

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
APPEAL NOS. 03-55894, 03-55901

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

Appellants,

v.

GROKSTER, LTD., et al.,

Appellees.

JERRY LEIBER, et al.

Appellants,

v.

GROKSTER, LTD., et al.

Appellees.

Appeal from the United States District Court, Central District of California
Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster, Ltd., et al.,
Case No. CV 01-08541 (PJWx) (Consolidated with *Leiber, et al. v.*
MusicCity.com, Inc., et al., Case No. CV 01-09923 SVW (PJWx)),
Honorable Stephen V. Wilson

**BRIEF OF *AMICUS CURIAE* ALTNET, INC., IN SUPPORT OF
DEFENDANTS-APPELLEES URGING AFFIRMANCE OF THE DISTRICT
COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Altnet, Inc., certifies the following:

Altnet, Inc. (“Altnet”) is a subsidiary of Brilliant Digital Entertainment, Inc., which owns 10% or more of its stock. Brilliant Digital Entertainment, Inc. is a publicly-held company. Additionally, Joltid, Ltd., a privately-held company, owns 10% or more of Altnet’s stock.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Altnet has built a successful and profitable business based on the electronic distribution of licensed content, including audio, video, and software files. Using the same open “FastTrack” peer-to-peer technology that underlies Appellee Grokster’s software application, a licensed version of the Joltid closed peer-to-peer technology, and Microsoft’s Digitally Rights Managed (“DRM”) technology, Altnet has become world's largest provider of secure content for peer-to-peer distribution over the internet. Altnet currently issues approximately 300,000 licenses each day for electronic content, which it makes available for peer-to-peer searching and downloading. In less than a year, Altnet has not only populated the so-called “file sharing networks” with an enormous amount of licensed content, but has implemented the means for collecting revenue from users of peer-to-peer software applications and distributing that revenue to copyright holders.

While embraced by many artists and labels not blessed with recording, marketing, or distribution contracts from the major record labels, and companies (other than Appellants) who own digital rights to content, Appellants in this action view Altnet as a direct competitive threat. By bundling Altnet’s technology to interoperate with peer-to-peer software applications like those at issue in this case, Altnet can distribute music and movies at a small fraction of the cost needed to operate Appellants’ “brick and mortar” distribution businesses. Altnet also competes with several of the Appellant-owned *Amici*, such as MusicNet, who

operate “web-based” businesses for internet distribution of licensed content.

Altnet possesses competitive advantages over these *Amici* because the use of peer-to-peer distribution technology does not require the same investment as distribution technology centered on web-based servers and it is more popular among consumers.

If Defendants were held contributorily or vicariously liable each time a user of their software downloaded a copyrighted work without permission of the copyright owner, no company could risk development or provision of the peer-to-peer applications at issue in this case—or any other internet communication tool. Indeed, no open computer communication protocol in the hands of computer users, including HTTP (the most widely-used communication protocol on the internet) is immune from misuse. Without these peer-to-peer communications protocols, Altnet’s digital distribution business could not function, leaving Appellees and their *Amici* with monopolistic control over both physical and digital content distribution. Accordingly, Altnet respectfully requests this Court to affirm the grant of partial summary judgment to the Defendant-Appellees.

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The modern internet developed as a collection of individual computers, equipped with networking protocols, which enabled communications and file transfers between each computer. Communications among individual computers,

known as “peers,” took place long before the emergence of the now-predominate “worldwide web” in which most internet traffic occurs between peers (also called clients) and central servers, or “web sites” capable of handling simultaneous communications from numerous peers. Until recently, client/server-based communications over the internet predominated, not for a lack of peer-to-peer communication technology, but because the advent of the “web browser” and “web search” functionality available through the web browser—which is based around a client/server model—simplified internet searching by non-computer experts. With the software at issue in this case, the web browser and web search technology developed in the mid-1990s for client/server communications can be extended for lay computer users to the peer-to-peer roots of the internet.

Altnet has developed a successful business based on the distribution power inherent in “user-friendly” peer-to-peer communications. Using Microsoft’s digitally rights managed (“DRM”) technology, Altnet secures licenses for digital files, makes those files available to users of the peer-to-peer software application known as the Kazaa Media Desktop (“KMD”), collects revenue each time a licensed file is distributed and purchased using the KMD application, and rewards users for making available for peer-to-peer distribution licensed Altnet files.

Altnet’s business not only provides an existing, substantial use for peer-to-peer applications that infringe no copyrights, Altnet’s capacity for peer-to-peer distribution of licensed works contains no limit. Moreover, if Altnet’s licensed

distribution business continues at its current pace through the continued support of copyright owners, it is likely that authorized, licensed content will replace the vast majority of infringing files downloaded between computer peers.

Of course, not even Altnet's solution—despite its rapid success in just over a year—can prevent all misuse of peer-to-peer technology. Just as some individuals continue to infringe copyrights with VCRs, photocopiers, email applications, and instant messenger services, so too will users of peer-to-peer applications misuse the technology to infringe copyrights no matter how much licensed content Altnet or others provide. But neither actual nor constructive knowledge that some percentage of the population will misuse a technology to infringe copyrights makes the technology provider secondarily liable for that infringement. To hold otherwise would place the technology companies in the position of guaranteeing legal uses only for their offered products—something that would stifle not only future innovation but jeopardize long-accepted technologies and those who developed them. It also would deny Altnet the peer-to-peer platform by which it competes with both Appellants and certain Appellant-owned *Amici* in distributing licensed audio and video content.

II. ALTNET'S BUSINESS USES PEER-TO-PEER TECHNOLOGY TO DISTRIBUTE LICENSED AUDIO AND VIDEO CONTENT IN COMPETITION WITH APPELLANTS AND CERTAIN APPELLANT-OWNED *AMICI*

Appellants and their *Amici* argue that the District Court's decision departs from settled law of secondary copyright infringement. It does not. Both

Grokster's Brief (at 26-29) and Steamcast's Brief (at 22-25) explain that a provider of technology capable of substantial non-infringing uses cannot be secondarily liable for copyright infringement. Imposing secondary liability for making available technology that can be misused, as opposed to denying liability when technology capable of proper uses is misused, would turn the *Sony-Betamax* doctrine its head.

A. **Altnet Makes Available Substantial Licensed Content for Peer-To-Peer Distribution**

Altnet has developed search indexing and directory technology for distributing secure, licensed content among computer users, peer-to-peer. Currently, Altnet bundles its technology with the Kazaa Media Desktop ("KMD"). Much like Grokster, the KMD is a user interface software application that operates with the FastTrack peer-to-peer protocols. When downloaded and opened by a computer user, the KMD provides the search and display screens that enable individual users (known as peers) to search for, download, and display, play, or operate downloaded digital files. KMD also sets up one or more folders on the user's computer so that other peers can access content made available for sharing. Using the popular Google web browser and search engine as an analogy, the KMD is like the user-friendly screens and tools that enable one to search for and locate web sites and content, while FastTrack is like the underlying index, routing, and transport protocols and systems that send the search results from Google servers (and from content located on computers tracked by Google) when the "search"

button is clicked.

In operation, Altnet's technology works like this: Once Altnet obtains a license for a digital file (whether audio, video, or software), Altnet "wraps" the files with Microsoft's DRM technology. The DRM technology, which Altnet licenses from Microsoft, gives content owners full control over the performance of the electronic file at the time it is opened to be played, displayed, or operated by the end user. It also allows content owners to set pricing and other usage conditions for opening and utilizing electronic files. Upon "wrapping," these "use" conditions are made part of the digital file. In sum, the DRM technology can prevent a file from being used unless a user is issued an "unlock" key by paying or meeting the conditions required by the content owner (and permanently associated with the digital file).

Next, Altnet loads the DRM-protected files onto its servers and records the file's hash value (a "logical fingerprint" derived from the contents of the file) into an Altnet database. Each copy of the KMD software contains a copy of the Altnet database, which is periodically updated.

When a user conducts a search with the KMD application, the KMD simultaneously searches both the FastTrack network and Altnet's local database, which resides on that user's computer. If a search matches an entry in the Altnet database, those entries are displayed on the KMD search results screen. With Altnet's "Topsearch" technology, which is integrated into the KMD, all Altnet files

are displayed to the KMD user with a “gold icon,” identifying the files as high quality and authorized by the content owner for downloading, subject to possible terms and conditions for displaying, playing, *etc.* Additionally, “gold icon” matches are displayed in first priority position on the KMD search results screen. If the user selects a gold icon file for downloading, the file can be downloaded directly from Altnet’s servers. More likely, however, if the particular file already has been downloaded by another peer, it will be obtained “peer-to-peer,” (*i.e.*, from another KMD user who has a copy of that exact file stored in his or her shared folder). Before a user can open the file after downloading, he or she must agree to the DRM license and comply with any payment terms or other conditions required by the copyright owner.

To support payment for licensed content, Altnet has built a payment gateway and has entered into agreements with AllCharge, Newgenpay, and others to support payments made via its payment gateway. The secured transaction gateway technology provided by these companies support most payment sources—credit cards, debit cards, pre-paid digital cash cards, pre-paid phone cards, and “virtual” cash cards consisting of account and pin numbers. Options to bill directly to phone or ISP accounts are in the process of being made available. Other payment systems enable users to have one password linked to multiple preferred payment methods. This gives content owners the flexibility to choose which payment types and international currencies they prefer to accept.

Finally, Altnet's technology includes a loyalty incentive program. KMD users accumulate "Peer Points" for uploading and making available for further distribution Altnet authorized "gold icon" DRM files to other users. Users can redeem accumulated points for various awards and other benefits. In offering this incentive program, Altnet and its joint enterprise partner, Sharman Networks, promote and encourage the peer-to-peer exchange of licensed, non-infringing works (along with the compensation of copyright owners) and simultaneously discourage the use of peer-to-peer software for illegal purposes.

B. Altnet Provides Considerable Authorized Content From Copyright Owners for Licensed Distribution Across Peer-to-Peer Platforms

Altnet's business is not just in the planning stages—it is fully functional and has operated for more than twelve (12) months with Sharman Networks' KMD application, the most popular peer-to-peer software application in use today.¹ Presently, Altnet is the largest provider of secure DRM content on the internet, issuing around 300,000 DRM licenses each day to users of peer-to-peer applications. In less than one year, Altnet has obtained, and provides for secure, licensed distribution, thousands of works from music artists, film makers, and computer game publishers. Specific examples include:²

¹ Sharman Networks Limited is a Defendant in this action but was not a party to the summary judgment motions that give rise to this appeal.

² Peer-to-peer software can be used to exchange many other types of non-

□ Distribution of video games. Altnet is a leader in distribution of authorized video games through the KMD. In distributing video games, trial versions are provided initially, which can typically be played only for a limited amount of time, after which the user is given the opportunity to pay for a full version. Altnet provides games created by Infogrames and other publishers, which are distributed by Trymedia. It also distributes games from Macromedia's Atom Shockwave division. Altnet has distributed millions of copies of video games in this fashion through the KMD application. In October 2002, Altnet's distribution of Infogrames' trial copies generated over 90,000 downloads, and more than 10 million inquiries. Since then, Infogrames acquired and changed its name to Atari.

□ Distribution of licensed feature films. Among other things, Altnet currently distributes authorized movie trailers for major motion pictures through the KMD. For example, Altnet distributed authorized trailers for the major motion pictures "Rules of Attraction" and "Confidence" from Lion's Gate Studios. It also distributed promotional videos for Tony Hawk's "Boom Boom HuckJam"—a touring extravaganza of skateboarding, cycling and punk rock. Additionally, Altnet distributes authorized documentaries

infringing files that have no relationship to Altnet. Some of the non-infringing uses of peer-to-peer software are described in Grokster's Brief (at 17-22) and Streamcast Network's Brief (at 15-17).

from Palm Pictures and has entered into a distribution agreement with Cine-Courts.com, a French movie distribution company.

□ Distribution of licensed music. Altnet distributes licensed music from Cornerband, a community of thousands of independent artists and bands, as well as 301 Records, an Australian independent recording label. In mid-2002, Altnet agreed to distribute a music track and video for Prodigy signed to the Maverick label. Altnet has since distributed over 2 million files for Prodigy and Maverick Records. On April 9, 2003, Sanctuary Records recording artists Widespread Panic released through Altnet (with the KMD application) an exclusive track from their new album, Ball, which began selling in stores on April 15. The track, "Nebulous" debuted with Altnet distribution through the KMD application to users worldwide.

□ Promotion of specific talent. Altnet also promotes authorized music of other independent artists, including Ice-T, Johnny Virgil, Brooke Allison, and Barrington Levy. Brooke Allison's music is released on the independent label 2KSounds, which is distributed by EMI. Free downloads of songs by these artists are designed to stimulate subsequent paid sales. Altnet is currently licensing authorized Brooke Allison and Barrington Levy songs for play with the KMD application.

□ Relationship with artist Ice T. On April 10, 2003, Altnet announced that it signed a distribution deal with multi-platinum recording artist Ice T.

Under the terms of the deal, Altnet uses its TopSearch technology to make the Ice T album "Repossession" available for purchase to KMD users. The deal also provides for future distribution of an additional 16 Ice T audio or video files. "Repossession", which consists of 19 tracks, is available through Altnet and promoted on the KMD start page. In addition, Ice T tracks known as "Bang, Bang" and "Swazy" are available as promotional downloads.

□ Relationship with author Lee Jaffe. At the beginning of May 2003, Altnet announced that it had secured the exclusive distribution rights to artist and author Lee Jaffe's never-been-seen-before home video footage of Bob Marley and the Wailers. The footage is available for free to KMD users. As part of this distribution deal, Altnet facilitates the sale of autographed copies of Jaffe's book "ONELOVE: Life with Bob Marley and the Wailers." KMD users can, via Altnet's payment gateway, purchase an autographed soft or hardcover copy of this book.

C. **Altnet's Peer-to-Peer Based Distribution System Is Innovative and Provides Much-Needed Competition With Appellants and Appellant-Owned Amici**

Certain Plaintiff-owned *Amici*, such as MusicNet, claim to be "true" innovators. (Brief of *Amicus Curiae* FullAudio Corporation, *et al.*, at 9-10.) According to these *Amici*, the peer-to-peer applications at issue in this case threaten their years of "business model" and "infrastructure" development. Far

from “innovative,” these *Amici* distribute, for a fee, digital audio files from websites. To the extent peer-to-peer distribution threatens *Amici*’s “business models” and “infrastructures,” it results from Altnet’s legitimate competition, not from the downloading of unauthorized, and often inferior copies. Of course, with a judicial ban on peer-to-peer platforms for Altnet’s business, *Amici*’s web-based business models would not face Altnet’s competition.

Remarkably, these *Amici* advocate the elimination of peer-to-peer based distribution because defendants have “refus[ed] to secure rights to the works distributed on their networks.” (*Id.* at 10.) Nonsense. Over the past year, Altnet has undertaken every effort to secure the same licensees from the major studio and record label Appellants as the website-based *Amici* have obtained. Yet Appellants have steadfastly refused to license their works to Altnet for KMD distribution using FastTrack or Altnet’s peer-to-peer application. Appellants’ refusal to license has nothing to do with inferior security or even a lack of monetizing capabilities. To the contrary, Altnet’s DRM security and payment gateways indisputably surpass the capabilities of many licensed *Amici*, who in some cases also use the Microsoft DRM standard. Instead, Appellants have refused to deal with Altnet and Sharman Networks on the same terms as their *Amici* for one reason only: unlike their traditional brick and mortar distribution channels and newer web-based distribution methods, Appellants cannot dominate and control every aspect of peer-to-peer distribution because each user in a peer-to-peer network becomes a cost-

free content distributor of Altnet-licensed DRM files.³

III. THIS CASE IS ABOUT MAINTAINING A DISTRIBUTION MONOPOLY, NOT STOPPING ILLEGAL CONDUCT

Without question, Appellants have a legitimate concern about impermissible downloading of their copyrighted files with Defendant's software. Altnet does too. Indeed, each time a non-licensed, copyrighted file is downloaded when an Altnet-licensed gold icon file is available, Altnet loses potential revenue. But the solution is not to drive providers of peer-to-peer software from business by holding them secondarily liable for each unauthorized download. That will not stop computer users from continuing to exchange files, authorized or not, with peer-to-peer protocols. After all, the ability to exchange files between individual computer users is not simply a byproduct of the internet; rather, the internet itself developed from that technology. And now that programmers have placed that ability into the hands of personal computer users through distribution of various peer-to-peer software applications, it will not go away even without companies like the Defendants in this case.⁴

³ This "distribution network" for Altnet DRM-protected files forms automatically since the DRM wrapping permanently affixes to each file, thus turning each individual peer into an authorized distributor for Altnet files.

⁴ Moreover, as explained in Appellees' briefs, holding providers of peer-to-peer software secondarily liable would extend the reach of contributory and vicarious copyright infringement far beyond the limits established in the *Sony-Betamax* and *Napster* decisions. In those cases, the Supreme Court and Ninth Circuit refused to make a developer and provider of technology secondarily liable for infringement

Altnet has demonstrated that Appellants' concerns about impermissible use of peer-to-peer software can be addressed through Altnet's technology and the licensing of Appellants' copyrighted works for paid distribution through peer-to-peer channels. With Altnet's incentive programs and guaranteed quality, users of peer-to-peer software have demonstrated an insatiable appetite for licensed, authorized content, rather than risk downloads of potentially infringing content. While Altnet's solution cannot stop all copyright infringement, it can and will dramatically limit the extent of peer-to-peer infringement.

Stopping peer-to-peer infringement, however, is not Appellants' goal in this litigation. Indeed, Appellants have demonstrated proficiency in enforcing their copyrights against the individual direct infringers without resort to secondary liability doctrines. Moreover, even if it were possible to stop all exchanges of copyrighted files with peer-to-peer applications, infringement of Appellants' works would continue largely unabated. In fact, it is likely that far more infringement of Appellants' copyrighted works takes place through street corner sales, email exchanges, web sites downloads, instant messenger mailings, and CD burning—with services and equipment that some Appellants themselves provide—than with Defendants' peer-to-peer software applications. Appellants have even conceded to

“merely because the structure of the system allows for the exchange of copyrighted material.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 436, 442-43 (1986)).

some digital copyright infringement although it has the same effect on Plaintiffs' exclusive rights as peer-to-peer downloading. For example, several Appellants provided limited licenses for a Microsoft peer-to-peer application known as "Three Degrees" without demanding compensation in return. Likewise, Appellants consented to statutorily-authorized infringement in the Audio Home Recording Act. See 17 U.S.C. § 1008 (immunizing consumers from copyright infringement actions based on copying of musical recordings with digital or analog audio recording devices).

If Altnet's technology is available to monetize peer-to-peer downloading of licensed works, if Appellants can sue direct infringers, and if Appellants even consent to certain infringing activities, why do they seek to recover billions in liability from, and seek injunctions against, the providers of the peer-to-peer software applications at issue in this case?⁵ The answer is simple: this case is not about copyright infringement, it is about maintaining distribution control of copyrighted works in order to protect Appellants' antiquated distribution monopoly.

⁵ Appellants and their *Amici* disingenuously claim that they have no complaint with the technology, but that Defendants "conduct" creates secondary liability for copyright infringement. Yet the only improper "conduct" about which Appellants complain is (i) Defendants' alleged "facilitation" of direct infringement by making their software applications available to computer users and (ii) Defendants' "profiting" from an advertisement-based compensation method that undisputedly does not rely on the transfer of any files, let alone unauthorized, copyrighted works.

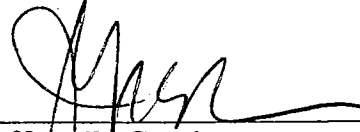
Appellants' and their *Amici* seek one result only: the same judicially-approved sanction against decentralized peer-to-peer file distribution as they achieved against the centralized file sharing system at issue in the *Napster* case. In no other way can Appellants protect their "brick and mortar" music and movie distribution businesses. In no other way can the Appellant-owned *Amici* protect their newly developed website-based distribution systems. After all, Appellants and their *Amici* are not the creators of the copyrighted works at issue; they are simply the assignees and licensees of copyrights to the works. As such, they have but a single means for deriving revenue: control of distribution. How else could the major music labels continue to sell CDs for \$20 that have only one or two tracks that consumers want? Once Appellants lose their control of distribution, especially to a virtually cost-free distribution method where every user of the internet can become a distributor of Altnet's licensed (and DRM protected) files, Appellants can no longer control the distribution markets upon which their corporations have been built.

IV. CONCLUSION

Imposing secondary liability will, in all likelihood, spell the demise of existing peer-to-peer software providers. Although it is less likely that it will end digital copyright infringement, it will eliminate Altnet as a competitive threat to Appellants. Altnet requires legitimate providers of peer-to-peer platforms to continue in the business of distributing licensed content. In so doing, Altnet

utilizes and provides significant non-infringing uses for this emerging technology and economic opportunities that copyright owners are only beginning to understand. For these reasons, Altnet respectfully urges that the decision of the District Court be affirmed.

Dated: September 25, 2003



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