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Atlantic Recording Corporation, Elektra Entertainment Group Inc., Warner Bros. Records Inc., London-Sire Records Inc., Maverick Recording Company, Tommy Boy Music, 143 Records, Atlantic Rhino Ventures Inc. d/b/a Rhino Entertainment Company, WEA International Inc., and Warner Music Latina Inc. (collectively referred to as the "Warner Music Group" or "WMG" Plaintiffs) submit this memorandum in reply to Defendants' opposition to Plaintiffs' motion for preliminary injunction. The parent company of the WMG Plaintiffs is AOL Time Warner Inc.<sup>1</sup>

### PRELIMINARY STATEMENT

In their opposition to this motion, Defendants attempt to deflect the Court's attention from the infringing nature of Aimster's system. They do so with the transparently spurious claim that Aimster is not materially different from America Online, Inc. ("AOL") or AOL's branded instant messaging service, "AIM".<sup>2</sup> (Opposition Br. at 1, 2, 6, 7; see also Declaration of John Deep ("Deep Decl."), January 21, 2002, at ¶¶ 13-14, 23.) This entire argument is irrelevant. This motion seeks to enjoin Defendants--and no-one else--from contributorily and vicariously infringing on Plaintiff's copyrighted works. It is the conduct of Defendants that is at issue. Comparisons to AIM are simply diversionary tactics. Whether Aimster should be enjoined must be determined according to Aimster's conduct.

In any event, and as shown below, the Aimster system, in all material respects, is fundamentally different from AIM and fundamentally the same as Napster. AIM allows for individual, targeted communication. A broad set of functional differences between AIM and Aimster makes Aimster the useful infringement tool that it is.

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<sup>1</sup> Neither AOL Time Warner Inc. ("AOLTW") nor America Online, Inc. ("AOL") is a party to this action.

<sup>2</sup> Defendants seem to conflate services provided by AOL with those provided by AIM. It is clear from their papers that the real comparison they are making is between Aimster and AIM. To be clear, AOL is a full service Internet service provider or "ISP". (Declaration of Raul Mujica ("Mujica Decl."), February 4, 2002, at ¶ 4; see also Supplemental Declaration of Daniel Farmer ("Supp. Farmer Decl."), February 4, 2002, at ¶ 4; Declaration of Daniel Farmer ("Farmer Decl."), December 31, 2001, at ¶¶ 27-28.) It provides a wide array of services including basic connectivity to the Internet and access to a variety of content and services, such as email, shopping, travel, news and entertainment content. (Id.) Aimster provides none of those things and, for that reason, is not regarded as an ISP. (Mujica Decl., at ¶ 4.)

Two fundamental differences distinguish the Aimster system from AIM. First, Aimster permits unknown, anonymous users to access each others' files. (See infra at 6-7.) AIM does not. (Declaration of Raul Mujica ("Mujica Decl."), February 4, 2002, at ¶¶ 12-13.) Second, Aimster permits those unknown, anonymous users to search each others' files, which facilitates unlawful sharing of copyrighted files. (See infra at 6-7.) AIM does not provide or condone such functionality. (Mujica Decl., at ¶¶ 13, 20.)

Thus, unlike AIM, and just like Napster, the Aimster system provides a centralized searching and indexing system<sup>3</sup> that enables and encourages millions of users to engage in the copying and distribution of copyrighted works -- conduct specifically found to be direct copyright infringement by the Ninth Circuit in the Napster case. A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). And unlike AIM, and even more than Napster, Defendants' "Club Aimster" service specifically and blatantly induces such direct copyright infringement. (See infra at 8.) Obviously aware that such activity is infringing, and that they are openly contributing to it, Defendants rely on misleading analogies to distract this Court. This memorandum addresses only the specific points raised by Aimster in its opposition regarding its comparisons to standard instant messaging services like AIM. The remainder of Defendants' arguments are addressed in the reply memorandum submitted by the remaining Record Company Plaintiffs. We incorporate that memorandum by reference herein.

The core of Defendants' argument that no injunction should issue requires this Court to accept the proposition that the Aimster system is just a standard instant messaging service such as AIM or MSN Messenger. (Opposition Br. at 1-2; 6, 7; see also "Deep Decl.", at ¶¶ 13-14, 22-23.) The facts, however, make it clear that the Aimster system<sup>4</sup> bears no resemblance whatsoever to standard instant messaging services. (Mujica Decl., at ¶¶ 11-20; see

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<sup>3</sup> (See infra at 6-7; Mujica Decl., at ¶¶ 12-13; Farmer Decl., December 31, 2001, at ¶¶ 21-23, 32; Declaration of Frank Creighton ("Creighton Decl."), December 20, 2001, at ¶ 4.)

<sup>4</sup> The "Aimster" system, which used to be provided through its website [www.Aimster.com](http://www.Aimster.com), has now been renamed "Madster", located at [www.Madster.com](http://www.Madster.com). However, solely for ease of reference in this litigation we continue to refer to Defendant's system as "Aimster".

also Supplemental Declaration of Daniel Farmer ("Supp. Farmer Decl."), February 4, 2002, at ¶ 3 ("Aimster has significantly higher functionality than an instant messaging service".) AIM is primarily a communication service that allows users to identify the online 'presence' of other known AIM users and to exchange messages with them immediately in real time. Aimster not a communications service, but a tool that sits on top of other services (such as AIM) to supply functionality lacking from those services.

Numerous differences encompassing all aspects of AIM (which allows for individual, targeted communication) leaves no doubt that it is far from being anything like Aimster.<sup>5</sup> These differences start with two overarching features that are the heart of Aimster and that are not available on AIM. First, the heart of Aimster is based on its broad search capability designed to enable users easily and quickly to locate copies of copyrighted material (see infra at 6). Second, this function is only made truly useful when combined with the ability on Aimster for users to search a directory of copyrighted files available on tens of thousands of unknown, anonymous users' hard drives. (See infra at 6-7.) The differences between Aimster and AIM do not stop here, however. They also include the following: Aimster automatically indexes all users' files (see infra at 7); Aimster provides a mechanism that automatically fixes interrupted downloads by automatically searching for an alternate version of the same song and then continuing the unlawful download where it left off (see infra at 7-8); Aimster provides a particularly blatant infringement tool called "Club Aimster" that preprograms searches and downloads for a "top 40" list of illegal copies of songs (see infra at 8); and Aimster provides its "Guardian Service" that promotes access to a select grouping of illegal copies of "Aimster's greatest hits" (see infra at 8).

Accordingly, Aimster's claims of similarity to AIM are simply and obviously false.

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<sup>5</sup> Aimster's comparison of itself to standard instant messaging services is not limited to AIM. (Opposition Br. at 1, 2; Deep Decl., at ¶¶ 13-14.) However, for purposes of this memorandum we focus on AIM as an example of a standard instant messaging service.

### Argument

#### **I. AIMSTER IS FUNDAMENTALLY DIFFERENT FROM AIM.**

To support their claim that Aimster is fundamentally like AIM, Defendants have asserted that Aimster simply provides "data" (Opposition Br. at 1), that it provides the exact same service or engages in the same conduct as standard instant messaging services (*id.* at 1, 2, 6-7; Deep Decl., at ¶¶ 13-14, 23), and that copyrighted files can be transferred over AIM as well as Aimster (Opposition Br., at 6-7; Deep Decl., at ¶ 23).

A brief description of what AIM is reveals that it is an individual, targeted communication vehicle. Comparisons to Aimster are, therefore, completely misplaced. In contrast to Aimster, AIM does not afford users an opportunity to share files with users whose screen names are unknown to them. (Mujica Decl., at ¶¶ 12-13.) Even when communication occurs between two users who know each other, AIM does not permit those users to search a directory of files compiled from other users' hard drives for a particular type of file or content. (Mujica Decl., at ¶ 13.) Aimster, on the other hand, has been constructed to permit file searching and sharing among multiple unknown, anonymous users. (Mujica Decl., at ¶ 13.)

By way of background, AIM is a branded instant messaging service provided by AOL. (Screen shots of AOL and AIM's first screens are respectively attached as Exhibits 1 and 2 to the Reply Declaration of Katherine B. Forrest ("Forrest Reply Decl."), February 4, 2002.) Instant messaging is a communications tool that allows users who are concurrently "logged on" to the Internet to send each other instant text messages. (Mujica Decl., at ¶ 5; Supp. Farmer Decl., at ¶ 3.) This means that users can communicate in a real-time exchange with each other rather than using the less immediate process of sending email messages. (Mujica Decl., at ¶ 5.) In order to use the AIM service to send an instant message, both the sender and the intended recipient must have registered to be AIM users, and each must have a unique "screen name". (Mujica Decl., at ¶¶ 6, 7.) To send a message to another user who is concurrently logged on, the sender must know the intended recipient's unique screen name. (*Id.*) As a result, sending instant

messages is far from an anonymous process -- most instant messaging occurs between family, friends and colleagues. (Id. at ¶ 7.)

There is nothing on AIM that promotes the availability of infringing files -- as Aimster does. (Compare Mujica Decl., at ¶¶ 8-10, 14 with id. at ¶¶ 12-13, 15.) Although a limited type of file sharing capability does exist for users of AIM (Mujica Decl., at ¶¶ 8-10), two fundamental (and dispositive) differences exist. As an initial matter, AIM only allows files to be shared between users whose screen names are already known to each other. (Mujica Decl., at ¶ 14.) Moreover, even when users know each other, AIM does not provide search capability to facilitate the exchange of files between those users. (Mujica Decl., at ¶¶ 10, 13.) In fact, the process of sharing files is quite cumbersome and distinct from file sharing through Aimster.

When accessing and downloading files with AIM, users must follow five steps. First, a user looking for a file must know the target user's screen name. Unlike Aimster, AIM does not have any function that allows searching among random, anonymous users. Second, a user willing to allow his own files to be accessed by others must enable such access first by designating individual files as being available for file sharing and, second, by deciding which individuals may have access to those files. The target user must therefore have established access rights that will allow the user who is looking for a file to access the desired files on the target computer. Third, the user looking for a file must verify that the known target AIM user is concurrently online and is connected using the particular personal computer that contains the desired files. Fourth, the user can then access the target AIM user's computer. Fifth, the user must know the name of the file that he or she is looking for, and he or she will have to scroll through the list of file names that are accessible on the target computer one at a time until the desired file is located. This last step is necessary because there is no mechanism on the AIM service that permits users automatically to search the file directory for a particular file or type of content. (Mujica Decl., at ¶¶ 10, 13.) This is an unwieldy process that clearly does not facilitate infringement.

In his declaration, Deep claims that file sharing through AIM is just like file sharing through Aimster except that, when using AIM, data is transferred in unencrypted form. (Deep Decl., at ¶ 23.) Deep even attaches a screen shot from a user whose name is masked allegedly to demonstrate this point. (*Id.* (attaching Exhibit A).) He also asserts that this anonymous user has made the music file available for copying to any other user.<sup>6</sup> (Deep Decl., at ¶ 23.) Deep's claims of similarity are false.<sup>7</sup> AIM's limited file sharing capability is described above. Below, we set forth a number of additional significant differences between AIM and Aimster that leave no doubt as to the falsity of Deep's assertion.

First, Aimster provides a broad, easy to use search capability. (Opening Br., at 3; Mujica Decl., at ¶¶ 11-13; Declaration of Daniel Farmer ("Farmer Decl."), December 31, 2001, at ¶¶ 19, 21, 23; Supp. Farmer Decl., at ¶ 3; Declaration of Frank Creighton ("Creighton Decl."), December 20, 2001, at ¶ 4.) The search capability enables users simultaneously to search an index of copyrighted files available on thousands of other users' hard drives. (Mujica Decl., at ¶ 12; Farmer Decl., at ¶ 21 (The "extensive Aimster directory" of files available for searching and downloading is "located on a computer server hosted at and maintained by Aimster").) Aimster's "search" area allows a user looking for copies of infringing files to type in a query, such as "Madonna", and come up with numerous "results" almost immediately. (Creighton Decl., at ¶ 4.) "Results" appear on the user's computer screen as a listing of files on the hard drives of potentially dozens or hundreds of other users matching the search request. (Farmer Decl., at ¶ 21

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<sup>6</sup> The steps described above make clear the disingenuous nature of Deep's claim that the anonymous AIM user has made a music file widely available. (Deep Decl., at ¶ 23.) AIM users could only access a specific AIM user's music file if they knew that user's unique screen name and the precise name of the file. (*See supra* at 5). As stated above, AIM does not provide any general search capability that allows a user to obtain files from thousands of unknown users. (*Id.*)

<sup>7</sup> Deep's omissions regarding the alleged instance of file sharing between AIM users are telling. He does not explain that he must have known the individual whose music files are depicted in Exhibit A. Nor does Deep explain that he had to know in advance that the user providing the file had MP3 files to share. Those two facts must be so because AIM, unlike Aimster, does not provide for generalized searching of an index of files available on unknown users' hard drives. (Mujica Decl., at ¶¶ 10, 13.) All that Exhibit A shows is that Deep and an AIM user conspired to use a legitimate service to an illegitimate end. This single example is far different from Aimster -- a service that is solely concerned with facilitating the sharing among strangers of thousands of illegal copies of copyrighted content.



(in response to each search query, Aimster generates an index of up to 500 available files.)

There is no similar search capability on AIM. (Mujica Decl., at ¶ 13).

Second, the success of Aimster's search capability relies on its ability to scan a directory comprised of files from the hard drives of thousands of Aimster users logged on at any given time. For ease of searching, Aimster consolidates into one central directory all the individual file sharing directories of Aimster users who happen to be concurrently connected to the Aimster system. In response to users' search requests, Aimster then canvasses that central directory to provide a list of users with matching files. (Mujica Decl., at ¶ 12; Farmer Decl., at ¶¶ 21-22.) AIM does not have any similar capability. (Mujica Decl., at ¶ 10.) To obtain a file using AIM, a user must know precisely where to look -- among other requirements, he or she must actually enter the single, unique screen name of the individual from whom the file will be obtained (Mujica Decl., at ¶ 14). Sharing files on AIM is part of an individual communications process -- it is far from an anonymous process. An AIM user simply cannot request and obtain thousands of unlawful copies of files from totally anonymous users. (Mujica Decl., at ¶¶ 8-10, 13-14.)

Third, as a part of Aimster's design to search a directory of all of its users' hard drives, it has an indexing function that AIM does not have. When a user signs on with Aimster, the system automatically indexes all files that users have made available in a specified folder, and then automatically communicates that information to an Aimster server. (Farmer Decl., at ¶¶ 21-22; Mujica Decl., at ¶ 12.) There is no similar function with AIM. (Compare Mujica Decl., at ¶ 12 with id. at ¶ 13.).

Fourth, Aimster also provides a service that "fixes" downloads that are interrupted before they are complete. (Opening Br., at 4; Farmer Decl., at ¶ 22; Mujica Decl., at ¶ 17.) If an Aimster user requests that a file be unlawfully copied and the copying is interrupted midstream (for instance because the user whose computer has the copyrighted file on its hard drive has logged off), Aimster automatically reperforms the original search, and locates an alternative copy

of the same file, and then automatically resumes the downloading. (*Id.*) AIM does not provide any similar capability. (Mujica Decl. at ¶ 18.)

Fifth, when you enter the Aimster system you are immediately presented with an aspect of Aimster called "Club Aimster". (Opening Br., at 5-6; Farmer Decl., at ¶ 26; Supp. Farmer Decl., at ¶ 3; Creighton Decl., at ¶ 14; Mujica Decl., at ¶ 15.) Club Aimster is a capability within Aimster that allows a user to view the "top 40" copyrighted songs available through Aimster for immediate, unlawful download.<sup>8</sup> (Opening Brief at 5-6.) Club Aimster is set up to facilitate that download by providing click-on buttons that have pre-programmed searches and pre-programmed automatic downloading. (*Id.*) Moreover, Club Aimster leaves no doubt that Deep knows of infringement on Aimster since the songs listed on Club Aimster have commentary by Deep or his daughter discussing specific songs. (Deposition of John A. Deep, November 14, 2001, at 267:6-268:5 (admitting that he and his daughter collaborate on the "Aimster says" commentary), attached hereto as Forrest Reply Decl., Ex. 4.)

AIM has never had a service that is in any way similar to Club Aimster (Mujica Decl., at ¶ 16) or to Guardian Aimster, which promotes access to a select grouping of illegal copies of "Aimster's greatest hits" (*id.* at ¶ 19). Not only that, AIM has never been promoted as a service that can be used to obtain unlicensed copyrighted material. (*Id.* at ¶ 20.)

The facts are clear that Aimster bears no resemblance to AIM, and that file sharing via Aimster is far different from trying to share files on AIM.

## **II. THE DOCTRINE OF UNCLEAR HANDS DOES NOT APPLY.**

Defendants assert that the doctrine of unclean hands precludes imposition of an injunction. (Opposition Br. at 6-7.) The assertion of such a claim is a sign of simple desperation.

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<sup>8</sup> The deposition of Deep taken in connection with trademark litigation between AOL, Deep and Aimster, indicates that songs are selected for placement in the "top 40" based upon the number of requests for that song. This testimony makes it clear that: (1) Aimster can and does somehow monitor users' searches, (2) while relatively few users had, at that time, signed up for "Club Aimster", the mere presence of a song on Club Aimster's top-40 list de facto indicates that that song has been the subject of a great deal of traffic. (Deposition of John A. Deep, November 14, 2001, at 250:1-16, 252:1-19, 259:16-23, 260:7-14, attached hereto as Forrest Reply Decl., Ex. 3.)

Defendants direct their unclean hands claim, in part, against the AIM service -- but AOL, the ISP that owns AIM, is not even a party to this lawsuit. But in any event, there is no evidence that AIM has any unclean hands that would prevent issuance of an injunction. Indeed, the numerous technical and practical differences distinguishing AIM from Aimster make it clear that invoking comparison between them is insupportable. See supra. Any claim of unclean hands based on those purported similarities must fail.

### III. AIMSTER SHOULD BE COMPARED TO NAPSTER -- NOT AIM.

The facts clearly demonstrate that Aimster is like Napster -- and not like AIM. Whatever Deep's initial representations regarding Aimster's purpose may have been, his expectation that Aimster would be "the next Napster" soon became a matter of public record. (Opening Br., at 1; Forrest Reply Decl., at Ex. 6.) Both Aimster and Napster are full service copyright infringement destinations. Aimster, and Napster before the various court decisions were issued enjoining its conduct, provide: broad search capabilities to find infringing music easily, allow thousands of anonymous users to exchange files simultaneously and index infringing files onto a centralized database. (Napster, 239 F.3d at 1011-13; Farmer Decl., at ¶ 19 ("Aimster duplicates all that Napster does with respect to searching for, copying and distributing music files").)

Users recognize Aimster for what it is:

- "I just came over from Napster and would like to share my files" (Opening Br., at 5)
- "[W]ill Aimster be having the same type of court battles as Napster in the near future? I just [sic] wondering how fast I need to download what I want" (id.)
- "I'm a Longtime Napster user, with about 900 mp3's . . . like everyone else, the RIAA has forced me to try other mp3 websites, so here I am" (id.)

- "I am new to this site and am looking for movies. I have several on DVD to swap (200+)" (Forrest Reply Decl., at Ex. 5).

Using Aimster to pick up where Napster left off was precisely Deep's intention. His comments that Aimster would be the "next Napster" and was "Napster squared" are not mere hype (Opposition Br., at 2), they are proud boasting of fact.

The Ninth Circuit affirmed an injunction in Napster on the basis of the same conduct that Aimster has engaged in (though Aimster has arguably gone even further). We respectfully submit that an injunction should issue here as well.

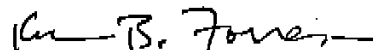
### CONCLUSION

For all the reasons set forth above as well as those set forth in the reply brief by the remaining Record Company plaintiffs, the WMG Plaintiffs respectfully request that the motion for preliminary injunction be granted.

Respectfully submitted,

CRAVATH, SWAINE & MOORE,

by



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