

Case No. 02-4125

**In the
United States Court of Appeals
for the Seventh Circuit**

IN RE: AIMSTER COPYRIGHT LITIGATION

**On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division**

**Case No. 01-C-8933
The Honorable Marvin E. Aspen**

**BRIEF OF THE PLAINTIFFS-APPELLEES,
ZOMBA RECORDING CORPORATION, *et al.***

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No. 02-4125
IN RE AIMSTER COPYRIGHT LITIGATION

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

- (1) Zomba Recording Corporation
Recording Industry Association of America, Inc.
Caroline Records, Inc.
EMI Christian Music Group, Inc.
Narada Productions, Inc.
Noo Trybe Records, Inc.
The Forefront Communications Group
Priority Records, LLC
Sony Discos Inc.
UMG Recordings, Inc.
BMG Music d/b/a The RCA Label
Motown Record Company, L.P.
Loud Records LLC
Hollywood Records, Inc.
Sony Music Entertainment Inc.
Capitol Records, Inc.
Artista Records, Inc.
Interscope Records
Virgin Records America, Inc.
BMG Music d/b/a Wyndham Hill
BMG Music d/b/a BMG Entertainment
Bad Boy Records
LaFace Records
A&M Records, Inc.
Geffen Records, Inc.
Island Records, Inc.
MCA Records, Inc.
Polygram Records, Inc.
Universal Records, Inc.
Motion Picture Association of America
Columbia Pictures Industries, Inc.
Disney Enterprises, Inc.
Metro-Goldwyn-Mayer Studios Inc.
Paramount Pictures Corporation
Sony Pictures Entertainment Inc.
Twentieth Century Fox Film Corporation
Fox Film Corporation
Universal City Studios, Inc.
Atlantic Recording Corporation
Elektra Entertainment Group, Inc.
Warner Bros. Records, Inc.
London-Sire Records, Inc.
Maverick Recording Company
143 Records
Tommy Boy Music
Atlantic Rhino Ventures, Inc. d/b/a Rhino Entertainment Company
WEA International Inc.

WEA Latina, Inc.
Time Warner Entertainment Company, L.P.
New Line Cinema Corporation
Acuff-Rose Music Publishing Inc.
Acuff-Rose Music, Inc.
Deer Valley Music, LLC
Hickory Records, Inc.
Milene Music, Inc.
Kenney A. Chesney
Donald R. Ewing, III
Larry Leiber individually and d/b/a Jerry Leiber Music
Mike Stoller individually and d/b/a Mike Stoller Music
The Rodgers and Hammerstein Organization
Criterion Music Corporation
Famous Music Corporation
Benson Music Group, Inc.
Benson Records, Inc.
Brentwood Music, Inc.
Dreamcatcher Entertainment, Inc. d/b/a Dreamcatcher Records
Essential Records,
Reunion Records
Fonovisa, Inc.
Musical Productions, Inc.
Platano Records Corporation

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- (3)(i) Unless otherwise noted, all parent corporations are publicly traded in the United States. All parent corporations own ten percent (10%) or more of the party's stock.

Party

Caroline Records, Inc.
EMI Christian Music Group, Inc.
Narada Productions, Inc.
Noo Trybe Records, Inc.
The Forefront Communications Group
Priority Records, LLC
Sony Discos Inc.
UMG Recordings, Inc.
BMG Music d/b/a The RCA Label

Motown Record Company, L.P.
Loud Records LLC
Hollywood Records, Inc.

Sony Music Entertainment Inc.
Capitol Records, Inc.
Artista Records, Inc.

Interscope Records
Virgin Records America, Inc.
BMG Music d/b/a Wyndham Hill

BMG Music d/b/a BMG Entertainment

LaFace Records

A&M Records, Inc.

Geffen Records, Inc.

Island Records, Inc.

MCA Records, Inc.

Polygram Records, Inc.

Universal Records, Inc.

Atlantic Recording Corporation

Parent Corporations

EMI Group PLC (public in UK)
EMI Group PLC (public in UK)
EMI Group PLC (public in UK)
EMI Group PLC (public in UK)
EMI Group PLC (public in UK)
EMI Group PLC (public in UK)
Sony Corporation of America
Vivendi Universal, S.A.
Bertelsmann, Inc. and
Bertelsmann AG
Vivendi Universal, S.A.
Sony Corporation of America
Disney Enterprises, Inc. and
The Walt Disney Co.
Sony Corporation of America
EMI Group PLC (public in UK)
Bertelsmann, Inc. and
Bertelsmann AG
Vivendi Universal, S.A.
EMI Group PLC (public in UK)
Bertelsmann, Inc. and
Bertelsmann AG
Bertelsmann, Inc. and
Bertelsmann AG
Bertelsmann, Inc. and
Bertelsmann AG
Vivendi Universal, S.A., UMG
Recordings, Inc. (not public)
Vivendi Universal, S.A., UMG
Recordings, Inc. (not public)
Vivendi Universal, S.A., UMG
Recordings, Inc. (not public)
Vivendi Universal, S.A., UMG
Recordings, Inc. (not public)
Vivendi Universal, S.A., UMG
Recordings, Inc. (not public)
Vivendi Universal, S.A., UMG
Recordings, Inc. (not public)
Vivendi Universal, S.A., UMG
Recordings, Inc. (not public)
Warner Communications Inc.,
Time Warner Cos. Inc., AOL
Time Warner (only AOL Time
Warner is public)

Warner Bros. Records, Inc.	Warner Communications Inc., Time Warner Cos. Inc., AOL Time Warner (only AOL Time Warner is public)
London-Sire Records, Inc.	Warner Communications Inc., Time Warner Cos. Inc., AOL Time Warner (only AOL Time Warner is public)
Maverick Recording Company	Maverick Records (not public), Warner Bros. Records Inc. (not public), AOL Time Warner
143 Records	Warner Communications Inc., Time Warner Cos. Inc., AOL Time Warner (only AOL Time Warner is public)
Tommy Boy Music	Warner Communications Inc., Time Warner Cos. Inc., AOL Time Warner (only AOL Time Warner is public)
Atlantic Rhino Ventures, Inc. d/b/a Rhino Entertainment Company	Warner Communications Inc., Time Warner Cos. Inc., AOL Time Warner (only AOL Time Warner is public)
WEA International Inc.	Warner Communications Inc., Time Warner Cos. Inc., AOL Time Warner (only AOL Time Warner is public)
WEA Latina, Inc.	Warner Communications Inc., Time Warner Cos. Inc., AOL Time Warner (only AOL Time Warner is public)
Famous Music Corporation Fonovisa, Inc.	Viacom, Inc. Univision Music, Inc. (not public), Univision Communications

(3)(ii) See above.

Attorney's Signature: _____ Date: 4/14/03

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Jurisdictional Statement

Appellant's Jurisdictional Statement is complete and correct.

Statement of Issue Presented for Review

Did the District Court abuse its discretion in granting a preliminary injunction prohibiting Appellant from contributorily and vicariously infringing Appellees' copyrighted works?

Statement of the Case

Appellant John Deep ("Deep") with his co-defendants AbovePeer, Inc. and BuddyUSA, Inc.,¹ created, operated, and profited from a computer system known as "Aimster,"² which, like Napster, is a peer-to-peer file copying and distribution system designed to encourage and enable millions of anonymous users to infringe copyrighted music. Appellees, record companies³ and music publishers⁴ (collectively, "Copyright Owners") own or license the rights to the vast majority of music distributed and copied on the Aimster system. Sanders Decl. ¶¶3, 17; Cheng Decl.

¹ AbovePeer, Inc. and BuddyUSA, Inc. were formed and controlled by Deep to run the Aimster system. Declaration of John Deep in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed Jan. 22, 2002 ("Deep Decl.") at 2 n.1.

² After losing an action brought by America Online before The National Arbitration Forum over the name "Aimster," Deep renamed his system "Madster." *America Online, Inc. v. John Deep d/b/a BuddyUSA, Inc.*, FA0103000096795. This brief refers to "Aimster" or the "Aimster system," as did the District Court.

³ The record companies are members of the Recording Industry Association of America ("RIAA"), whose members account for approximately 90% of the legitimate sound recordings produced, manufactured, or distributed in the United States. Declaration of Frank Creighton in Support of Plaintiffs' Motion for Preliminary Injunction, filed Jan. 2, 2002, ¶2. Sound recordings are protected by federal copyright. 17 U.S.C. § 102(a)(7).

⁴ The music publishers bring their action on behalf of all publisher-principals of the Harry Fox Agency, which are the owners of copyrights in musical compositions. The Harry Fox Agency acts as agent for over 27,000 music publishers to issue licenses and collect royalties. Sanders Decl. ¶5. Musical compositions are protected by copyright. 17 U.S.C. § 102(a)(2).

¶¶2-3 and Exs. 1-2; *see* Stoller Decl. ¶¶2-15.⁵ The Copyright Owners sought a preliminary injunction to halt rampant copyright infringement on the Aimster system. The District Court, after reviewing a detailed and voluminous record, saw through Deep’s characterization of the Aimster system as a benign “instant messaging service” and recognized the Aimster system for the infringing system it is.⁶ The District Court also was unconvinced by Deep’s claimed blindness (admittedly self-imposed) to the infringement on the Aimster system. The District Court found what anyone who looked at the Aimster system could observe – that its purpose was to infringe copyrights:

Aimster is “a service whose very *raison d’etre* appears to be the facilitation of and contribution to copyright infringement on a massive scale.”

“Defendants manage to do everything but actually steal the music off the store shelf and hand it to Aimster’s users.”

In re Aimster Copyright Litigation, 2002 WL 31006142, at *1, 14 (N.D. Ill. Sept. 4, 2002) (“*Aimster*”).

⁵ The Copyright Owners cite to titles of documents filed with the District Court and their filed dates (rather than referring to the record) because the record Deep transferred to this Court was incomplete. Although the District Court granted the Copyright Owners’ motion to correct the record (and thus this Court now has all of the relevant documents), the documents are not all listed on the docket sheet Deep attaches to his Opening Brief. The declarations of Sanders, Cheng, Stoller, Creighton, Farmer, Forrest, Schafer, Agnew, Cottrell, Eisenberg, Hessinger, Leak, Ostroff, Seklir, and Vidich were filed on January 2, 2002 in support of Plaintiffs’ Motion for Preliminary Injunction and will be cited with the last name of the declarant followed by “Decl.”

⁶ Deep misquotes the District Court, claiming the Court describes Aimster as an “instant messaging service.” Opening Brief at 6-7. The quote recites *Deep’s contention*. *In re Aimster Copyright Litigation*, 2002 WL 31006142, at *3 (N.D. Ill. Sept. 4, 2002). The District Court observed: “If Deep’s declaration were the only means by which we could evaluate the Aimster system, we might be convinced that it is as innocent as Defendants claim. Unfortunately for Defendants, however, Plaintiffs have submitted numerous declarations to demonstrate that Deep’s description of the Aimster service is less than complete.” *Id.*

The District Court found that the Copyright Owners “had an exceptionally strong likelihood of success on the merits of their contributory infringement claim,” and a “likelihood of success on the vicarious infringement claim.” *Aimster*, at *16, 26-27. The Preliminary Injunction the District Court issued was narrowly tailored and similar to those traditionally imposed in copyright infringement cases, essentially requiring defendants to cease infringing the Copyright Owners’ copyrights, but allowing defendants to continue to operate the Aimster system so long as they did not facilitate copyright infringement.

Statement of Facts

The Aimster system enables and facilitates the “viral distribution” of copyrighted works. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).⁷ In function and result, the Aimster system is no different than the Napster system, except that, in addition to enabling wholesale, anonymous infringement of music, the Aimster system facilitates unlawful copying and distribution of movies, images, and software. Creighton Decl. ¶3. Deep intended the Aimster system to capitalize on Napster’s popularity and to supplant the enjoined Napster system as the forum for unlawful copying and distribution of copyrighted works. Creighton Decl. Exs. 1-2, 4-7. Even after courts branded Napster an infringing system, Deep continued to tout his Aimster system as “the next Napster,” and “Napster squared.” Creighton Decl. Ex. 6.

⁷ Napster was a system whose purpose was to infringe copyrights in music. The court found a likelihood of success on the merits of plaintiffs’ contributory and vicarious copyright infringement claims. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000) (“*Napster*”), *aff’d and remanded*, 239 F.3d 1004 (9th Cir. 2001) (“*Napster I*”) (remanding for entry of modified preliminary injunction); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1095 (9th Cir. 2002) (“*Napster II*”) (affirming shut down order).

Overview of the Aimster System

Aimster is a computer system that enables users to connect to a hub, and to one another, so they can distribute and copy copyrighted works. Users first must download free, proprietary software from the Aimster website. Farmer Decl. ¶20. Each user must then provide a user name and a password. Forrest Decl. Ex. 17. The user can both communicate with the Aimster system and exchange copyrighted works with other users, whom Deep calls “buddies.”⁸ Farmer Decl. ¶¶20-21. However, selection of specific “buddies” is not required; by default, every Aimster user automatically is the “buddy” of every other user. *Id.*; Supplemental Farmer Declaration in Support of Reply, filed February 5, 2002 (“Supp. Farmer Decl.”) ¶3; *see* Schafer Decl. Ex. 1 at 22; Forrest Decl. Ex. 14. The Aimster system conceals the identities of infringing users by, among other things, “encrypting” their communications. Farmer Decl. ¶24. *See Aimster*, at *3-7. In addition, the Aimster system includes tutorials to assist users to copy copyrighted music; “Club Aimster,” which gives paying members direct access to copy copyrighted music; and forums, message boards, and chat rooms that allow users to seek music for copying. Creighton Decl. Exs. 7, 13; Forrest Decl. Exs. 1, 4, 9-16; Schafer Decl. Exs. 1-2.

Aimster copying and distribution: To enable users to distribute and copy music, the Aimster system inventories the files on-line users have available on their hard drives and organizes them into a detailed directory. Farmer Decl. ¶21. The directory is updated as new users come on-line and others go off-line. *Id.* ¶22. The directory is maintained on a central server and made available to *all* Aimster users. *Id.* ¶21. Users run the Aimster software, type the name of the music they want in the “Search For” field (for example, a user would type in Beatles’ “Yesterday”) and the

⁸ Notwithstanding Aimster’s use of the word “buddy,” Aimster users are, by design, anonymous.

Aimster system generates and transmits a list of files containing the song (*e.g.*, “Yesterday” that are available for immediate copying. *Id.* The Aimster system also determines and provides information concerning the salient characteristics of available files, including their size, bitrate, frequency, length, and source, and the speed of the internet connection. *Id.*

Once they have searched for and received a list of available music files, users simply double-click on the desired file, or click on the “download” button, to begin copying the file to their computers.⁹ Farmer Decl. ¶21. The Aimster system connects the user who intends to download the file to the user on whose computer the file is stored. *Id.* ¶22. The Aimster system then initiates the uploading (distribution) from one user and the downloading (copying) by the other. *Id.* A user can copy multiple files simultaneously. *Id.* During copying, the Aimster system provides information about the status of each download or upload, *e.g.*, the progress (percent complete), rate of transfer, and time remaining to complete copying. *Id.* ¶21. When several users simultaneously attempt to download the same file, the Aimster system adds each additional user to a queue; when the previous download is completed, the Aimster system begins the download to the next user. *Id.* ¶22. The Aimster system also provides the ability to resume an interrupted download without any user input by searching for and making available a substitute file of the identical copyrighted work to complete the copying from the point it was discontinued. Farmer Decl. ¶22. The Aimster system then organizes the files copied. *Id.*

⁹ Transmitting information to another’s computer is “uploading”; receiving information from another’s computer is “downloading.” *See United States v. Sromalski*, 318 F.3d 748, 749 (7th Cir. 2003).

At the conclusion of the process, the downloading user and the uploading user have copies of the music on their hard drives to further copy and distribute to others throughout cyberspace. *Id.* In this respect, the Aimster system is a “viral system,” in which the number of infringing copies made available multiplies rapidly as each user copying a file also becomes a distributor of that file. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 331 (S.D.N.Y.), *aff’d sub nom., Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). The only evidence before the District Court of any actual use of the Aimster system demonstrated that it was used for copyright infringement.

Tutorials: The “Aimster Guardian Tutorial” and “Aimster Tutorial” dramatically demonstrated Aimster’s purpose to enable copyright infringement. Farmer Decl. ¶25; Creighton Decl. ¶13 and Ex. 12; Forrest Decl. Ex. 1. The tutorials explained, step-by-step, how to infringe copyrights by downloading and uploading music using the Aimster system. *Id.* Both tutorials used the Copyright Owners’ copyrighted works as examples of music that could be copied. The Guardian Tutorial used some of the copyrighted works that the Copyright Owners previously had notified Deep were being infringed by the Aimster system. Creighton Decl. ¶13 and Ex. 12; Forrest Decl. Ex. 1.

“Club Aimster”: “Club Aimster” hardly is the “on-line magazine” Deep now proclaims it to be. Rather, “Club Aimster” is the Aimster system packaged and promoted specifically to enable users to download with a single click the most popular music on Aimster – which is the copyrighted music owned by the Copyright Owners. Farmer Decl. ¶26; Forrest Decl. Exs. 7, 19; Creighton Decl. ¶14. Deep promoted “Club Aimster” as having “All the Hot New Releases . . . All the Time.”

Forrest Decl., Ex. 19.¹⁰ Each “Club Aimster” member pays \$4.95 per month to access this easier and quicker means of infringement. *Id.*, Exs. 7, 19; Farmer Decl. ¶26; Creighton Decl. ¶14. Members enter their user names and passwords on “Club Aimster.” *Id.* The user selects the “Play” button or clicks on a particular record title listed on the “Club Aimster” webpage. *Id.* The Aimster system automatically selects a file (from any Aimster user on-line at the time) containing the selected music and copies it to the user’s computer, without any further search or effort by the user. *Id.*

Forums, message boards and chat rooms: The Aimster website made clear the obvious: the purpose of the Aimster system was to infringe, and copyright infringement was rampant on the Aimster system. Testimonials of Napster expatriates, discussing copyright infringement, litter the Aimster “Forums” and Message Boards:

“I just came over from Napster and would like to share my files. . . . Also will aimster be having the same type of court battles as napster in the near future? I just wondering how fast I need to download what I want.”

“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.”

Schafer Decl. ¶4(c) and Ex. 1 at 39, 45.

One Aimster user accurately summed up the Aimster system in one sentence:

“What you have with Aimster is a way to share, copy, listen to and basically in a nutshell break the law using files from other people’s computers.”

Id. ¶4(c) and Ex. 1 at 49.

¹⁰ Appendix Exhibit 1 are samples of screen shots demonstrating the operation of the Aimster system. Appendix Exhibit 2 are sample screen shots of “Club Aimster.” Hundreds of additional screen shots are attached to the Creighton Decl.

Procedural History

In April 2001, after the record companies had informed Deep they would sue if the Aimster system did not cease infringing their copyrights, Deep's co-defendants AbovePeer and BuddyUSA filed pre-emptive declaratory relief actions in Deep's home forum, the Northern District of New York. Creighton Decl. ¶7 and Ex. 8. Numerous lawsuits by multiple copyright owners followed in five other courts. The Judicial Panel on Multi-District Litigation consolidated and coordinated eleven separate actions by or against Deep and his co-defendants (the "MDL Litigation") in the Northern District of Illinois. Judicial Panel for Multi-District Litigation Order, dated November 16, 2001, at 2.

In December 2001, the Copyright Owners moved for a preliminary injunction. After the motion was briefed and ready for oral argument, Deep filed a Chapter 13 petition, and his co-defendants filed Chapter 11 petitions, in the Northern District of New York. Thereafter, the Copyright Owners moved for relief from the automatic stay. The Bankruptcy Court granted the motion "for the limited purpose of permitting [the Copyright Owners] to request the MDL Court to issue its decision on the pending preliminary injunction motion, without any further hearing other than oral argument" *In re Deep*, 279 B.R. 653, 660 (N.D.N.Y. 2002). The Bankruptcy Court order was intended to promote judicial efficiency and to spare the bankruptcy estates from claimed unnecessary expense or harm.¹¹

¹¹ It was the Bankruptcy Court, not the Copyright Owners' counsel (Opening Brief at 3), who responded to Deep's argument that it would be burdensome and expensive to argue the Motion for Preliminary Injunction in the District Court: "I would submit that it would probably be less expensive at this point to get a Southwest ticket to Chicago to argue that motion and come back." Appendix Exhibit. 3, Transcript of May 28, 2002 Bankruptcy Court hearing at 34:9-12.

Deep did not appeal the order lifting the stay. Instead, Deep moved in the District Court to refer the MDL Litigation back to the Bankruptcy Court, claiming, *for the first time*, that the District Court needed to hold an evidentiary hearing before ruling on the Preliminary Injunction Motion that had been filed 6 months earlier. Deep never had propounded discovery in connection with the pending motion nor previously requested an evidentiary hearing. The District Court denied Deep's request to transfer, stating "[t]here is no reason for us to continue in this game of forum ping-pong." District Court Minute Order, dated July 12, 2002.

On September 4, 2002, following argument and review of the lengthy record (including Deep's post-argument submissions), the District Court granted the Motion for Preliminary Injunction, finding the Copyright Owners "had an exceptionally strong likelihood of success on the merits of their contributory infringement claim," and a "likelihood of success on the vicarious infringement claim." *Aimster*, at *16, 26.

The District Court directed the parties to submit proposed language for a preliminary injunction. The Copyright Owners submitted language that comported with traditional injunction standards. The Copyright Owners concurrently described certain technology available to Deep to prevent infringement; including technology Deep claimed already to have developed. *See* Plaintiffs' Proposed Preliminary Injunction Order and Memorandum in Support, filed Sept. 11, 2002 ("Proposed Preliminary Injunction Memorandum"). Deep did not object to any of the language proposed by the Copyright Owners, did not propose alternative language, and did not claim that it would be impossible (only, for unspecified reasons, "difficult") to comply with the proposed preliminary injunction. Declaration of John Deep in Opposition to Plaintiffs' Proposed Preliminary Injunction Order, filed

October 17, 2002 (“Second Deep Decl.”) at 5. The District Court entered the Preliminary Injunction on October 30, 2002. The Preliminary Injunction, *inter alia*, requires Deep to cease infringement and disable and prevent access to the Copyright Owners’ works on the Aimster system. Preliminary Injunction ¶2. It does not require Deep to shut down his technology or his website, and specifically allows Deep to continue any noninfringing operations. The Preliminary Injunction also specifically provides that, if Deep disputes his ability to “carry out the duties established under the Order,” he may set the matter for a hearing. *Id.* ¶ 7. Deep never availed himself of this provision.

Deep did *nothing* to comply with the Preliminary Injunction, or to implement any available “filtering” or “blocking” technology to limit infringement. First Report of Compliance with Preliminary Injunction, November 12, 2002 (“First Compliance Report”). Deep continued to infringe the Copyright Owners’ copyrights and to collect monthly fees from Aimster’s infringing users. On November 20, 2002, the Copyright Owners filed an Application for an Order to Show Cause re Motion for Contempt. At a November 26, 2002 hearing on the Order to Show Cause, Deep declined to present any argument or evidence concerning his failure to comply with the Court’s order. The District Court scheduled a contempt hearing for December 19, 2002.¹²

On December 10, 2002, Deep filed in this Court an Application for Emergency Motion to Stay Preliminary Injunction and Temporary Restraining Order Pending Appeal. It was denied.

¹² In the interim, the District Court issued a Temporary Restraining Order to compel compliance with the Preliminary Injunction. The Temporary Restraining Order expired on December 22, 2002, and is not the subject of this appeal. The defendants’ appeal of the Temporary Restraining Order was ordered dismissed.

On December 18, 2002, the day before the contempt hearing, Deep filed a motion to dismiss the contempt motion. It was denied.

At the December 19, 2002 contempt hearing, neither Deep nor any of his 25 designated witnesses appeared. (Deep was represented by counsel.) The District Court found Deep in contempt, and required that the Aimster system stay off-line “until such time that Aimster demonstrates to the Court, after briefing and a hearing, that the Aimster System and Service prevents infringement of Plaintiffs’ Copyrighted Works.” District Court Order, dated December 20, 2002. Deep never has accepted the District Court’s invitation to demonstrate that the Aimster system could operate in a noninfringing manner.

On February 14, 2003, the Bankruptcy Court granted the motion of the Copyright Owners, the United States Trustee, and the Chapter 13 Trustee to convert the Chapter 11 cases of Deep’s co-defendants to Chapter 7, based on Deep’s fraud and mismanagement. While a similar motion with respect to Deep’s personal bankruptcy was pending, Deep (facing the loss of control over the Aimster system) voluntarily dismissed his bankruptcy case on February 25, 2003.

Summary of Argument

The District Court found, applying traditional copyright principles to an extensive record, that the Copyright Owners are “extremely” likely to succeed on the merits of their contributory infringement claim, and are likely to succeed on their vicarious infringement claim. The District Court determined that Deep’s defenses were without merit, including his claims that *Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Sony-Betamax*”) shielded his conduct and that his infringing system was covered by the limitations on liability of

the Digital Millennium Copyright Act (“DMCA”). After balancing the harm to the parties and weighing the public interest, the District Court issued a Preliminary Injunction prohibiting further infringement of the Copyright Owners’ works. The District Court did not abuse its discretion.

Standard of Review

This Court “review[s] the grant of a preliminary injunction for an abuse of discretion, giving great deference to the district court’s weighing of the factors and will reverse only when the district court commits a clear error of fact or law.”

Promatek Indus., Ltd., v. Equitrac Corp., 300 F.3d 808, 811 (7th Cir. 2002). “The question for [the Court of Appeals] is whether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes.” *Re/Max No. Cent., Inc. v. Cook*, 272 F.3d 424, 429 (7th Cir. 2001)(citations and quotations omitted). The Court reviews a denial of an evidentiary hearing for abuse of discretion. *AlliedSignal, Inc. v. B.F. Goodrich & Co.*, 183 F. 3d 568, 682 (7th Cir. 1999).¹³

Preliminary injunctive relief is authorized under the Copyright Act. 17 U.S.C. § 502. In this Circuit,

“A party seeking to obtain a preliminary injunction must demonstrate: (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted. If the court is satisfied that these three conditions have been met, then it must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted,

¹³ Deep’s attempt to create a stricter standard for review of preliminary injunction language proposed by a party is baseless. *Chicago & NW Transp. Co. v. Railway Labor Exec. Ass’n*, 908 F.2d 144, 149 (7th Cir. 1990) only held that an injunction order must include the terms of the injunction itself, and not incorporate other documents. In *Machlett Labs., Inc. v. Techny Indus., Inc.*, 665 F.2d 795, 797 (7th Cir. 1981), the district court adopted the plaintiff’s proposed findings of fact and conclusions of law. Here, the District Court made its own findings of fact and conclusions of law in a 47-page opinion.

balancing such harm against the irreparable harm the moving party will suffer if relief is denied. Finally, the court must consider the public interest (non-parties) in denying or granting the injunction.”

Ty, Inc. v. The Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001)(citations omitted). “This process involves engaging in what we term the sliding scale approach: the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor plaintiff’s position.” *Id.* Additionally, irreparable injury is presumed when the exclusive rights of a copyright holder are infringed. *See Atari, Inc. v. North Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1982).

ARGUMENT

I. The District Court Correctly Determined the Copyright Owners are Likely to Succeed on the Merits of Their Claims.

Deep appears to question the legitimacy of the doctrines of contributory and vicarious infringement. These doctrines have been an established part of copyright law for almost a century, *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911), and have been endorsed by Congress. H.R. Rep. No. 94-1476, at 61 (1976)(“A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers.”); 17 U.S.C. § 1201(c)(2)(recognizing contributory and vicarious copyright infringement); *see* 3 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright*, § 12.04[A] at 12-71 (2002)(“a long series of cases under both the 1909 Act and the [1976] Act imposes liability, under appropriate circumstances, for acts of infringement committed by others”).

The contributory and vicarious copyright infringement doctrines applied by the District Court are steeped in this Circuit’s jurisprudence, commencing with one of

the seminal opinions on the subject. *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929)(dance hall owner liable for orchestra’s unauthorized use of copyrighted compositions); *see, e.g., Hard Rock Cafe Licensing Corp. v. Concession Serv., Inc.*, 955 F.2d 1143, 1150 (7th Cir. 1992) (“a defendant is vicariously liable for copyright infringement if it has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities”)(internal quotations and citations omitted); *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1013 (7th Cir. 1983)(“a licensee who lacks the plaintiff’s authorization to create a derivative work is a direct infringer and the defendant is a contributory infringer through its sale”); *F.E.L. Publ’ns Ltd. v. Nat’l Conference of Catholic Bishops*, 466 F. Supp. 1034, 1040 (N.D. Ill. 1978)(“A person who promotes or induces the infringing acts of another is jointly and severally liable as a vicarious infringer even without knowledge of the infringement. And one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another may be liable as a ‘contributory’ infringer.”). That this case involves “technology” does not mean the rules of secondary liability carry any less force. *See Napster I*, 239 F.3d at 1028 (“We are at a total loss to find any ‘special circumstances’ simply because this case requires us to apply well-established doctrines of copyright law to a new technology.”).

A. Contributory Infringement

“One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). This standard has been widely adopted, including

within this Circuit.¹⁴ See, e.g., *Burdick v. Koerner*, 988 F. Supp. 1206, 1209 (E.D. Wis. 1998); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire and Equip. Distrib. and NW Nexus, Inc.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997). Either actual or constructive knowledge is sufficient to establish contributory liability. *Design Craft Fabric Corp. v. K-Mart Corp.*, 1999 WL 1256258, at *4 (N.D. Ill. Dec. 21, 1999); *ISC-Bunker Ramo Corp. v. Altech*, 765 F. Supp. 1310, 1332 (N.D. Ill. 1990)(defendant “knew (or should have known)” of infringing conduct).

1. Deep Had Actual and Constructive Knowledge of the Infringing Activities.

Deep did not dispute that Aimster users were engaging in copyright infringement. *Aimster*, at *10 (“Defendants, in their brief and at oral argument, do not dispute that unauthorized copying of copyrighted works occurs on the Aimster system by Aimster’s end users.”); see *Napster I*, 239 F.3d at 1013-14 (“the majority of Napster users use the service to download and upload copyrighted music . . . constitut[ing] direct copyright infringement.”). Overwhelming evidence supports the District Court’s determination that Deep had actual knowledge of the infringing activity:

- The Copyright Owners repeatedly notified Deep in writing of the infringing activity on the Aimster system, identifying thousands of infringed music titles and specific filenames containing that music. Creighton Decl. ¶¶7, 10, 14 and

¹⁴ Contrary to Deep’s suggestion (Opening Brief at 25-26), *Gershwin* remains the law after *Sony-Betamax*, which cited and favorably discussed *Gershwin*. *Sony-Betamax*, 464 U.S. at 437 n.18. In the almost 20 years since, no case has even hinted that *Sony-Betamax* reversed or modified *Gershwin*. Despite Deep’s claim (Opening Brief at 26), *Gershwin* continues to be cited as the standard for contributory infringement, including by the Second Circuit, even after *Softel, Inc. v. Dragon Med. & Scientific Comm., Inc.*, 118 F.3d 955, 971 (2d Cir. 1997) (cited by Deep Opening Brief at 26). See *Matthew Bender and Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998); see also, e.g., *Napster I*, 239 F.3d at 1019; *ALS Scan, Inc. v. RemarQ Cmty. Inc.*, 239 F.3d 619, 622 n.1 (4th Cir. 2001).

Exs. 8, 11 and 13. *Aimster*, at *12; see *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 512 (7th Cir. 1994)(“A letter informing the defendant of possible infringement clearly provides notice.”); *Napster I*, 239 F.3d at 1020 n.5; *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)(letters notifying swap meet organizers of vendors’ sale of counterfeit recordings established knowledge); *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994)(“in light of [plaintiff’s] earlier requests that [defendant] cease copying its copyrighted photographs, [defendant] had actual notice”).

- “Club Aimster” tracked, listed, provided commentary on, and made available for immediate copying, the music most often infringed, frequently identifying the record company whose copyrights were infringed. *Aimster*, at *12; Creighton Decl. ¶14; Forrest Decl. Ex. 19 (“Sony has banned its customers from owning this song on their computer hard drives . . . Sony is screwin you!”); Declaration of Katherine B. Forrest in Support of Reply Memorandum of the Warner Music Group Plaintiffs in Support of Joint Motion for Preliminary Injunction, Feb. 5, 2002 (“Forrest Reply Decl.”) Ex. 3 at 250-52. The Copyright Owners own virtually every recording listed on the “Club Aimster” Top 40. Creighton Decl. ¶14.

- The Aimster “tutorial” used song titles of popular recordings owned by the Copyright Owners to demonstrate how to download music. *Aimster*, at *12; Creighton Decl. ¶13 and Ex. 12; Forrest Decl. Ex. 1.

- The Copyright Owners’ complaints identified specific music that was being infringed. See *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1169-70 (C.D. Cal. 2002)(filing complaint identifying infringements

constitutes notice). This music continued to remain available for distribution and copying. Creighton Decl. ¶¶15-17 and Exs. 14-17.

- Well after Napster was deemed infringing, Aimster boasted it was Napster's replacement to infringe copyrighted music. Creighton Decl., Exs. 1, 2, 5, 6; Forest Decl. Ex. 15. *See also* Creighton Decl. Ex. 6. ("we're the next technical innovation upon Napster;" characterizing the Aimster system as "Napster squared"). Deep also designed a way for Napster users to circumvent the Court-ordered filtering of copyrighted works being infringed on the Napster system. Creighton Decl. Ex. 5; Answer in *Leiber. v. AbovePeer*, 01-CV-5901 ¶ 10; Creighton Decl. ¶ 6, Ex. 5.

- The Aimster forums were replete with user discussions about how to "screw" the music industry and "steal" music using the Aimster system, *Aimster*, at *12; Schafer Decl. ¶¶4(a) and (c) and Ex. 1 at 5, 51-52 ("LET'S ALL F--- OVER THE MUSIC INDUSTRY" and "I AM NOT GOING TO BUY CDS ANYMORE!"), and references to copying specific, popular copyrighted music ("I'M LOOKING FOR SOME DOWNLOADS, BEETLES [sic] AND WINGS IF YOU HAVE THEM?????").

- The Aimster system was marketed by touting availability of the Copyright Owners' music. Forrest Decl., Ex. 7 ("you can get the Aimster Top 40 of Hot New Releases before anyone else knows – even before the Labels know!"). There was no evidence the Aimster system was used for any purpose other than to infringe copyright. *See* Creighton Decl. Exs. 11, 13-27.

- Deep provided interviews for articles in which the infringing Aimster system was discussed in detail. Creighton Decl. Exs. 1, 4-6.

Deep's knowledge mirrors that found sufficient for contributory infringement in *Napster*. *Napster I*, 239 F.3d at 1020-22.

Although actual knowledge clearly is present, constructive knowledge also exists. The listings and availability on "Club Aimster" of newly-released copyrighted music is constructive knowledge that copying and distributing these works is unauthorized. *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 858 (S.D.N.Y. 1984)("knowledge" where "the very nature of" the product "would suggest infringement to a rational person"); *Universal City Studios Inc. v. American InvSCO Mgt. Inc.*, 217 U.S.P.Q. 1076, 1077 (N.D. Ill. 1981)(that motion picture was just released in theaters supported inference of knowledge that videocassette was infringing). Further, Deep clearly understands the nature of copyright law; he sought to protect copyrights in the Aimster software (Creighton Decl. Ex. 3 at 3-4), and sued a former employee for distributing the Aimster copyrighted source code. *See Napster I*, 239 F.3d at 1020 n.5 ("constructive knowledge because [Napster] ha[s] enforced intellectual property rights in other instances.").

Deep possessed sufficient knowledge even if, as he claims, he did not know which specific infringements were occurring on the Aimster system at the precise time they were occurring. Opening Brief at 23-24. *See Aimster*, at *13 ("there is absolutely no indication in the precedential authority that such *specificity* of knowledge is required")(emphasis in original); *Napster I*, 239 F.3d at 1020 n.5 (finding knowledge even though Napster may not have had knowledge of the actual

acts of infringement);¹⁵ *see also, e.g., Gershwin*, 443 F.2d at 1163 (firm responsible for organizing concerts liable for contributory infringement despite not knowing which specific songs would be played; general knowledge that “copyrighted works were being performed at [the concert] and that neither the local association nor the performing artists would secure a copyright license” was sufficient); *Fonovisa v. Napster*, 2002 WL 398676, *5-6 (N.D. Cal. Jan. 28, 2002)(knowledge of specific infringing works not required to establish contributory infringement); *Sega Enter. Ltd. v. MAPHIA*, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994) (“*Sega I*”)(“Even if Defendants do not know exactly when games will be uploaded to or downloaded from [its service], their role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory infringement.”).

Moreover, although Deep claims he “encrypts” files on the Aimster system (and thus allegedly cannot know what music is being distributed), he admittedly tracked and ranked the specific music downloaded on the Aimster system – thereby creating the “Club Aimster” Top 40. Farmer Decl. ¶26; Forrest Reply Decl. Ex. 3 at 250-52. Deep concedes the “Club Aimster” Top 40 is “a list compiled by mining anonymous users’ data.” Opening Brief at 11. Deep also provided reviews of the music in the “Top 40,” sometimes noting the name of the copyright owner, and included copies of the copyrighted album covers on Aimster’s website. Creighton Decl. ¶14; Forrest Reply Decl. Ex. 4 at 267-68; Forrest Decl. Ex. 19; (“This song [Usher’s You Got It Bad] will also hit #1 on the Labels’ Chart”; “Great song [Mary J. Blige’s Family Affair] but it’s already peaked”; “Sony has banned its customers from owning this

¹⁵ The statement in *Napster I*, 239 F.3d at 1021 (cited by Deep) that “if a computer system operator learns of specific infringing material available on his system,” the operator has “sufficient knowledge . . . to impose contributory liability” is not to the contrary. The Court did not hold that knowledge of specific infringing material is necessary to liability, or that actionable knowledge cannot be shown by other evidence of actual or constructive knowledge, as, in part, it was in *Napster. Id.*

song [Incubus – Wish You Were Here”]. . .!”). The ability to identify the top 40 recordings, and to cause a specific recording to be sent to a “Club Aimster” member’s computer, belies Deep’s allegation that “encryption” kept him ignorant of the identity of the music copied. *See* Forrest Reply Decl. Ex. 3 at 284-85.¹⁶ Ultimately, the Aimster system necessarily decrypts the files so that the downloading user has a useable copy. (The user never sees any encrypted files nor does the user need an encryption password.) Deep simply implemented a disintegrating encryption overlay to the Aimster system with the hope that, if he temporarily “encrypted” the copyrighted music being copied and distributed, he could claim ignorance.¹⁷

The District Court discounted Deep’s “willful blindness.” *Aimster*, at 13 (“it is [] disingenuous of Defendants to suggest that they lack the requisite level of knowledge when their putative ignorance is due entirely to an encryption scheme *that they themselves put in place*”)(emphasis in original); *see Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 590 (7th Cir. 1989)(“willful blindness is knowledge enough” for contributory trademark infringement); *Playboy Enter. Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 510, 514 (N.D. Ohio 1997)(“knowledge” for contributory liability despite “disingenuous” claim defendants were unaware that copyrighted photographs were on their computer bulletin board service). The District Court saw

¹⁶ When it suited his purposes, Deep admitted he could determine what files were being distributed on the Aimster system. Second Deep Decl. 21 (“I could have proved that the content available for download is not primarily copyrighted.”). In fact, Deep never presented evidence of *any* non-copyrighted works distributed and copied over the Aimster system.

¹⁷ Deep claims the District Court did not understand “encryption.” Opening Brief at 15-16. The record shows the contrary. *See* Farmer Decl. ¶24 (“‘Encryption’ is a mathematical process that can take English text, song files and other data and manipulate them to make them undecipherable to anyone without the appropriate ‘key’ to the encryption code. The encryption prevents outsiders from knowing what is being exchanged, but is entirely at the discretion of Aimster, which is in the position at any and all times to change or eliminate the encryption.”).

what was clear to the Copyright Owners – and to anyone who looked at or used the Aimster system – that regardless of encryption, infringing works were being distributed and copied on the Aimster system.

The District Court correctly found “overwhelming evidence” of Deep’s knowledge of infringing activity. *Aimster*, at *12 (“[t]here is no doubt that Defendants either know or should know of the direct infringement occurring on the Aimster system”).

2. Deep Induced, Caused, And Materially Contributed To Infringement.

This element is satisfied where a defendant provides “the site and facilities for direct infringement.” *See Napster I*, 239 F.3d at 1022. (“without the support services defendant provides, . . . users could not find and download the music they want with the ease of which defendant boasts”)(quotation omitted); *Fonovisa*, 76 F.3d at 264 (“it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet” . . . the swap meet “actively strives to provide the environment and the market for counterfeit recording sales to thrive”); *Gershwin*, 443 F.2d at 1163 (“pervasive participation” in creating audience).

Deep’s assertion that he merely provided “the infrastructure” (Opening Brief at 8) is no different than Napster’s similarly unavailing claim. *See Napster*, 114 F. Supp. 2d at 920. Aimster clearly was the “but for” cause of infringement. *See Napster I*, 239 F.3d at 1022; *Napster*, 114 F. Supp. 2d at 918-20. Aimster provides the “site and facilities,” and much more. *Aimster*, at *3-7. Every Aimster user must download Aimster’s software, connect to the Aimster system, use Aimster’s continuously updated index to locate files to copy, copy only files made available for

distribution at that time over the Aimster system, and be connected to Aimster to initiate both distribution and copying. Aimster predicates its service upon furnishing a “road map” for users to find, copy, and distribute copyrighted music. *See supra* at 3-7; *Aimster*, at *14 (“Defendants in this case have provided the software and support services necessary for individual Aimster users to connect with each other. Without Aimster’s services, Aimster’s infringing users would need to find some other way to connect.”). *See Sega Enter. Ltd. v. MAPHIA*, 948 F. Supp. 923, 933 (N.D. Cal. 1996)(defendant “provided a road map on his BBS for easy identification of Sega games available for downloading” and “provided the facilities for copying the games by [] monitoring, and operating the BBS software, hardware and phone lines necessary for the users to upload and download games”).

The District Court correctly found “Aimster clearly encourages, entices, and contributes to the infringement of its users.” *Aimster*, at *18.

3. *Sony-Betamax* Is Not A Defense.

The District Court correctly found the *Sony-Betamax* defense inapplicable. *Aimster*, at *14-16. In *Sony-Betamax*, the Court addressed the narrow question of whether the manufacture and sale of a “staple article of commerce” capable of “substantial noninfringing uses,” but sometimes used for potential infringement, alone provides *constructive* knowledge sufficient for contributory infringement. *Sony-Betamax*, 464 U.S. at 439. The Court held that, where Sony had no “ongoing relationship” with Betamax purchasers, had no actual knowledge of their activity, and was not in a position to control unauthorized uses of copyrighted material, it was not “manifestly just” to impose liability for the infringing activities of third parties. *Id.* at 437-38.

The Court hinged its analysis on the finding that the “primary use” of the Betamax machine – private, noncommercial, time-shifting in the home of free television programming – was fair use. *Id.* at 423. Also important to the Court’s analysis was that the “use” did not involve the distribution of copyrighted works to others, *id.* at 425; and that plaintiffs’ public television programming was something consumers “had been invited to witness in its entirety free of charge,” *id.* at 449, was copied for the purpose of playing once at a later time, then erased, *id.* at 423, and accounted for “well below 10%” of television programming subject to Betamax copying. *Id.* at 443. Plaintiffs even conceded they had not suffered harm from the Betamax machine. *Id.* at 454.

The precise holding of *Sony-Betamax* is narrow (and rarely has been successfully applied as a defense in the almost 20 years since it was decided). If the evidence of actual or constructive knowledge is more than a mere showing that a product may be used for infringing purposes, the *Sony-Betamax* defense does not apply. *Id.* at 439. It was the existence of precisely the type of knowledge that Deep possesses here that was the basis for the determination that *Sony-Betamax* did not immunize Napster’s contributory infringement. *Napster I*, 239 F.3d at 1020; *Fonovisa v. Napster*, 2002 WL 398676 (N.D. Cal. Jan 28, 2002). Because Deep “knew or had reason to know of [his] users’ infringement of plaintiffs’ copyrights,” the *Sony-Betamax* defense fails. *See Napster I*, 239 F. 3d at 1020; *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 697 (D. Md. 2001).¹⁸

¹⁸ Deep errs in characterizing *Sony-Betamax* as holding contributory infringement should be applied with restraint. *Sony-Betamax*, 464 U.S. at 442 (the goal is to “strike a balance between a copyright holder’s legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce”).

Deep failed to meet his burden to demonstrate the applicability of the *Sony-Betamax* defense. *See, e.g., Napster*, 114 F. Supp. 2d at 912; *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)(defendant has burden of proving fair use defense). The District Court correctly determined that *Sony-Betamax* did not apply to Deep's infringing business for five separate and independent reasons. *Aimster*, at 14-16.

First, the *Sony-Betamax* defense is inapplicable because the *primary* use of the Aimster system – and the business plan on which it is predicated – is infringement. *See* Creighton Decl. ¶ 2 and Ex. 1. *Aimster*, at *15 (“the evidence leads to the inescapable conclusion that the *primary* use of Aimster is the transfer of copyrighted material among its users”)(emphasis in original). Deep failed to demonstrate the existence of any noninfringing use, much less a substantial and commercially significant one. Deep attempts to avoid this indisputable fact by positing an interpretation of *Sony-Betamax* that would eviscerate the doctrine of contributory infringement. Under Deep's theory, even though he did not provide any evidence of actual noninfringing use, he would escape liability merely because he could hypothesize a possible future noninfringing use for the Aimster system. Opening Brief at 26-27. In requiring a “commercially significant” and “substantial non-infringing” use, *Sony-Betamax* did not create a defense that swallowed the whole. *See Sony-Betamax*, 464 U.S. at 442 (the Betamax machine was “*widely used for legitimate unobjectionable purposes*”)(emphasis added); *see also Napster I*, 239 F.3d at 1021 (“commercially significant use”); *A&M Records, Inc. v. Abdallah*, 948 F.

Supp. 1449, 1456 (C.D. Cal. 1996) (“insubstantial” noninfringing uses not sufficient); *Sega I*, 857 F. Supp. at 685 (“incidental capabilities” insufficient).¹⁹

Second, the *Sony-Betamax* defense is limited to situations where a defendant *manufactures a product or device* – a “staple article of commerce” – and ceases any contact with or supervision of its customers at the time of sale. *Sony-Betamax*, 464 U.S. at 438 (“the only contact between Sony and the users of the Betamax that is disclosed by this record occurred at the moment of sale”). Despite Deep’s new argument that all he does is distribute a software product, the Aimster system is not a staple article of commerce. As the District Court correctly determined, the Aimster system “is not a discrete product, like a Betamax VCR, to be sold to customers who thereafter use the machine as they see fit. Instead [it] is a *service* more closely akin to the swap meet in *Fonovisa*.” *Aimster*, at *15 (emphasis in original).

Aimster’s Terms of Service describe the Aimster system as a “service.” Creighton Decl. Ex. 3. The continuous interactions between the Aimster system and its users – and the system’s design, construction, and operation that enable or require such interactions – confirm that description. The infringing activity only can take place while users are logged onto the Aimster system, which enables the infringement. Among other things, Deep provides a continuously updated index of available infringing music. He provides a tutorial to users. He provides the “Club Aimster” service (for which he charges a monthly fee). He updates and upgrades the Aimster

¹⁹ *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988) does not assist Deep. Opening Brief at 23. *Vault* involved the specific statutory exemption for a single, “archival copy” of a computer program under 17 U.S.C. § 117(a), which is not implicated here. *Vault*’s discussion of substantial noninfringing use was not directed to the magnitude or viability of the alleged noninfringing uses (which were assumed sufficient), but to whether the copies were “archival copies.” *Id.* at 263-67.

system. Forrest Decl. Ex. 3. Deep's involvement does not cease at the "moment of sale." *Aimster*, at *15 (Aimster "involves an ongoing relationship between the direct infringers (the users) and the contributory infringers"); *Sony-Betamax*, 464 U.S. at 437 (imposing contributory liability in cases "involving an *ongoing relationship* between the direct infringer and the contributory infringer at the time the infringing conduct occurred" is "manifestly just")(emphasis added); see *Abdallah*, 948 F. Supp. at 1456-57; *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 339 (S.D.N.Y. 1984)(*Sony-Betamax* "extends protection only to the manufacturer of the infringing machine, not to its operator"); see also *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986)(contributory infringement applied to company that provided customers with copyrighted movies, video players, and rooms in which to view the movies).

Third, Sony-Betamax does not apply to systems that facilitate and enable public *distribution* of multiple copies of copyrighted works. The private "time-shifting" for home use of free television programs by making a single *copy* for personal viewing and later erasing it, is not equivalent to the viral *distribution* of copyrighted works to millions of strangers. Indeed, at the outset, the Court marked the parameters of the *Sony-Betamax* decision, recognizing that the case "concerned the private, home use of VTR's for recording programs broadcast on the public airways without charge to the viewer. No issue concerning the transfer of tapes to other persons . . . was raised." *Sony-Betamax*, 464 U.S. at 425; see *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 504 (2001)(*Sony-Betamax* inapposite where defendant electronic publishers are "not merely selling 'equipment'; they are selling *copies* of [plaintiffs' copyrighted works]")(emphasis added); *Aimster*, at *15 (*Sony-Betamax* not applicable where defendant "makes each of its users a global distributor of Plaintiffs' copyrighted music for copying by any number of other [of defendant's]

users”). No court ever has held *Sony-Betamax* applicable to the facilitation of infringing *distribution*. See *Napster I*, 239 F.3d at 1019; *Napster*, 114 F. Supp. 2d at 913-14.

Fourth, the *Sony-Betamax* defense does not apply where a defendant specifically designs a system for infringement. *Aimster*, at *16 (“*Aimster* is a service specifically designed to aid the infringing activities of its users”); *Sony-Betamax*, 464 U.S. at 436; *Abdallah*, 948 F. Supp. at 1456; *Compaq Computer Corp. v. ProCom Tech., Inc.*, 908 F. Supp. 1409, 1424 (S.D. Tex. 1995); *RCA Records*, 594 F. Supp. at 339. Contrary to Deep’s suggestion (Opening Brief at 29), there was overwhelming evidence to support this conclusion here. *E.g.*, Creighton Decl. ¶¶ 1, 2, 5, 6.

Fifth, the *Sony-Betamax* defense does not apply where the defendant “influences and encourages” infringement. *Aimster*, at *16 (“the Court in *Sony* approvingly cited the district court’s finding that Sony had not ‘influenced or encouraged’ the unlawful copies”). Deep manifestly influenced and encouraged the unlawful distribution and copying. *Id.* (“*Aimster* actually goes to great lengths to both influence and encourage the direct infringement among its users.”).²⁰

B. Vicarious Infringement

Contributory and vicarious infringement are separate torts with liability under each analyzed independently, as the District Court did. *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988). Vicarious liability rests on a basic proposition: if a person generates financial gain from others’ infringing activities

²⁰ Deep cites *Manville Sales Corp v. Paramount Sys., Inc.*, 917 F.2d 544 (Fed. Cir. 1990) and *E.I. Du Pont de Nemours & Co. v. Mallinckrot, Inc.*, 654 F. Supp. 890 (S.D. Ohio), *aff’d*, 833 F.2d 1022 (Fed. Cir. 1987). Opening Brief at 31. Neither case addresses contributory infringement or *Sony-Betamax*.

and has the ability to supervise or control those activities, that person – not the copyright owner – should bear the costs of infringement. *See, e.g., Gershwin* 443 F.2d at 1159; *F.E.L. Publ'ns*, 466 F. Supp. at 1040 (defendant “may be liable as a vicarious infringer . . . if the defendant has the right and ability to supervise the infringing activities as well as a direct financial interest in those activities.”).

Vicarious infringement is not limited to the doctrine of *respondeat superior*. *See, e.g., Napster I*, 239 F.3d at 1022; *Fonovisa*, 76 F.3d at 262; *Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325-26 (D. Mass. 1994). Knowledge of infringement is not an element. *F.E.L. Publ'ns*, 466 F. Supp. at 1040. *Sony-Betamax* is not a defense to vicarious liability. *Napster I*, 239 F.3d at 1022.

1. Deep Had The Right and Ability To Supervise or Control the Infringing Activity.

As reflected by the entire Aimster system, and exemplified by “Club Aimster,” Deep formed and promoted an infringing system. *Aimster*, at 16. “[P]ervasive participation in the formation and direction of the direct infringers, including promoting them (*i.e.*, creating an audience for them)” suffices to place Deep “in a position to police the direct infringers.” *Fonovisa*, 76 F.3d at 263 (quoting *Gershwin*, 443 F.2d at 1163); *see Napster I*, 239 F.3d at 1023. Deep “promoted” Aimster’s infringing service far beyond the type of generalized promotional activities on which the *Fonovisa* Court predicated liability.

Deep also had the right and ability to control the infringements on the Aimster system. Through his proprietary software, Deep controlled access to the Aimster system. *Aimster*, at *16. Through his Terms of Service (to which every user must agree) Deep maintained control over users’ access, stating he will “take down” “infringing material” and that repeat violators of copyright law will have “access to

the work . . . disabled.” Forrest Decl. Ex. 8. Thus, Deep had precisely the same right and ability to control as the operators of Napster’s infringing system and Cherry Auction’s swap meet. “The ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise.” *Napster I*, 239 F.3d at 1023; *see Fonovisa*, 76 F.3d at 262 (ability to supervise where defendants had the “right to terminate vendors for any reason”).

Deep’s insistence that, because he *chose* to encrypt part of the Aimster system, he lacked control, is unavailing. *Aimster*, at *17 (assuming the Aimster system is encrypted, such “would not prove that Defendants did not have the right and ability to supervise”). Courts consistently have rejected defendants’ attempts to structure their affairs to deny responsibility for infringements from which they profit. “Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.” *Napster I*, 239 F.3d at 1023; *see Aimster*, at *17 (“there is nothing about the right and ability to control which requires Defendants to have [] precise identifying knowledge”); *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 777-78 (8th Cir. 1988); *Fonovisa*, 76 F.3d at 262; *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 306-07 (2d Cir. 1963); *Chess Music, Inc. v. Sipe*, 442 F. Supp. 1184, 1185 (D. Minn. 1977).

Further, vicarious liability does not require that a defendant *actually* exercise supervision or control over infringers; it is enough that the defendant has the *ability* to do so. *Gershwin*, 443 F.2d at 1162-63 (if defendant is “in a position to police the infringing conduct,” its “failure to police the conduct” gives rise to liability); *see Napster I*, 239 F.3d at 1023; *Broadcast Music, Inc. v. Hartmarx Corp.*, 1988 WL 128691, at *3 (N.D. Ill. Nov. 17, 1988)(“It is the existence of the right to supervise, not whether Hartmarx in fact chose to exercise that right, that is at issue.”); *Chess*

Music, 442 F. Supp. at 1185 (“In an age where much of the music is copyrighted, [defendant] should not profit at the expense of these song composers by instructing musical groups not to play copyrighted music and by claiming ignorance as to their program.”); *see also Fonovisa*, 76 F.3d at 262 (rejecting characterization of swap meet owner as mere “absentee landlord” that “surrendered” its supervisory powers to tenants); *Shapiro, Bernstein & Co.*, 316 F.2d at 306 (vicarious liability for sale of bootlegged recordings by store’s concessionaire even though defendant did not control and supervise the employees).

In any event, Deep, like Napster, also had the ability to control the Aimster system by filtering or blocking copyrighted works from being infringed. Farmer Decl. ¶8; Supp. Farmer Decl. ¶8; Breslin and Vance Decls. in support of Proposed Preliminary Injunction Memorandum (fingerprinting technologies can be implemented on the Aimster system). *See Napster II*, 284 F.3d at 1098. Deep admitted as much. Forrest Reply Decl. Ex. 3 at 284-85; Request for Judicial Notice, filed November 20, 2002, Ex. 6, ¶5; Creighton Decl. Ex. 10 (Aimster represented it was developing software which “will feature a blocking technology to ensure that only files designated [by its software licensor] can be searched, accessed or exchanged”). That Deep chose not to exercise this control, does not avoid liability. *Napster I*, 239 F.3d at 1023 (“To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent.”); *see Napster II*, 284 F.3d at 1098 (Napster required to “do everything feasible to block files from its system which contain noticed copyrighted works”).²¹

²¹ The Court’s observation that “Napster’s reserved ‘right and ability’ to police is cabined by the system’s current architecture,” *Napster I*, 239 F.3d at 1024, does not assist Deep. Opening Brief at 24. In a later appeal, the Court made clear that “architecture” meant the general structure of the peer-to-peer system, not every detail of its original implementation.

The District Court's determination that Deep has the right and ability to supervise or control infringing activity is not clearly erroneous.

2. Deep Received a Direct Financial Benefit From Infringing Activities.

"Defendants' direct financial interest in the infringing activities of its users is without question." *Aimster*, at *17. Each "Club Aimster" member paid a monthly fee for the infringing service, which provided one-click downloading of copyrighted music. *Aimster*, at *6; Forrest Decl. Ex. 19. Deep's argument that such a monthly fee does not qualify as "financial interest" is unsupported. *See Perfect 10*, 213 F. Supp. 2d at 1172-73 (direct financial benefit from a monthly fee); *Playboy Enter., Inc. v. Webbworld, Inc.*, 986 F. Supp. 1171, 1176 (N.D. Tex. 1997)(monthly fee is "direct financial benefit"); *Polygram*, 855 F. Supp. at 1331-32. *See also* Second Deep Decl. ¶15 (charging Aimster users for an upgrade of the Aimster software would be a "financial benefit"). Deep additionally solicited contributions over the Aimster system to finance this litigation. *Aimster*, at *17. Forrest Decl. Ex. 2. Deep also sold merchandise to Aimster users. *Aimster*, at *17. Creighton Decl., Ex. 23.

Further, the financial benefit requirement is satisfied where infringing activities enhance the attractiveness of the system. Every Aimster user provided copyrighted works to and attracted additional users; thus, Aimster's value is directly attributable to infringement. *Aimster*, at *17. ("Aimster's bulletin boards and chat rooms are replete with examples of users drawn there simply because they know it is a place where they can obtain infringing material."); *see Napster I*, 239 F.3d at

Napster II, 284 F.3d at 1098. After remand, the district court ordered Napster to shut down its system until it implemented an effective filtering system. *Id.* at 1097. Rejecting Napster's protest that this disregarded the "current architecture" of its system, the Ninth Circuit affirmed, stating that the "new filtering mechanism does not involve a departure from Napster's reserved ability to police its system." *Id.* at 1098.

1023 (“[f]inancial benefit exists where the availability of infringing material ‘acts as a draw’ for customers); *Fonovisa*, 76 F.3d at 263 (“the sale of pirated recordings at the [] swap meet is a ‘draw’ for customers”); *Playboy*, 982 F. Supp. at 513 (“the quantity of adult files available to customers” on defendant’s bulletin board “increased the attractiveness of the service”); *Sega I*, 857 F. Supp. at 684 (“the existence of the distribution network for Sega video game programs increases the prestige of the MAPHIA bulletin board”); *Broadcast Music*, 1988 WL 128691, at *2 (using infringing material to “attract” customers to a business, which may increase the business’ profits, is an “obvious and direct” financial interest in infringing conduct); *Universal City Studios*, 217 U.S.P.Q. at 1079 (plaintiffs need only show the infringing screening was intended to “stimulate business at the [defendant’s] Lounge”).

The District Court did not abuse its discretion in determining that Deep derived a direct financial benefit from infringing activity.

C. The Aimster System Does Not Qualify For a Limitation On Liability Under The DMCA.

When trying to qualify the Aimster system as a “staple article of commerce,” Deep claims he distributed a software *product*. Opening Brief at 27. When invoking the DMCA (17 U.S.C. § 512), Deep argues the Aimster system is a service – an “internet *service* provider.” Opening Brief at 34. Regardless of Deep’s characterization, the Aimster system is not entitled to the DMCA limitation on liability.

In enacting the DMCA, Congress was concerned with the ability to protect against on-line piracy: “Due to the ease with which digital works can be copied and

distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet *without reasonable assurance that they will be protected against massive piracy.*” S. Rep. No. 105-190 at 8 (1998)(emphasis added). For that reason, the DMCA intended “to exclude sophisticated pirate directories – which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted – from the safe harbor.” *Id.* at 48. Thus, “[t]he DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence, *i.e.*, at the moment it becomes aware that a third party is using its system to infringe.” *ALS Scan*, 239 F.3d at 625. This concern was codified in § 512(d). Qualification for DMCA protection is an affirmative defense. H.R. Rep. No. 105-551, pt.1, at 26 (1998)(“a defendant asserting [a DMCA limitation on liability] as an affirmative defense . . . bears the burden of establishing its entitlement.”); *Aimster*, at *18 (“Liability protection under the DMCA is an affirmative defense and, as such, Defendants bear the burden of establishing its applicability.”). The District Court correctly determined that Aimster does not qualify for any of the DMCA limitations on liability.

1. Section 512(i) – Repeat Infringer Policy

Assuming, arguendo, Aimster is a service provider,²² it is ineligible for the protections of the DMCA unless it “adopted and *reasonably implemented* . . . a

²² The DMCA limits liability of “service providers.” Although the District Court deemed Aimster a service provider, there is a substantial question whether it so qualifies. Supp. Farmer Decl. ¶4. *See Napster I*, 239 F.3d at 1025; *A&M Records, Inc. v. Napster, Inc.*, 54 U.S.P.Q. 2d 1746, 1753 (N.D. Cal. 2000)(assuming, but declining to hold, that Napster is a “service provider”). A “service provider” is “a provider of online services or network access, or the operator of facilities therefor . . .” 17 U.S.C. § 512(k). There was no evidence Aimster provides “online services” or “network access” or is the “operator of facilities therefor.” To the contrary, access to the Aimster system requires an unrelated third party “provider of online services” and “network access.” Farmer Decl. ¶¶27-31; Supp. Farmer Decl. ¶¶4-5; Deep Decl. ¶9; Defendants’ Opposition to the Motion for Preliminary Injunction at 15-16.

policy that provides for the termination” of repeat infringing users. 17 U.S.C. § 512 (i)(1)(A)(emphasis added); *A&M Records, Inc. v. Napster, Inc.*, 54 U.S.P.Q. 2d 1746, 1753 (N.D. Cal. 2000). This provision ensures that “those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.” H.R. Rep. No. 105-551, pt. 2, at 61.

There is no evidence Deep implemented *any* repeat-infringer policy with respect to *any* part of the Aimster system. *Aimster*, at *21.²³ All the copyrighted music identified in the complaints, and that Deep repeatedly had been notified was being infringed, continuously remained available on the Aimster system. Creighton Decl. ¶¶7-18 and Exs. 8-11, 13-22. Thus, Deep did not reasonably implement a repeat infringer policy (and by allegedly encrypting files, purposely chose not to do so). Clearly, “[a]dopting a repeat infringer policy and then purposefully eviscerating any hope that such policy could ever be carried out is not an implementation as required by § 512(i).” *Aimster*, at *21; *see Napster*, 54 U.S.P.Q. 2d at 1749-50 (commenting on failure to effectively ban anonymous users).

Deep also tries to excuse his failure to implement a repeat infringer policy on the ground it “could not easily be enforced” (Opening Brief at 35), complaining that the District Court’s decision means that the limitation on liability of the DMCA never can be claimed where implementation of a repeat infringer policy is “difficult.” But the DMCA does not contain any exception to its repeat infringer termination requirement just because it would be difficult to implement (especially when the

²³ That Deep claims he could police his *website* (as distinguished from the distribution and copying components of the Aimster system) is meaningless. Opening Brief at 13-14. Each function of Aimster must be analyzed separately in determining the availability of DMCA limitation on liability. 17 U.S.C. § 512(n); *Napster*, 54 U.S.P.Q. 2d at 1753.

alleged difficulty is a result of the service provider's own actions). Service providers who want the protections of the DMCA (limitation on liability) must pay its price (implementing a repeat infringer termination policy).²⁴

2. Section 512(a) – Conduit

Contrary to Deep's contorted reading, section 512(a) applies only to activities "in which a service provider plays the role of a *'conduit'* for the communications of others." H.R. Rep. No. 105-551, pt. 2 at 51 (1998)(emphasis added); *Napster*, 54 U.S.P.Q. 2d at 1752. It is applicable only if "the material is transmitted through the system or network without modification of its content." Aimster-aided infringement is not transmitted "through the [Aimster] system." *Aimster*, at *21-22; see *Napster*, 54 U.S.P.Q. 2d at 1751 ("even if each user's Napster browser is part of the system, the transmission goes from one part of the system to another, or between parts of the system [all via the Internet, not through Napster's server], but not 'through' the system"); Farmer Decl. ¶¶27-28; Supp. Farmer Decl. ¶¶4-5.

But even assuming information did pass "through" the Aimster system, it does not do so "without modification of its content," as section 512(a) requires. *Aimster*, at *22 n.19 ("by Defendants' own admission, Aimster *does* modify the content: Aimster encrypts all the information that is transferred between users")(emphasis in original).

²⁴ Deep's reliance (in a footnote) on the anti-circumvention prohibitions of 17 U.S.C. § 1201 as justification for not implementing a repeat infringer policy, is without merit. Opening Brief at 12, n.1. Section 1201 is designed to *prevent infringement* by prohibiting trafficking in tools designed to circumvent a technology implemented by a copyright owner to control access to a copyrighted work. *Reimerdes*, 111 F. Supp. 2d at 316 ("Section 1201(a)(1), governs '[t]he act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work"). It was not intended to protect the knowing facilitation of infringement. Moreover, Deep's brief mention of criminal prosecution under 18 U.S.C. §§ 2511 and 2512 is unexplained and unsupported.

3. Section 512(d) – Information Location Tools

Section 512(d)'s limitation on liability applicable to “information location tools”²⁵ is unavailable for at least two reasons: (1) Deep had knowledge of the infringing activity encouraged and enabled on the Aimster system, and (2) Deep received a financial benefit directly attributable to the infringing activity and has the right and ability to control such activity.

First, Deep has actual and constructive knowledge of the infringing activity. *See* Part I.A.; § 512 (d)(1)(A)-(C) (512(d) unavailable to defendant that has “actual knowledge that the material or activity is infringing,” or that is “aware of facts or circumstances from which infringing activity is apparent”); *ALS Scan*, 239 F.3d at 625 (the DMCA’s limitations on liability are “not presumptive, but granted only to ‘innocent’ service providers who can prove they do not have actual or constructive knowledge of the infringement”). Deep invites the Court to adopt a novel standard, requiring “specific knowledge of specific activity,” that is inconsistent with the plain language of section 512(d). *See* § 512(d)(1)(A) (“knowledge of material *or* activity” that is infringing); *see also* 17 U.S.C. § 512 (d)(3)(defendant need only be provided with “information *reasonably sufficient* to permit the service provider to locate [infringement]”) (emphasis added); § 512 (c)(3)(ii)(only representative list of infringements need be provided). But even if the knowledge standard were more

²⁵ Information location tools, like Yahoo!, serve as “card catalogues” to the World Wide Web, and enable users to find the information they need by categorizing hundreds of thousands of on-line locations and filtering out irrelevant and offensive material. *See* H.R. Rep. 105-551, pt. 2 at 58 (1998). As the District Court determined, Deep would not qualify for this limitation on liability, even assuming specific aspects of the Aimster system are an information location tool, because all other aspects of the system would not be subject to section 512(d). *See* 17 U.S.C. § 512(n).

stringent than the statutory language denotes, Deep had knowledge that specific music was being infringed on the Aimster system.²⁶

Deep also (and independently) is disqualified from section 512(d)'s limitation on liability because Aimster "receive[s] a financial benefit directly attributable to the infringing activity" and "has the right and ability to control such activity." *See* Part I.B.; § 512(d)(2)(service provider having "the right and ability to control such activity" and "receiving a financial benefit directly attributable to the infringing activity" not qualified for limitation on liability); *Napster*, 114 F. Supp. 2d at 919 n.24; *see also* H.R. Rep. No. 105-551, pt. 2, at 25-26 (1998)("financial benefit standard in Subparagraph (B) is intended to codify and clarify the direct financial benefit element of vicarious liability . . . The 'right and ability to control' language in Subparagraph (B) codifies the second element of vicarious liability").

Deep nevertheless contends he does not receive the requisite financial benefit because the infringing user makes a monthly payment. Opening Brief at 41. However, the legislative history he relies upon destroys this argument. "In general, a service provider *conducting a legitimate business* would not be considered to receive a financial benefit . . . where the infringer makes the same kind of payment as noninfringing users." Opening Brief at 39 (citing legislative history, emphasis added). The Aimster system is not a "legitimate business." Deep's business model, including "Club Aimster," was to charge a fee to facilitate infringement. *See* Part I.B.2.

²⁶ Deep misplaces reliance on the section 512(d)(1)(C) "take down" provisions, requiring that access to infringing "material" be disabled. He did not do so. Opening Brief at 38. Additionally, sections 512(d)(1)(A), (B), and (C) are independent requirements – a service provider is liable unless he complies with all three sections.

Deep also asserts that the limitations on liability of the DMCA serve no purpose if they can be invoked only by the “innocent.” However, the DMCA was not designed to provide refuge for knowing infringers. It provides a safety net for those whose technology otherwise might commit unintentional infringement. Deep’s interpretation would mean that a knowing facilitator of mass infringement is immune from liability, a result that defies logic.

II. The District Court Properly Balanced the Harm to the Parties.

Likelihood of success on a copyright infringement claim establishes a presumption of irreparable harm. *Ty, Inc. v. GMA Accessories, Inc.*, 959 F. Supp. 936, 944 (N.D. Ill.), *aff’d*, 132 F.3d 1167 (7th Cir. 1997). Deep failed to rebut this presumption. *Aimster*, at *26. Further, the Copyright Owners proved that the copying and distribution of their music was causing irreparable harm. Every act of infringement over the Aimster system can result in tens or hundreds of thousands of infringements. *Reimerdes*, 111 F. Supp. 2d at 331-32 (describing on-line viral distribution). The Copyright Owners showed that the same copyrighted works owned by them and identified in their complaints (among innumerable others) remained available on the Aimster system. Creighton Decl. ¶¶16,17 and Exs. 16, 17; *see* Bodenstein Contempt Decl. ¶3; Creighton Contempt Decl. ¶4.²⁷ They also showed that newly-released and top-selling music was available on the Aimster system. Creighton Decl. ¶18 and Exs. 18-22; *see* Bodenstein Contempt Decl. ¶2; Schafer Contempt Decl. ¶4. The Copyright Owners spent enormous sums and years of effort to develop a market for digital distribution of their music. Agnew Decl. ¶¶6-9; Cottrell Decl. ¶¶9-19; Eisenberg Decl. ¶¶11-21; Leak Decl. ¶¶8-13; Ostroff Decl. ¶¶11-22; Seklir Decl. ¶¶9-15; Vidich Decl. ¶¶8-12; *see* Sanders Decl. ¶¶14-18. *See*

²⁷ The declarations of Bodenstein, Creighton, and Schafer were filed on November 20, 2002, in support of Plaintiffs’ Motion for Order to Show Cause Re Contempt.

also Napster I, 239 F.3d at 1016-17. Deep has been providing that music, the very foundation of the Copyright Owners' business, for free. *See Napster I*, 239 F.3d at 1015 ("Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads."); *Napster*, 114 F. Supp. 2d at 912.

Balanced against this harm is Deep's desire to continue a business grounded on infringement. Deep claims the Preliminary Injunction "destroyed a business." Opening Brief at 40. The District Court correctly rejected this argument. The Preliminary Injunction does not prevent the operation of a legitimate business, so long as Deep does not enable the distribution and copying of the Copyright Owners' works. Deep could continue to post the Aimster website, administer chat rooms, and sell merchandise. *See Napster I*, 239 F. 3d at 1019 ("plaintiffs did not seek to enjoin . . . noninfringing use of the Napster's system, including: chat rooms, message boards and Napster New Artist Program"); *Re/Max*, 272 F.3d at 432-33 ("Cook argues that the injunction would 'put [her] out of business.' Cook's melodramatic interpretation of the impact of the injunction is without merit. The injunction does not prohibit Cook from maintaining relationships with existing clients or developing relationships with new clients – it only requires her to remove Re/Max logos."). And, if Deep implemented filtering technologies to prevent infringement, he could operate the entire Aimster system.

Acceptance of an infringer's "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); *see Atari*, 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”)(citation and quotation omitted); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983)(reversing order that considered the “devastating effect” an injunction would have on defendant’s business; “If that were the correct standard, then a knowing infringer would be permitted to construct its business around its infringement, a result we cannot condone”)(citations omitted).²⁸

The District Court did not abuse its discretion in determining the balance of the harms favored the Copyright Owners.

III. The District Court Properly Considered the Public Interest.

A preliminary injunction enforcing the Copyright Act is in the public interest. *Autoskill Inc. v. Nat’l Educ. Support Sys. Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993). “[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work.” *Apple*, 714 F.2d 1240 at 1255. The District Court applied this principle. *Aimster*, at *26 (“the public interest is served by upholding copyright protections against those who would seek to misappropriate protected works”); *see Harper & Row Pub., Inc. v.*

²⁸ *Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr.*, 684 F.2d 1346, 1350-51 (7th Cir. 1982) and *WarnerVision Enter. Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261-62 (2d Cir. 1996) cited by Deep (Opening Brief at 40) did not involve copyright infringement. The *Dos Santos* Court found the district court erred in shutting down a business because “significant hardships outweigh the somewhat speculative and in most respects completely compensable” harm to plaintiffs. Here, the Copyright Owners’ harm is neither speculative nor compensable. The *WarnerVision* Court reversed a preliminary injunction because the district court applied the incorrect law.

Nation Enter., 471 U.S. 539, 558 (1985)(“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and Useful Arts.”)(quotations omitted).

IV. The Preliminary Injunction is not Vague or Overbroad.

In claiming the Preliminary Injunction is vague and overbroad, Deep improperly argues issues never raised in the District Court. *See Retired Chicago Police Ass’n v. City of Chicago*, 76 F.3d 856, 870 (7th Cir. 1996). Nor did he raise them when the District Court provided the opportunity to object to the proposed preliminary injunction. Second Deep Decl. In any event, the Preliminary Injunction contains language typical in copyright injunctions. *See, e.g., Abdallah*, 948 F. Supp. at 1460; *Sega I*, 857 F. Supp. at 690-691; *Walt Disney Co. v. Video 47, Inc.*, 972 F. Supp. 595, 604 (S.D. Fla. 1996); *Central Point Software, Inc. v. Nugent*, 903 F. Supp. 1057, 1060 (E.D. Tex. 1995). None of Deep’s arguments, discussed below, is well taken.

First, Deep exaggerates the requirements of the Preliminary Injunction. Opening Brief at 42. The Preliminary Injunction requires Deep to stop facilitating infringement of the Copyright Owners’ works. Nothing precludes Deep from operating a legitimate business, let alone from “turn[ing] on his computer.”

Second, Deep contends the Preliminary Injunction is based on a “false premise” that “users of the system ha[ve] engaged in direct copyright infringement.” Opening Brief at 43. Not only does overwhelming evidence support the finding of direct infringement on the Aimster system, but Deep has conceded as much. *Aimster*, at *10. The record also belies Deep’s unsupported statement that there is “no evidence

that Defendants possibly could prevent the alleged infringing activities from occurring.” Opening Brief at 43. As discussed above, Deep finally conceded he could stop the infringement, arguing only that doing so would be “difficult” or “impractical.” Second Deep Decl. at 5; First Compliance Report at conclusion. *See Napster II*, 284 F.3d at 1096 (Napster implemented some filtering of copyrighted works).

Third, the Preliminary Injunction does not preclude protected speech. Opening Brief at 44. *See Harper*, 471 U.S. at 558 (“it should not be forgotten that the Framers intended copyright itself to be the engine of free expression”); *Napster I*, 239 F.3d at 1028 (“[unauthorized] uses of copyrighted material that are not fair uses are rightfully enjoined” and not a violation of the First Amendment); *Cable/Home Comm. Corp. v. Network Prod., Inc.*, 902 F.2d 829, 849 (11th Cir. 1990)(“the [F]irst [A]mendment is not a license to trammel on legally recognized rights in intellectual property”)(citation and quotation omitted).²⁹

Fourth, the Preliminary Injunction does not require Deep to shut down his “technology” and is not a blanket order enjoining any party from “violating the statute.” Opening Brief at 45-48. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 515, 517-20 (9th Cir. 1993)(affirming injunction barring “copying, disseminating, selling, publishing, distributing, loaning, or otherwise infringing [plaintiff’s] copyrighted works”); *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981)(injunction preventing defendant from “rendering any public

²⁹ *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975)(“the right to a fair trial, . . . must take precedence over the right to make comments about pending litigation by lawyers who are associated with that litigation”) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)(peaceful distribution of leaflet protected by the First Amendment)(Opening Brief at 44), are inapposite.

performances . . . which would infringe plaintiff's copyrighted musical compositions"); *see also Napster II*, 284 at 1097 (“[w]e do not set aside injunctions under this rule unless they are so vague that they have no reasonably specific meaning”)(citation and quotation omitted). The Preliminary Injunction permits Deep to continue noninfringing operations. It was only after Deep refused to comply that the District Court ordered him to shut down the Aimster system pending compliance. *See Napster II*, 284 F.3d at 1095 (affirming shut-down order).

Fifth, Deep claims it is the copyright owners' "burden to identify the copyrighted works that are being infringed as a prerequisite to receiving the benefit of injunctive relief." Opening Brief at 48. The law is to the contrary. Deep can be enjoined from infringing any and all of the Copyright Owners' works. *See, e.g., Pacific & So. Co., Inc. v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984) (injunction is not limited to works identified in lawsuit); *Walt Disney Co. v. Powell*, 897 F.2d 565, 567-68 (D.C. Cir. 1990) (“it is appropriate to permanently enjoin the future infringement of [all] works owned by the plaintiff”); *Canopy Music, Inc. v. Harbor Cities Broad., Inc.*, 950 F. Supp. 913, 916 (E.D. Wis. 1997)(enjoining radio station “from performing any songs to which ASCAP possesses the right to license”); *see also Columbia Pictures Indus., Inc. v. Babella*, 1996 WL 328015, at *4 (N.D. Ill. June 11, 1996)(enjoining infringement of any of plaintiffs' works). In any event, the Copyright Owners have identified thousands of their copyrighted works infringed on the Aimster system.

V. An Evidentiary Hearing was Neither Necessary nor Required.

“There is no general requirement that a district judge hear live testimony or conduct a hearing at all” in connection with a motion for preliminary injunction. *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d at 577; *see Syntex Ophthalmics, Inc.*

v. Tsuetaki, 701 F.2d 677, 682 (7th Cir. 1983)(rejecting argument that preliminary injunction order should be stayed for lack of an evidentiary hearing); *see also Napster I*, 239 F3d at 1026 n.7 (“court did not abuse its discretion in [] refusing to conduct an evidentiary hearing”).

Deep’s citations are not to the contrary. “[I]n any case in which a party seeks an evidentiary hearing, he must be able to persuade the court that the issue is indeed genuine and material and so a hearing would be productive – he must show in other words that he has and intends to introduce evidence that if believed will so weaken the moving party’s case as to affect the judge’s decision on whether to issue an injunction.” *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997)(evidentiary hearing unnecessary; only evidence defendant sought to submit was testimony of person whose affidavit already was in evidence); *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 38-39 (7th Cir. 1981)(“in those cases where everything depends on what happened and that is in sharp dispute,” an evidentiary hearing is necessary); *General Elec. Co. v. American Wholesale Co.*, 235 F.2d 606, 609 (7th Cir. 1956)(preliminary injunction denied because the “crucial question of fact was hotly contested”).

Deep never requested an evidentiary hearing before the Bankruptcy Court prohibited one (after the motion for preliminary injunction was fully briefed). And, the only reason an evidentiary hearing was foreclosed was because, as a tactic, Deep filed for bankruptcy.³⁰ When Deep finally did request an evidentiary hearing (6 months after the preliminary injunction motion was filed), he never identified any

³⁰ When his bankruptcy case no longer benefited him (and an automatic stay no longer was needed), Deep dismissed it.

genuine material issue demonstrating an evidentiary hearing would be productive. *See Ty*, 132 F. 3d at 1171.³¹

In any event, an evidentiary hearing would not have changed the outcome. “[G]iven the length and comprehensive nature of the parties’ submissions, an evidentiary hearing was unnecessary.” *Aimster*, at *8. The District Court considered thousands of pages of declarations and documents. *Aimster*, at *1 n.2. Ultimately, the bulk of the critical evidence was incontrovertible. Indeed, perhaps the most incriminating evidence came from Aimster users, “Club Aimster,” and Deep himself. Creighton Decl. Exs. 1, 4-7, 12; Forrest Decl. Exs. 1-2, 8, 15, 19. Just like Napster, Aimster – the self proclaimed “next Napster” – properly was enjoined from continuing its infringement of the Copyright Owners’ works.

³¹ And, although Deep now contends that knowledge of the Aimster system’s operation was crucial, when the District Court requested from both parties the opportunity to log on to the Aimster system and view its operation, Deep flatly refused. Defendants’ Objection to the In Camera Review, filed June 21, 2002.

Conclusion

As one court aptly put it, “[t]he complex marvels of cyberspatial communication may create difficult legal issues; but not in this case.” See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000). It is respectfully submitted that the District Court’s order should be affirmed.

Dated April 14, 2003.

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CIRCUIT RULE 31(e) CERTIFICATION

I, Bradley S. Rochlen, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the Plaintiffs-Appellees Brief in a non-scanned PDF format. I further certify that a digital version of the brief has been sent to all parties listed on the Certificate of Service on a virus-free disk.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C)(i), I, Bradley S. Rochlen, certify that the foregoing Brief of the Plaintiffs-Appellees contains 13,744 words, including headings, footnotes and quotations. The brief complies, therefore, with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B)(i).

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INDEX TO DOCUMENTS REFERENCED IN APPENDIX

<u>Exhibit No.</u>	<u>Description of Item</u>	<u>Record Entry No.</u>	<u>Appendix Page No.</u>
1.	Sample Screen Shots from Declaration of Frank Creighton in Support of Plaintiffs' Motion for Preliminary Injunction, Exhibits 15, 22 (filed on January 2, 2002)	ROA 97 M.C., Ex. C ¹	1
2.	Sample Screen Shots from Declaration of Katherine B. Forrest in Support of Plaintiffs' Motion for Preliminary Injunction, Exhibit 19 (filed on January 2, 2002)	ROA 97 M.C., Ex. I	3
3.	Transcript of Motion Hearing Before Honorable Robert E. Littlefield, United States Bankruptcy Court Judge dated May 28, 2002	N/A	10

¹ "M.C." refers to the Motion to Correct the Record on Appeal, filed in the District Court on March 3, 2003 and granted by Judge Aspen on March 5, 2003. The Motion to Correct the Record on Appeal contained two volumes of exhibits tabbed A through X. These volumes were forwarded to the Court of Appeals for the 7th Circuit on March 7, 2003.