the relevant market for the digital distribution within the United  
5 States of major theatrical motion pictures over the Internet for a fee, and have  
6 concertedly acted with specific intent to maintain and exercise that monopoly power  
7 to dictate (i) the terms, conditions, and technology by which such works will be  
8 digitally distributed, and (ii) the entities allowed to digitally distribute such works, in  
9 violation of § 2 of the Sherman Act.

10 91. As a direct and proximate result of the violations alleged herein,  
11 Sharman has been and will continue to be damaged by the Industry plaintiffs.

12 92. The Industry plaintiffs' unlawful conduct will continue unless enjoined,  
13 and Sharman has no adequate remedy at law for all the effects of such conduct.

14 **COUNT IV**

15 **(Unfair Business Practices and Unfair Competition, Cal. Bus. & Prof. Code**  
16 **§§ 17200 *et seq.*)**

17 93. Sharman realleges and incorporates in this Count the preceding  
18 allegations of this Counterclaim, and further alleges as follows:

19 94. The acts of the Industry plaintiffs alleged in paragraphs 65-80 herein  
20 constitute unlawful, unfair or fraudulent business acts or practices in violation of Cal.  
21 Bus. & Prof. Code §§ 17200 *et seq.*

22 95. The Industry plaintiffs' acts of unfair competition and unlawful, unfair  
23 and fraudulent business acts and practices significantly threaten or harm competition  
24 in the defined digital distribution markets.

25 96. The Industry plaintiffs' acts of unfair competition and unlawful, unfair  
26 and fraudulent business acts and practices have injured competition, Sharman and the  
27 public.  
28

1 97. The Industry plaintiffs' acts of unfair competition and unlawful, unfair  
2 and fraudulent business acts and practices are likely to continue and therefore  
3 constitute a continuing threat to fair and lawful competition.

4 98. Sharman and the public at large will continue to sustain damages and  
5 will suffer harm for which there is no adequate remedy at law unless the Industry  
6 plaintiffs are permanently enjoined from continuing to engage in the acts of unfair  
7 competition and unlawful, unfair and fraudulent business acts and practices alleged  
8 above.

9 **COUNT V**

10 **(Copyright Infringement in Violation of 17 U.S.C. § 501, et seq.)**

11 99. Sharman realleges and incorporates in this Count the preceding  
12 allegations of this Counterclaim and further alleges as following:

13 100. At all relevant times, Sharman has been the owner of all rights, title, and  
14 interest in certain software known as the Kazaa Media Desktop. Sharman has  
15 registered, and has pending applications for registering, copyrights for versions of its  
16 Kazaa Media Desktop software with the Register of Copyrights, and at least one  
17 version of the Kazaa Media Desktop software is the subject of a valid Certificate of  
18 Copyright Registration.

19 101. Sharman is informed and believes, and on that basis alleges, that Industry  
20 and Studio Plaintiffs, acting individually, acting in concert, and acting through their  
21 agents and co-conspirators, including without limitation Big Champagne, Media  
22 Defender, Vidius, Overpeer and BayTSP have infringed Sharman's registered  
23 copyrights by, among other things, downloading and using unauthorized versions of  
24 Sharman's Kazaa Media Desktop software, including an unauthorized and unlicensed  
25 version known as "Kazaalite," for purposes of tracking software use and collecting  
26 information about software users. in violation of 17 U.S.C. § 501, et seq.

27 102. Sharman is informed and believes, and on that bases alleges, that  
28 Industry and Studio Plaintiffs knew or had reason to know that their use of

1 unauthorized and unlicensed versions of Sharman's Kazaa Media Desktop software  
2 was infringing. Through their agents, Industry and Studio Plaintiffs have used, and  
3 continue to use, unauthorized versions of the copyrighted Kazaa Media Desktop  
4 software in both public demonstrations and private data collection activities.

5 103. Industry and Studio Plaintiffs, their agents, and their co-conspirators  
6 have downloaded and used unauthorized and unlicensed versions of Sharman's  
7 copyrighted Kazaa Media Desktop Software without the permission, license, or  
8 consent of Sharman.

9 104. Each download and use of unauthorized and unlicensed versions of  
10 Sharman's copyrighted Kazaa Media Desktop Software by Industry and Studio  
11 Plaintiffs, their agents, and their co-conspirators constitutes a separate and distinct act  
12 of infringement.

13 105. The foregoing acts of infringement by Industry and Studio Plaintiffs have  
14 been willful, intentional, and purposeful, in disregard of and with indifference to  
15 Sharman's rights.

16 106. As a direct and proximate result of Industry and Studio Plaintiffs'  
17 infringement of Sharman's copyright and exclusive rights under copyright, Sharman  
18 has suffered substantial damages to its business, including without limitation, dilution  
19 of the value of its rights, and Sharman is entitled to damages for each act of  
20 infringement.

21 107. Alternatively, Sharman is entitled to statutory damages, pursuant to 17  
22 U.S.C. § 504(c), in the amount of \$150,000 for each act of infringement. More  
23 specifically, one or more acts of infringement are occurring and have occurred each  
24 time the Industry and Studio plaintiffs and their agents use Sharman's copyrighted  
25 content to target individual users of file sharing technology.

26 108. Sharman further is entitled to its attorneys' fees and full costs pursuant to  
27 17 U.S.C. § 505.





1 employment relationships or under non-disclosure agreements).  
2 (EULA 2.5.)

3 112. Sharman is informed and believes, and on that basis alleges, that Industry  
4 and Studio Plaintiffs, acting individually, acting in concert, and acting through their  
5 agents and co-conspirators, including without limitation Big Champagne, Media  
6 Defender, Vidius, Overpeer and BayTSP, have downloaded and used the Kazaa  
7 Media Desktop software, thereby consenting to the provisions of the EULA recited in  
8 the preceding paragraph.

9 113. Sharman is informed and believes, and on that basis alleges, that Industry  
10 and Studio Plaintiffs, acting individually, acting in concert, and acting through their  
11 agents and co-conspirators, have breach paragraphs 2.1 through 2.5 of the EULA by,  
12 among other things:

- 13 a. Violating the copyrights owned by Sharman relating to its Kazaa  
14 Media Desktop software by, among other things, using  
15 unauthorized and unlicensed copied software known as Kazaalite  
16 to secretly obtain information from users of the Kazaa Media  
17 Desktop to commence copyright infringement actions against  
18 them.
- 19 b. Improperly and illegally collect information about users of the  
20 Kazaa Media Desktop software.
- 21 c. Hacking and/or reverse engineering the Kazaa Media Desktop  
22 software.
- 23 d. Transmitting and downloading “spoofed” or “corrupted” files  
24 with the Kazaa Media Desktop software;
- 25 e. Violating state and federal personal privacy laws and the rights of  
26 individual computer users by hacking and exploring files located  
27 on their personal computers in order to frighten legitimate users of  
28 the Kazaa Media Desktop software.

1 f. Using the instant messenger functionality of the Kazaa Media  
2 Desktop software to sent threatening messages to other users of  
3 the Kazaa Media Desktop software.

4 16. As a direct and proximate cause of Industry and Studio Plaintiffs'  
5 breaches of the EULA, Sharman has suffered and sustained, and is entitled to recover  
6 from Plaintiffs, general and special damages and other sums in an amount now  
7 unknown but to be established at trial.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Defendant/Counterclaimant prays for relief as follows:

10 1. That Plaintiffs take nothing as a result of their First Amended Complaint  
11 and that Sharman be awarded its costs and reasonable attorneys' fees.

12 2. On Count I:

13 a. An award of actual damages in an amount according to proof,  
14 trebled pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15;

15 b. A preliminary and permanent injunction enjoining the Industry  
16 plaintiffs and all persons, firms and corporations acting on their behalf and under their  
17 direction or control from continuing to refuse to deal with Sharman and Altnet in a  
18 commercially reasonable manner;

19 c. An award of attorneys fees, costs and expenses of suit incurred  
20 herein; and

21 d. Such other and further relief as this Court may deem just and  
22 proper.

23 3. On Count II:

24 a. An award of actual damages in an amount according to proof,  
25 trebled pursuant to California Bus. & Prof. Code § 16750;

26 b. A preliminary and permanent injunction enjoining the Industry  
27 plaintiffs and all persons, firms and corporations acting on their behalf and under their  
28

1 direction or control from continuing to refuse to do business with Altnet and Sharman  
2 in a commercially reasonable manner;

3 c. An award of attorneys fees, costs and expenses of suit incurred  
4 herein; and

5 d. Such other and further relief as this Court may deem just and  
6 proper.

7 4. On Count III:

8 a. An award of actual damages in an amount according to proof,  
9 trebled pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15;

10 b. A preliminary and permanent injunction enjoining the Industry  
11 plaintiffs and all persons, firms and corporations acting on their behalf and under their  
12 direction or control from continuing to refuse to deal with Sharman and Altnet in a  
13 commercially reasonable manner;

14 c. An award of attorneys fees, costs and expenses of suit incurred  
15 herein; and

16 d. Such other and further relief as this Court may deem just and  
17 proper.

18 5. On Count IV:

19 a. A preliminary and permanent injunction enjoining the Industry  
20 plaintiffs and all persons, firms and corporations acting on their behalf and under their  
21 direction or control from taking any further action adjudged to constitute unfair  
22 business practices or unfair competition;

23 b. For disgorgement by the Industry plaintiffs of any ill-gotten gains  
24 as a result of such unfair business practices or unfair competition;

25 c. For an award of attorney fees as a private attorney general and  
26 pursuant to Cal. Code Civ. P. § 1021.5;

27 d. For costs and expenses of suit incurred herein; and  
28

1 e. Such other and further relief as this Court may deem just and  
2 proper.

3 6. On Count V:

- 4 a. For damages in such amount as may be found, or alternatively, for  
5 maximum statutory damages of not less than \$150,000 for each act  
6 of copyright infringement.
- 7 b. A preliminary and permanent injunction enjoining Industry and  
8 Studio Plaintiffs and all persons, firms, and corporations acting on  
9 their behalf and under their direction or control from directly or  
10 indirectly infringing in any manner any of Sharman's copyrights or  
11 other exclusive rights (whether now in existence or hereafter  
12 created).
- 13 c. For prejudgment interest according to law.
- 14 d. For Sharman's attorneys' fees, costs, and expenses of suit incurred  
15 herein; and,
- 16 e. Such other and further relief as this Court may deem just and  
17 proper.

18 7. On Count VI:

- 19 a. For actual damages in an amount to be proven at trial.
- 20 b. For prejudgment interest according to law.
- 21 c. For Sharman's attorneys' fees, costs, and expenses of suit incurred  
22 herein; and,

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1 **PROOF OF SERVICE**

2  
3 STATE OF CALIFORNIA, )  
4 ) SS.  
5 COUNTY OF LOS ANGELES )

6 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
7 years and not a party to the within action; my business address is 601 South Figueroa Street, Suite  
8 3300, Los Angeles, California 90017.

9 On September 24, 2003, I served the foregoing document described as **SHARMAN**  
10 **NETWORKS LIMITED'S CORRECTED THIRD AMENDED ANSWER AND**  
11 **COUNTERCLAIMS FOR: (1) CONSPIRACY IN RESTRAINT OF TRADE (15 U.S.C. § 1);**  
12 **(2) TRUSTS AGAINST PUBLIC POLICY (CAL. BUS. & PROF. CODE §§ 16700, 16726);**  
13 **(3) MONOPOLIZATION (15 U.S.C. § 2); UNFAIR COMPETITION AND DECEPTIVE**  
14 **ACTS AND PRACTICES; DEMAND FOR JURY TRIAL** on the interested parties in this action  
15 by e-mail and by placing the true copy thereof enclosed in sealed envelopes addressed as follows:

16  By electronic transmission. I caused to be transmitted the documents described  
17 above to the individuals on the service list.

18  By placing the document listed above in a sealed envelope with postage thereon  
19 fully prepaid, in the United States mail at Los Angeles, California addressed as set  
20 forth below.

21 **SEE ATTACHED SERVICE LIST**

22 I caused such envelope with postage thereon fully prepaid to be placed in the United States  
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25 service on that same day with postage thereon fully prepaid at Los Angeles, California in the  
26 ordinary course of business. I am aware that on motion of the party served, service is presumed  
27 invalid if postal cancellation date or postage meter date is more than one day after date of deposit for  
28 mailing in affidavit.

I declare that I am employed in the office of a member of this bar of this court at whose  
direction the service was made.

Executed on September 24, 2003 at Los Angeles, California.

\_\_\_\_\_  
Lisa Spears

*MGM, et al. v. GROKSTER*, U.S.D.C. No. CV 01-8541 SVW (PJWx)

1 2 3 4 5 6 7	Russell J. Frackman- <b>rjf@msk.com</b> Matt J. Railo- <b>mjr@msk.com</b> George M. Borkowski Mitchell Silberberg & Knupp LLP 11377 West Olympic Boulevard Los Angeles, CA 90064 Telephone: 310/312-2000 Facsimile: 310/312-3100	Matthew J. Oppenheim- <b>moppenheim@riaa.com</b> Dean Garfield Recording Industry Association of America, Inc. 1330 Connecticut Avenue, N.W., Suite 300 Washington, DC 20036 Telephone: 202/775-0101 Facsimile: 202/775-7253
8 9 10 11 12 13	David E. Kendall- <b>dkendall@wc.com</b> Tom Henoff- <b>thentoff@wc.com</b> Robert J. Shaughnessy- <b>bshaughnessy@wc.com</b> Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005 Telephone: 202/434-5000 Facsimile: 202/434-5029	Jan B. Norman- <b>janbnorman@aol.com</b> Gregory P. Goeckner Mark D. Litvack- <b>mark_litvack@mpaa.org</b> 15503 Ventura Boulevard Encino, CA 91436-3103 Telephone: 818/995-6600 x250 Facsimile: 818/382-1797
14 15 16 17	Steven B. Fabrizio Jenner & Block, LLC 601 Thirteenth Street, NW Suite 1200 South Washington, DC 20005 Telephone: 202/639-6040 Facsimile: 202/661-4823	Robert M. Schwartz- <b>rschwartz@omm.com</b> Marvin Putnam- <b>mputnam@omm.com</b> O'Melveny & Myers, LLP 1999 Avenue of the Stars, Suite 700 Los Angeles, CA 90067-6035 Telephone: 310/553-6700 Facsimile: 310/246-6779
18 19 20 21 22	Kenneth B. Wilson- <b>kwilson@perkinscoie.com</b> Perkins Coie, LLP 180 Townsend Street, 3rd Floor San Francisco, CA 94107-1909 Telephone: 415/344-7001 Facsimile: 415/344-7201	Charles S. Baker- <b>cbaker@munsch.com</b> Munsch Hardt Kopf & Harr, P.C. 111 Congress Avenue, Suite 2010 Austin, TX 78701 Telephone: 512/391-6115 Facsimile: 512/226-7115
23 24 25 26	Cindy A. Cohn Electronic Frontier Foundation 454 Shotwell Street San Francisco, CA 94110 Telephone: 415/436-9333 x 123 Facsimile: 415/436-9993	Lance T. Lackey Akin Gump Strauss Hauer & Feld LLP 300 W. Sixth Street, Suite 2100 Austin, TX 78701 Telephone: 512/449-6200 Facsimile: 512/499-6290

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Matthew C. Lapple Paul, Hastings, Janofsky & Walker LLP 695 Town Center Drive Costa Mesa, CA 92626 Telephone: 714/666-6234 Facsimile: 714/979-1920	John M. Benassi Colbern C. Stuart, III Paul, Hastings, Janofsky & Walker LLP 12390 El Camino Real San Diego, CA 92130 Telephone: 858/720-2850 Facsimile: 858/720-2555
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**LEIBER, et al. v. GROKSTER, LTD., et al., U.S.D.C. No. CV 01-9923 SVW (PJWx)**

Carey R. Ramos - <b>cramos@paulweiss.com</b> Theodore K. Cheng Paul, Weiss, Rifkind, Wharton & Garrison LLP 1285 Avenue of the Americas New York, NY 10019-6064 Telephone: 212/373-3000 Facsimile: 212/757-3990	A.J. Thomas- <b>ajthomas@dwt.com</b> Kelli L. Sager- <b>kellisager@dwt.com</b> Davis Wright Tremaine LLP 865 S. Figueroa Street, Suite 2400 Los Angeles, CA 90017-2566 Telephone: 213/633-6800 Facsimile: 213/633-6899
Michael H. Page - <b>mhp@kvn.com</b> Mark A. Lemley Stacey L. Wexler Kecker & Van Nest, LLP 710 Sansome Street San Francisco, CA 94111-1704 Telephone: 415/391-5400 Facsimile: 415/397-7188.	

1 d. Such other and further relief as this Court may deem just and  
2 proper.  
3

4 DATED: September 24, 2003

Respectfully submitted,

5 HENNIGAN BENNETT & DORMAN LLP

6 WASSERMAN, COMDEN, CASSELMAN &  
7 PEARSON, L.L.P.

8  
9 By



Roderick G. Dorman

10 Attorneys for Defendant and Counterclaimant  
11 SHARMAN NETWORKS LIMITED  
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DEMAND FOR JURY TRIAL

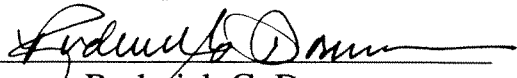
Pursuant to Fed. R. Civ. P. 38(b), a demand for a jury trial is hereby made.

DATED: September 24, 2003

Respectfully submitted,

HENNIGAN BENNETT & DORMAN LLP

WASSERMAN, COMDEN, CASSELMAN &  
PEARSON, L.L.P.

By   
Roderick G. Dorman

Attorneys for Defendant and Counterclaimant  
SHARMAN NETWORKS LIMITED

HENNIGAN, BENNETT & DORMAN LLP  
LAWYERS  
LOS ANGELES, CALIFORNIA

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9 On September 25, 2003, I served the foregoing document described as **SHARMAN**  
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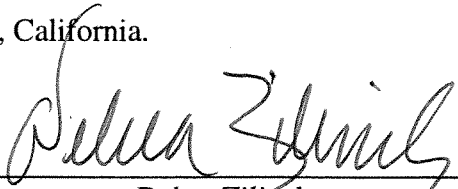
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I declare that I am employed in the office of a member of this bar of this court at whose  
direction the service was made.

Executed on September 25, 2003 at Los Angeles, California.

  
\_\_\_\_\_  
Debra Zifnisky

*MGM, et al. v. GROKSTER*, U.S.D.C. No. CV 01-8541 SVW (PJWx)

<p>Russell J. Frackman-<b>rjf@msk.com</b> Matt J. Railo-<b>mjr@msk.com</b> George M. Borkowski Mitchell Silberberg &amp; Knupp LLP 11377 West Olympic Boulevard Los Angeles, CA 90064 Telephone: 310/312-2000 Facsimile: 310/312-3100</p>	<p>Matthew J. Oppenheim- <b>moppenheim@riaa.com</b> Dean Garfield Recording Industry Association of America, Inc. 1330 Connecticut Avenue, N.W., Suite 300 Washington, DC 20036 Telephone: 202/775-0101 Facsimile: 202/775-7253</p>
<p>David E. Kendall-<b>dkendall@wc.com</b> Tom Henoff-<b>thentoff@wc.com</b> Robert J. Shaughnessy- <b>bshaughnessy@wc.com</b> Williams &amp; Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005 Telephone: 202/434-5000 Facsimile: 202/434-5029</p>	<p>Jan B. Norman-<b>janbnorman@aol.com</b> Gregory P. Goeckner Mark D. Litvack-<b>mark_litvack@mpaa.org</b> 15503 Ventura Boulevard Encino, CA 91436-3103 Telephone: 818/995-6600 x250 Facsimile: 818/382-1797</p>
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Facsimile: 858/720-2555

7 **LEIBER, et al. v. GROKSTER, LTD., et al., U.S.D.C. No. CV 01-9923 SVW (PJWx)**

8 Carey R. Ramos -**cramos@paulweiss.com**  
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