

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ABOVEPEER, INC.

Plaintiff,

__ Civ. __

against-

COMPLAINT

**TRIAL BY JURY
DEMANDED**

RECORDING INDUSTRY ASSOCIATION OF
AMERICA, INC.,

Defendant.

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Plaintiff, AbovePeer, Inc. by its attorneys, Boies, Schiller & Flexner LLP, alleges for its complaint as follows:

THE PARTIES

1. AbovePeer, Inc. (“AbovePeer”) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the County of Albany, New York.

2. Upon information and belief, Defendant Recording Industry Association of America, Inc. (“RIAA”) is a New York not-for-profit corporation with a place of business at 1330 Connecticut Avenue, NW, Washington D.C. 20036. It represents the major national and multi-national corporations that manufacture and distribute sound recordings.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the Copyright Act, 17 U.S.C. § 101 et. seq. This Court also has supplemental jurisdiction of the state law claims pursuant to 28 U.S.C. § 1367.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) (1) and (c) because Defendant resides in this District; pursuant to § 1391 (b) (2) because a substantial part of the events giving rise to this action occurred in this District; and pursuant to § 1400 (a) because this is an action relating to copyrights and Defendant resides and is found in this District.

FACTS

5. AbovePeer is an Internet service provider that offers the Aimster service (“Aimster”) to the general public. Aimster is a provider of a digitally-signed service that can be downloaded, free of charge, by any user anywhere in the world, with a computer and a modem. Aimster enables users to store, view and search diverse types of computer files, such as text files, photographs, music files and many others across an encrypted network in “real time” that ensures the privacy of the files and messages exchanged by the users.

6. One of the unique features of Aimster is that it inter-operates with instant messaging systems offered by a variety of companies such as America Online, the Microsoft Corporation and Yahoo. Users of instant messaging systems commonly referred to as “buddies” can designate other “buddies” with whom they can exchange messages. Aimster allows individuals to actually transfer files stored on their computer hard drives across the encrypted Aimster network.

7. Because of its encryption technology, Aimster can also enable its users to create their own unique digital signatures. Each user eventually will be provided with a private “key” that is unique to that user. The Digital Signature is being designed to qualify under New York State’s Electronic Signatures and Records Act, N.Y. State Technology Law § 101 *et. seq.* and the European Union’s Electronic Signature Directive enacted on December 13, 1999, which is required to be implemented in full by the Member States of the European Union by July 2001.

8. The administrator, or creator, of each private network using Aimster has the ability to limit access to its network to a few users or to many. AbovePeer does not determine access; it merely provides the means by which members of each network can exchange files.

9. AbovePeer has no ability to censor, control, or modify encrypted information or data that one user of the Aimster service sends to another user. Moreover, AbovePeer does not store information or data that is exchanged through any of the networks using Aimster. Further, AbovePeer does not initiate any transfer of information or data.

10. AbovePeer has created the equivalent of an office network without walls. As in an office network, the information or data that is communicated within the network is solely the choice of the users of the network.

11. On or about January 26 2001, AbovePeer filed a designation of agent pursuant to the terms of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512, with the United States Copyright Office. AbovePeer also has adopted a procedure pursuant to the DMCA § 512(c), by which copyright owners may notify Aimster’s agent of any alleged infringement of copyrighted subject matter by anyone using the Aimster program. AbovePeer

has also adopted and implemented a copyright compliance policy pursuant to 17 U.S.C. § 512 (i) which informs its subscribers of Aimster's policy providing for termination of subscribers who are repeat copyright infringers.

12. The Aimster service attracted substantial press in the media and representatives of various member companies of RIAA were quoted in the press as having knowledge of the Aimster service as early as the September, 2000.

13. RIAA has recently threatened AbovePeer with litigation unless it prevents users of the Aimster service from transferring files among themselves that may contain copyrighted musical compositions owned by RIAA members.

14. RIAA, however, has failed to provide any notice to AbovePeer of (a) the title of any alleged infringed works; (b) the name of any recording artist performing a work which has allegedly been infringed; (c) the name of particular any file on Aimster containing the alleged infringing works; and (d) any certification that RIAA or its members own or control any of the rights in works allegedly infringed.

15. Further, upon information and belief, RIAA has not complied with the notification provisions of the DMCA 17 U.S.C. § 512(c) in that it has not sent a sworn, written communication to AbovePeer's designated agent (a) identifying the copyrighted works alleged to have been infringed; (b) identifying the material claimed to be infringing the subject works and (c) providing "information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number and if available an electronic mail address at which the complaining party may be contacted" § 512(c)(3).

FIRST CAUSE OF ACTION

(No Copyright Infringement)

16. The operation of the Aimster service is not a violation of the copyright of any member of RIAA, or of any other person or entity.

SECOND CAUSE OF ACTION

(AbovePeer's Actions Are Immunized Under the DMCA)

17. AbovePeer's actions, even if otherwise a violation of United States Copyright Act, are immunized by the Digital Millennium Copyright Act.

THIRD CAUSE OF ACTION

(Innocent Infringement)

18. Any alleged infringement by AbovePeer was done with innocent intent and without any belief that any acts of AbovePeer constituted an infringement of copyright.

FOURTH CAUSE OF ACTION

(Laches)

19. Even if AbovePeer's actions constitute a violation of United States Copyright Act, any claim by RIAA or any of its members, or any person or entity claiming violation of copyright, is barred by laches.

FIFTH CAUSE OF ACTION

(Unclean Hands)

20. Even if AbovePeer's actions constitute a violation of United States Copyright Act, any claim by RIAA or any of its members, is barred by unclean hands.

SIXTH CAUSE OF ACTION

(Fair Use)

21. The operation of the Aimster program constitutes fair use under the United States Copyright Act.

SEVENTH CAUSE OF ACTION

(No State Law Claims)

22. The operation of the Aimster program does not violate any state common law or statutory rights of RIAA or any of its members, or of any other person or entity.

WHEREFORE, AbovePeer demands judgment pursuant to 28 U.S.C. § 2201(a) declaring that it has no obligation or liability to the Recording Industries of America, or any of its members, and seeks the costs and disbursements of this action, including attorneys' fees, and such other and further relief as the Court may deem just and proper.

Dated: April 30, 2001
Albany, New York

BOIES, SCHILLER & FLEXNER LLP

By: _____

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