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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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THOMAS W. GILLINS
CLERK, U.S. DISTRICT COURT

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IN RE: AIMSTER COPYRIGHT
LITIGATION

MASTER FILE
No. 01 C 8936

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This Document Relates To:

Judge:
Marvin E. Aspen,
Chief Judge

ZOMBA RECORDING	01 C 8940
ATLANTIC RECORDING	01 C 8941
JERRY LEIBER	01 C 8942

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**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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Defendants, John Deep, AbovePeer, Inc. and BuddyUSA, Inc. (collectively "Defendants"), respectfully submit this memorandum of law in opposition to Plaintiffs' motion for preliminary injunction.

PRELIMINARY STATEMENT

Plaintiffs seek to enjoin Aimster, an instant message and file sharing service that is fundamentally no different than the service operated by the lead Plaintiff, AOL Time Warner, Inc. (hereinafter "AOL") and literally dozens of other internet service providers. Aimster allows individuals to send to each other data in encrypted form. That data may represent any tangible medium of expression that the user wishes to send. Defendants do not control, censor or monitor what individuals using the service send to each other. The ability to send data, which represents music, pictures, text or video, is a fundamental attribute of every internet service provider.

Despite Plaintiffs' incessant reference to Napster, Defendants are not Napster. Defendants do not maintain any central directory of copyrighted works. Thus, unlike the injunction in Napster, which required Napster to remove from its central directory copyrighted works, an injunction here would require Defendants to send blocking signals to literally millions of computer users, disabling their ability to send files to each other, something Defendants cannot do. Such an injunction would not only be grossly invasive, but would serve absolutely no purpose, since individuals using Aimster have a myriad number of ways, including AOL, to transfer data across the internet.

The internet may be analogized to a massive tunnel or cable carrying literally thousands of individual wires, all of which are capable of transmitting data. Plaintiffs suggest to this Court that they will be "irreparably injured" unless one of these thousands of wires is disconnected. Yet, ironically, the largest wire carrying the most data, AOL, is one of the Plaintiffs asking for the relief.

There is no question that John Deep, the inventor of Aimster, hyped the service by making comparisons to Napster. That hype, however, does not affect the reality that Aimster is fundamentally a method of transmitting data that is indistinguishable from other instant messaging services, such as AOL and Yahoo, all of which can be used to transmit music, text or any other message the user wishes to send.

Plaintiffs only now seek injunctive relief to block individuals' use of Aimster seventeen (17) months after they learned of Aimster's existence and over a year after they embraced Aimster and its commercial benefits. Indeed, Plaintiffs only cried foul when they determined a musical retailer involved with Aimster may impact their profits and control. Even then, however, no claims of irreparable harm were made. Plaintiffs' own inaction demonstrates that Aimster's operation has little or no effect on Plaintiffs, especially in light of their refusal to develop the technology necessary to protect their own copyrighted works and their inexplicable inaction in the face of a massive exchange of copyrighted works by services other than Defendants. As a spokesman for the Recording Industry Association of America ("RIAA") confirmed, "[t]here will always be a certain amount of piracy and we can live with that." Declaration of John Deep dated January 21, 2002 (hereinafter the "Deep Decl."), Ex. F.

FACTS

The factual basis of this action is set forth in the accompanying Declaration of John Deep, dated January 21, 2002, to which we respectfully refer the Court.

ARGUMENT

I. Preliminary Injunction Standard.

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). To obtain a preliminary injunction, the movant must demonstrate that (1) it has a likelihood of success on the merits; (2) no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is denied. If the movant can meet these hurdles, it must then show that the harm it will suffer without an injunction is greater than the harm the non-movant will bear if the relief is granted. Finally, the movant must demonstrate that the injunction will not harm the public interest. Anderson v. U.S.F. Logistics, Inc., 274 F.3d 470, 475 (7th Cir. 2001); Kiel v. City of Kenosha, 236 F.3d 814, 815-16 (7th Cir. 2000); Motor Werks Partners, L.P. v. BMW of N.A., Inc., 2001 WL 1607503, at *5 (N.D. Ill. Dec. 17, 2001). See also Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 967 (2d Cir. 1995).¹

¹ While a Multidistrict Litigation Court follows the law of its circuit for federal questions, “the law of a transferor forum on a federal question . . . merits close consideration . . .” In re Korean Air Lines Disaster, 829 F.2d 1171, 1176 (D.C. Cir. 1987)(Ginsburg, J.), aff’d sub nom., 490 U.S. 122 (1989). Because Defendants first commenced their actions in the Northern District of New York and many Plaintiffs brought actions in the Southern District of New York, Second Circuit precedent is significant.

II. Plaintiffs Cannot Demonstrate Irreparable Harm.

A. Plaintiffs' Inexcusable Delay Demonstrates There Is No Irreparable Harm.

Plaintiffs champion the hefty time and effort they expend in developing their market and protecting their music, but are alarmingly silent about why the purported harm to those efforts are only now irreparable or why they waited for over seventeen (17) months to assert that such harm is imminent.

It is axiomatic that “[e]quity aids only the vigilant, and injunctive relief will be denied to those who slumber upon their rights.” International Union v. Local Union No. 589, 693 F.2d 666, 674 (7th Cir. 1982). Indeed, it has long been held that “[d]elay in pursuing a preliminary injunction may raise questions regarding the plaintiff’s claim that he or she will face irreparable harm if a preliminary injunction is not entered.” Motor Werks Ptrs., L.P. v. BMW of N.A., Inc., 2001 WL 1136145, at *2 (N.D. Ill. Sept. 24, 2001)(Aspen, C.J.)(quoting Ty, Inc. v. Jones Group, Inc., 237 F.3d 891 (7th Cir. 2001)); Ohio Art Co. v. Galoob Toys, Inc., 799 F.Supp. 870, 887 (N.D. Ill. 1992)(“It can be inferred from the plaintiff’s delay that there is no threat of irreparable harm”); Stockley-Van Camp, Inc. v. Coca-Cola Co., 2 U.S.P.Q.2d 1225, 1227 (N.D. Ill. 1987)(three (3) month delay “indicates a lack of a need for the extraordinary remedy of a preliminary injunction”); Borden, Inc. v. Kraft, Inc., 224 U.S.P.Q. 811, at 822 (N.D. Ill. 1984)(“Such delay [five (5) months] speaks volumes about whether a plaintiff is being irreparably injured”). See also Tough Traveler, 60 F.3d at 968 (delay alone may preclude the granting of injunctive relief).

Integral to this Court's denial of injunctive relief in Motor Werks was the plaintiff's delay in seeking relief which "raise[d] serious questions as to the need for the requested order." Motor Werks, 2001 WL 1136145 at *2. Plaintiffs' delay in this action also seriously undermines their claim of irreparable harm.

Plaintiffs have known about the capabilities of instant messaging and peer-to-peer systems for half a decade and have known about Aimster for over 17 months. Plaintiffs knew about Aimster's operations as early as August 2000, and from September 3, 2000 until February 2001, Aimster and those representing Aimster had a series of discussions with AOL about a possible business relationship between the two.

In February 2001, the CEO of AOL approvingly acknowledged Defendants' interaction with his own internet service as innovative and mused about investing in Defendant. At that time, the CEO remarked, "[Aimster is] not doing anything illegal, so we'll see where it goes." In October 2000, Plaintiff EMI/Capitol Records formed a business relationship with Aimster to market the copyrighted work Radiohead - Kid A through Aimster. In addition, several meetings were held between RIAA member Bertelsmann and Aimster between December 2000 and February 2001 to discuss potential investments in Aimster. In March 2001, a supporter of Aimster met with RIAA member Universal Records to discuss utilizing Aimster. Deep Decl., ¶¶ 25-28, and Exs. B-D.

It was only in April 2001 that Plaintiffs did an about-face and began contacting Defendants to complain about their actions. These complaints came within weeks of contact between a major retailer of musical recordings and Edgar Bronfman of Vivendi/Universal about the possibility of the retailer contracting with Aimster to sell copyrighted musical works over the

Aimster system under license from the major recording companies. Within two weeks of that contact, on April 3, 2001, RIAA demanded that Aimster cease operation. *Id.* at ¶¶ 29-30.

Defendants immediately commenced a declaratory judgment action on April 20, 2001. Plaintiffs followed suit and filed a myriad of actions in May, June and July of 2001. And, despite over seven (7) months of extensive motion practice and detailed disclosure of Aimster's operations in these actions, Plaintiffs never sought relief for their purported irreparable harm.² Deep Decl., ¶¶ 30-45. Such delay precludes their claim of irreparable harm. Motor Werks, 2001 WL 1136145; Shaffer v. Globe Prot., Inc., 721 F.2d 1121, 1123 (7th Cir. 1983)(seeking injunctive relief two (2) months after denial of class certification was "inconsistent with a claim of irreparable injury"); Henri Studio, Inc. v. Outdoor Mktg, Inc., 1997 WL 652351, at *6 (N.D. Ill. Oct. 14, 1997)(eight (8) months delay in seeking injunctive relief after commencing action was "inconsistent with [plaintiff's] claim that immediate and irreparable harm will come to it through [defendant's actions]"), vacated pursuant to settlement, 1998 WL 569303 (N.D. Ill. Aug. 3, 1998); Tough Traveler, 60 F.3d at 968.

B. Plaintiffs' Unclean Hands Precludes Their Claim of Irreparable Harm.

AOL, the lead Plaintiff in this action, is a larger, more efficient and more prosperous file sharing service than Aimster and engages in the same conduct that it and the other Plaintiffs rail against here. Their complicity in these acts bars their claim of irreparable harm, for it is well settled that the party "who comes into equity must come with clean hands."

² That a stay was in force in the Northern District of New York between July 18, 2001 and November 15, 2001 does not excuse Plaintiffs' inaction. Not only were Plaintiffs able to move to lift the stay, but they had filed over nine (9) actions prior to the stay without any request for interim injunctive relief. Plaintiffs, specifically AOL, moved to transfer to the MDL without any request for interim injunctive relief and delayed another month after the transfer before requesting this relief.

Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). Unclean hands “closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.” Id. “This maxim necessarily gives wide range to the equity court’s use of discretion in refusing to aid the unclean litigant.” Id.; Packers Trading Co. v. Commodity Futures Trading Commn., 972 F.2d 144, 148 (7th Cir. 1992); Haagen-Dazs, Inc. v. Frusen Gladje Ltd., 493 F.Supp. 73, 76 (S.D.N.Y. 1980); Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 281-82 (7th Cir. 1992); Innovative Clinical Solutions, Ltd. v. Clinical Research Ctr., 173 F.Supp.2d 826, 834 (C.D. Ill. 2001).

Plaintiffs have watched instant messaging and file sharing systems proliferate for years. Throughout that time the vast capabilities of these systems have been touted. Deep Decl., ¶¶ 25-26, and Exs. B-C. Some of the Plaintiffs were so impressed with those capabilities that they too wanted to create and exploit file transfer systems. And they did. Indeed, AOL has now become one of the largest purveyors of file sharing in the entire world, and boasts its enormous membership. AOL provides the exact same service as Defendants. As demonstrated in the Declaration of John Deep, one could download and transfer the same copyrighted files through AOL’s service as through Aimster. Id., ¶¶ 22-23, and Ex. A. Having participated in the exact same actions as Defendants, Plaintiffs cannot now ask this Court to enjoin those actions.

III. Plaintiffs Are Not Likely To Succeed On The Merits.

A. Plaintiffs Cannot Demonstrate Direct Infringement.

Plaintiffs are unable to make the requisite showing of direct infringement because Aimster’s users are protected by the Audio Home Recording Act of 1992 (“AHRA”).

The AHRA was enacted as an amendment to the Copyright Act of 1976 to guarantee the right of consumers to make digital recordings of copyrighted music for their private use. S.Rep. No. 102-294 at 30 (1992); RIAA v. Diamond Multimedia Syst., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999)(the main purpose of the AHRA is “the facilitation of personal use.”). Specifically, the AHRA prohibits copyright infringement actions “based on the noncommercial use by a consumer of ... a device or medium for making digital music recordings” 17 U.S.C. § 1008. The Ninth Circuit described the copying of digital music from a user’s hard drive as “paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.” Diamond Multimedia, 180 F.3d at 1079. Accordingly, the AHRA effectively ended the debate over the legality of home taping sound recordings.

Plaintiffs rely on A& M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) to contend that the personal copying from one user to another is infringement. However, Napster misinterprets the AHRA. Even if a computer hard drive is not considered a “digital recording device” or does not make “digital music recordings,” as Napster found, the statutory exemption in § 1008 is not so limited. The AHRA was intended to immunize personal use of copyrighted material by “protect[ing] all noncommercial copying by consumers of digital and analog musical recordings.” Diamond Multimedia, 180 F.3d at 1079 (emphasis added); see also S.Rep. No. 102-294 at 52 (1992); H.Rep. 102-873(I) at 24 (1992)(same). The foremost authority on copyrights also reads the AHRA as providing a broader exemption. See Nimmer on Copyrights § 8B.07 [C][4] at 8B-94 (“Based on the legislative history’s characterization of ‘all noncommercial copying by consumers of digital ... musical recordings’ as falling under the home taping exemption, the courts appear ready to apply that provision beyond its precise wording.”).

B. Plaintiffs Cannot Demonstrate Contributory Infringement.

To prove a claim of contributory copyright infringement, Plaintiffs will have to demonstrate that Defendants “with knowledge of the infringing activity, induce[d], cause[d] or materially contribute[d] to the infringing conduct of another.” Religious Tech. Ctr. v. Netcom On-Line Comm. Servs. Inc., 907 F.Supp. 1361, 1373 (N.D. Ca. 1995).

Defendants cannot be liable as contributory infringers, however, if their technology is “capable of substantial non-infringing uses.” Sony Corp. v. Universal Studios, 464 U.S. 417 (1984). The Sony Court rejected the entertainment industry’s efforts to enjoin the sale and distribution of video tape recorders that were used to copy and transfer copyrighted works. The Court expressly rejected the argument that Sony contributed to any infringement because it “suppl[ied] the means to accomplish an infringing activity and encourag[ed] that activity through advertising.” Id. at 436. Instead, the Court held Sony was not liable because its recorders had the mere capability of providing substantial non-fringing uses. Id. at 442-43. Courts subsequent to Sony have followed the same reasoning. Vault v. Quaid, 847 F.2d 255, 266-67 (5th Cir. 1988); RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 776-77 (8th Cir. 1988); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020-21 (9th Cir. 2001).

Here, Aimster is capable of substantial non-infringing uses. The service allows users, through encryption technology, to privately transfer any number and type of non-copyrighted messages and files to other users or terminals in a network; users may identify others with similar interests and share information and develop clubs; and businesses without a network administrator may use it to exchange business records cheaply, securely and efficiently. Deep Decl. ¶¶ 16-18.

Plaintiffs do not deny that there are substantial non-infringing uses of Aimster, but instead claim that Defendants have actual knowledge of infringement. Plaintiffs' argument misapprehends the nature of Aimster. Aimster contains only encrypted references to the computers or physical addresses where digital files are stored. Thus, the identities of the users are encrypted. Moreover, every communication between and among the users is encrypted. Just like an electronic bank or financial transaction, only the parties to the transaction have access to the transmission. Accordingly, Aimster provides merely infrastructure services to users. The users themselves control the transaction. Indeed, it is the primary internet service providers, such as AOL, that have the commercial relationship with users that have actual knowledge of such users and are capable of identifying their infringing use. *Id.*, ¶¶ 3-6, 8-13, 15, 19.

Defendants' knowledge and support of the Napster service does not demonstrate that they have actual knowledge of infringement through their own system. Moreover, Plaintiffs' purported notice that hundreds of thousands of copyright works reside on unknown users' hard drives cannot demonstrate actual knowledge. Courts have held in the online context that notice that copyrighted works are potentially being infringed is not enough to demonstrate actual or constructive knowledge. *Religious Tech.*, 907 F.Supp. at 1374. "Where [the service provider] cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show there is likely infringement, the operator's lack of knowledge will be found reasonable and there will be no liability for contributing infringement for allowing the continued distribution of the works on its system." *Id.*

Here, as stated, Defendants cannot determine what files are being transferred, by whom, or for what purpose.³ Deep Decl., ¶¶ 8, 12, 15, 19.

Defendants cannot be held to materially contribute to the infringement merely because they provide the means for the infringement to occur. Sony, 464 U.S. at 436. If that were so, every internet service provider would be guilty of copyright infringement. Similarly, Plaintiffs' claim that Aimster provides the "but for" causation for the infringement cannot stand because that too would condemn every internet service provider. Aimster's architecture is based on standard instant messaging technology -- indeed it is nearly identical to AOL's. Deep Decl., ¶ 13. If Aimster were held to materially cause infringement, so would every search engine, instant messenger and internet service provider.

C. Plaintiffs Cannot Demonstrate Vicarious Infringement.

To demonstrate vicarious liability for copyright infringement, Plaintiffs must show that Defendants have (1) the right and ability to control the infringing activities and (2) a direct financial interest in those activities. Religious Tech., 907 F.Supp. at 1375.

Here, Defendants do not have the right or ability to control their users. Indeed, as stated, because Aimster encrypts all information about the users and the files they transfer, Defendants do not know who their users are. Unlike Napster, which identified the physical internet addresses of its users, Defendants do not maintain or discover who or where a user is located. Thus, unlike Napster, Defendants do not have the ability to block a user's access to the service. The only way Defendants could block a user's access is to shut down the whole system. Deep Decl., ¶¶ 8-15, 19.

³ Plaintiffs' reliance on Napster here is misplaced because, unlike Napster, Defendants here do not maintain a central directory of copyrighted works on their servers and thus cannot block such material.

Similarly, Defendants do not have a financial interest in the infringing activity they control, because they do not control any infringing activity. Except for Club Aimster, which accounts for a minute portion of the traffic on Defendants' service, there is no money exchanged for any service and there is no paid advertising on the site. Deep Decl., ¶ 20.

D. Defendants Have Immunity Under The DMCA.

The Digital Millennium Copyright Act (hereinafter "DMCA"), 17 U.S.C. § 512, enacted by Congress in 1998, establishes four statutory "safe harbors" to protect on-line services and internet access providers from potential liability when infringing material is transmitted online through their services. 17 U.S.C. §§ 512(a)-(d).

The limitations of liability found in the DMCA represent a conscious decision by Congress to protect internet service providers while continuing to encourage Internet growth and development. S.Rep. No. 105-190 at 8. The DMCA helps ensure that internet service providers continue to implement innovative and efficient on-line communication technologies to expand the scope and quality of internet services and increase the free exchange of ideas and information over the internet. *Id.* By providing "safe harbors" Congress allows internet service providers to avoid liability for merely facilitating the transfer of potentially infringing material. *Id.*

Significantly, an internet service provider is not liable for copyright infringement for failing to meet DMCA requirements, and remains free to establish any defense in addition to the "safe harbor" protections of the DMCA. § 512(l). As such, the sole purpose of the DMCA is to expand the scope of protections available to internet service providers. Further, the DMCA represents a legislative determination that copyright owners must bear the burden of policing and maintaining their copyright monopoly. S.Rep. No. 105-190, 1998 WL 239623, at * 105-07 ("The Committee strongly urges all of the affected parties expeditiously to commence voluntary,

interindustry discussions to agree upon and implement the best technological solutions available to achieve these goal(s).”). Accordingly, the DMCA does not require a provider to engage in “monitoring its service or affirmatively seeking facts indicating infringing activity.” § 512(m)(1). These policies implement an express Congressional intent to expand the variety and quality of internet services, and to protect service providers from liability for acts of those who deploy their services.

Under § 512(a) of the DMCA, a service provider will not be subject to copyright liability by reason of transmitting, routing or providing connections for infringing material through a system the provider controls or operates when: the provider does not initiate the transmission; the transmission is carried out through an automatic technical process without a selection of material by the provider; the provider does not select recipients; no copy of the material is maintained on the provider's system; and the transmission occurs without modification by the provider. § 512(a).

Plaintiffs do not -- and cannot -- claim that Defendants’ actions fall outside of the required elements of the safe harbor provided by § 512(a). Instead Plaintiffs claim that Defendants are not “service providers” and material does not go “through” Aimster. These myopic contentions must be rejected.

The term “service provider” is construed broadly and, as used in § 512(a), is defined as “an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” § 512(k)(1)(j); ALS Scan, Inc. v. Remarq Communities, Inc., 239 F.3d 619, 623 (4th Cir. 2001); Hendrickson v. Ebay, Inc., 165 F.Supp.2d 1082, 1088 (C.D. Cal. 2001); Costar Group, Inc. v. Loopnet, Inc., 164

F.Supp.2d 688, 701 (D. Md. 2001). Plaintiffs do not even cite to that part of the definition, let alone disagree that Defendants meet it.

Aimster connects digital signals from one user to another so that they may identify each other as “buddies” or for the purpose of sending information and data from one user to another. The material to be sent and the “buddies” are chosen wholly by the user without modification by Defendants. Further, Aimster provides an infrastructure of online services and network access for transferring encrypted files. Aimster operates in the standard way that many infrastructure service providers do, such as providers of email gateways, instant messaging and caching servers, by providing a backbone or infrastructure through a contractual relationship with other intermediate internet service providers, who in turn have commercial relationships with other infrastructure providers on down the line to the provider that has a relationship with the end user. Deep Decl., ¶¶ 3-6, 8-13.

Plaintiffs’ argument that connections do not go “through” Aimster unduly constrains the language of the statute. Like any other internet service provider, Aimster is integral to connecting two users together to share data. In that sense, plainly Defendants provide connections “through” their system within the intendment of § 512(a). Reading the statute in that manner also provides consistency in the definition of the term “through,” which is used twice in § 512(a). Compare § 512(a) (“providing connections for material through a system or network”) with § 512(a)(2) (“provision of connections ... is carried out through an automatic technical process”). Plainly, “carried out through an automatic technical process” cannot be read to mean “as a conduit” as Plaintiffs urge. A statute must be construed to provide consistent meaning to its terms. Taracorp, Inc. v. NL Indus., Inc. 73 F.3d 738, 744 (7th Cir 1996). “Through” as used in these two contexts must be given its plain definition, meaning “by means of” or “by the help or agency of.”

See Webster's Third New International Dictionary Unabridged, definition 2a (1996).⁴

Defendants lose their safe harbor under § 512(a) only if they have not complied with § 512(i), which requires the adoption of a policy for dealing with "repeat infringers."⁵ While not a notice statute *per se*, § 512(i) requires a provider to act when it is on notice that its subscribers or account holders are repeat infringers. Here, Plaintiffs have not provided such notice because they do not identify repeat infringers. All Plaintiffs have done is provide notice that individual Aimster users have copyrighted songs stored on their personal computer hard drives. As discussed above, downloading songs to a personal computer is not a copyright infringement, and is specifically recognized as non-commercial private use to which no liability attaches. Moreover, placement by a user of particular song titles on his or her hard drive serves another substantial non-infringing purpose, *i.e.*, allowing other individuals of like interest to locate that user for the purpose of chatting or sharing information about the particular artist or type of music. Despite bearing the burden of persuasion, Plaintiffs do not even attempt to address these issues.

Contrary to Plaintiffs' contention, Defendants have adopted and reasonably implemented a repeat infringer policy. Aimster's subscribers are informed that they are prohibited from using Aimster to distribute original information that infringes on other parties' intellectual property rights. Indeed, like any other infrastructure provider, once Defendants are notified that a

⁴ Although the lower court in *Napster* found that Napster was not a service provider, the Court of Appeals noted that questions regarding the issue persisted. 239 F.3d at 1025. Notably, the lower court never discussed the other statutory uses of the term "through," nor did it contrast Napster with other internet service providers.

⁵ Significantly, § 512 (i)(1)(B), which is not directly at issue on this motion, envisions the recording industry's development and implementation of technical measures to prevent copyright infringement of their works. Congress hoped Plaintiffs would have implemented preventive measures to protect their copyrights as did the movie industry with respect to DVD technology. S.Rep. 105-190, 1998 WL 239623, at *115. Plaintiffs, however, have failed to develop technology to protect their copyrighted assets and instead rely on Defendants and other internet service providers for such protection.

particular internet protocol address is identified with any infringing use, Defendants will notify the primary internet service provider to terminate their access.

Notably, Plaintiffs do not identify a single repeat offender. To Plaintiffs, there is not a rogue user, rather they abhor the whole system. Plaintiffs do not want Defendants to implement a termination policy to remove recalcitrant users, they want Defendants to implement a termination policy to shut down Aimster. However, that is not required or appropriate under the terms of § 512(i).

Defendants also fall within § 512(b), which provides a safe harbor to service providers that temporarily store material on a system and meet certain other conditions. Plaintiffs do not dispute that Defendants meet the conditions and instead only claim that Defendants do not “cache” material on their system.

Defendants cache material on their system in several ways. In order to accommodate non-simultaneous data requests, material is cached until the requests can coordinate with each other. Also, if two users are each behind “firewall” protection, Defendants’ system must temporarily store the transmitted material to allow the users to penetrate the firewalls. Additionally, certain non-copyrighted attributes of the material transferred must be temporarily cached on Defendants’ system to allow other technologies, such as virus detection, digital rights management systems and community standards ratings systems, to act upon the files. Finally, all the encrypted material that is transferred sits for some amount of time on the system before being routed to its destination. Deep Decl., ¶ 14.

If Defendants’ service does not fit in with §§ 512(a) or 512(b), then it should fall within the safe harbor of § 512(d). Section 512(d) provides a safe harbor to a provider that refers or links users to an “online location” containing infringing material where the provider (1) does not

have actual knowledge of the infringement; is not aware of facts from which the infringing activity is apparent; or, after obtaining knowledge, acts expeditiously to remove it; (2) does not receive any financial benefit from the infringing activity in a case where the provider has the right and ability to control the infringing activity; and, (3) upon notification of claimed infringement, "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing." 17 U.S.C. § 512(d). Section 512(d) was placed in the DMCA to protect those service providers who linked individual users to other Websites and directories on the internet. While Defendants' service does not link its users to a Website, it provides the vehicle by which users link to each other at online locations and create their own online user-to-user networks.

For the reasons stated above, Defendants do not have actual knowledge of infringement and do not control any infringement activity in which they have a financial stake. See Ebay, Inc., 165 F.Supp. at 1093-94. Finally, Defendants will act when they receive proper notice, something Plaintiffs have yet to provide.

Section 512(d) requires notices of alleged copyright infringement to comply with the detailed notice requirements of § 512(c)(3). Upon receipt of such notice, a provider preserves its § 512(d) safe harbor by responding "expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity..." § 512(d)(3).

Plaintiffs' purported "notice" in this action does not come close to complying with the requirements of § 512 (c)(3). See Ebay, Inc., 165 F.Supp. at 1089-92. Plaintiffs have not provided Defendants with any evidence of infringement. Both the April 3 letter, which enclosed a computer disk containing 500,000 titles of sound recordings allegedly owned by RIAA members, and the May 9 letter, showing some 2,900 Aimster users who apparently had titles of copyrighted

works on their computer hard drives, failed to demonstrate that any copyrighted subject matter was being transferred from user to user. Deep Decl. at ¶¶ 30, 33.

Merely providing evidence that Aimster's users may have copyrighted songs on their hard drives clearly is insufficient notice under § 512(c)(3). The requirement that a copyright owner identify a specifically infringing "online site," § 512(c)(3)(ii), was intended to deal with the situation of an internet provider who was linking users to Websites containing blatantly infringing material. S.Rep. No. 105-190, 1998 WL 239623 (1998).

Even providers that offer, "online directories prepared by human editors and reviewers" may retain their safe harbor when they actually view an infringing internet Website, unless they become consciously aware of a "red flag", such as an obvious "pirate" or "bootleg" site:

Absent actual knowledge, awareness of infringement as provided in subsection (d) should typically be imputed to a directory provider only with respect to pirate sites or in similarly obvious and conspicuous circumstances and not simply because the provider viewed an infringing site during the course of assembling the directory. *Id.* at * 105-07.

In the absence of an obvious pirate or bootleg site, internet providers are not required to exercise any judgment in determining whether a particular site contains infringing information:

The common-sense result of this "red flag" test is that online editors and cataloguers would not be required to make discriminating judgments about potential copyright infringement. If, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a "red flag." A provider proceeding in the face of such a red flag must do so without the benefit of a safe harbor. *Id.*

Defendants do not link users to any other Websites, let alone "pirate" or "bootleg" Websites, which raise a red flag. While Defendants are aware that Aimster can convey digitized sound recordings, like any other information, that fact does not provide Defendants, or other internet

service providers (such as AOL), with specific notice of infringement such that the provider must block all users who would have the potential to transfer such digitized sound recordings to other users.⁶

Finally, even if Plaintiffs' purported notice were sufficient under the DMCA, Defendants are under no duty to eliminate "all" infringing activity in which their users might engage. The DMCA only requires a provider to remove or disable the specific "reference or link" to infringing material that is identified in the copyright holder's notice. § 512(d)(3).⁷ Moreover, Defendants are under no duty to continually monitor their system by examining the files on all of its users' hard drives so as to ensure that none of them engage in infringing activity in the future. Congress expressly disclaimed any attempt to require such continuous monitoring. See § 512(m)(1).

IV. The Balance Of Hardships Favors The Defendants And The Public Interest.

An injunction must be denied where the balance of hardships weights too heavily on the non-movant. Granting injunctive relief here would predetermine the case because it would kill Defendants' business. Jordan v. Wolke, 593 F.2d 772, 774 (7th Cir. 1978); Santos v.

⁶ The only decision dealing in any detail with the notice requirements of the DMCA is the Fourth Circuit's decision in ALS Scan, Inc. v. Remark Communities, Inc., 239 F.3d 619 (4th Cir. 2001). That decision, however, is of little factual relevance to this case, since the defendant provider in ALS Scan was linking its users to two Websites created for the sole purpose of publishing plaintiff's copyrighted works. Virtually all of the images contained on the Websites were plaintiff's copyrighted material, and the pictures were identified using plaintiff's name and/or accompanying copyright symbol. The Fourth Circuit held that the provider clearly had notice of this infringing activity under § 512(c)(3) of the DMCA. 239 F.3d at 625.

⁷ Plaintiffs cannot claim that they can place the burden of removing "all" infringing sound recordings on all of Aimster's users' hard drives by merely providing a "representative list" of 2,900 such users. While § 512(d)(3)(A)(ii) allows a copyright owner to provide a "representative list" of infringing works, the reference is to a representative list of infringing works on a particular Website to which the provider allows connection. It does not relieve the copyright holder of identifying the specific infringing material that can be located on the provider's own system.

Columbus – Cuneo – Cabrini Med. Ctr., 684 F.2d 1346, 1350-51 (7th Cir. 1982); WarnerVision Entm't, Inc. v. Empire, 101 F.3d 259 (2d Cir. 1996). The massive, extensive and intrusive efforts Plaintiffs seek to impose on Defendants to police the internet would be too costly to undertake and would destroy the foundation of Defendants' relationships with users. Moreover, an injunction would prevent not only the transfer of Plaintiffs' works, but the transfer of non-copyrighted files and material. Deep Decl., ¶¶ 46-47.

The public will also be harmed by the overextension of copyright laws. While the public has an interest in upholding legitimate applications of the copyright laws, it does not benefit from their misapplication and use as a sword to destroy competition, create unlimited property rights and limit non-infringing actions. See Sony, 464 U.S. at 429 n.10 (copyright protections are neither unlimited nor designed to provide a special private benefit).

In contrast, Plaintiffs will not suffer any hardship without an injunction. Defendants represent an insignificant amount of file sharing traffic on the internet. An injunction would do nothing to prevent users from continuing to share millions of files and potentially all of Plaintiffs' works on those services, including using Plaintiff AOL's file sharing service. Deep Decl., ¶ 47, and Ex. F. Plaintiffs were charged under the DMCA to develop methods to prevent the transfer of digitized works, and yet they have done nothing. They only took action here after they determined that another competitor may impact their profits and control. Plaintiffs themselves do not view the purported infringement as seriously damaging their business, let alone inflicting irreparable harm. As RIAA's spokesman confirmed, "There always will be a certain amount of piracy and we can live with that... We're not going to sue our way through the internet." See In Napster's Wake, New Services Take Off, p. 3 (Reuters Sept. 4, 2001), Deep Decl., Ex. F.

V. A Substantial Bond Is Required.


Rule 65 requires any injunction to be secured by a bond to compensate Defendants for all damages it may suffer if the injunction were improvidently granted. Fed.R.Civ.P. 65(c). Any injunction here would destroy Defendants' business, leaving their only recourse to the value of the bond. Accordingly, the Court should require Plaintiffs to post a \$15 million bond, in the event injunctive relief is granted.

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Respectfully submitted,

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