UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	AIMSTER COPYRIGHT LITIGATION	:	MASTER FILE No. 01 C 8933
		:	Judge Marvin E. Aspen

PLAINTIFFS' PROPOSED PRELIMINARY INJUNCTION ORDER AND MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 4, 2002, this Court issued a Memorandum Opinion and Order granting Plaintiffs' motion for preliminary injunction against Defendants' operation of Aimster, "a service whose very *raison d'etre* appears to be the facilitation of and contribution to copyright infringement on a massive scale." See In re: Aimster Copyright Litigation, ___ F. Supp. 2d ____, 2002 WL 31006142 at *1 (N.D. Ill. Sept. 4, 2002) ("Court Order"). The Court directed Plaintiffs to submit a proposed preliminary injunction order taking into account the "unique problem with regard to the identification of infringing material and the transitory nature of [Aimster's] end-users," id. at *27, and invited the parties to consider the reasoning embodied in the Ninth Circuit's decision in A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) ("Napster I"). Plaintiffs have fashioned such an order. See Exhibit A ("Proposed Order").

The Proposed Order reflects Plaintiffs' consideration of three key factors: (a) the experience with and failures of the Napster injunction; (b) advancements in filtering technology for peer-to-peer systems; and (c) Aimster's reported development of a new "Digital Download Technology," which, according to Aimster, operates "with the

explicit permission of the copyright holder." In light of these factors, the Proposed Order differs from the modified preliminary injunction issued on remand in Napster I. See Exhibit B ("Napster Injunction").[1] Nonetheless, Plaintiffs believe the Proposed Order is appropriate and necessary, and strikes the proper balance between preventing ongoing and future copyright infringement on the Aimster system, "while allowing non-infringing uses of the Aimster system, if any, to continue." Court Order at *27.

II. THE FAILURE OF THE NAPSTER INJUNCTION

In Napster I, the Ninth Circuit held that a preliminary injunction against Napster's conduct in operating its peer-to-peer system was "not only warranted but required." A&M Records , Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001). To that end, the Court directed Napster "to affirmatively use its ability to patrol its system and preclude access to infringing files" on its system. Id. While the Court also required the provision of certain notices by plaintiffs, it specially placed on Napster the burden "of policing the system within the limits of the system." Id.

As directed by the Ninth Circuit, the district court in Napster entered a modified preliminary injunction allocating burdens among the parties. For example, the recording company plaintiffs were to provide Napster with identifying information for each work, including: (a) the title of the work; (b) the name of the performing artist; (c) a single "file name" of the work on the Napster system;[2] and (d) a statement certifying ownership.[3]

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[1] The district court in Napster issued five separate preliminary injunction orders, one for each of the lawsuits filed in that litigation. Variations in the preliminary injunctions for the recording companies and for the music publishers exist with respect to the notice requirements, but the injunctions are otherwise similar. The injunction issued in Case No. C 99-05183 (the record company injunction) and the injunction issued in Case No. C 00-0074 (the music publisher's injunction) are attached to this memorandum as Exhibits B and J, respectively.

[2] Importantly, the district court did not require that plaintiffs identify every infringing file name available on the Napster system: "Given the limited time an infringing file may appear on the system and the individual user's ability to name her files, relief dependent on plaintiffs' identifying each 'specific infringing file' would be illusory." Exhibit B, Napster Injunction ¶ 4, n.2.

Exhibit B, Napster injunction ¶ 2. Complying with the Napster Injunction was extremely burdensome for Plaintiffs, requiring thousands of hours of investigative work, hundreds of hours of employee time, and the hiring of outside experts. See Exhibit C, ("Plaintiffs' Compliance Report"). For its part, Napster had three (3) business days to prevent such works from appearing on its system once it received notice. Exhibit B, Napster Injunction ¶¶ 5 & 6. Finally, the injunction made it clear that Napster bore "the burden 'of policing the system within the limits of the system.'" Exhibit B, Napster Injunction ¶ 4 (citing Napster I).

Although the Napster Injunction was in effect between March 5, 2001 and July 11, 2001, it simply failed to work. During that four-month period, the district court was forced to appoint a technical advisor, the parties filed numerous reports on Napster's "compliance" and "non-compliance" with the injunction, the district court received several written and oral reports from the technical advisor, and held several hearings. Eventually, the district court ordered Napster to disable completely its file-sharing system until such time that it could show the district court it was doing everything feasible to block infringement and "achieve full compliance with the modified preliminary injunction." This "shut-down" order was affirmed by the Ninth Circuit. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095 (9th Cir. 2002) ("Napster II").

The most significant reason for the failure of the Napster injunction was Napster's refusal to implement an effective filtering technology. As outlined in a report filed by plaintiffs with the district court, various filtering technologies were available to Napster. See Exhibit C, Plaintiffs' Compliance Report. For example, Napster could have chosen to "filter in" only works that were licensed for distribution; or, it could have deployed digital fingerprinting technology that recognized whether a particular music file (based on certain characteristics, like sound waves or other metadata) was authorized for

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[3] As is apparent from Exhibit J, the music publishers "notice" requirements were different than that discussed herein.

distribution. Instead, Napster initially chose to employ "text-based filtering," which did not block, for example, files containing misspellings in artist names or song titles. This method, as implemented by Napster, proved porous and wholly ineffective. See Napster, II, 284 F.3d at 1098 ("The text-based filter proved to be vulnerable to user-defined variations in file names.").[4]

Months later, and after significant urging by the plaintiffs, Napster was required to implement its technological filter based on audio fingerprinting, but did not demonstrate "every effort ha[d] been made to, in fact, get to zero tolerance." Id. at 1097. Even Napster then conceded that its filtering had been incomplete, and, when Napster voluntarily closed down its system, the district court ordered that the system remain down until Napster could "get [the infringements] down to zero." Id. The Ninth Circuit affirmed that "shut-down" order.

Plaintiffs' experience with the Napster Injunction has influenced the formulation of their Proposed Order in several important ways: *First,* it is now clear that the most effective means of preventing infringements online, including over peer-to-peer systems, is for the site operator to "filter in" only those works that are authorized by copyright owners.[5] At least one company, CenterSpan Communications Corp. (located on the Internet at *www.scour.com*), operates such a licensed peer-to-peer system for the distribution of sound recordings and videos. See Exhibit D (www.scour.com). *Second,* "text-based filtering," similar to that used by Napster, cannot effectively filter copyrighted works in an online environment. Requiring Plaintiffs to provide artist names and song titles for filtering, therefore, does not serve to curtail the continued infringement. *And third,* the adoption of technological filtering solutions – whether to

[4] Ironically, Aimster directly aided circumvention of Napster's text-based filtering by its "Pig Encoder." See Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, at 11. Clearly, Aimster easily could frustrate text based filtering on its own system.

[5] A "filter in" method is the on-line version of the traditional process of obtaining permission from a copyright owner prior to copying or distributing copyrighted works.

"filter in" licensed works or to "filter out" or block unlicensed works – must occur as early as possible in the injunctive process in order to minimize the harm to copyright owners while maximizing the operations of peer-to-peer applications.

III. RECENT ADVANCES IN PEER-TO-PEER FILTERING TECHNOLOGY

Technology has advanced since March 2001 (when the court issued the Napster injunction). The Aimster system operates at a time when digital filtering capabilities are advanced and are wholly adaptable to peer-to-peer systems. Several companies have developed and maintain sound file data, including "acoustic" or "digital" fingerprints of the file, that can be used to "filter in" (or, as required, to "filter out") sound recordings on the Internet, based on the preferences of copyright owners. See Exhibit E, Declaration of Patrick Breslin ¶¶ 8-16 ("Breslin Decl."), see also Exhibit F, Declaration of Vance Ikezoye ¶¶ 2-12 ("Ikezoye Decl."). Such technologies also are capable of accurately identifying millions of digital audio files without any significant, negative impact on even a large-scale network's performance. Exhibit E, Breslin Decl. ¶ 2.[6] These technologies are effective on all forms of audio files, regardless of the digital format into which the audio has been encoded. See Exhibit F, Ikezoye Decl. ¶ 4. And, most important, these technologies can be used to identify audio files irrespective of whether the file has been mislabeled – or even not labeled at all. Exhibit E, Breslin Decl. ¶ 12.

Such digital filtering technology is available to Aimster. Exhibit E, Breslin Decl. ¶ 18; Exhibit F, Ikezoye Decl. ¶ 9. If, for example, Aimster chose to implement a technology that would "filter in" only licensed works, today's technology is capable of recognizing whether certain files offered by a user are authorized to be made available to others for download. Exhibit F, Ikezoye Decl. ¶ 11; see Exhibit E, Breslin Decl. ¶ 19. If, on the other hand, Aimster chose to adopt a technology that would "filter out"

[6] For example, one filtering company's database currently contains fingerprint data for approximately 3.4 million copyrighted sound recordings, which represent almost all of the music available for retail purchase in North America, including music from the major and leading independent record companies. Exhibit F, Ikezoye Decl. ¶ 10.

unauthorized works, fingerprint technology could be used to preclude the distribution of infringing works. Exhibit F, Ikezoye Decl. ¶ 11; see Exhibit E, Breslin Decl. ¶ 20. All of this can be achieved without the burdens and inefficiencies inherent in providing lists of owned works to Aimster for manual implementation.

Plaintiffs in no way wish to dictate the technological means through which Aimster must achieve compliance with the preliminary injunction order, nor should this submission be read to suggest that Aimster must select the audio fingerprinting technology discussed above. As a technology company itself, and the developer of its infringing system, Aimster is in the best position to decide what technology would serve as the best filter. However, Plaintiffs urge that the Court require Aimster to select the most comprehensive means reasonably available at the earliest stages of the injunction process.

IV. AIMSTER'S DEVELOPMENT OF A "DIGITAL DOWNLOAD TECHNOLOGY"

During oral argument on Plaintiffs' Preliminary Injunction Motion, Aimster went through great pains to impress upon this Court that "[t]here's no way a peer-to-peer system can stop the . . . digital transfer of copyrighted music . . . ." See Exhibit G, Transcript of July 24, 2002 Oral Argument at 34-35 ("Hearing Transcript"). As discussed herein, however, ***not only does viable filtering technology exist today, but Defendant John Deep already has developed his own filtering technology.***

In a recent filing in the bankruptcy court, Defendant Deep claims to have developed "Digital Download Technology." See Exhibit H, Application of Debtor in Support of Order Authorizing Transfer of Interest in Property of the Estate. This technology reportedly will **"facilitate digital downloads of licensed copyrighted music, movies and videogames** ***with the explicit permission of the copyright holder.***" See Exhibit I, Affidavit of Debtor in Support of Order Authorizing Transfer of Interest in Property of the Estate ¶ 5 (italics in original). This technology apparently is sufficiently

perfected so that Defendant Deep currently is attempting to license it to third parties. Id. at ¶ 4. The development of this technology makes clear that Defendant Deep potentially has a ready means of compliance at hand. If Defendant Deep is to be believed – and his sworn statement should bind him here – Aimster easily should be able to comply with the Proposed Order.

V. THE PROPOSED PRELIMINARY INJUNCTION

Based on the experience of the Napster injunction, advancements in digital filtering technology, and Aimster's apparent ability to develop a copyright-compliant system, Plaintiffs have crafted a Proposed Order sensitive to the concerns expressed in Napster I and Napster II. Plaintiffs acknowledge that the Proposed Order does not include a provision requiring Plaintiffs to provide to Aimster lists of file names or works. For the reasons discussed above, however, such a provision is not required here. This Court already has found that Aimster has "actual knowledge" of the copyright infringement occurring on its system *despite* Aimster's claim to the contrary. Court Order at *13 ("there is absolutely no indication in the precedential authority that such *specificity* of knowledge is required in the contributory infringement context.")(emphasis in original).

First and foremost, Aimster should not be permitted to allow ongoing infringement on its system while it weighs, selects, develops and then implements, a technological fix. At the same time, Plaintiffs recognize the importance of "allowing non-infringing uses of the Aimster system, if any, to continue." Court Order at *27. Accordingly, the Proposed Order enjoins only the copying, downloading, distributing, uploading, linking to, or transmitting, of Plaintiffs' copyrighted works. See Exhibit A, Proposed Order ¶ 2. Nothing in the Proposed Order enjoins Aimster's other functions, nor does the Proposed Order limit in any way Aimster's ability to operate its chat rooms, bulletin boards, or retail operations. Since Aimster has described itself on numerous

occasions as a multi-purpose "destination website" of which exchanging music is a minor component, Aimster's compliance with this provision should not significantly affect its operations. See Court Order at *22, n.19; see also Exhibit G, Hearing Transcript at 21 ("[T]here is [*sic*] more nonmusic titles than there are music titles on Aimster."); Hearing Transcript at 23 ("[M]usic is not the predominant use of the Aimster system.").

Second, just as the Ninth Circuit required of Napster, Aimster must act affirmatively to monitor its system," thus ensuring its own compliance with any injunction. Exhibit A, Proposed Order ¶ 4. It is now clear that Aimster can, and does, monitor and control the file transfers on its system, and Aimster should not be heard to say otherwise. See Court Order at *14, n.14 (discussing Aimster's ability to monitor transfers of adult photographs over its system); see also Court Order at **16-17 (discussing Aimster's ability to control file transfers over its system). Accordingly, a technological solution would serve this end best, and the Proposed Order suggests such a solution.

Third, Aimster must keep records in order for Plaintiffs and this Court to monitor Aimster's attempts at compliance. Exhibit A, Proposed Order ¶ 6. As a technology company, Aimster will experience little, if any, burden as a result of this record keeping requirement.

Fourth, again echoing the Napster Injunction, it is imperative that Aimster submit to this Court periodic reports of Aimster's compliance efforts. Exhibit A, Proposed Order ¶ 5.

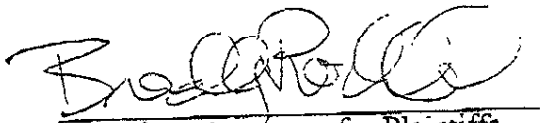
This Court should reject any suggestion by Aimster that filtering on its system is "impossible." The suggestion is inaccurate and belied by Defendant Deep's representations to the bankruptcy court. If filtering is "impossible," however, this Court should shut down Aimster. "Courts have been unequivocal in ruling that where defendants "created the all-or-nothing predicament in which they currently find themselves," the distribution of an entire product can be enjoined – even where such

products contain non-infringing uses. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1406 (9th Cir.), cert. denied, 521 U.S. 1146 (1997); Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 510-11 (N.D. Ohio 1997) ("If Defendants cannot divine an efficient way to operate a computer BBS free of copyrighted material . . . then Defendants have the option of leaving the industry."); Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672, 686 n.14 (S.D.N.Y. 1979) ("[W]hen, as here, it is technologically impossible to separate out the infringing material the copyright owner ought not go unprotected."). Aimster should not be permitted to continue profiting from its infringing conduct, all the while causing ongoing harm to Plaintiffs.

VI. CONCLUSION

For the reasons discussed herein, Plaintiffs respectfully request that the Court issue Plaintiffs' Proposed Order.

Dated: September 11, 2002



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