

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

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IN RE: AIMSTER COPYRIGHT
LITIGATION

MASTER FILE
No. 01 C 8933

-----X

Judge:
Marvin E. Aspen

This Document Relates To:

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

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NOTICE OF FILING

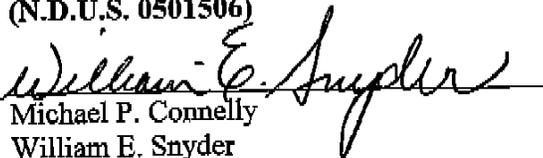
TO: Counsel On Attached Service List

PLEASE TAKE NOTICE that we have this day filed with the Clerk of the Court First Report of Compliance With The Preliminary Injunction Entered in Case No. 01 C 8933 Dated November 12, 2002, a copy of which is attached hereto.

Dated: November 12, 2002

CONNELLY ROBERTS & McGIVNEY LLC
(N.D.U.S. 0501506)

By:



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**Judge:
Marvin E. Aspen,
Chief Judge**

**First Report of Compliance With
The Preliminary Injunction Entered in Case No. 01 C 8933
Dated November 12, 2002**

This First Report of Compliance is submitted on behalf of John A. Deep, a named defendant in the within copyright litigation, and Defendants AbovePeer, Inc. and BuddyUSA, Inc. Deep hereby submits this Report of Compliance identifying the steps taken to comply with this Court's Order entered on October 30, 2002, and effective November 4, 2002 upon the posting of Plaintiff's bond.

I. INTRODUCTION:

The Differences between Napster and Aimster

On both Napster and Aimster users may perform searches using key words. There the similarity ends. The following identification of steps taken to comply with this Court's Order also illustrates important differences between Napster and Aimster.

The Aimster user directory may not refer to data that can be downloaded – in the Napster service all of the MP3 file names [the user] stores in [a user directory] automatically become available to other online Napster users. This is not true in Aimster. Aimster users may make directories available *only* for browsing or searching. Browse-only or search-only directories *do not refer to any data available for download*.

Browse-only or search-only directories are a common and useful feature of many linguistic devices, from books to computer operating systems. Readers are often given permission only to browse or search a Table of Contents. While the Table refers to content, the content itself is protected from viewing or copying. In a messaging service like Aimster, messaging users who are attempting to meet each other and to find new buddies value the ability to browse and search directories. In this way, users can meet simply by sharing a directory, but without sharing copies of the content in the directories.

The Aimster data may not be in mp3 data format – In Napster:

... before the [Napster] client software uploads MP3 file names to [Napster's] master servers, it "validates" the files stored in the user library directories. The client software reads those files to ensure they are indeed MP3 files, checking to see whether they contain the proper syntax specification and content. If the files are not properly formatted, their file names will not be not uploaded to the Napster servers.

In Aimster, even if the data appears to be an mp3 data format because it ends in .mp3, there is no verification done prior to indexing. As a result, files ending in .mp3 can be another file type altogether. For example, a file that appears to be mp3 data could in fact be a URL, which if opened would not play a song but only launch a web browser to a web destination described by the URL. Users may create filenames that are long or deceptive in an effort to attract attention.

For example:

[start of long filename]My Music\Jazz of the twenties\poppa collection\spears.mp3
come visit my website at www.poppa.com my poppa was a better musician than Britney
Spears and his 20s jazz is free at www.poppa-jazz.com.url.mp3 [end of long filename]

The mp3 data in Aimster may not contain music at all – In Napster, MP3 was a popular, standard format used to store compressed audio files. In Aimster, even if a file is mp3 data, and not some other data type, still it need not be music at all. Users may make versatile use of the MP3 data format as a way to record their own voice commentaries, and then embed *any file type inside the MP3* of their voice commentary, such as Word documents, PDF files, or software executables. There are evident advantages to embedding other file types inside an MP3:

1. The embedded file can be sent with a voice commentary
2. The embedded file can be made confidential, because a password can be required to extract the embedded file.
3. MP3 data is virus-safe as a mail attachment. Opening an MP3 will open a music player, but will not launch a harmful virus executable.

The MP3 data in Aimster may not be Copyrighted– In Napster, The evidence shows that virtually all Napster users download or upload copyrighted files and that the vast majority of the music available on Napster is copyrighted. In Aimster, although the court did not allow evidence, it is reasonable that copyrighted music would make up a smaller percentage than in Napster:

First, files in Aimster can be of any type, not only music, and can be meaningful as an expression

of interest or commentary - users can share browse-only or search-only directories, and can give titles to files that use certain keywords in an effort to meet others who share an interest in the same keywords or commentary. Second, even data named with the term Spears could merely be a review that contains Spears in the name, as the example shows. Further, the keyword Spears may also be a reference to the voice commentary the user has embedded in the MP3, in which the user comments on and reviews an artist named Spears, or as in the example, compares the artist to Spears.

Aimster data cannot be transferred without personal scrambler devices and passwords.

On Napster, “The content of the actual MP3 file is transferred over the Internet between users.”

On Aimster, *the actual MP3 is never transferred. Instead, all data must be scrambled before transferring*, using a “black box” or personal scrambler device and a password the user may choose.

Users may choose, install and configure personal “black box” scrambler devices for encryption and decryption, and may use passwords for each device. In this way, Aimster can be configured to make a dynamic network as large or as small as the user desires - to “Share Only with Buddies” if desired. However, users’ passwords are never stored or transmitted beyond the users’ own computer.

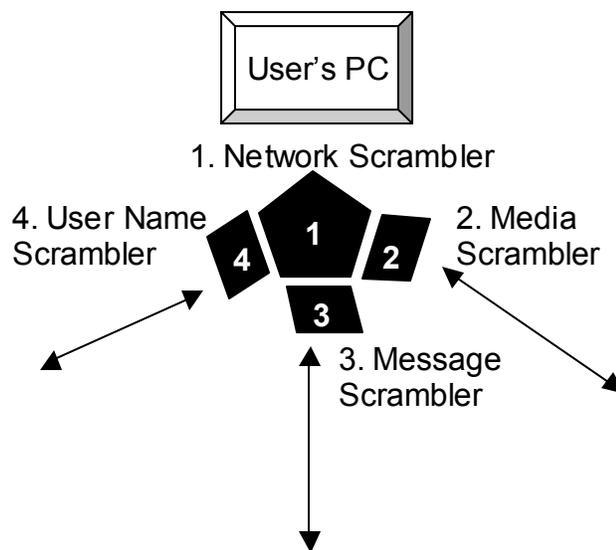
- 1. The Network Scrambler encrypts and decrypts all network traffic.** Aimster users may create their own encrypted networks, by scrambling and descrambling all network

traffic with a network scrambler, or “black box.” In this way, Aimster users may create private self-enclosed networks. Within each private self-enclosed network, three additional “black box” scrambling devices can be used: the Media Scrambler, the Message Scrambler and the User Name Scrambler.

2. **The Message Scrambler must be used to encrypt and decrypt all messages, including directory indexes, searches and search results** – Aimster messages, searches and search results are also sent in a scrambled form using a password, and then must be descrambled by the recipient, using the same password. For example, the word “Spears” might be scrambled to be “f98dwo” when sent, and thus need to be descrambled when it is received. Scrambling messages as they travel over the Internet and between users protects confidentiality of messages.
3. **The Media Scrambler must be used to encrypt all media before transfer, and to decrypt it before permitting a copy** – Before an Aimster user can send or transfer media of any type using Aimster software, the sending user must first *encrypt* the media with the scrambler device. Similarly, before another Aimster user can receive media of any type using Aimster software, the recipient user must first *decrypt* the media with a descrambler device, or else no copy of the original media is ever made.
4. **The User Name scrambler must be used to encrypt and decrypt User names** – On Napster, “users would not be able to access the uploaded file names and corresponding routing data without signing on to the Napster system.” On Aimster, even if users *do not*

wish to sign on at all, the software continues to operate. However, if users do wish to sign on, Aimster user names are then sent to the authentication server in a scrambled form, using a password known only to the user, similar to a PIN number, and descrambled by the client software whenever displayed. The descrambled user name is never stored on the authentication server, nor is the secret password used to scramble it. The European Union has created a directive to govern privacy of online identity, and already charged Microsoft's Messenger service with violating that privacy directive.

Illustration 1: Aimster "Black Box" Scrambler Devices



In sum, Napster "maintains and supervises an integrated system that users must access to upload or download files." Aimster is very different. Aimster software is neither supervised nor integrated; users make their own networks, simply by configuring their personal scrambling devices with passwords – and they use four basic scrambling devices for network, messages, media and user names.

In a short range of examples:

- If each user chooses a unique password for each device, then no network is made beyond each user's own devices.
- If two or more users configure any of their devices with the same password, then a network is dynamically made that consists of only those users, and only for the configured devices.
- Users need not access an authentication server to upload or download files, but may access authentication if they wish.

Napster broadcasts media - Aimster scrambles media

As media distribution software, the difference between Napster and Aimster is like the difference between broadcasting and scrambling. On Napster, content is transmitted to any receiver unscrambled, in peer-to-peer fashion “not through the Napster servers.” On Aimster all media must first be scrambled before it can be transmitted peer-to-peer, and can only be sent to a receiver *if* the receiver has a compatible descrambler.

The Commercial Potential of Media Scrambling, and the Need for Authentication

Cable television depends on technology for scrambling and descrambling licensed media to implement commercial distribution and pay-per-use. In the same way, software for scrambling

and descrambling could help to implement commercial distribution of licensed media and pay-per-use over cost efficient peer-to-peer services, especially if licenses for media could be obtained from copyright holders.

However, before commercial distribution can be realized a legitimate method for authenticating users for payment may be needed. The method of authentication may be both private and optional, as it is in Aimster, but authentication itself may still have commercial value. Although the court found in Napster that control of access by authentication gave Napster liability for contributory infringement, authentication itself is not a harm.

Deep attempted to solve both problems – to obtain licenses for copyrighted media and to provide a legitimate method for authentication – by seeking licenses from all the Plaintiffs themselves, and ultimately by licensing exclusive rights to the Aimster software to TransWorld Entertainment, a large retailer and strategic partner of all the Plaintiffs.

The TransWorld Entertainment Licensing Agreement

Attached is the TransWorld Entertainment Licensing Agreement, which Plaintiffs have previously submitted as an exhibit to their Memorandum in Support of Proposed Injunction Order. As Plaintiffs state, the TransWorld Entertainment Licensing Agreement was submitted by Deep in support of a motion claiming Deep has developed a “Digital Download” technology. The “Digital Download Technology” is described in more detail the TransWorld Entertainment Licensing Agreement, and the Purchaser in that agreement is Transworld Entertainment. Some important provisions are:

- **Scope:** Aimster will develop a customized version of the software, and the Content is defined as “music, movies and videogames.”
- **Absolute Right to Permit File-Sharing:** File-sharing “shall not be deemed to violate the Purchaser’s exclusive rights.”
- **Right to Use and Exclusivity:** TransWorld will have the exclusive right both to sell Content and to “exclusive hosting.”

This License agreement, and especially the Right to Use and Exclusivity, suggests that an authentication server would be necessary to implement this commercial application. However, the authentication server is designed for copyright protection of licensed content, and does not encourage or facilitate copyright infringement in any way.

Thus, the resulting Aimster software is an effective device designed for copyright protection of licensed content. To circumvent this effective copyright protection device - either by shutting down the authentication server, or by circumventing the personal scrambling devices of users - may be a violation of the DMCA.

§ 1201. Circumvention of copyright protection systems

(a) Violations regarding circumvention of technological measures.

(1) (A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

Indeed, even to disclose publicly in this compliance report, and thus to traffic in, various circumvention techniques – such as methods for circumventing the Aimster scrambling devices - may also be a violation of the DMCA.

§ 1201. (b) Additional violations.

(1) No person shall manufacture, import, offer to the public, provide, or otherwise

traffic in any technology, product, service, device, component, or part thereof, that--

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof

Conclusion

This court has asked for a practical solution to prevent copyright infringement. Aimster is very different from Napster, because Deep has installed practical and effective devices to prevent copyright infringement. If any copyright infringement continues in spite of Deep's effective encryption devices, neither Deep nor the Plaintiffs have any evidence or reasonable knowledge of it, and Deep can have no liability for contributory or vicarious infringement, if any, of Copyrighted Works. Deep contends it is impractical to comply further with this injunction. Finally, Deep asserts that circumvention of Aimster's effective copyright protection devices, or even trafficking in methods for circumvention, may violate the DMCA.

VERIFICATION

I, John Deep, hereby declare:

I am a defendant in this action, and am authorized to make this Verification. I am in charge of implementing and overseeing compliance with this Court's Preliminary Injunctions to the extent practical. I have read the foregoing FIRST REPORT OF COMPLIANCE WITH THE PRELIMINARY INJUNCTION ENTERED IN CASE NO. 01 C 8933 and know the contents thereof. I know or am informed and believe that the factual matters stated therein are true and on that ground certify and declare under penalty of perjury that the same are true and correct.

Executed on this 12th day of November, 2002.



John Deep

Schedule 5.3

Consulting Agreement Terms

Scope: The Company will use its best efforts to develop a customized version of the Aimster technology (the "Digital Download Technology") to facilitate the Purchaser's digital download and digital streaming distribution of Content to the Company's customers (the "Scope").

The term "Content" as used herein shall mean music, movies and video games.

The Purchaser shall be responsible for: (1) development of such encryption and other technology for the Content, other than the Digital Download Technology, as the Purchaser may desire and (2) obtaining permission from copyright owners, as applicable, for the use, distribution, licensing or sale of the Content; and tracking any payments owed to the copyright owners in respect thereof. The Purchaser will indemnify and hold harmless the Company against any claims of copyright infringement arising out of the Purchaser's distribution of copyrighted Content through the Company's network.

Absolute Right to Permit File Sharing: Notwithstanding anything to the contrary herein, it is expressly agreed that file sharing among the Company's customers without remuneration to the Company shall not be deemed to violate the Purchaser's exclusive rights under the Consulting Agreement.

Information Sharing: The Company will share and permit the use of such of its information (the "Information") with and by the Purchaser as the Purchaser may reasonably request to the extent that such Information may be used or useful to the Purchaser in the conduct of its business within the Scope. Purchaser agrees to restrict access to the Information among its employees to a "need to know basis." Purchaser further agrees to use the Information solely for purposes within the Scope. Purchaser will reimburse the Company for any out of pocket expenses or professional services fees incurred in connection with the sharing of Information pursuant to this paragraph.

Term: 5 years from the Effective Date with an option to extend for two additional 5-year terms, unless terminated earlier in accordance with the Consulting Agreement.

Right to Use and Exclusivity: The Purchaser shall have the exclusive right use the Digital Download Technology to market, re-sell, license and sub-license Content and to provide hosting services using the Digital Download Technology. The Company will not (i) permit any person to use the Digital Download Technology other than the Purchaser (ii) develop technology used for substantially the same purpose as the Digital Download Technology for any person other than the Purchaser or (iii) modify its code base to incorporate Content or otherwise facilitate the integration of Content on its network with systems outside of its network with, for or on behalf of any person other than the Purchaser. Except for the foregoing and as otherwise specified in the Consulting Agreement, the Company will reserve all rights with respect to the Digital Download Technology that are not specifically granted to the Purchaser.

Non-competition and Confidentiality: During the Term or any extension thereof, the Company and its affiliates (including certain key employees of the Company) will not enter into any consulting, licensing, joint venture or other business relationship within the Scope with any person and shall take reasonable steps to ensure that any licensee, joint venture partner or other business relationship of the Company operates in compliance with the foregoing.

The Company and its affiliates will also agree to maintain the confidentiality of all of the Purchaser's proprietary information. The Company shall enter into such agreements with its employees regarding competition and confidentiality as shall be reasonably necessary to ensure compliance by the Company with this provision. The Consulting Agreement shall contain reciprocal provisions to those set forth in this paragraph requiring Purchaser to maintain the confidentiality of the Company's proprietary information.

Fees, Costs and Expenses: (A) The Purchaser shall pay the reasonable and customary fees for the development of the Digital Download Technology to the extent that such fees exceed the sum of \$200,000; (B) In consideration for the exclusive rights granted to the Purchaser herein, the Company shall be entitled to remuneration based on the Purchaser's conduct of business within the Scope as set forth in the Business Plan; and (C) The Purchaser shall reimburse the Company for any out of pocket expenses incurred in connection with the development of the Digital Download Technology.

Advisory Board: The Purchaser shall appoint an Advisory Board having responsibility for the development of a business plan (the "Business Plan") to exploit of the Purchaser's rights hereunder. The Purchaser shall name a designated member of the Company to the Advisory Board. The Advisory Board shall (i) meet as frequently as may be necessary to perform its duties, and initially at least once a month (ii) develop the Business Plan, including marketing, funding, support, budget and implementation goals and (iii) establish in good faith a rate and method of remuneration to the Company as referenced in clause (B) of "Fees, Costs and Expenses". If, for a period of one year or more, the Purchaser shall not in good faith pursue the exploitation of its rights under the Consulting Agreement, upon 90 days notice to the Purchaser and an opportunity to cure, the Exclusivity and Non-competition provisions of the Consulting Agreement shall terminate; *provided* that the Purchaser shall retain the right to use the Digital Download Technology on a non-exclusive basis.

Miscellaneous: The parties will acknowledge that the Company's ability to develop the Digital Download Technology may be limited with respect to certain applications by technological and/or budgetary constraints.

FACSIMILE TRANSMISSION COVER SHEET

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MESSAGE:
