

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
		:	MDL 1425 Judge Marvin E. Aspen

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**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF  
JOINT MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

*"Despite plaintiffs' incessant reference to Napster, defendants are not Napster." (Defendants' Opp. at 1.)*

*"In the midst of uncertainty about the future of Napster and its millions of devotees, a new Napster-like Internet application has been developed...and unveiled at the website Aimster.com." (Aimster press release; Forrest Supp. Decl. Ex. 6.)*

Defendants cannot escape the reality of what they created and maintain, aptly described in their self-comparison to Napster. Defendants spend much of their opposition and their single, largely conclusory declaration, raising defenses previously and clearly rejected in other cases, mischaracterizing contacts with some Plaintiffs,<sup>1</sup> making unsupportable comparisons to AOL,<sup>2</sup> and pointing out that Defendants are not the only ones infringing Plaintiffs' copyrights. Defendants built, maintain, and profit from a system on which massive copyright infringement is occurring. A preliminary injunction "is not only warranted but required." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001) ("Napster").

### I. THE AUDIO HOME RECORDING ACT ("AHRA") HAS NO RELEVANCE TO THE CONDUCT OF AIMSTER USERS

Defendants' lead defense -- that the AHRA immunizes ongoing, massive infringement by Aimster users -- is inconsistent with the statute's express language and intent, and has been rejected by both the only court to consider the issue and by the U.S. Copyright Office. The full text of Section 1008 of the AHRA (including the words omitted by Defendants) reveals the speciousness of Defendants' argument:

"No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a *digital audio recording device*, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of *such a device* or medium for making *digital musical recordings* or analog musical recordings." 17 U.S.C. § 1008 (emphasis added).

The AHRA "places restrictions only upon a specific type of recording device," requiring such a device to be equipped with copy protections, and requiring royalties to be paid based on their sale.

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<sup>1</sup> See Cohen and McDonald Reply Decls.

<sup>2</sup> See Reply Memorandum of the Warner Music Group Plaintiffs and accompanying Mujica and Schuler Reply Decls.

Recording Indus. Ass'n. of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1075 (9th Cir. 1999). "[T]he [AHRA] does not cover the downloading of MP3 files to computer hard drives" because a computer hard drive is *not* a "digital audio recording device," and because Aimster users are *not* making "digital musical recordings." Napster, 239 F.3d at 1024 (emphasis added); accord Diamond, 180 F.3d at 1077, 1078.<sup>3</sup>

The U.S. Copyright Office, in an *amicus* brief filed in Napster, also has refuted Defendants' position:

"Section 1008 was adopted to address a very different phenomenon -- the noncommercial consumer use of digital audio recording devices, such as DAT tape decks, to perform 'home taping' of musical recordings. *Napster's effort to bring itself within the ambit of Section 1008 flouts the terms of the statute and conflicts with the basic policies of the Act.*" (Frackman Reply Decl., Ex. 1 at 8, emphasis added.)<sup>4</sup>

Despite the lack of precedent or authority, Defendants argue that both the Court of Appeals and the Copyright Office "misinterpreted" the AHRA because the "main purpose" of the Act is "the facilitation of personal use." Opp. at 8.<sup>5</sup> However, Defendants' argument ignores that, under limited conditions, the AHRA immunizes only certain *private copying* ("noncommercial use...for *making* digital musical recordings," 17 U.S.C. § 1008), not widespread copying and distribution. The wholesale copying and widespread distribution of unlawful copies to millions of Aimster users are

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<sup>3</sup> A computer hard drive also is not a "digital audio recording medium," which, under section 1008, is an object used "for the purpose of making digital audio copied recordings by use of a digital audio recording device." 17 U.S.C. § 1001(4)(A).

<sup>4</sup> The Copyright Office's interpretation is entitled to great weight. See Goldstein v. California, 412 U.S. 546, 567-69 (1973); Bonneville Int'l. Corp. v. Peters, 153 F. Supp. 2d 763, 772 (E.D. Pa. 2001) ("The legislative history also points to congressional intent to use the Copyright Office as an interpreter of copyright law.").

<sup>5</sup> Defendants' reliance on Diamond to support the contention that Napster "misinterpreted" the AHRA is misplaced. Diamond was decided two years *before* Napster. The Ninth Circuit not only knew of, but relied upon, its own earlier Diamond opinion (which held that certain hand-held devices were not "digital audio recording devices") in concluding that the AHRA "does not cover the downloading of MP3 files to computer hard drives." Napster, 239 F.3d at 1024. Similarly, Defendants' out-of-context quotation from the Nimmer treatise fails to buttress their position. Nimmer's view of the AHRA is fully consistent with the Napster holding: "[T]he AHRA's structure, whereby computers are excluded from its thrust, places the Internet essentially outside the statute's purview." 2 M. & D. Nimmer, Nimmer On Copyright ¶8B.02[A][1][a] at 8B-29 (2000) (emphasis added).



activities that always have been, and remain here, infringements. See Napster, 239 F.3d at 1014 ("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.").

## II. THE SONY DOCTRINE DOES NOT SHIELD DEFENDANTS

Defendants claim they are not liable for contributory infringement, attempting to argue that the Aimster system, like the Betamax VCR, is a "staple article of commerce" under the doctrine announced in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) ("Sony"), and supposedly is capable of substantial noninfringing uses.<sup>6</sup> Whether or not the Aimster system has any noninfringing use, Sony and the "staple article of commerce" defense are inapplicable here for a number of reasons.<sup>7</sup>

*First*, Sony and its few progeny apply only to "a staple *article* of commerce." 464 U.S. at 442 (emphasis added). It is indisputable that Defendants are not simply selling a product ("an article of commerce") like the Betamax VCR machine in Sony; Defendants are providing an integrated, ongoing system and service. Additionally, in describing the underpinnings of its doctrine on the other hand, the Sony Court emphasized that "[t]he only contact between Sony and the users of the

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<sup>6</sup> Defendants concede that the "staple article of commerce" doctrine applies only to contributory and not to vicarious infringement. *Opp.* at 9. Napster, 239 F.3d at 1022-23; RCA/Ariola Int'l., Inc. v. Thomas & Grayston Co., 845 F.2d 773, 781 (8th Cir. 1988).

<sup>7</sup> No court has considered absolving a defendant of infringement without some showing that the product in question *actually* is used for some noninfringing purpose. See, e.g., Napster, 239 F.3d at 1021 (district court should have compared current infringing use with "*current and future noninfringing use*." (emphasis added); A&M Records, Inc. v. General Audio Video Cassettes, Inc., 948 F. Supp. 1449, 1456 (C.D. Cal. 1996) ("insubstantial" noninfringing uses not sufficient); Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 685 (N.D. Cal. 1994) ("incidental capabilities" insufficient); In re Certain Personal Computers, 224 U.S.P.Q. 270, 280 (U.S. Int'l Trade Comm'n 1984) ("commercially significant" use necessary). Defendants do not even begin to provide evidence that the Aimster system *actually* is used for noninfringing purposes. See Deep Decl. ¶¶ 16-18 (making a conclusory reference to "substantial non-infringing uses," mostly hypothetical, and including social clubs and chat rooms, which (as in Napster), Plaintiffs do not seek to enjoin). By contrast, in Sony evidence by both sides showed that the *primary, actual use* of the Betamax machine was time-shifting of programs originally made available by copyright holders to consumers via free television -- *i.e.*, recording a program to view it once at a later time and then erasing it. The Court found such conduct to be "fair use." 464 U.S. at 423. Distributing and copying music sold by Plaintiffs is not equivalent to "time-shifting" free television broadcasts, and it is not fair use. Napster, 239 F.3d at 1019; UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351-52 (S.D.N.Y. 2000) ("space-shifting" of MP3 files is not fair use).

Betamax that is disclosed by this record occurred at the moment of sale." *Id.* at 438. On the other hand, Sony described as "manifestly just" imposing liability in cases "involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred." *Id.* at 437. In the years since, Sony has been rejected as a defense for those who *provide an integrated system* (not just a product), who have *ongoing relationships* and contact with their infringing users, and who *retain control* over their system. See A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 912-13 (N.D. Cal. 2000) ("[g]iven defendants' control over the service as opposed to mere manufacturing or selling, the existence of a potentially unobjectionable usc...does not defeat plaintiffs' claims."); General Audio Video, 948 F. Supp. at 1456-57 (Sony does not exonerate defendant who not only sold blank tapes, but also engaged in other activities to assist customers' infringements, including timing legitimate recordings to provide blank tapes of the precise length necessary to copy those recordings); RCA Records v. All-Fast Sys., Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984) (Sony "extends protection only to the manufacturer of the infringing machine, not to its operator"); see also Columbia Pictures Industries, Inc. v. Aveco, Inc., 800 F.2d 59, 62 & n.3 (3d Cir. 1986) (business that rented rooms in which public viewed copyrighted video cassettes was contributory infringer, even though it did not supply cassettes).<sup>8</sup>

*Second*, Sony does not apply where the contributory infringer has actual knowledge of infringement. The uncontroverted evidence establishes that Defendants have actual knowledge of the infringement facilitated by their system. Napster, 239 F.3d at 1022 (Sony inapplicable because "Napster has actual knowledge that specific infringing material is available using its system"); Costar Group, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 697 (D. Md. 2001) (Napster "distinguish[ed] Sony on the basis of Napster's 'actual, specific knowledge' of direct infringement"). Defendants do not even address, let alone deny, the following evidence (among more) of their actual knowledge of infringements on their system: (1) Plaintiffs notified Defendants in writing of thousands of Plaintiffs' copyrighted works available on the system, Napster, 239 F.3d at 1022; see also Fonovisa, 76 F.3d

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<sup>8</sup> If the Aimster system could be a "staple article of commerce," then so could a swap meet (and numerous services held to be contributory infringers), which may provide various products and services that are capable of "substantial noninfringing uses." Indeed, the swap meet in Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996), had these characteristics, but no court seriously would have entertained the argument that it was a "staple article of commerce."

at 264;<sup>9</sup> (2) Defendants track and comment on the music most often infringed on their system, listing it in the "Aimster Top 40 List," virtually all of which are Plaintiffs' copyrighted works; (3) the Aimster "Tutorial" uses Plaintiffs' copyrighted music to demonstrate how to infringe, despite Plaintiffs' notification that the very same "Tutorial" works are protected by copyright, *see Napster*, 239 F.3d 1029 & n.5; (4) Aimster users describe on Aimster bulletin boards how they use the system to make infringing copies of music; and (5) Defendants repeatedly analogized Aimster to Napster, provided a link on their website to Napster, and developed and provided a "pig latin" encryption program to circumvent the preliminary injunction entered against Napster. *See* evidence cited at pp. 10-11 of Plaintiffs' Opening Brief ("POB").<sup>10</sup>

Defendants claim they lack actual knowledge of infringement because the identities of Aimster users and files are encrypted (by Defendants). *Opp.* at 10. Napster likewise claimed an inability to read specific files, but to no avail. *Napster*, 239 F.3d at 1020 (district court rejected "Napster's contention that because the company cannot distinguish infringing from noninfringing files, it does not 'know' of the direct infringement," *citing* 114 F. Supp. 2d at 917); *see also, e.g., Sega Enters.*, 857 F. Supp. at 686-87 ("Even if defendants do not know when [copyrighted] games will be uploaded to or downloaded from the MAPHIA bulletin board, their role in the copying, including provision of facilities, direction, knowledge, and encouragement, amounts to contributory copyright infringement."). Where "a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and

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<sup>9</sup> *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) does not stand for the proposition that, "in the online context, notice that copyrighted works are potentially infringed is not enough to demonstrate actual or constructive knowledge." *Opp.* at 10. That case arose on a motion for summary judgment by *defendant* bulletin board service, which the Court *denied*. "More importantly, Napster [like Aimster] is not an Internet service provider that acts as a mere conduit for the transfer of files....Rather, it offers search and directory functions specifically designed to allow users to locate music, the majority of which is copyrighted.... Thus...*Religious Technology Center* would not mandate a determination that Napster, Inc., lacks the knowledge requisite to contributory infringement." *Napster*, 114 F. Supp. 2d at 919.

<sup>10</sup> Additionally, *Sony* only prohibits imputing *constructive* knowledge of infringement solely from the fact that a product may be used for infringement. *Sony*, 464 U.S. at 439-40. Defendants do not deny that they have constructive knowledge from facts *separate and apart* from their knowledge that the Aimster system may be used for infringement, such as newspaper reports of infringing activity and Defendants' enforcement of their own intellectual property rights. *See* POB pp. 11-12. This constructive knowledge independently suffices to impose contributory infringement liability. *Napster*, 239 F.3d at 1020.

contributes to direct infringement." Napster, 239 F.3d at 1021. The Sony Court did not intend to shield those who deliberately design a system to infringe, while making it impossible to determine what material is infringed and actively encouraging consumers to infringe. Sony, 464 U.S. at 437-38; see Cable/Home Comm. Corp. v. Network Prods., Inc., 902 F.2d 829, 846 (11th Cir. 1990) (noting that Court in Sony was "influenced by the district court's finding that [Sony Corp.] had not 'influenced or encouraged' unlawful copies."); General Audio Video, 948 F. Supp. 2d at 1456.

*Third*, Sony does not protect unauthorized, widespread *distribution* of infringing works. The conduct held noninfringing in Sony was the conduct of individuals who made "time-shifted," single copies of television programs for their own later use. Sony, 464 U.S. at 425 ("No issue concerning the transfer of tapes to other persons...was raised."); New York Times Co., Inc. v. Tasini, 533 U.S. 483, 121 S.Ct. 2381, 2395 (2001) (Sony inapposite where defendant electronic publishers are "not merely selling 'equipment'; they are selling *copies* of [plaintiffs' copyrighted works]") (emphasis added)). Here, Aimster makes each user a global distributor of Plaintiffs' music for copying by innumerable other users.

*Fourth*, Sony's protections do not extend "to products specifically manufactured for counterfeiting activity, even if such products have substantial noninfringing uses." General Audio Video, 948 F. Supp. at 1456; see Cable/Home Comm. Corp., 902 F. 2d at 846 (even though "other uses" existed, defendants liable where they "utilized and advertised these devices primarily as infringement aids and not for legitimate, noninfringing uses"). Aimster was based on the Napster application and was designed and promoted to capture Napster's "millions of devotees." See, e.g., Creighton Decl., Ex. 6 ("we're the next technical innovation upon Napster"; Aimster is "the next Napster clone" and "Napster squared"); Forrest Supp. Decl., Ex. 3, at 245:20-246:14 (defendants examined Napster protocol as a model for Aimster).

*Fifth*, Sony does not apply where the infringing activity can be avoided while permitting alleged noninfringing uses to continue. RCA Records, 594 F. Supp. at 339; Compaq Computer Corp. v. Procom Tech., Inc., 908 F. Supp. 1409, 1424 (S.D. Tex. 1995); see also RCA/Ariola Int'l, Inc., 845 F.2d at 778, 780 (affirming injunction requiring, among other things, retailers to control access to blank tapes and inspect copyrighted recorded tapes their customers proposed to copy); compare Sony, 464 U.S. at 440-41 & n.21 (finding of contributory infringement would be "functional equivalent" of completely removing the article from the public). It is not the "peer-to-peer" technology that Plaintiffs decry; it is Defendants' implementation of the technology and their system to foster and enable infringement. Defendants have the ability to adopt measures to prevent

the transfer of copyrighted material and, like Napster, to filter or block infringing content. Farmer Supp. Decl. ¶ 8. To provide immunity from liability under such circumstances would create the anomalous situation where any noninfringing use would shield wide-scale, preventable infringement.

### III. DEFENDANTS ARE LIABLE FOR VICARIOUS INFRINGEMENT

Defendants' primary defense to vicarious infringement is that they have encrypted the Aimster system, removing their ability to control it. Defendants do not deny that their "Terms of Service" provide they will "take down" "infringing material" and that repeat infringers "may have their access to all services terminated." Forrest Decl. Ex. 8; POB at 13. Yet, Defendants now claim they cannot block access by Aimster users because *Defendants choose* to encrypt all information about users and the files they distribute. Opp. at 11; Deep Decl. ¶19. Defendants' encryption argument avails them of nothing because, as Defendants do not deny, it is "entirely at the discretion of Aimster, which is in a position at any and all times to change or eliminate the encryption."<sup>11</sup> Farmer Decl. ¶ 24. Defendants created, and hold the key to unlocking, the very mechanism they now claim permits massive infringement to continue unabated over their system. However, Defendants' right and ability to control is not diminished by their decision not to exercise it. Napster, 239 F.3d at 1023 ("Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability"); Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1161-63 (2d Cir. 1971) ("failure to police" does not insulate defendants from vicarious infringement).

Defendants do not challenge that they derive a direct financial benefit from the infringement over their system. POB at 13-14. Defendants need not receive any money in order to satisfy the financial benefit element of vicarious infringement -- all that is required is that the infringing material "act as a 'draw' for customers," which obviously is the case here. Napster, 239 F.3d at 1023 (quoting Fonovisa, 76 F.3d at 263-64); see also POB at 15. Moreover, Defendants acknowledge that they do receive money directly by virtue of Club Aimster. Opp. at 12. Although they claim that Club Aimster is a "minute portion" (Opp. at 12) or "a very small portion" (Deep Decl. ¶20) of their

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<sup>11</sup> Moreover, Defendants' suggestion that encryption disables them from knowing what files are being distributed and copied is belied by, among other things, Aimster principal and Defendant John Deep's deposition testimony in another case in which he describes how the Club Aimster "Top 40 List" is compiled. Ex. 3 to Forrest Supp. Decl. at 250:5-23: ("The Club Aimster Top 40 is a rating of what appear to be the most popular titles as defined by club members....We have a proprietary rating sort of similar to like a Nielsen for the Internet and we're able to sample what are the popular titles in the same way that Nielsen might sample the popular media on television."); see also id. at 283:10-285:13 ("Guardian Aimster" identifies objectionable file content).

system, Defendants do not quantify the revenues received, the number of subscribers, or the amount of music copied or distributed over Club Aimster. In fact, presently, the *only* way for a user to join the Aimster system is by subscribing to and paying for Club Aimster. Farmer Supp. Decl. ¶ 9 and Ex. 1. Additionally, although such sales are not necessary to show financial benefit, Defendants' denial of sales of products on or through the Aimster system (Deep Decl. ¶ 20) is false. Clothing, weight-loss products, and performance-enhancing vitamins have been offered for sale on the Aimster website. Creighton Decl., Ex. 23. Defendants simply ignore that evidence. Similarly, they fail even to mention the contributions they solicit from their users to fund this litigation. Forrest Decl., Ex. 7.

#### IV. THE DIGITAL MILLENNIUM COPYRIGHT ACT ("DMCA") DOES NOT LIMIT DEFENDANTS' LIABILITY

Plaintiffs previously established that Aimster does not qualify for any DMCA so-called "safe harbor." POB at 16-18. Nothing in the Opposition changes that conclusion, let alone carries Defendants' burden of proving this affirmative defense.

Defendants begin by misstating the goals of the DMCA, claiming its "sole purpose...is to expand the scope of protections available to internet service providers." Opp. at 12. In fact, the DMCA recognizes that "the law must adapt to make digital networks safe places to disseminate and exploit copyrighted materials." S. Rep. No. 105-190, at 2 (1998); see POB at 16.<sup>12</sup> The DMCA was designed to limit certain remedies imposed on legitimate companies engaged in honest business enterprises; it was not meant to shield deliberately infringing activity. See ALS Scan, Inc., 239 F.3d at 619; POB at 16-17.

The threshold issue under the DMCA is whether Aimster is a "service provider," to which the DMCA is limited. Aimster effectively admits that it is not a service provider for purposes of the DMCA, by claiming that it cannot even execute the basic functions required of service providers under that statute. See Opp. at 15-16 ("once Defendants are notified that a particular internet protocol address is identified with any infringing use, Defendants will notify the primary internet service provider to terminate their access."). See POB at 17.

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<sup>12</sup> Also contrary to Defendants' assertions, the burden of monitoring and protecting copyrights is not allocated solely to owners. Opp. at 12. The DMCA encourages "service providers and copyright owners to cooperate to detect and deal with copyright infringements." H.R. Conf. Rep. No. 105-796, at 72 (1998); ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001).

Whether or not Aimster is a "service provider," Defendants fail to qualify for any safe harbor protection because they have not "adopted and reasonably implemented a repeat infringer policy," as required by section 512(i)(1)(A). Such a policy is necessary to qualify "for *any* DMCA safe harbor." A&M Records, Inc. v. Napster, Inc., 54 U.S.P.Q. 2d 1746, 1752 (N.D. Cal. 2000) (emphasis in original). Defendants' unsupported reference to a generalized instruction to their users not to infringe copyrights (Opp. at 15) appears only on the Aimster website, which users need visit only once (to obtain the free Aimster software), and which they need never see again while they continue to engage in distributing and copying of Plaintiffs' works. Farmer Decl. ¶¶ 20-22. That instruction does not constitute the required repeat infringer policy and, even if Defendants had adopted such a policy, they admit they never did nor could implement it because they deliberately choose to encrypt their own users' identities and IP addresses. See Napster, 54 U.S.P.Q. 2d at 1753 (noting that Napster chose not to block IP addresses of infringing users). Merely telling users not to infringe and then claiming ignorance of their infringing activities is not a copyright-protection policy, Chess Music, Inc. v. Sipe, 442 F. Supp. 1184, 1185 (D. Minn. 1977), much less the policy that section 512(i) requires to be "adopted and implemented." See Napster, 54 U.S.P.Q. 2d at 1752-53 ("Without further documentation, defendant's argument that it has satisfied section 512(i) is merely conclusory...").<sup>13</sup> Defendants cannot comply with section 512(i) by claiming that they "will" shift to third-party internet service providers their own obligation to implement a policy as to their "subscribers and account holders." Opp. at 15-16. In any event, Defendants do not even claim that they actually have done so, or that they have done anything to ensure that their infringing users (and infringing activity) are removed or disabled and do not reappear.

Even assuming *arguendo* that Aimster had and implemented a valid repeat infringer policy, in order for Aimster to obtain any DMCA limitation on remedies, its entire integrated system must fall within the provisions of sections 512(a), (b), or (d). (Defendants have not claimed protection under subsection (c).) Section 512 does not allow, as apparently Aimster believes it does, an integrated system to take advantage of a safe harbor, even assuming isolated functions of the system

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<sup>13</sup> Defendants argue that plaintiffs have not given notice of repeat infringers. Opp. at 15-16. This argument is irrelevant because section 512(i) does not require such notice. Moreover, Plaintiffs notified Defendants of numerous infringing works, all of which remained available on Aimster as of the filing of this motion. Creighton Decl. ¶¶ 10-18. See Hotelling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 204 (4th Cir. 1997) ("no one can expect a copyright holder to prove particular instances of use by the public when the proof is impossible to produce because [defendant] has not kept records of public use.").

would fit within one of the DMCA provisions. Unless the entire integrated system and *each function* qualify under the DMCA, Defendants' system does not qualify. 17 U.S.C. § 512(n); Napster, 54 U.S.P.Q. 2d at 1751; S. Rep. No. 105-190, at 54 (1998). Among the functions of the integrated Aimster system that disqualify it from DMCA protection are the following -- all of which materially contribute to infringement: Aimster provides a broad search capability designed to easily locate copies of infringing files; Aimster automatically creates an index of files available for downloading by inventorying users' hard drives; Aimster provides anonymity to its infringing users; Aimster circumvents firewalls; if a download is interrupted, Aimster automatically executes a search to locate an alternate infringing copy and then resumes the download where it left off; and Aimster provides Club Aimster, which pre-programs searches for and downloads of infringing copies of works that Aimster compiles in a "Top-40" list of recordings. Farmer Decl. ¶¶ 21-26; Farmer Supp. Decl. ¶ 3; Deep Decl. ¶¶ 14, 21. In effect, Aimster duplicates everything that the infringing Napster system did to search for, copy, and distribute Plaintiffs' music. Farmer Decl. ¶ 19.

The foregoing obviates the need to consider whether the Aimster system satisfies the prerequisites of the safe harbors of Sections 512(a), (b), or (d). In any event, as described immediately below, Aimster fails to qualify for any safe harbor.

Section 512(a) (Transitory Digital Network Communications): Defendants do not cite the single case that discussed and analyzed this subsection and that disposes of Defendants' contention. Napster, 54 U.S.P.Q. 2d at 1746 (holding section 512(a) did not provide a limitation on remedies). Section 512(a) protects only activities "in which a service provider plays the role of a 'conduit' for the communications of others." Id. at 1752, quoting H.R. Rep. No. 105-551(II), 105th Cong., 2d Sess. (1998). Aimster, like Napster, is not a mere conduit; indeed, Aimster claims to do even more than Napster (e.g., encrypt files). Aimster, like Napster, "does not provide connections 'through' its system...the connection itself occurs through the Internet." Napster, 54 U.S.P.Q.2d at 1752; Deep Decl. ¶ 11; Farmer Decl. ¶ 28; POB at 17.<sup>14</sup> There is nothing in section 512(a) or its legislative

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<sup>14</sup> Defendants assert that "through," as used in the DMCA, does not mean "as a conduit." Opp. at 14-15. Their argument would greatly expand the scope of section 512(a) and flatly contradicts the statute's plain language, the legislative record, and the applicable precedent. See Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975) (statute that establishes exceptions to exclusive copyright rights must be strictly and narrowly construed); Apple Computer, Inc. v. Formula Int'l, Inc., 594 F. Supp. 617, 623 (C.D. Cal. 1984) (exceptions from copyright liability should not be construed "in a manner that would effectively emasculate the protections...contained in other sections of the Copyright Act.").



history suggesting an extension of that section beyond a "conduit" to a system that provides broad search capabilities, creates an index of infringing files on users' hard drives, allows for anonymous users to transfer infringing files, fixes interrupted downloads of infringing files, preprograms both searches and downloads for "Top-40" music, and provides commentary on Plaintiffs' popular recordings which are made available for copying. Farmer Supp. Decl. ¶¶ 3-4.

Section 512(b) (System Caching): Like "conduit" functions, caching also requires files to be transmitted *through* a system. Section 512(b)(1)(B). If files do not go through the Aimster system, they cannot be stored or cached *on* the system. Farmer Supp. Decl. ¶¶ 5-6. Moreover, even Defendants are careful to avoid claiming that Aimster caches the actual infringing files. At most, Aimster caches only "metadata," i.e., the invisible codes associated with a file that tell computers how to identify and deal with the file, such as whether to allow it to pass through a firewall. *Id.*

Section 512(d) (Information Location Tools): Defendants are disqualified from the section 512(d) safe harbor because they have both (a) knowledge of, and contribute to, infringing activity, section 512(c)(1)(A)(i)-(iii); and (b) the right and ability to control infringing activity and a financial benefit. Section 512(c)(1)(B); POB at 17-18. Additionally, Defendants *admit* that section 512(d) "was placed in the DMCA to protect those service providers who linked individual users to other Websites and directories on the internet." Opp. at 19. Aimster, as Defendants also admit, "does not link its users to a Website." *Id.* Rather, it is a closed (infringing) system that searches users' hard drives to enable infringement.

#### V. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

Defendants offer no evidence to rebut either the presumption of irreparable harm, e.g., Atari, Inc. v. North Am. Phillips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir. 1982), or the evidence of irreparable injury. POB, Part IV. Instead, Defendants suggest that "Plaintiffs' inexcusable delay demonstrates there is no irreparable harm." Opp. at 4. However, the facts establish there was no "inexcusable delay." Plaintiffs filed their preliminary injunction motion as soon as practicable under all the circumstances. And, in any event, any purported reliance by Defendants on the "delay" would have been unreasonable.

Plaintiffs learned of Aimster around September 2000; but until March 2001, it was difficult to ascertain much about the Aimster system because it was prone to technical problems and frequently was inaccessible for lengthy periods. Creighton Supp. Decl. ¶ 3. Time spent in investigation is not "delay" for purposes of irreparable harm. See, e.g., Balsamo/Olson Group, Inc. v. Bradley Place Ltd. Partnership, 966 F. Supp. 757, 764 (C.D. Ill. 1996). Then, during April 2001,

Plaintiffs attempted to negotiate a resolution with Defendants. Creighton Decl. ¶¶ 8-9. Time elapsed during settlement negotiations is not "delay" for purposes of irreparable harm. See, e.g., Porsche Cars N. Am., Inc. v. Manny's Porshop, Inc., 972 F. Supp. 1128, 1132-33 (N.D. Ill.1997).

30 days!

Beginning in late April 2001, eleven lawsuits were filed. From May to November 2001, numerous motions were filed in various district courts, one appeal was briefed, heard, and decided, and the MDL Panel determined which court should hear the related actions. As Defendants concede, the actions were stayed during most of this time, either formally or de facto. The Court in the Northern District of New York *sua sponte* stayed its own actions pending a determination by the MDL Panel, where proceedings were filed in July 2001, and decided in November.

Wrong

The foregoing is not the type of delay that shows lack of irreparable harm, especially because under Seventh Circuit law, delay (of any type or length) cannot itself overcome the presumption of irreparable harm. Ty, Inc. v. The Jones Group, Inc., 237 F.3d 891, 903 (7th Cir. 2001); Ideal Indus., Inc., 612 F.2d at 1025. Delay becomes potentially relevant to irreparable harm only if the party opposing the injunction proves the delay caused it to be "lulled into a false sense of security" or to act detrimentally "in reliance on" the delay. Defendants have not alleged, much less shown, that Plaintiffs' "delay" had any negative effect on Defendants. Jones Group, 237 F.3d at 903 ("mere delay alone, without any explanation on [defendant's] part of why such a delay negatively affected [defendant], would not lessen [plaintiff's] claim of irreparable injury"); Ideal Indus., Inc. v. Gardner Bender, 612 F.2d 1018, 1025 (7th Cir. 1979); Barnes Group Inc. v. Rinehart, 2001 WL 301433 \*23 (S.D. Ind. Feb. 26, 2001) ("Defendants have neither argued nor presented any evidence that [Plaintiff's] delay in seeking a preliminary injunction lulled them into a false sense of security or that they acted in reliance on the delay. Thus, [Plaintiff's] delay in seeking a preliminary injunction is insufficient to weaken [Plaintiff's] showing of irreparable harm.").<sup>15</sup>

Nor did Defendants' purported interaction with one of the Plaintiffs or companies related to Plaintiffs, "lull" Defendants into a false sense of security. (See Deep Decl. ¶¶ 25-30, which, like much of the Deep Declaration lacks foundation, is conclusory, and is replete with inadmissible

<sup>15</sup> The authorities that Defendants cite regarding irreparable harm are either inapt (e.g., a temporary restraining order case, Motor Werks Partners, L.P., v. BMW of N. Am., Inc., 2001 WL 1136145 (N.D. Ill. Sept. 24, 2001)); are from other circuits where the law is different than in the Seventh Circuit (e.g., Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964 (2d Cir. 1995)); see Philip Morris, Inc. v. Allen Dist., Inc., 48 F. Supp. 2d 844, 854 n.12 (S.D. Ind. 1999), contrasting the Seventh Circuit's Ideal Industries decision with Tough Traveler); or incompletely state the clear Seventh Circuit law discussed in the text.

hearsay.) The alleged "business relationship" between Defendants and Plaintiff Capitol Records, Inc., *did not allow Aimster users to download, copy, or distribute music*, and was based on Deep's representations that Defendants would not permit Aimster users to engage in widespread, unauthorized copying and distribution of copyrighted music. (Cohen Reply Decl. ¶¶ 2-3).<sup>16</sup>

Further, Defendants demonstrably did *not* rely on Plaintiffs' alleged "delay." As early as February 2001, Defendant Deep admitted he was aware suit likely would be filed. Opp. Ex. D, (Washington Post, Feb. 25, 2001). He said he was not worried. *Id.* Little more than a month later, Plaintiffs sent a cease and desist letter. Creighton Decl., Ex. 8. That letter, which put Defendants on notice that a request for injunctive relief could result if they did not cease their infringing activities, alone rendered unreasonable any subsequent "reliance" on alleged delay. *See Ty, Inc. v. Softbelly's, Inc.*, 2001 WL 125321\*8 (N.D. Ill. Feb. 9, 2001) ("the very fact that Ty sent a cease and desist letter should have placed Softbelly on notice that the instant action and motion could result").

#### VI. NEITHER THE BALANCE OF HARDSHIPS NOR THE PUBLIC INTEREST FAVORS DEFENDANTS

The presumption of irreparable harm obviates the need to balance the hardships. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999).<sup>17</sup> Moreover, as between a copyright owner whose business is based on copyrights and the infringers of those copyrights, the balance clearly must favor the innocent copyright owner. *See Autoskill, Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993) ("the public interest is the interest in upholding copyright protections"). Defendants' bare conclusion that an injunction would put them out of business, even if true, would not tip the balance of hardships in their favor. As this

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<sup>16</sup> Defendants also make vague assertions about meeting, at unidentified locations, with unidentified persons related to non-party subsidiaries of the parent company (Bertlesmann AG) of one Plaintiff (BMG Music). Deep Decl. ¶28. If such contacts occurred -- and BMG Music has been unable to determine from Defendant Deep's sparse description that they did -- they did not involve any Plaintiff or result in any business transaction, and are irrelevant. McDonald Reply Decl. ¶¶ 2-3. Likewise, any alleged contact with AOL, not a party to this lawsuit, is irrelevant. In any event, there was only a single meeting. No deal with Aimster was addressed. Memorandum of Warner Music Group Plaintiffs and, accompanying Mujica and Schuler Reply Decls. Defendants do not claim contacts with the other Record Company Plaintiffs or with the Music Publisher Plaintiffs.

<sup>17</sup> Defendants suggest that their infringing conduct ought not be enjoined because there are bigger infringers. Opp. at 19. But "evidence of other potential infringers is irrelevant to a suit against a particular infringer." *Ty, Inc. v. Publications Int'l Ltd.*, 2000 WL 1499449 \*14 (N.D. Ill. Oct. 6, 2000); *see also Philip Morris, Inc.*, 48 F. Supp. 2d at 854.


Court has observed, acceptance of infringers' "claim[s] that an injunction will put them out of business" would "pervert the meaning of the balance of hardships test. Under [defendant's] logic, a blatant copyright and trademark infringer would be encouraged to go into an infringing business because it can later argue to a court that enjoining the blatant infringement would sink the business. We cannot accept such reasoning." Horn Abbot Ltd. v. Sarsaparilla Ltd., 601 F. Supp. 360, 369-70 (N.D. Ill. 1984) (Aspen, J.); sec also Atari, Inc., 672 F.2d at 620 ("Advantages built upon a deliberately plagiarized make-up do not seem to us to give the borrower any standing to complain that his vested interests will be disturbed."); Philip Morris, Inc., 48 F. Supp. 2d at 855 (preliminary injunction granted even though defendant "might well be forced out of business").

#### **VII. AT MOST A MINIMAL BOND SHOULD BE REQUIRED**

Although Defendants claim Aimster is much smaller than Napster, Deep Decl. ¶ 47, the \$15 million bond Defendants request (without providing any basis) is three times the bond in Napster. 239 F.3d at 1028. To the extent any bond is required, a nominal bond is within this Court's discretion, id., and is sufficient here.

**CONCLUSION**

For all the reasons set forth in Plaintiffs' original Memorandum and here, Plaintiffs respectfully request that the Court issue a preliminary injunction enjoining Defendants' continued infringement of Plaintiffs' copyrights.

  
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