52

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

IN RE: AIMSTER COPYRIGHT LITIGATION

MASTER FILE
No. 01 C 8936

This Document Relates To:

ATLANTIC RECORDING	01 C 8940	MDL 1425 Judge Marvin E. Aspen
ZOMBA RECORDING	01 C 8941	
JERRY LEIBER	01 C 8942	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Defendants built, maintain, own, and control, a computer system known as "Aimster," which they designed specifically to encourage and enable millions of individual users to copy and distribute infringing copies of thousands of copyrighted works, including all of today's most popular music. Aimster was designed to be and is the same type of infringing system as the notorious Napster, except that, in addition to enabling the wholesale, anonymous infringement of music, Aimster also facilitates the unlawful copying and distribution of movies, images, and software. Plaintiffs, including record companies and music publishers, seek to halt Aimster's massive copyright infringements, and the continuing resulting irreparable harm.[1]

Defendants created the Aimster system to capitalize on Napster's popularity and, while Napster is enjoined, to supplant Napster as the preferred forum for the unlawful copying and distribution of copyrighted works. Defendants advertise on their website <www.aimster.com> that Aimster is a "Revolutionary Napster-Like Application Unveiled." (Creighton Decl., Ex. 1)[2] Defendants have boasted to the press that "we're the next technical innovation upon Napster." Even after courts branded Napster an unlawfully infringing system, Defendant Deep touted Aimster as "the next Napster," "Napster squared," and "a significant step toward implementing universal file sharing." (Creighton Decl., Ex. 6) Aimster even provided a direct connection for its users to "link" to Napster. (Id., Ex. 2.) As in Napster, Aimster's blatant copyright infringement is causing substantial irreparable harm on a daily basis. And as in Napster, an immediate preliminary injunction to prevent Aimster from enabling further theft of Plaintiffs' copyrighted works during the course of this lawsuit "is not only warranted but required." Napster, 239 F.3d at 1027.

---

[1] Certain Plaintiffs sued Napster and obtained injunctive relief enforcing their right to be free from cyberspace piracy. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)(remanding for immediate entry of modified preliminary injunction)("Napster"); A&M Records, Inc. v. Napster, Inc., 54 U.S.P.Q.2d (BNA) 1746 (N.D. Cal. 2000)(denying Napster's motion for partial summary judgment); 114 F. Supp. 2d 896 (N.D. Cal. 2000)(granting preliminary injunction).

[2] References to Exhibits are to the exhibits to the declarations filed herewith. Each declaration is identified by the last name of the declarant (e.g., "Creighton Decl.")

I. SUMMARY OF FACTS

A. Copyright Holders

The Record Company Plaintiffs[3] invest substantial time, money, and resources to create, produce, manufacture, and sell recorded music; these Plaintiffs own or control the copyrights in their sound recordings. (Agnew Decl. ¶¶ 3 and 8; Cottrell Decl. ¶¶ 3-6 and 8; Eisenberg Decl. ¶¶ 3-6 and 8; Leak Decl. ¶¶ 3-4 and 7; Ostroff Decl. ¶¶ 3-6 and 8; Seklir Decl. ¶¶ 3-6 and 8.) The Music Publisher Plaintiffs[4] are songwriters and music publishers who compose and publish musical compositions; these Plaintiffs own the copyrights to the underlying music and lyrics of those musical works. (Sanders Decl. ¶ 12; see generally Stoller Decl.; Cheng Decl. ¶¶ 2-3 and Exs. 1-2.) Together, the Record Company Plaintiffs and the Music Publisher Plaintiffs own or license the rights to the vast majority of music distributed and copied on the Aimster system. These include unauthorized copies of hit music by some of the most popular artists of the day -- including Destiny's Child, Madonna, N Sync, and the Backstreet Boys -- and by artists of prior eras who remain immensely popular, such as the Beatles, Elvis Presley, and Bob Dylan. (Creighton Decl., Exs. 14-22.) It is the operation of Aimster--a business designed to enable the unfettered and overwhelming infringement of copyrights--that Plaintiffs now address.

B. Aimster

"*What you have with Aimster is a way to share, copy, listen to and basically in a nutshell break the law using files from other people's computers.*" (Schafer Decl., Ex. 1)(user message on Aimster bulletin board.)

---

[3] A list of the Record Company Plaintiffs is attached hereto as an Appendix. Each is a member of the Recording Industry Association of America, Inc. ("RIAA"), a trade organization whose members account for approximately 90% of the legitimate sound recordings produced, manufactured, or distributed in the United States. (Creighton Decl. ¶ 2.)

[4] The Music Publisher Plaintiffs bring their action as a class action on behalf of all publisher-principals of the Harry Fox Agency. A similar class was certified in the Napster litigation. The Harry Fox Agency is an organization that acts as an agent for music publishers to issue mechanical licenses and collect royalties. (Sanders Decl. ¶ 7.) Mechanical licenses are for the use of a musical composition in a sound recording. (Id. at ¶¶ 8, 11.) See ABKCO Music, Inc. v. Harrisongs Music, Ltd., 508 F. Supp. 798, 800 n. 3 (S.D.N.Y. 1981).

Defendant John A. Deep ("Deep") created the Aimster system and founded Defendants BuddyUSA, Inc. ("BuddyUSA") and AbovePeer, Inc. ("AbovePeer") to operate it. (Answer in Leiber, et al. v. AbovePeer, Inc., et al., 01-CV-5901 (S.D.N.Y.) ¶ 15; Creighton Decl., Exs. 1 and 6 [press release; news articles]); (Amended Complaint in AbovePeer, Inc. v. Acuff-Ross Music Publishing, 01 CV-0811 (N.D.N.Y.) ¶ 23); (Amended Complaint in BuddyUSA, Inc. v. Recording Industry Assoc. of Am., et al. 01-CV-0631 (N.D.N.Y.) ¶¶ 25, 28).

Aimster is a comprehensive, highly integrated system that enables computer users to connect to one another to infringe copyrights.[5] In order to use Aimster, users must download from the Aimster website, www.aimster.com, a free Aimster-distributed software program that allows users to communicate with both the Aimster servers and with other users. To enable users to distribute and copy fi__, the Aimster system inventories the files each user has available on his or her computer hard drive and organizes those files into a detailed directory, which is maintained on a central server made available to all users. Users simply run the Aimster software, type in the name of what they want in the "Search For" field, and the Aimster system generates an index of available files that match that name The Aimster system also determines and provides information concerning the salient characteristics and quality of each available file, including the size, bitrate, frequency, length, and source of each file, as well as the speed of the connection.

Users then simply double-click on the desired file, or click on the "download" button, to begin copying the file to the user's computer. The Aimster user downloading the file is connected by the Aimster system to the Aimster user on whose computer the file is stored: the downloading from the one Aimster user to the other is then initiated by Aimster. A user can run multiple downloads and copy multiple recordings simultaneously. During copying, the Aimster system provides information about the status of each download or upload, e.g., the progress

---

[5] A detailed description of the Aimster system is included in the Farmer Declaration at ¶¶ 18-26. Illustrative Exhibits are attached to the Forrest and Creighton Declarations. See, e.g., Forrest Decl., Exs. 1 (Aimster Tutorial), 2 (screen shot of Aimster "Fight for Freedom" page), 5 (screen shot of search results), 6 (screen shot of download process), 15 (FAQs), 17 (first log-in instructions), 20 (search results); Creighton Decl., Exs. 12 (Aimster Guardian tutorial), 13-22 (screen captures of search results and downloads from Aimster). Plaintiffs will make available to the Court at the hearing on this motion a demonstration of the Aimster system.

(percent complete), the rate of transfer, and the time remaining to complete the copy. When several users simultaneously attempt to download the same file, each additional user is added to a queue; when the previous download is completed, the Aimster system automatically begins the next download. Aimster also provides the ability automatically to resume an interrupted download (by, without any user input, searching for and making available a substitute file of the identical interrupted copyrighted work to complete the copying process), and to organize files. At the conclusion of the entire process, both the downloading user and the uploading user have copies of the music file on their hard drives to play, to "burn" onto a recordable CD, and to further distribute to other Aimster users. In this way, it is a "viral system," like Napster; the number of infringing copies made available multiplies rapidly as each user copying a music file then becomes a potential distributor of that file to all other Aimster users. Throughout this entire copying and distribution process, Aimster insures the anonymity of its users while they are committing copyright infringement, and encrypts communications among its users.

C. Aimster's Guardian Tutorial

The "Aimster Guardian Tutorial" located on the Aimster website methodically demonstrates *how* to infringe *copyrighted* works. As examples of music that can be copied, the Tutorial uses some of the ***identical*** copyrighted works that Plaintiffs previously notified Defendants were owned by Plaintiffs and were being infringed by the Aimster system (e.g. recordings by the Allman Bros., Arlo Guthrie, and George Jones). (Creighton Decl. ¶ 13 and Ex. 12.) In other words, after Plaintiffs demanded that Defendants remove specific recordings, Aimster tutored its users on how to continue to infringe by using those very same recordings as illustrations.

D. Aimster's Message Boards

Messages posted on Aimster make clear that copyright infringement is rampant on the system (see generally Schafer Decl. and Ex. 1):

- "Hey, I'm a new member and wondered if any1 cud send me stuff...that includes KORN, Nin, Nirvana, Stand, Kittie, etc." (Id.)
- "I'M LOOKING FOR SOME DOWNLOADS, BEETLES [sic] AND WINGS IF YOU HAVE THEM?????" (Id.)

Testimonials of Napster expatriates litter the Aimster "Forums." For example, "I just came over Napster and would like to share my files. . . . how do I pull all my files from napster before I uninstall it, and no I did not get kicked off, they just don't have anything available that I want anymore. Also will aimster be having the same type of court battles as napster in the near future? I just wondering how fast I need to download what I want." (Id.) Other users write, "I too have just come over from napster and have transferred my files to aimster you may share with me hopefully we will have some files that the other one will want" (Forrest Decl., Ex. 10.) and "I'm a Longtime Napster user, with about 900 mp3's[6] . . . like everyone else, the RIAA has forced me to try other mp3 websites, so here I am." (Id.)

E. Club Aimster

On or about November 6, 2001, Aimster launched "Club Aimster." (Forrest Decl., Ex. 18.) Club Aimster is the Aimster system repackaged and promoted to provide users easier and quicker, one-click downloading of the most popular works on Aimster -- which are among the most popular copyrighted music owned by Plaintiffs -- in exchange for a payment to Aimster of $4.95 per month per subscriber. (Id., Exs. 7 ("THOUSANDS of Hot New Releases picked by Club members."), 19; Creighton Decl. ¶ 14.) Club Aimster provides to its subscribers the entire "Aimster Top 40 List" directory (Id., Ex. 19C; Creighton Decl. ¶ 14 and Ex. 13.) -- a list of the 40 "hot new releases" most frequently downloaded by Aimster users, virtually all of which are owned by Plaintiffs. Creighton Decl. ¶ 14 and Ex. 13. The Top 40 list is prepared and updated by Defendants and is based, apparently, on recordings actually copied by Aimster users. Farmer Decl. ¶ 26. Rather than searching for a recording, a user simply selects the "Play" button or double clicks on the record title, and the Aimster system selects a file containing that recording and begins copying the selected recording to the user's computer, without any further search or other effort by the user. (Creighton Decl. ¶ 14.) A "Download Manager" provides information on the status of each download requested, including the time left for completion and

---

[6] "MP3" is a digital sound recording or audio file of the type distributed and copied using the Aimster system. It has been compressed, in whole or in part, by use of the MPEG-1 Audio Layer 3 digital audio compression algorithm, or by use of another compression algorithm. See Napster, 239 F.3d at 1011; RIAA v. Diamond Multimedia Sys., Inc., 180 F. 3d 1072, 1073-74 (9th Cir. 1999) ("By most accounts, the predominant use of MP3 is trafficking in illicit audio recordings[.]")

the transfer rate. (Forrest Decl., Ex. 19E.) When the copying is complete, the music is stored on the user's personal computer and immediately can be played and made available for other users to copy (Id., Ex. 19G; Creighton Decl. ¶ 14.)

Aimster promotes Club Aimster as having "All the Hot New Releases . . . All the Time." (Forrest Decl., Ex. 19G.) The vast majority, if not all, of the music on Club Aimster is owned by Plaintiffs and all of it is listed in the Billboard Hot 100.[7] (Creighton Decl. ¶ 14.) Aimster's commentary on each work underscores its knowledge that these works are protected by copyrights owned by the Record Company Plaintiffs. (Forrest Decl., Ex. 19C.) ("This song will also hit #1 on the Labels' Chart"; "How 'bout all us gurlz go oWn this for Petey [Pabel] and stick it up the Labels' butt?"; "Great song but it's already peaked. Aimster says: Of course Labels are still milking it, and claiming it's going up."). Additionally, "Club Aimster Top 40" screens even provide copies of the copyrighted album covers of major copyrighted recordings available on the Aimster system. (Id.)

F. Knowledge Of And Ability To Control Infringement

On April 3, 2001, the RIAA, on behalf of its record company members including the Record Company Plaintiffs, sent Defendants Deep and BuddyUSA a letter demanding that they "immediately take steps to prevent the dissemination of infringing sound recordings owned by our member companies." The letter was accompanied by a CD-ROM containing a list of 500,000 specifically identified recordings owned by RIAA members. (Creighton Decl. ¶ 7 and Exs. 8 and 9.) Defendants failed to take any action to curtail the rampant copying and distribution of infringing works on the Aimster system. Instead, Defendants stated they wanted to work on filtering copyrighted music from the Aimster system and attempt to resolve the RIAA's copyright concerns. (Creighton Decl. ¶¶ 8-9 and Ex. 10.) Defendants initiated, scheduled, and then cancelled, two meetings with the RIAA, on the pretext of desiring to discuss possible non-litigation resolutions to Aimster's copyright infringement. (Id.) After delaying for almost a month, on April 27, Defendants cancelled the meeting scheduled for that day, and represented that they were developing software which "will feature a blocking technology to

[7] Billboard is a leading weekly music trade magazine, widely available and used by music professionals worldwide. It contains lists of the top-selling records in various genres, including the "Hot 100" listing of top-selling albums. (Creighton Decl. ¶ 18 and Ex. 18.)

ensure that only files designated [by its software licensor] can be searched, accessed or exchanged." (Creighton Decl. ¶ 9 and Ex. 10.) On April 30, 2001, the next business day after Defendants' letter, Defendants BuddyUSA and AbovePeer filed declaratory relief actions in the Northern District of New York against the RIAA and some of the Plaintiffs here. The other MDL actions followed.[8]

On May 9, 2001, the RIAA sent a second notice to Defendants, attaching hundreds of pages of screen shots illustrating more than 2900 copyrighted recordings available for copying on the Aimster system, and demanding that Defendants take immediate steps to remove all of Plaintiffs' works and police the Aimster system to prevent further infringement. (Creighton Decl. ¶ 10 and Ex. 11.) The screen shots included some of the most popular recordings owned by the Record Company Plaintiffs, such as those by Mariah Carey, Celine Dion, U2, Sheryl Crow, Elvis Presley, Mary Chapin Carpenter, the Beatles, Britney Spears, Madonna, and Ricky Martin. (Id.)

Defendants admit they have the ability to supervise and control conduct on the Aimster system, stating that users can be "blocked" for violating rules of conduct, and/or that Aimster can "terminate" access to offending content files. (See Aimster Terms of Service, Forrest Decl., Ex. 8.) Nevertheless, Defendants have refused to take any steps to prevent infringing conduct. (Creighton Decl. ¶¶ 8-18.) To the contrary, Defendants brag that Aimster intends to "fight for freedom" against the record labels and others, and the Aimster website solicits contributions to its "defense fund." (Forrest Decl., Ex. 2.) The motto prominently displayed on the first page of its website, directed at copyright holders and copyright laws, is "Can't Touch This."[9] (Id., Ex. 13.) True to this boast, among many others, *every one* of Plaintiffs' works identified in their Complaints as unlawfully distributed and copied *still* are available on the Aimster system. (Creighton Decl. ¶¶ 11-18.)

---

[8] The later-filed Florida and Tennessee actions are tag-along actions.

[9] "Can't Touch This" is the title of a copyrighted recording by M.C. Hammer, another work infringed by Aimster. (Creighton Decl., Ex. 22.)

II. THE LEGAL STANDARD

Injunctive relief is specifically authorized under the Copyright Act. 17 U.S.C. § 502. In the Seventh Circuit,[10]

> "A party seeking to obtain a preliminary injunction must demonstrate: (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted. If the court is satisfied that these three conditions have been met, then it must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied. Finally, the court must consider the public interest (non- parties) in denying or granting the injunction." Ty, Inc. v. The Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001).

"Irreparable injury may normally be presumed from a showing of copyright infringement." Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir. 1982); Ixl, Inc. v. AdOutlet.Com, Inc., 2001 WL 315219, at *13 (N.D. Ill. March 29, 2001). "The public interest [] strongly favors the issuance of a preliminary injunction, as it will preserve the integrity of the copyright laws, which embody an important national policy of encouraging creativity." ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp 1310, 1332-33 (N.D. Ill. 1990).

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Musical compositions are protected by the Copyright Act. 17 U.S.C. §§ 102(a)(2). Since 1972, sound recordings also have been protected by copyright. Goldstein v. California, 412 U.S. 546, 552 (1973).[11] Copyright owners have the exclusive rights to copy and distribute copyrighted works. 17 U.S.C. § 106(1), (3). "To establish [direct copyright] infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991). A plaintiff need not prove intent to infringe. Lipton v. Nature

---

[10] In Multidistrict Litigation "cases involving federal questions, the transferee court follows the law of its own circuit." 15 Wright & Miller, Fed. Prac. & Proc. Jurisd. 2d, § 3866 at 128 (pocket part 2001).

[11] State law protects sound recordings "fixed" before 1972. See section III.D., infra.

Co., 71 F.3d 464, 471 (2d Cir. 1995); Photofile, Inc. v. Graphicomp Sys., 1993 WL 375769, at *2 (N.D. Ill. Sept. 22, 1993)("the law is clear that intent is not an essential element of copyright infringement").

Whenever direct infringement exists, contributory and vicarious infringement also may exist.[12] See Midway Mfg. Co. v. Arctic Int'l., Inc., 704 F.2d 1009, 1013 (7th Cir. 1983). The law of contributory and vicarious infringement is no less applicable to cyberspace than to any other means of infringement. See Napster, 239 F.3d at 1019-24; see also ALS Scan, Inc. v. Remarq Communities, Inc., 239 F.3d 619 (4th Cir. 2001); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); see also Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 213 (S.D.N.Y. 2000), aff'd, 2001 U.S. App. LEXIS 25330 (2d Cir. November 28, 2001).

A. Direct Infringement Is Rampant On The Aimster System.

Direct infringement is indisputable here:

- Aimster users have downloaded or uploaded innumerable copies of copyrighted music using the Aimster system. Downloading (i.e., copying) and uploading (i.e., distributing) copyrighted works violate both the exclusive ***reproduction*** and ***distribution*** rights. See, e.g., Napster, 239 F.3d at 1014 ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights."); NLFC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 235 (7th Cir. 1995)(loading software into a computer constitutes making a copy under Copyright Act); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993)(reproduction); Sega Enter. Ltd. v. MAPHIA, 948 F. Supp. 923, 931 (N.D. Cal. 1996)("Sega II")(reproduction); Playboy Enter., Inc. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993)(distribution).

- Plaintiffs own or control copyrights for works copied and distributed using the Aimster system (Agnew Decl. ¶ 3; Cottrell Decl. ¶¶ 3-6; Eisenberg Decl. ¶¶ 3-6; Leak Decl.

[12] The direct infringer need not be named as a defendant. See, e.g., Napster, 239 F.3d at 1013, n.2; Design Craft Fabric Corp. v. K-Mart Corp., 1999 WL 1256258, at *4 (N.D. Ill. Dec. 21, 1999).

¶¶ 3-5; Ostroff Decl. ¶¶ 3-6; Seklir Decl. ¶¶ 3-6.) Plaintiffs' copyright certificates constitute *prima facie* evidence of their ownership. 17 U.S.C. § 410(c). (Id., Exs. 1.)

- Plaintiffs have not granted Aimster permission to make available for copying or distribution any of Plaintiffs' copyrighted works. (Agnew Decl. ¶ 4; Cottrell Decl. ¶ 7; Eisenberg Decl. ¶ 7; Leak Decl. ¶ 6; Ostroff Decl. ¶ 7; Seklir Decl. ¶ 7.)

B. Defendants Are Liable For Contributory Infringement.

"A party is liable for . contributory infringement where the party 'with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.'" Design Craft Fabric Corp., 1999 WL 1256258, at *4 (quoting Gershwin Pub'g. Corp. v. Columbia Artists Mgt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)); see Napster, 239 F.3d at 1019-22.

1. Defendants Have Knowledge Of The Pervasive Infringements Enabled By The Aimster System.

Defendants have ***actual*** knowledge of the countless infringements taking place on the Aimster system:

- Plaintiffs ***repeatedly have notified*** Defendants in writing of the massive and obvious infringing activity on Aimster. (Creighton Decl. ¶¶ 7, 10, 14 and Exs. 8, 11 and 13.) See Napster, 239 F.3d at 1020 n.5; Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996)("Fonovisa")(letters notifying swap meet organizers of their vendors' sale of counterfeit recordings established knowledge); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th Cir. 1994)("in light of [plaintiff's] earlier requests that [defendant] cease copying its copyrighted photographs, [defendant] had actual notice"); Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 512 (7th Cir. 1994)("A letter informing the defendant of possible infringement clearly provides notice.").

Aimster ***tracks*** and ***comments*** on the specific music most often infringed on its system by listing that music in the "Aimster Top 40 List " in Club Aimster (Forrest Decl., Ex. 19). Virtually every recording listed on the "Aimster Top 40" is owned by Plaintiffs. (Creighton Decl. ¶ 14.)

- Aimster uses specific copyrighted recordings in its "Tutorial" to demonstrate, step-by-step, how to infringe copyrighted works. (Creighton Decl. ¶ 13 and Ex.

12.) Plaintiffs have notified Aimster that the works in the "Tutorial" are protected by copyright. (Creighton Decl. ¶ 13.).

Aimster is based upon and has linked directly with Napster. (Creighton Decl., Ex. 2.) Defendant Deep, with knowledge of Napster's infringing conduct, has admitted his desire to take over where Napster left off, has claimed that "we're the next technical innovation upon Napster" and has called the Aimster system "Napster squared." (Creighton Decl., Ex. 6.) Defendants' press release on the Aimster website even announces Aimster as a "Revolutionary Napster-Like Application Unveiled." (Id., Ex. 1.)

- Defendants devised and offered on the Aimster website software expressly designed to help Napster users circumvent the preliminary injunction prohibiting Napster's infringing activities by encrypting their sound recording filenames in "Pig Latin." (see Answer in Jerry Leiber, et al. v. AbovePeer, et al., 01-CV-5901 ¶ 10; Creighton Decl. ¶ 6, Ex. 5).

- The Aimster forums are replete with discussion on how to "screw" the RIAA and "steal" music. (Schafer Decl., Exs. 1, 2) Aimster acknowledges that the record companies do not authorize Aimster to use their recordings. Forrest Decl., Ex. 19 ("you can get the Aimster Top 40 of Hot New Releases before anyone else knows - even before the Labels know!")

- Defendant Deep openly discusses the massive infringements of the Aimster system. (Creighton Decl., Exs. 2 and 6.)

Although actual knowledge clearly is present here, constructive knowledge also suffices for contributory infringement. Design Craft Fabric Corp., 1999 WL 1256258, at *4; ISC-Bunker Ramo Corp., 765 F. Supp. at 1332 (contributory infringement where defendant "knew (or should have known)" of the unlawful conduct); Sega II, 948 F. Supp. at 933. The availability of newly released popular works on Aimster (including the "Top 40") is constructive knowledge that copying and distributing these works is unauthorized. RSO Records, Inc. v. Peri, 596 F. Supp. 849, 858 (S.D.N.Y. 1984)("knowledge" found where "the very nature of" the product "would suggest infringement to a rational person"); Universal City Studios Inc. v. American Invsco Mgt. Inc., 217 U.S.P.Q. (BNA) 1076, 1077 (N.D. Ill. 1981), 1981 WL 1435, at *2 (N.D. Ill. May 26, 1981)(that motion picture was just released in theaters supported inference of actual or constructive knowledge that videocassette copy was infringing). Further, Defendants

clearly understand the nature of copyright law; they seek to protect their own intellectual property by, among other things, purporting to copyright their software. Creighton Decl., Ex. 3 (Aimster's Terms of Service, pp. 3-4 "Copyright Information"); see, e.g., Napster, 239 F.3d at 1020 n.5 ("constructive knowledge because [Napster] ha[s] enforced intellectual property rights in other instances.").

In Playboy Enter., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997), defendant bulletin board operators encouraged users to upload and download copyrighted photographs. The Court rejected the argument that defendants were not liable because they had no way of distinguishing between copyrighted and uncopyrighted photographs, finding that defendants had "at least constructive knowledge that infringing activity was likely to be occurring" on their bulletin board because "Playboy Magazine is one of the most famous and widely distributed adult publications in the world. It seems disingenuous for Defendants to assert that they were unaware that copies of photographs from Playboy Magazine were likely to find their way onto the BBS." Id. at 514; see also, e.g., Gershwin, 443 F.2d at 1163 (firm responsible for organizing concerts liable for contributory infringement despite not knowing which specific songs would be played; it sufficed that firm had general knowledge that "copyrighted works were being performed at [the concert] and that neither the local association nor the performing artists would secure a copyright license"); Sega Enter. Ltd. v. MAPHIA, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994) ("Sega I")("Even if Defendants do not know exactly when games will be uploaded to or downloaded from [its service], their role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory infringement.").

2. Defendants Induce, Cause, And Materially Contribute To Infringement.

This element is satisfied where a defendant offers "the site and facilities for direct infringement." Napster, 239 F.3d at 1022 ("'without the support services defendant provides, . . . users could not find and download the music they want with the ease of which defendant boasts'" (quoting Napster, 114 F. Supp. 2d at 919-920)); see Gershwin , 443 F.2d at 1163 (concert promoter "caused" copyright infringement by its "pervasive participation" in creating an audience for the concert).

Aimster clearly is (as Napster was) the "*but for*" cause of its users' infringement; the infringement could not take place without Aimster's involvement. See Napster, 239 F.3d at 1022; Napster, 114 F. Supp. 2d at 918-20. Aimster provides the "site and facilities," and much more. To engage in copyright infringement, every Aimster user must download Aimster's proprietary software, must connect to one of Aimster's servers, must use Aimster's continuously updated search index to locate files to copy, may copy only files made available for distribution at that time over the Aimster system, and must be hooked up to Aimster to initiate both the distribution and the copying process. Aimster predicates its entire service upon furnishing a "road map" for users to find, copy, and distribute copyrighted music. Indeed, users do not have a choice; as soon as the "play" button is clicked, Aimster immediately starts downloading (as opposed to playing) the copyrighted recording. See Sega II, 948 F. Supp. at 933 (defendant who "provided a road map on his BBS for easy identification of Sega games available for downloading" and "provided the facilities for copying the games by [] monitoring, and operating the BBS software, hardware and phone lines necessary for the users to upload and download games" was contributorily liable).

C. Defendants Also Are Liable For Vicarious Infringement.

A defendant "may be liable as a vicarious infringer . . . if the defendant has the right and ability to supervise the infringing activities as well as a direct financial interest in those activities." F.E.L. Pub., LTD. v. Nat'l. Conference of Catholic Bishops, 466 F. Supp. 1034, 1040 (N.D. Ill. 1978)(citing Shapiro, Bernstein & Co. v. H.L. Green & Co., 316 F.2d 304 (2d Cir. 1963) and Gershwin, 443 F.2d at 1162); see Napster, 239 F.3d at 1022 (citing Fonovisa, 76 F.3d at 262). Knowledge of infringement is not an element of vicarious infringement. F.E.L. Pub., LTD., 466 F. Supp. at 1040 (citing Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929)).

1. Defendants Have The Right And Ability To Supervise.

Defendants ***admit*** their right and ability to supervise Aimster's users: Aimster's Terms of Service (to which every user must agree) states that Aimster will "take down" "infringing material" and that repeat violators of copyright law "may have their access to all services terminated." (Forrest Decl., Ex. 8.) Defendants have the same right and ability to supervise conduct as did Napster: "The ability to block infringers' access to a particular

environment for any reason whatsoever is evidence of the right and ability to supervise." Napster, 239 F.3d at 1023; Fonovisa, 76 F.3d at 262 (ability to supervise where defendants had the "right to terminate vendors for any reason," "promoted the swap meet," and "controlled the access of customers to the swap meet area"). Where, as here, a defendant is "in a position to police the infringing conduct," its "*failure* to police the conduct" gives rise to vicarious liability. See Broadcast Music, Inc. v. Hartmarx Corp., 1998 WL 128691, at *3 (N.D. Ill. Nov. 17, 1988)("It is the existence of the right to supervise, not whether Hartmarx in fact chose to exercise that right, that is at issue."); Chess Music, Inc. v. Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977)("In an age where much of the music is copyrighted, [defendant] should not profit at the expense of these song composers by instructing musical groups not to play copyrighted music and by claiming ignorance as to their program. He is deemed to have acquiesced in the musicians' performance as he allowed the musicians the discretion to select the program."); Fonovisa, 76 F.3d at 262 (rejecting characterization of swap meet owner as mere "absentee landlord" that had "surrendered" its supervisory powers to its tenants); Shapiro, Bernstein & Co., 316 F.2d at 306 (store vicariously liable for sale of bootlegged recordings by its concessionaire even though defendant was not actively involved in the sale of records and did not control and supervise the employees).

Defendants' "'pervasive participation in the formation and direction' of the direct infringers, including promoting them (i.e., creating an audience for them)," places Defendants "in a position to police the direct infringers," further satisfying this element. Fonovisa, 76 F.3d at 263 (quoting Gershwin, 443 F.2d at 1163); see Napster, 239 F.3d at 1023. Defendants have "promoted" Aimster's infringing service far beyond the type of generalized promotional activities on which the Fonovisa court based vicarious liability. (E.g., Creighton Decl., Exs.1 & 6.)

2. Defendants' Financial Interest In Infringing Activities

Each Club Aimster subscriber pays $4.95 per month for the service, which provides one-click downloading of Plaintiffs' most popular copyrighted music. (Forrest Decl., Ex. 2). Further, Defendants solicit monetary contributions from Aimster users to finance this litigation. (Id., Ex. 7). Defendants also sell merchandise (such as clothing, weight-loss products, and performance-enhancing vitamins) on the Aimster website. (Creighton Decl., Ex. 23.) Thus, Defendants derive income directly from the infringement of copyrighted works.

This element also is satisfied where, as here, infringing activities enhance attractiveness to potential customers. Napster, 239 F.3d at 1023 ("Financial benefit exists where the availability of infringing material 'acts as a draw' for customers." (quoting Fonovisa, 76 F.3d at 263-64)). Every Aimster user engaged in unauthorized copying and distribution attracts additional users; thus, Aimster's value and Defendants' exploitation of its user base are directly attributable to the infringement of Plaintiffs' copyrights. Napster, 239 F.3d at 1023 (Napster had a direct financial interest because "Napster's future revenue is directly dependent upon 'increases in user base'" (quoting Napster, 114 F. Supp. 2d at 902)); Fonovisa, 76 F.3d at 263 ("the sale of pirated recordings at the [] swap meet is a 'draw' for customers"); Universal City Studios, Inc., 217 U.S.P.Q. (BNA) at 1079 (plaintiffs only need show the screening was intended to "stimulate business at the [defendant's] Lounge," or that defendant "stood to benefit from [the screening.]"); Broadcast Music, Inc., 1988 WL 128691, at *2 (using infringing material to "attract" customers to a business, which in turn may increase the business' profits, is an "obvious and direct" financial interest in infringing conduct); Playboy, 982 F. Supp. at 513 ("the quantity of adult files available to customers" on defendant's bulletin board "increased the attractiveness of the service"); Playboy Enter., Inc. v. Webbworld, Inc., 968 F. Supp. 1171, 1177 (N.D. Tex. 1997) (copyrighted photographs "enhanced the attractiveness of the [defendant's] website to potential customers"); Sega I, 857 F. Supp. at 684 (defendants profited because "the existence of the distribution network for Sega video game programs increases the prestige of the MAPHIA bulletin board"). Whether Aimster has yet made any profit is irrelevant. See Napster, 239 F.3d at 1023; Major Bob Music v. Stubbs, 851 F. Supp. 475, 480 (S.D. Ga. 1994) (for vicarious liability, a commercial enterprise "is considered to be 'profit-making' even if it never actually yields a profit"); 2 M. & D. Nimmer, Nimmer On Copyright § 8.21 n.1 (2001)(describing the "Netscape" strategy: "Give it away for free in order to make money."); see also 17 U.S.C. § 101 ("financial gain" includes "receipt, or ***expectation of receipt***, of anything of value . . .")(emphasis added).

D. Defendants Violate State Law By The Misappropriation Of The Record Company Plaintiffs' Sound Recordings "Fixed" Prior To 1972.

Sound recordings "fixed" before February 15, 1972, are not protected by copyright, but are subject to state law protection. 17 U.S.C. § 301(c). Under the state law to be applied here, such sound recordings are protected against unauthorized copying and distribution.[13] See, e.g., Apple Corps Ltd. v. Adirondack Group, 476 N.Y.S.2d 716, 719 (Sup. Ct. 1983)("Record piracy is a well-recognized form of unfair competition" under New York law).

E. Aimster Does Not Qualify For The "Safe Harbor" Limitation Of Remedies Under The DMCA

Aimster asserts almost the identical laundry list of meritless affirmative defenses that Napster unsuccessfully raised.[14] See Napster, 239 F. 3d at 1024-27. In view of its recent enactment and the limited, but dispositive, authority, Plaintiffs address here only the inapplicability of Defendants' putative defense under the Digital Millennium Copyright Act (17 U.S.C. § 512; "DMCA").

As Defendants acknowledge in their Answer, the DMCA is an affirmative defense. DMCA House Report 105-551 (105th Cong. 2d Sess.) at 26 ("a defendant asserting [a DMCA limitation on liability] as an affirmative defense . . . bears the burden of establishing its entitlement."). The DMCA is designed to provide copyright owners with "reasonable assurance that they will be protected against massive piracy." DMCA Senate Report 105-190 (105th Cong., 2d Sess.) at 8. It is intended "to exclude sophisticated pirate directories - which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted - from the safe harbor." Id. at 48. Thus, the DMCA limits remedies available only against ***innocent*** infringers; that limitation "is not presumptive, but granted only to 'innocent' service providers ***who can prove*** they do not have actual or constructive knowledge of

---

[13] In Multidistrict Litigation "cases in which a federal court would be guided by state law, most commonly diversity cases, the transferee court is bound to apply the law that the transferor court would follow." 15 Wright & Miller, Fed Prac. & Proc. Jurisd. 2d, § 3866 at 610 (2d ed. 1986).

Defendants answered only in Jerry Leiber, et al. v. AbovePeer, et al., Case No. 01-CV-5901.

the infringement . . .." ALS Scan, 239 F.3d at 625 (emphasis added). "The DMCA's protection of an innocent service provider disappears at the moment the service provider loses its innocence, *i.e.*, at the moment it becomes aware that a third party is using its system to infringe." Id. For many reasons, Aimster does not qualify for any of the DMCA limitations on remedies, or "safe harbors."

First, the DMCA protects only "service providers." There is a substantial question whether Aimster is even a "service provider," as that term is defined under 17 U.S.C. § 512(k). Napster, 239 F.3d at 1025. A "service provider" is "a provider of online services or network access, or the operator of facilities therefor . . .." 17 U.S.C. § 512(k). Aimster does not provide "online services" or "network access"; on the contrary, access to the Aimster system requires a ***third party*** "provider of online services" and "network access." (Farmer Decl. ¶¶ 27-31.)

Second, a service provider is not eligible for the protections of the DMCA unless it "adopted and reasonably ***implemented*** . . . a policy that provides for the termination" of repeat infringing users. 17 U.S.C. § 512 (i)(1)(A)(emphasis added). This provision ensures that "those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access." DMCA House Report 551(II), at 61, 1998 WL 414916, at *154. At the very least, Aimster has failed to implement any such policy. (Creighton Decl. ¶¶ 7-18.)

Third, the DMCA's "safe harbors" apply only in four limited circumstances: a service provider (a) transmits material through its system (§ 512(a)); (b) provides temporary storage of material by "caching" on a system or network (§ 512 (b)); (c) stores material, at the direction of the user, on a system or network (§ 512(c)); or (d) refers or links users to an online location containing infringing material or activity by using information location tools (§ 512(d)).

Sections 512(a) and (b) do not protect Aimster because, like Napster, Aimster-aided infringement is not transmitted ***through*** Aimster's system. See §§ 512(a), 512(b)(1)(B); Napster, 54 U.S.P.Q. 2d (BNA) at 1751 ("even if each user's Napster browser is part of the system, the transmission goes *from* one part of the system *to* another, or *between* parts of the system [all via the Internet, not through Napster's server], but not 'through' the system"); (Farmer Decl. ¶¶ 27, 28.) Sections 512(b) and (c) are not applicable, because Aimster does not store

material on its system. Section 512(d) is irrelevant, because (1) Aimster does not refer or link users to an "online location," i.e., an Internet website, but to each others' home computers; and (2) it engages in and enables much more than true, limited, information location tools (such as Yahoo). (Id. ¶ 29.)

Fourth, even if Aimster met the technical definitions applicable to Sections 512(c) and (d), they would be unavailable to Aimster. To qualify for either of these safe harbors, a service provider must satisfy ***all*** of the requirements of the applicable sub-section. See ALS Scan, 239 F.3d at 623 (analyzing Section 512(c)). Aimster does not. First, it has knowledge of the infringing activity it encourages and enables. §§ 512 (c)(1)(A)(i)-(iii), (d)(1)(A)-(C)(safe harbor unavailable to defendant that has "actual knowledge that the material or activity is infringing," or that is "aware of facts or circumstances from which infringing activity is apparent"); ALS Scan, 239 F.3d at 625 (DMCA immunity is "granted only to 'innocent' service providers who can prove they do not have actual or constructive knowledge of the infringement"). Defendants have actual ***and*** constructive knowledge of infringing activity. See Section III.B.1., supra. Independent of the innocent infringer requirement, Aimster also is disqualified from safe harbor under §§ 512(c) and (d) because, as discussed above (Section III.C.2.) Aimster "receive[s] a financial benefit directly attributable to the infringing activity" and "has the right and ability to control such activity." § 512(c)(1)(B) (service provider having "the right and ability to control such activity" may not "receive a financial benefit directly attributable to the infringing activity"); § 512(d)(2) (same); Napster, 114 F. Supp. 2d at 919 n.24 (analyzing § 512(d)); see also DMCA House Report 105-551 (105th Cong., 2d Sess.) at 25-26 ("The financial benefit standard in subparagraph (B) is intended to codify and clarify the direct financial benefit element of vicarious liability . . .. The 'right and ability to control' language in Subparagraph (B) codifies the second element of vicarious liability.").

IV. NO ADEQUATE REMEDY AT LAW EXISTS, AND, ABSENT AN INJUNCTION, PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

> "[C]ourts may ordinarily presume that all damages incurred due to copyright infringements are irreparable, and therefore not susceptible to monetary measurement, rendering any legal remedy inadequate. A presumption of irreparable harm may arise upon a showing of likelihood of success on the merits and a *prima facie*

case." Ty, Inc. v. GMA Accessories, Inc., 959 F. Supp. 936, 943-44 (N.D. Ill. 1997), *aff'd*, 132 F.3d 1167 (7th Cir. 1997).

Plaintiffs here could, but need not, rest on this presumption. Plaintiffs have spent enormous sums and years of effort to develop a legitimate market for digital distribution of their copyrighted music. Defendants are providing the very foundation of Plaintiffs' business -- copyrighted music -- for free and unsecured, to the same consumers to whom Plaintiffs are trying to sell these works. (Agnew Decl. ¶¶ 6-9; Cottrell Decl. ¶¶ 9-19; Eisenberg Decl. ¶¶ 11-21; Leak Decl. ¶¶ 8-13; Ostroff Decl. ¶¶ 11-22; Seklir Decl. ¶¶ 9-15. See Sanders Decl. ¶¶ 14-18.) See also Napster, 239 F.3d at 1016-17 ("'[T]he district court concluded that Napster harms the market in 'at least' two ways: it reduces audio CD sales among college students and it raises barriers to plaintiffs' entry into the market for digital downloading of music.") In addition, every day these infringements continue, more and more of the public begins to accept the notion that "free music" is an entitlement, and that digital copies of Plaintiffs' works may be freely taken. This has a direct and negative impact on public perception of and respect for copyright law, and, most significantly for this motion, causes incalculable but irreparable and long-term harm to Plaintiffs. (Agnew Decl. ¶ 9; Cottrell Decl. ¶ 18(c); Eisenberg Decl. ¶ 21; Leak Decl. ¶ 13; Ostroff Decl. ¶ 22; Seklir Decl. ¶ 15. See Sanders Decl. ¶¶ 16-18.)

V. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST.

In copyright cases, "the issue of public policy rarely is a genuine issue if the copyright owner has established a likelihood of success," Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 612 (1st Cir. 1988), because "the public interest is the interest in upholding copyright protections." Autoskill Inc. v. Nat'l Educ. Support Sys. Inc., 994 F.2d 1476, 1499 (10th Cir. 1993). "[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work." Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d Cir. 1983). Here, "[a] preliminary injunction is necessary to preserve the integrity of the copyright laws which seek to encourage individual effort and creativity by granting valuable enforceable rights." Atari Inc., 672 F.2d at 620. See generally Hessinger Decl.

VI. DEFENDANTS SHOULD BE ENJOINED FROM CONTRIBUTORILY OR VICARIOUSLY INFRINGING ANY OF PLAINTIFFS' COPYRIGHTS

To prevent continuing infringement, Plaintiffs need an injunction prohibiting the Aimster system from being used to enable the infringement of ***any*** of Plaintiffs' copyrighted works. See Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984)(Copyright Act authorizes an injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright"); Canopy Music, Inc. v. Harbor Cities Broad, Inc., 950 F. Supp. 913, 916 (E.D. Wis. 1997)(enjoining radio station that infringed 10 musical composition copyrights and "prohibit[ing] the defendant from performing any songs to which ASCAP possesses the right to license."); Zeon Music v. Stars Inn Lounge, Ltd., 1994 WL 163636, at *5 (N.D. Ill. Apr. 28, 1994)(defendants infringed four songs, court enjoined defendants "from publicly performing or sponsoring the public performances of ***any*** musical composition included ***in ASCAP's repertory*** until such time as defendants obtain a license to do so")(emphasis added); Weintraub/Okun Music v. Atlantic Fish & Chips, Inc., 1991 WL 34713, at *4 (N.D. Ill. Mar. 13, 1991)(seven songs infringed by restaurant; because of threat of future infringement, Court enjoined "further infringement of the copyrights held by ASCAP members"); Broadcast Music, Inc. v. Dendrinos, 1983 WL 1153, at *7 (N.D. Ill. Oct. 21, 1983); Columbia Pictures Indus., Inc. v. Babella, 1996 WL 328015, at *4 (N.D. Ill. June 11, 1996)(enjoining infringement of ***any*** of plaintiffs' works); Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990); see also CSC Holdings, Inc. v. Greenleaf Elec., Inc., 2000 WL 715601, at *7 (N.D. Ill. June 2, 2000) ("[a] balancing of the parties' respective hardships reveals that the injunction means only that Defendants will be enjoined from conducting a business that is prohibited by federal law.").

Aimster's massive, pervasive, and blatant infringement unabashedly flouts the law and mandates the imposition of an injunction prohibiting infringement of all of Plaintiffs' copyrighted works.

VII. THE BOND

$5,000,000. Id. at 927; Napster, 239 F. 3d at 1028. Here, a substantially lower bond is warranted, because, among other things the Napster precedent establishes that the essentially identical conduct of Aimster is infringing, and, therefore, an appropriate subject for injunctive relief.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction enjoining Defendants from infringing any of Plaintiffs' copyrighted works.

Lee J. Eulgen
One of the Attorneys for Plaintiffs

Floyd A. Mandell
Lee J. Eulgen
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Chicago, Illinois 60661-3693
(312) 902-5200

Russell J. Frackman
Roy L. Shults
Patricia H. Benson
Peter B. Gelblum
Karin G. Pagnanelli
MITCHELL SILBERBERG & KNUPP LLP
11377 West Olympic Boulevard
Los Angeles, California 90064-1683
(310) 312-2000

Matthew J. Oppenheim
Andrea M. Sharrin
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
1330 Connecticut Avenue, N.W., Suite 300
Washington, D.C. 20036
(202) 775-0101

Carey R. Ramos
Michael C. Keats
Theodore K. Cheng
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Evan R. Chesler
Katherine B. Forrest
CRAVATH, SWAINE & MOORE
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

Leon P. Gold
Carla M. Miller
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

APPENDIX

RECORD COMPANY PLAINTIFFS

Atlantic Recording Corporation, Elektra Entertainment Group Inc., Warner Bros. Records Inc., London-Sire Records Inc., Maverick Recording Company, Tommy Boy Music, 143 Records, Atlantic Rhino Ventures Inc. d/b/a Rhino Entertainment Company, WEA International Inc., WEA Latina Inc., Time Warner Entertainment Company, L.P., and New Line Cinema Corporation, Zomba Recording Corporation, Caroline Records, Inc., EMI Christian Music Group, Inc., Narada Productions, Inc., Noo Trybe Records, Inc., The Forefront Communications Group, Priority Records LLC, Sony Discos Inc., UMG Recordings, Inc., BMG Music d/b/a The RCA Records Label, Motown Record Company, L.P., Loud Records LLC, Hollywood Records, Inc., Sony Music Entertainment Inc., Capitol Records, Inc., Arista Records, Inc., Interscope Records, Virgin Records America, Inc., BMG Music d/b/a Windham Hill, BMG Music d/b/a BMG Entertainment, Bad Boy Records, and LaFace Records