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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 METRO-GOLDWYN-MAYER STUDIOS,
14 INC., et al.,
15 Plaintiffs,

16 vs.

17 GROCKSTER, LTD., et al.,
18 Defendants.

Case No. CV 01-08541 SVW (PJWx)

Case No. 01-09923 SVW (PJWx)

**NOTICE OF MOTION AND MOTION
WITH ACCOMPANYING BRIEF FOR
PERMISSION TO FILE AS AMICUS IN
SUPPORT OF DEFENDANTS' MUSIC
CITY.COM, INC.'S, et al. OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

19 JERRY LEIBER, ET AL.,
20 Plaintiffs,
21 Vs.

22 GROCKSTER, LTD., et al.,
23 Defendants.

Date: December 2, 2002 (or such other time
designated by the Court)
Time: 1:30 p.m.
Ctrm: The Hon. Stephen V. Wilson

24 AND RELATED COUNTERCLAIMS

25 MOTION BY AMICUS, LIME WIRE, INC., FREE PEERS, INC. AND RAPHAEL
26 MANFREDI CASE NO. CV 01-08541 SVW (PJWX)

27 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

28 Amicus In Support Of Defendants' Motion In Opposition To Plaintiffs' Motion For Summary Judgment

1 PLEASE TAKE NOTICE that, on December 2, 2002, at 1:30 p.m., or at such other time as the
2 Court may designate beforehand, in the Courtroom of the Honorable Stephen V. Wilson, 312 N.
3 Spring Street, Los Angeles, California 90012, the above-listed Amicus will move the Court to
4 accept a memorandum of law of Amicus in support of Defendants' opposition to Plaintiffs'
5 motion for summary judgment in case Nos. CV 01-08541 SVW (PJWx) and 01-09923 SVW
6 (PJWx) pursuant to this Court's discretionary powers and F.R.Civ.P. 7, and for the reasons more
7 fully set forth in the attached memorandum of law.

8 This Motion is based upon:

- 9 • this Notice of Motion and Motion
- 10 • the accompanying Memorandum
- 11 • the record of this case as made available to the public
- 12 • such other matters as the Court may elect to consider of take notice of.

13
14
15 Dated this 15th day of October, 2002
16 JOSHUA S. WATTLES, ATTORNEY AT LAW
17
18

19
20 MEMORANDUM OF AMICUS LIME WIRE INC., FREE PEERS, INC AND RAPHAEL
21 MANFREDI

22
23 1. Status of Amici

24
25 Lime Wire, Inc., Free Peers, Inc. and Raphael Manfredi appear as Amici to Defendants in
26 opposition to Plaintiffs' motion for summary judgment.

27
28 The Gnutella Network consists of computers, run mostly by individuals, each running a software
program that speaks the Gnutella Protocol. Each of Amici produces software that runs the

1 Gnutella Protocol. Defendant Streamcast distributes software that is built with and
2 communicates through the Gnutella Protocol.

3
4 Plaintiffs have placed the Protocol and the Network at great risk with an over-reaching appeal to
5 this Court for relief that is both inappropriate to the circumstances of their alleged injuries and
6 which would strangle a new channel for open expression and publication.

7 8 2. The Gnutella Network

9
10 Imagine if in Jefferson's Virginia some even more inventive Franklin devised a method by which
11 every private library, including the very large collection maintained by Jefferson, could be
12 shared at the election of its owner in every library in every State, Commonwealth or Colony for
13 all to use - - while remaining in place. This is the Gnutella Network - - a few years late onto the
14 scene. The privilege of access to Thomas Jefferson's library would, no doubt, have included the
15 use of then copyrighted works as well as works which enjoyed copyright protection only in some
16 States or some countries; as well as works which were written by Jefferson without intention of
17 any commercial benefit; as well as many old and ancient works which could not be copyrighted;
18 and, ironically given the facts of this case, folios full of notated music in which no copyright
19 could be obtained because it was not then recognized as the kind of writing which should obtain
20 protection as intellectual property.

21
22 Now, imagine, if we can, the impact Mr. Franklin's innovation would have had on American
23 intellectual history. No less an impact is at stake in the case before this Court.

24
25 The Internet provides a wonderful framework for passing messages from computer to computer.
26 E-mail is a familiar example of passing messages and files from one address to one or many
27 others. AOL, Yahoo! and Microsoft have built closed, proprietary systems for instant messaging
28 in which fellow users are able to pass files and messages to one or many others within its walls.

1 And, any financially and technically able person can create a location for content on the Internet
2 by establishing a web site and populating it with content that is “served” to anyone who comes to
3 its address.

4
5 E-mail, Instant Messaging, and the basic functioning of the World Wide Web all technically
6 enable the distribution of Plaintiffs’ copyrighted works, as did Napster; or, the systems at issue in
7 this action, OpenNap, FastTrack, and Gnutella.

8
9 However, the Gnutella Network presents a distinctly new forum for expression and exchange.¹ It
10 connects individual personal computers (PC’s) through the Internet in the same manner that the
11 World Wide Web connects dedicated servers. It also represents the first public example of a
12 semantic information-passing layer built on top of the Internet. Semantic message passing is a
13 technical term for sending messages based on words and meaning rather than computer
14 addresses. The Gnutella Protocols are able to find files without knowing their location. In doing
15 so, Gnutella demonstrates the Internet’s ability to route messages to non-specific users. As a
16 tool, the Gnutella Protocols turn PC’s into servers of content on the Internet at absolutely no
17 incremental cost, effect the searching and sending of messages and content from one PC to
18 others, and permit one PC to find similarly equipped and willing PC’s.

19
20 In short, the message passing and information routing enabled by the Gnutella Protocols allows
21 computers to communicate in ways that more closely mimic human society.

22
23 The Network turns a disparate group of individual PC’s and their designated contents into one
24 giant computing ecosystem. The Network is based on open standards and open protocols on
25 which any software developer is free to build. Users are free to choose among various Gnutella

26
27 ¹ Facts relied upon by Amici in characterizing the Gnutella Network and Protocols are drawn from the Declaration
28 of Defendant, Streamcast’s expert, Steven D, Gribble dated September 9, 2002 and filed in this case under the
caption of *Jerry Leiber, et. al. v. Consumer Empowerment BV, a/k/a FastTrack et. al.* and from the assertions of fact
found in Plaintiffs’ and Defendants’ briefs filed prior to the date of this memorandum. We were unable to view the
record beyond those papers because so many of the declarations are under seal.

1 compatible software programs without prejudicing access to the Network. The Gnutella
2 Network and its Protocols are owned by none. The software necessary to use the Network is
3 available for free. The Network is, therefore, an entirely open forum in which users can share
4 content, bandwidth and storage with the power to generate enormous social benefits. It is much
5 like a Commons (for grazing) that is owned by all and therefore none and which is controlled by
6 none and therefore by all.

7
8 Sharing files or passing messages related to files is an open and public act on the Gnutella
9 Network. Plaintiffs can observe each and every file made available, find its location, and take
10 whatever remedial action would be appropriate under the Copyright Act. They need not
11 eradicate the Network nor tar it with the suggestion that its sole mission is to do violence to
12 Plaintiffs' combined and powerful interests.

13 14 3. Gnutella Is Pure Speech

15
16 Among the powerful benefits presented by the Gnutella Network is the empowerment of any
17 individual to effect publication to an immense audience without going through a controlled gate
18 (such as AOL) and without incremental costs (such as the maintenance of a web server and the
19 cost of remaining connected to the Internet to "serve" the content). The Gnutella Network
20 creates a virtual public domain for those who wish to use it.

21
22 Most critically, the Gnutella Network is speech at its most basic level. It lets anyone with a
23 computer and an Internet connection open a virtual window and shout to a virtual street any
24 message or content they choose and conversely empowers anyone in that street to listen and hear
25 on the basis of what they have defined they want to hear. This technology touches the most
26 fundamental and primitive sources to free speech and the corollary rights to publication. *Red*
27 *Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating "it is the right of the public to receive
28 suitable access to social, political, esthetic, moral, and other ideas and experiences which is

1 crucial here. That right may not constitutionally be abridged“); *Cf. New York Times Co. v.*
2 *United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (stating “both the history and
3 language of the First Amendment support the view that the press must be left free to publish
4 news, whatever the source, without censorship, injunctions, or prior restraints”).

5
6 In a free society governed by the Constitution of the United States and the Constitutions of each
7 and every of its States, the technology of the Gnutella Network and its availability to the public
8 at large must be accommodated no matter what ill uses may befall it in the hands of bad-actors.
9 *See Harper & Row v. Nation Enters.*, 471 U.S. 539, 550 n.3 (1984) (citing *Iowa State Univ.*
10 *Research Found., Inc. v. American Broad. Cos.*, 621 F.2d 57, 60 (1980) (stating fair use “permits
11 courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the
12 very creativity which that law is designed to foster”)); *Zacchini v. Scripps-Howard Broad. Co.*,
13 433 U.S. 562, 575 n.12 (1977) (stating “respondents news broadcast increased the value of
14 petitioner’s performance by stimulating the public’s interest in seeing the act live”). *See*
15 *generally* Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why*
16 *the Copyright Extension Act is Unconstitutional*, 36 LOY. L. REV. 83, 86–89 (interpreting *Harper*
17 *& Row*, 471 U.S. 539 and stating “[n]othing in the opinion suggests that copyright laws are
18 immune from First Amendment analysis or that they would be upheld if they were seen as
19 unduly restricting expression”).

20
21 The Gnutella Network is neither the simplistic recording device at issue in *Sony Corp. of*
22 *America et al., v. Universal City Studios, Inc., et al.*, 464 U.S. 417 (1984), nor the central server
23 indexing system at the core of the Napster service. *A&M Records v. Napster, Inc.*, 239 F.3d
24 1004, 1012 (2001). The Court’s analysis of the Gnutella Network may be informed by those
25 cases, but the factual circumstances are quite different.

26
27 A critical channel for free speech and expression is at stake. The factual issues are too delicate
28 and intricate for the broad brush of summary findings. Amici suggest that the Court cannot rule

1 on summary judgment and should instead require the parties to develop a full record and
2 satisfactory explanation of the underlying technology and software for the Gnutella Network and
3 its Protocols. In particular the Court should consider the credibility of the parties' respective
4 experts through live testimony. *See* Schwartz et. al, Federal Civil Procedure Before Trial,
5 § 14:249 (The Rutter Group 2002) (stating "Summary Judgment should be denied where an issue
6 as to a material fact cannot be resolved without observation of the demeanor of witnesses in
7 order to evaluate their credibility."); *see also* SEC v. Koracorp Insud., 575 G.2d 692, 699 (9th
8 Cir. 1978) (stating "Credibility issues are appropriately resolved only after an evidentiary hearing
9 or a full trial."). *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (noting that even where
10 the basic facts are undisputed, if reasonable minds could differ on the inferences to be drawn
11 from those facts, summary judgment should be denied).

12 13 4. Plaintiffs' Over-reach

14 A. Shutting down Gnutella goes too far.

15
16 If anything is clear from Plaintiff's papers in this case, they are terrified of new technologies and
17 fearful of damage to traditional distribution channels in which they find the comfort of
18 familiarity. They are desperate to bring the Court along on their mission to re-instate a status
19 quo ante. It is transparent that Plaintiffs have brought this action, arrayed as a group, not just to
20 attack specific instances of copyright infringement but also to preserve their well-established
21 business practices and to cut off a distribution channel that displeases them.

22
23 This Court should not be led down their path. With respect, it should limit its findings to the acts
24 of these Defendants alone. If there is a responsibility beyond the four corners of the alleged
25 infringements, it is to protect, defend and preserve open communication and only to
26 accommodate private interests such as copyright.

1 Plaintiffs suppose these claims of open access and speech are a ruse to steal away their
2 properties. They impugn the basic dignity of a person’s right to share their possessions, thoughts
3 and ideas with others. Plaintiffs say, “shut it off,” since the preponderance of the content shared
4 over the Gnutella Network - - this week -- is allegedly their property. Because their sheep have
5 been put to graze in the commons without their consent, the commons itself should cease to be.

6
7 Plaintiffs should tend to their flock and leave the commons alone.

8
9 Plaintiffs point to a lack of unprotected material, or other authorized livestock, on the commons.
10 But Plaintiff fail to comprehend that there has never been a forum such as this for self-expression
11 and that time is needed to permit the expression it will incubate to grow. Conversely, because
12 users of the Gnutella Network must ask to receive, those users need to become accustomed to the
13 availability of open, legal content. Moreover, a system based on open protocols requiring no
14 payment for use with freely available software incorporating all the tools necessary to use the
15 Network will lack a profit model and customary financial incentives to its use. The obvious
16 outcome would be (and is) a slow path to development of innovative applications. Finally, with
17 the Gnutella Network and similar technologies under constant assault by Plaintiffs and their
18 powerful allies, legitimate users of the Network are chilled.²

19
20 **B. Gnutella is not Napster**

21
22 Plaintiffs indiscriminately define the Gnutella Network to be the same as OpenNap and the same
23 as Fast-Track and then tar them all with the “Napster” brush; hoping by repeated incantations to
24

25
26 ² Because the Gnutella Network allows any kind of file to be passed from one computer to another as well as
27 messages, the Court can suppose that the Network could be used for as many non-infringing uses as there are non-
28 infringing communications in every day life. Because much of the factual record in this case is under seal, we
cannot extract declarations in support of non-infringing uses. But imagine simply attaching promotional materials to
files to announce products and events or to solicit funds for causes big and small; or the common sharing of public
domain works such as old and ancient texts and maps without incurring the costs of building new housing for the
materials (whether actual or virtual). Educational institutions are very active in their assessments of the Gnutella
Network and Protocols. A list of articles on the subject is attached as an addendum.

1 convince the Court that it must reach the result supported by the Ninth Circuit. *Napster, Inc.*, 239
2 F.3d at 1029. Amici are certain the Court has more sophistication and we defer to Defendants’
3 able efforts to distinguish the facts of the Gnutella technology from the Napster software and
4 central server system.³ Within those distinctions the Court will find substantial issues of fact that
5 remain in dispute and that preclude summary adjudication on this record. Fed. R. Civ. P. 56(c);
6 *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986).

7
8 C. Plaintiffs overstate and confuse the facts

9
10 Plaintiffs also list a blend of Defendants’ alleged activities on three separate platforms to
11 establish a Napster-like nexus. Notice of Motion and Motion by Plaintiffs for Summary
12 Judgment at 21–23, 50 (C.D. Cal. filed Sept. 12, 2002) (No. CV 01 08541 SVW (PJWx)). and to
13 suggest Defendants’ cumulative behavior as contributory infringing activity. Accurate factual
14 analysis is critical to findings of law in this case. Plaintiffs do a disservice in blending facts
15 haphazardly to confuse the issues. And, in doing so, Plaintiffs reveal a dangerous agenda to have
16 the Court find benign behavior wrongful simply because it involves a technology which
17 Plaintiffs fail to understand and cannot seem to control.

18
19 Among those activities cited by Plaintiffs, which pose no threat, are many common to the
20 provisioning of any computer software, including the software used to type the Court’s opinions.
21 To wit: providing certain software free of charge and updating the software; improving the
22 performance of the software; monitoring the performance of the software; providing technical
23 assistance to users of the software; registering in a central “server” just the names of people
24 using the software; providing addresses for parts of the network to speed performance; and,
25 providing in the software a search function which can find things, including copyrighted works.

26
27
28 ³ It is evident from the contrast between the characterizations of the Gnutella Network in Plaintiff’s brief and the
description found in the Gribble declaration, footnote 1, *supra*, that very different factual assertions are being made
by the parties about substantive aspects of the technology critical to the evaluation of the mixed issues of fact and
law which are to be resolved by this Court.

1
2 Clearly, it is more efficient for Plaintiffs to extend the meaning of contributory or vicarious
3 liability for infringement in ways that preclude whole technologies. Plaintiffs seemingly lack the
4 will to police direct unauthorized uses of their copyrighted works by the individuals who in fact
5 distribute those works publicly. It is a political choice on their part to suppress technology and
6 they want judicial aid to extend the law instead of betting on the legislature.

7
8 5. Conclusion

9
10 Amici are deeply concerned that the simple, functional aspects of developing and disseminating
11 a means for computers to communicate with each other could become unlawful. That cost seems
12 unacceptable and would savage technology, such as Gnutella, designed to enhance the lives, and
13 the work, and the freedoms of well intentioned, valued citizens hoping to reach out into the
14 world.

15
16 Amici respectfully request that the Court deny Plaintiffs' motion for summary judgment.

17 Dated: October 15, 2002

Respectfully Submitted,
Joshua S. Wattles, Attorney At Law

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19
20
21 _____
