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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

GROKSTER, LTD., et al.,

Defendants.

JERRY LEIBER, et al.,

Plaintiffs,

v.

CONSUMER EMPOWERMENT BV a/k/a FASTTRACK, et al.,

Defendants.

CV 01-08541-SVW (PJWx)
CV 01-09923-SVW (PJWx)

ORDER DIRECTING ENTRY OF PARTIAL FINAL JUDGMENT AND ALTERNATIVELY CERTIFYING APRIL 25, 2003 ORDER FOR IMMEDIATE APPEAL

I. INTRODUCTION

Now before the Court is Plaintiffs' Motion for entry of partial final judgment and for certification of the Court's April 25, 2003 Order ("April 25 Order") for immediate appeal. For the reasons set forth below, the Motion is GRANTED.

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II. ANALYSIS

A. Partial Final Judgment

Plaintiffs move first for entry of partial final judgment under Fed. R. Civ. P. 54(b). Rule 54(b) provides that "[w]hen more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all the claims . . . upon an express direction that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). Entry of partial final judgment is proper if it will aid in "expeditious decision" of the case. Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797-98 (9th Cir. 1991).

Defendant Sharman Networks ("Sharman") objects to this motion, contending that the April 25 Order did not finally resolve any of Plaintiffs' "claims," and thus that entry of judgment under Rule 54(b) is not proper.

The plaintiffs in each of the consolidated cases allege "single" copyright claims arising from Defendants' past and present conduct. The April 25 Order decided only those aspects of Plaintiffs' copyright claims as they apply to the "current versions" of Defendants Grokster, Ltd.'s ("Grokster") and StreamCast Network, Inc.'s ("StreamCast") software and services. The Court declined to rule on the current record as to the potential liability arising from "past versions" of Defendants' products and services. Sharman's position, therefore, is that the copyright claims have not been fully adjudicated, and are not eligible for entry of judgment under Rule 54(b).

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Plaintiffs' response on this point is that a single "count" in a complaint may state more than one "claim," and that Rule 54(b) judgment may properly be entered where a single "claim" is resolved, even if Court does not dispose of the entire count. Plaintiffs note some authority to this effect. See Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450, 539-40, 542-43 (S.D.N.Y. 2001) (citing Second Circuit for proposition that counts consist of multiple claims if the allegations therein could be parsed into separately enforceable causes of action); Federal Election Comm'n v. Christian Coalition, 52 F. Supp. 2d 45, 98 (D.D.C. 1999).

Indeed, the liberal pleading standards of the federal system inevitably give rise to circumstances in which a single count in a complaint may contain more than one legally cognizable claim. See Fed. Rules Civ. P. 8(a), 8(f); Arizona Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991) (explaining that "claim" refers to set of facts giving rise to legal rights in a claimant). Because Plaintiffs' copyright claims as they apply to present versus past conduct are factually (and, potentially, legally) distinct, and because the Court's April 25 Order granted summary judgment for Defendants as to the former, partial final judgment may properly be directed.

Under Rule 54(b), it remains only for the Court to direct that there is no reason to delay entry of judgment, and that partial final judgment will aid in expeditious decision of the case. Fed. R. Civ. P. 54(b). Because appellate review of the Court's April 25 Order will undoubtedly inform the many remaining components of this case, and absent any persuasive reason for delay, the Court so directs.

Accordingly, the Court DIRECTS entry of partial final judgment on the claims concerning the "current versions" of Defendants' products and services as to which the April 25 Order granted summary judgment for Defendants Grokster and StreamCast.

B. Certification for Appeal

In addition, and in the alternative, Plaintiffs move the Court to certify the April 25 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Section 1292(b) allows certification of an interlocutory order where "such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and . . . and immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

1. Controlling Question of Law

There is little question that the April 25 Order involved a controlling question of law, as it determined Grokster's and StreamCast's liability for their current products and services, and engaged in legal interpretation that undoubtedly would inform - if not decide - the issues of past liability for these Defendants.

2. Substantial Grounds for Difference of Opinion

Plaintiffs note a number of bases for a possible difference of opinion as to the correctness of the Court's April 25 ruling.

First, Plaintiffs assert that the Court applied the Ninth Circuit decision in A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) ("Napster") "more narrowly" than other courts by interpreting the conduct described therein as "necessary" to give rise to copyright liability, rather than simply "sufficient" to do

so. Thus, they maintain, the fact that Grokster's and StreamCast's conduct does not rise to the level of Napster's should not preclude a finding of liability.

As the Court then noted, the fundamental question with respect to contributory liability is whether either Defendant materially contributes to the alleged infringement with knowledge of that infringement. (April 25 Order, at 16.) That this accurately reflects the elements of contributory infringement is confirmed by, and not in tension with, the decision purportedly at odds with this Court's Order. See Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676, at *4 (N.D. Cal. Jan. 28, 2002).

Further, while the Court necessarily compared the conduct before it with that found potentially sufficient to give rise to secondary liability in Napster, Plaintiffs are incorrect to characterize the April 25 Order as interpreting Napster's conduct to be necessary to a finding of liability. After contrasting Defendants' conduct with that of Napster, the Court proceeded separately to consider at length the evidence adduced by Plaintiffs in support of their allegation that Grokster and StreamCast materially contribute to their users' alleged infringement. (April 25 Order, at 24-27.) The Court concluded that Plaintiffs had adduced *no evidence* that Defendants materially facilitate or contribute to the file exchanges that form the basis of these lawsuits. (See id.) The Court of course agrees with Plaintiffs' legal proposition that a "range of conduct" may give rise to contributory copyright liability, other than "a combination of actual knowledge and failure to block access." Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676, at *7. As was thoroughly elucidated

in the April 25 Order, however, Plaintiffs failed to carry their burden of showing a material dispute as to whether Defendants' conduct falls within that range.[1]

Second, Plaintiffs point to the district court decision in In re Aimster Copyright Litigation, 252 F. Supp. 2d 634, 2002 U.S. Dist. LEXIS 17054 (N.D. Ill. Sept. 22, 2002). That case is factually and legally distinct. Most significantly, Aimster used copyrighted song titles as pedagogical examples in its user tutorial, provided catalogs of popular copyrighted music to its users, and generally based its service on encouraging the exchange of copyrighted music. Id., at *36, 40-42. The court in Aimster did not rely on the provision of filesharing software and support services alone, but rather pointed specifically to the fact that "Aimster predicates its entire service upon furnishing a 'road map' for users to find, copyright and distribute copyrighted music." Id. at *41-42. Such encouragement of copyright infringement undoubtedly is of a different tenor in the contributory infringement analysis than what was before this Court.

Moreover, the Aimster court specifically stated that the Napster decision, "while certainly persuasive on some points, is simply not precedential authority in this circuit . . . . [O]ur decision today need not rest on the legal reasoning or factual findings of the *Napster* courts." Id. at *4. Because the Aimster decision is unmoored from this circuit's binding precedent, it is unclear whether

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[1] To the extent that the April 25 Order was not explicit on this point, the Order is amended to incorporate the analysis herein.

a contrary conclusion by that court, even if one was reached, constitutes the type of tension contemplated by 28 U.S.C. § 1292(b).

Indeed, Plaintiffs point to the Aimster court's analysis of Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774 (1984), on the issue of whether Defendants' products have substantial non-infringing uses. Yet the Aimster court did not mention the Ninth Circuit's exposition of that issue in Napster (see 239 F.3d at 1020-21), by which this Court is bound. (See April 25 Order, at 12-13.) Further, Plaintiffs have essentially not disputed that Defendants' software has current and potential future substantial non-infringing uses, and it is curious that Plaintiffs would seek to squarely address this issue for the first time on appeal.

Finally, Plaintiffs take issue with the Court's observation that Grokster and StreamCast "may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefitting financially from the illicit draw of their wares." (April 25 Order, at 33.) Plaintiffs contend that such efforts should not be countenanced by a finding that no copyright liability accrues. If this Court is correct in its interpretation and application of existing copyright law, however, this position is nothing more than an invitation to judicial policymaking - a course the Supreme Court has specifically warned against in the copyright context. See Sony, 464 U.S. at 431; Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 414, 94 S. Ct. 1129 (1974).

Nonetheless, as Plaintiffs observe, it is not necessary for the Court to believe it erred for there to exist a "substantial ground

for difference of opinion." So long as the Court's decision is "arguably" in tension with rulings by other courts, Section 1292(b) certification is appropriate. See, e.g., Am Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 29 (S.D.N.Y. 1992). Given the relative novelty of the claims presented, the potentially contrary decision by the Aimster court, and the lack of controlling authority dispositive of the issues in this case, the Court's ruling clearly is susceptible to substantial differences of opinion.

3. Immediate Appeal Would Advance Termination of the Case

Because an appellate decision on the April 25 ruling is bound to inform and perhaps direct the Court's resolution of the issues remaining in this case, an immediate appeal is likely to facilitate termination of this litigation.

Although the Court's entry of partial final judgment affords Plaintiffs an appeal as of right, the Court alternatively amends the April 25 Order (as otherwise amended herein) to certify it for immediate appeal pursuant to 28 U.S.C. § 1292(b).

C. Grokster's Request for Entry of Final Judgment

Grokster notes that, unlike StreamCast, it moved for summary judgment without qualification - StreamCast limited its Motion to the current versions of its software - and that the April 25 Order purported to grant Grokster's Motion. Accordingly, Grokster contends that all claims against it have been resolved, and final judgment should be entered in its favor.

As noted supra, however, the April 25 Order was expressly limited to the "current versions" of Grokster's and StreamCast's software and services. (See April 25 Order, at 6.) The Order

specifically did not "reach the question whether either Defendant is liable for damages arising from past versions of their software, or from other past activities." (Id.) To the extent that the April 25 Order was unclear, it is amended to reflect that Grokster's Motion was GRANTED IN PART as to Plaintiffs' claims arising from the current versions of Grokster's products and services.

Grokster further contends that the "past versions" of its software and services are functionally synonymous with the "current versions," and thus that the Court's April 25 Order necessarily resolved all the claims against Grokster. The Court notes that at oral argument on the instant Motion, Plaintiffs suggested a dispute as to whether or not Grokster has previously operated factually distinct file-sharing services. Further, Grokster itself concedes that it at one time operated a "root supernode," and the Court has not ruled on the legal significance of that fact. (See April 25 Order, at 21 & n.6.) Finally, even if Grokster is correct as a factual matter that its current and past activities are essentially indistinguishable, the April 25 Order simply did not reach the latter category.

Accordingly, the Court declines to enter final judgment as to Defendant Grokster other than as directed supra pursuant to Rule 54(b).

D. StreamCast's Request to Stay Discovery

StreamCast requests that the Court stay discovery on the claims remaining against it pending appeal. The Court declines that request.

III. CONCLUSION

Therefore, the Court HEREBY GRANTS Plaintiffs' Motion for Entry of a Partial Final Judgment Under Fed. R. Civ. P. 54(b) and for Certification of the April 25 Order for Immediate Appeal Under 28 U.S.C. § 1292(b).

The Court HEREBY DIRECTS entry of final judgment as to Plaintiffs' claims concerning the current versions of Defendants Grokster's and StreamCast's respective products and services.

The Court HEREBY AMENDS the April 25 Order (as otherwise amended herein) to certify it for interlocutory appeal pursuant to 28 U.S.C.§ 1292(b).

IT IS SO ORDERED AND ADJUDGED.

DATED: 6/18/03

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE