

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC  
RECORDING CORPORATION; BMG MUSIC;  
CAPITOL RECORDS, INC.; ELEKTRA  
ENTERTAINMENT GROUP INC.;  
INTERSCOPE RECORDS; LAFACE  
RECORDS LLC; MOTOWN RECORD  
COMPANY, L.P.; PRIORITY RECORDS LLC;  
SONY BMG MUSIC ENTERTAINMENT;  
UMG RECORDINGS, INC.; VIRGIN  
RECORDS AMERICA, INC.; and  
WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

LIME GROUP LLC; LIME WIRE LLC; MARK  
GORTON; GREG BILDSON, and M.J.G. LIME  
WIRE FAMILY LIMITED PARTNERSHIP

Defendants.

CIVIL ACTION NO. 06 CV. 5936  
(GEL)

**STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1(a)  
IN SUPPORT OF DEFENDANT LIME WIRE LLC'S  
MOTION FOR SUMMARY JUDGMENT**

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REDACTED VERSION – COMPLETE VERSION FILED UNDER SEAL

Pursuant to Rule 56.1(a) of the Local Rules of the United States District Court for the Southern District of New York, Defendant Lime Wire LLC (“LW”) contends that there is no genuine issue to be tried with respect to the following material facts:

**I. The LimeWire Software and How It Works**

1. The LimeWire client software provides its users with the ability to share computer files with each other, and with users of other Gnutella-compliant client software, over the Internet. For example, using LimeWire software, a user can make photos, movie files, audio files, computer software, word processing documents, and any other kind of computer file available for other users to find and download. Declaration of Dr. Steven Gribble (“Gribble Decl.”) at ¶ 10.

2. Napster was commonly described as a peer-to-peer file-sharing application, and indeed a substantial part of how it worked took advantage of a decentralized, peer-to-peer architecture. However, Napster in fact had a hybrid architecture, as its search functionality was centralized. When connecting to the Napster service, a Napster client uploaded to Napster’s centralized servers a list of files the client possessed and was willing to share. When a user searched for a file, the user’s client software sent a query to the Napster server, which then looked through the lists of files that clients had previously reported to it in order to find a match. (This aggregate list of files available through Napster is commonly called an “index.”) The server then returned a list of matching files, and the IP addresses of the Napster clients that possessed them. Gribble Decl. at ¶ 25.

3. To transfer files, Napster clients communicated directly with each other. The client that wanted to download the file initiated a network connection to one or more

clients that possessed the file, and the file was then transferred over this direct connection. Thus, while searching was centralized in Napster, file transfers were implemented in a decentralized, peer-to-peer fashion. Gribble Decl. at ¶ 26.

4. Because Napster clients had to rely on the centralized Napster servers when searching for files, and because clients reported the list of files they were sharing to those servers, it was possible for the operators of Napster to monitor and control the activities of its users. Gribble Decl. at ¶ 27.

5. Not all hybrid peer-to-peer architectures enable monitoring and control of user activity. For example, the LimeWire file-sharing software, which incorporates more recent versions of the Gnutella protocol and specification, takes advantage of a new architectural component called an “ultrapeer.” An individual Gnutella peer can choose to promote itself to become an ultrapeer. Ultrapeers provide service to a relatively small number of Gnutella peers; a peer that uses the services of an ultrapeer is called a “leaf” of that ultrapeer. Gribble Decl. at ¶ 28.

6. An ultrapeer acts in a manner somewhat reminiscent of Napster’s centralized servers, in that it manages searches on behalf its leaf peers. However, instead of an ultrapeer indexing all files from all peers participating in the Gnutella network, an ultrapeer learns a small amount of information about the files made available by its leaves. Using this information, the ultrapeer routes queries between its leaves, and also potentially forwards queries on to other ultrapeers within the Gnutella network. Gribble Decl. at ¶ 29.

7. Ultimately, ultrapeers reduce the number of hosts with which a peer must communicate in order to find a file, and as a result, ultrapeers increase the efficiency,

performance, and scalability of the Gnutella network. An ultrapeer does not, however, have the ability to force a peer to become its leaf, and no ultrapeer has a complete view of the entire Gnutella network. Accordingly, ultrapeers have only a very limited ability to monitor or control the behavior of peers in Gnutella. Gribble Decl. at ¶ 30.

8. The file-searching and file-sharing capabilities of LimeWire are based on Gnutella. Gnutella is an open, decentralized file-sharing network. Users that participate in the Gnutella network can make files available to others, search for files, and download files from other users on the network. Peers participating within the Gnutella network consist of privately-owned and operated computers. Gribble Decl. at ¶ 31.

9. By open it is meant that the communications protocol used within the Gnutella network is a public specification, allowing anybody who so chooses to implement Gnutella-compliant software that can participate in the network. By decentralized, it is meant that there are no centralized components that the Gnutella network relies on to operate. Instead, the network is based on a hybrid peer-to-peer architecture, and it is comprised of a vast number of voluntarily participating peers, ultrapeers, and other components. Because of Gnutella's decentralized nature, it would be virtually impossible for any one entity to monitor or control the Gnutella network or its users. Gribble Decl. at ¶ 32.

10. Gnutella is an open protocol, which means that its implementation details are publicly available for everyone to use, and its development and evolution are the result of collaboration in an open forum in which anybody can participate. Anyone can implement the protocol by creating Gnutella-compatible software (a "Gnutella client") that will enable users to access and use the Gnutella network. Because all Gnutella

clients are based on implementations of the same, open protocol, a Gnutella-compliant client will interoperate with other Gnutella-compliant clients developed by other entities, thereby forming a single, worldwide network that is described as the Gnutella network. The Gnutella protocol and network was first created in early 2000 by developers working at a company called Nullsoft, which was a subsidiary of AOL-Time Warner. Since then, the Gnutella protocol has been refined substantially to improve the performance, reliability, features, and scalability of the network. Today, there are many Gnutella-compliant software clients. Users of any one of these products can search for and share files with users of the others. Gribble Decl. at ¶ 33.

11. The decentralized, peer-to-peer nature of Gnutella has various implications for its operation:

a. First, its decentralized structure makes Gnutella robust. Because there is no central, single point of failure, the failure or termination of a single peer has virtually no impact on the continued operation of the network as a whole. Even if a majority of peers shut down, the network will most likely continue to function. Indeed, research into peer-to-peer networks has demonstrated that most of the peers that participate in the Gnutella network only remain connected for short periods of time, implying that over the period of several hours, the structure and membership in the Gnutella network undergoes significant change, all the while continuing to operate correctly. Gribble Decl. at ¶ 34.

b. Second, no one entity, including LW, has the power to control the Gnutella network or to shut it down. In a client-server based system, the central server is typically owned and operated by, or on behalf of, a specific entity (*e.g.*, Yahoo). This

entity has the ability to control the operation of the central server, and as a result, this entity can affect the operation of the service. For example, if a central server is accessed or used in an unauthorized manner, the server operator can deny access to unauthorized users, or completely shut down the server. In contrast, because the Gnutella network has a decentralized structure where all peers play similar roles, no one peer has the ability to control the network or to shut it down without the willing acquiescence of the great majority of other peers in the network. In other words, because the Gnutella network is a decentralized collection of individually owned and operated peers, it is self-organizing and self-sustaining, and operates solely based on the collective decisions of its peer members. No one entity or peer has the ability to dictate the operation of the entire network, or for that matter, to completely dictate the operation of any other peer owner/operator in the network. Gribble Decl. at ¶ 34.

12. To operate, the Gnutella client software, like LimeWire, must first “bootstrap” itself onto the Gnutella network. Once it has been bootstrapped, client software can send queries into and receive queries from the Gnutella network, and participate in the transfer of files between peers in the network. Gribble Decl. at ¶ 36.

13. Bootstrapping is the process through which a Gnutella peer finds other peers in the Gnutella network with whom it can communicate. Once a peer has been bootstrapped, it knows of a collection of other peers and ultrapeers that are willing to exchange Gnutella messages with it. A bootstrapped peer is a fully functioning member of the Gnutella network; it has grafted itself into the Gnutella network topology, and it is able to search for, download, and make available files. Gribble Decl. at ¶ 37.

14. To help peers bootstrap, the Gnutella network includes some nodes called “UDP host caches,” or UHCs, that serve to introduce peers and ultrapeers to each other. By participating in the Gnutella network, over time a UHC learns about peers, ultrapeers, and other UHCs. A peer can ask a UHC for a list of other peers and ultrapeers that the UHC knows of; using this list, the peer can then attempt to initiate a connection to one of these other peers in order to join the network. Gribble Decl. at ¶ 38.

15. Gnutella client software will typically ship with a list of UHC nodes. The first time that a user launches the software, the client will contact this initial list of UHC nodes in order to bootstrap itself. Alternatively, most Gnutella clients allow the user to manually bootstrap by typing in the DNS name or IP address of other peers and ultrapeers in the Gnutella network. Once bootstrapped, a peer uses the Gnutella protocol itself to maintain a fresh list of UHCs and other peers. As long as the user continues to use the software periodically, a Gnutella client, like LimeWire, will replenish itself with a fresh set of peers to communicate with, as well as UHCs to fall back upon. Gribble Decl. at ¶ 39.

16. When a user wants to find a file on Gnutella, the user types a search query into their Gnutella client software. On behalf of its user, the client software will send a message to its ultrapeer, asking the ultrapeer to help it find matching files. An ultrapeer uses a number of techniques to locate files within the Gnutella network that match the query. Using the “Query Routing Protocol” (“QRP”), an ultrapeer will forward the query to those of its leaf nodes that are likely to have matches. Using “Dynamic Querying” (“DQ”), an ultrapeer will slowly broaden the search by relaying the query to additional ultrapeers, and transitively, to those ultrapeers’ leaf nodes. Gribble Decl. at ¶ 40.

17. If a Gnutella peer receives a query that matches a file that it is currently sharing, the peer will generate response “query hit” messages that include “metadata” about the matching files. Metadata is simply data describing a file and its contents. For example, the metadata associated with a music file might include the file name, artist, track title, musical genre, album name, and track length. This metadata typically includes information such as the IP address of the host that has the file, the size of each matching file, the name of each matching file, a hash fingerprint of each matching file, and other type-specific information about matching files. A query hit message contains information that is intended to be displayed to the user that initiated the query, as well as information that is needed by the user’s client software to find and download the file if the user so chooses. Query hit messages flow back to the peer that initiated the query, either directly over the Internet or indirectly through the peers’ ultrapeers. Gribble Decl. at ¶ 41.

18. As the Gnutella network processes a query and returns a set of query hit messages, the user’s client software will display a list of files that match the queries the user has issued. If a user chooses to download one of those files, the Gnutella client software will initiate a transfer of the file from one or more of the peers that possess it. Gribble Decl. at ¶ 44.

19. In the simplest case, a peer that wants to download a file will initiate a network connection to one peer that has the file, causing the file to be transferred directly between these two peers. Since frequently requested files can usually be found on many peers, Gnutella clients often include the ability to transfer content via a “swarming protocol,” in which pieces of the file are downloaded concurrently from multiple remote



peers. Swarming increases the performance of transfer, since the downloader can potentially enjoy the aggregate upload rate of all of the peers participating in the swarm. Gribble Decl. at ¶ 45.

20. The Gnutella protocol itself does not provide a software distributor, such as LW with any mechanism to control or supervise acts of direct infringement. Acts of direct infringement involve the peers that transfer those files across the network. The Gnutella protocol itself does not give a software distributor, such as LW the ability to observe these acts of direct infringement, let alone to control them. Gribble Decl. at ¶ 48.

21. A Gnutella software distributor provides client software to users. Once the user has downloaded the software, the distributor need not interact with the user or the user's client software again. Thus, a Gnutella software distributor does not need to play an operational role on the Gnutella network. Gribble Decl. at ¶ 49.

22. The client software can interact with peers, ultrapeers, and UHCs run by other parties participating in the Gnutella network. If a user chooses to perform an infringing act, the user's computer and network, and the computers and networks of the peers from which the infringing file is downloaded, provide the computing resources that power the infringing transfer. Gribble Decl. at ¶ 50.

23. There is a diversity of content that is made available via Gnutella. Gnutella itself supports the publication and transfer of any kind of content; the nature of the files that are published, searched for, or transferred is determined by the users of the network and what they choose to do. In many regards, this is similar to the Web: Users can choose to make any kind of file available by placing it on their Website, and other users can elect to search for and download these files. Gribble Decl. at ¶ 51.

24. The LimeWire client software is a Gnutella- and BitTorrent- compliant client implemented in the Java programming language. There are two versions of the LimeWire software. LimeWire “basic” is free software, while the slightly enhanced LimeWire “Pro” software must be purchased. LW maintains both versions of the software. Gribble Decl. at ¶ 60.

25. The LimeWire client software has been released as open source. As a consequence, anyone can download its source code, create derivative works based on it, and either use the derivative code themselves or redistribute it to others. Several Gnutella clients are available that are derivatives of LimeWire’s code. Gribble Decl. at ¶ 62.

26. Because the source code is open, LW does not have full control over how its software gets used. For example, there is nothing preventing a technologically savvy user from downloading the source code, eliminating some features from the code base, optimizing some aspects of how the software behaves, and then compiling and running this modified software. Gribble Decl. at ¶ 63.

27. To begin using LimeWire, a user must first download a LimeWire installer program to her computer, and then execute the installer, which can be downloaded by visiting the “Download.com” website (at <http://download.com>) that is owned and operated by CNET Networks, Inc. In addition to being available through Download.com, the LimeWire installer can also be accessed from LW’s website. Once the user has downloaded the LimeWire installer, the user must launch the installer. The installer places various files in different folders on the user’s computer. At this point, the user can go ahead and launch the LimeWire client software itself. Gribble Decl. at ¶ 65.

28. When the user launches the software for the first time, the LimeWire client presents the user with a series of configuration screens, culminating in a dialog box asking the user to agree not to commit copyright infringement. The user is unable to begin using the LimeWire client software until the user has agreed not to commit copyright infringement. Gribble Decl. at ¶ 66.

29. File-sharing activity begins when a user initiates a search for a file. To initiate a search, the user types a search string into the “search” box on the LimeWire user interface. The search string consists of a string of words to describe the file that the user wants to find on the Gnutella network. For example, a user might type in the word “Shakespeare” to try to find documents that contain the works of William Shakespeare. In addition to containing a list of general words to match, a user of LimeWire may also generate searches for files that have specific attributes (or “metadata”), such as a search for a text document with a particular title, or an audio file from a particular artist. The LimeWire user interface allows a user to indicate what type of file to search for, and for each file type (such as text, audio, and video), the user interface contains a list of attributes that can be searched against. Gribble Decl. at ¶ 68.

30. The sending and receiving of query and query hit messages in connection with searching the Gnutella network is a fundamental element of the Gnutella network protocol and is part of the inherent functioning of the Gnutella network. No interaction with LW servers is required for these messages to be exchanged between Gnutella peers. None of the query or query hit messages generated as a result of searches conducted by voluntarily-participating Gnutella peers (including LimeWire peers) are reported or

relayed to LW servers. LW has no ability to monitor or control the content of these messages. Gribble Decl. at ¶ 70.

31. Each query hit message that flows back to a LimeWire peer contains the file name of a candidate matching file, the IP address of the hosting peer, and other metadata. If the LimeWire user initiates a download of a candidate matching file, LimeWire uses this IP address to create a temporary Internet connection directly between the LimeWire peer and the hosting peer (*i.e.*, the peer hosting the file to be downloaded). LimeWire uses this temporary Internet connection to transfer the file from the hosting peer to the LimeWire peer. This transfer is accomplished using “HTTP,” the standard WorldWide Web file transfer protocol. Gribble Decl. at ¶ 71.

32. No interaction with the LW servers is required in order for a user of LimeWire to carry out the file sharing operations described above. In LimeWire’s default configuration, no information relating to file searches or transfers between Gnutella peers will flow to any servers operated by LW. As a consequence, LW has no ability to monitor or control file downloads performed by LimeWire peers in their default configuration. Gribble Decl. at ¶ 72.

33. The LimeWire client software, like all Gnutella clients, must make a number of engineering decisions about how it interacts with the Gnutella network. For example, the LimeWire client must decide how many ultrapeers to connect to, and it must tune a parameter that affects how accurately an ultrapeer can determine whether a particular leaf is likely to have files that match a query. The LimeWire source code contains many parameter settings for these and other engineering issues. Gribble Decl. at ¶ 74.

34. LimeWire clients have the ability to receive “viral messages” through the Gnutella network itself. A viral message contains new parameter settings that LimeWire clients should adopt. To protect against malicious parties from forging harmful viral messages, each viral message is cryptographically signed, ensuring that only LW (or its authorized parties) are able to create viral messages that LimeWire clients will accept. Thus, to change parameters on its clients, LW can inject a signed viral message into the network, and eventually all active LimeWire clients will learn of and adopt the parameter changes specified within the message. Gribble Decl. at ¶ 76.

35. There are many kinds of parameter changes that can be set in a viral message. Broadly speaking, viral messages can affect: (i) Gnutella network parameters that affect performance and reliability; (ii) filter settings, including lists of “blacklisted” peers that are known to behave in a hostile manner; (iii) some operational aspects of the client software, such as a list of IPs that are permitted to crawl the network and gather statistics about the number of connections each peer maintains; and, (iv) user interface elements such as pictures or URLs that are displayed to users at various times. Gribble Decl. at ¶ 77.

36. Viral messages give LW a limited ability to affect how its deployed clients interact with the Gnutella network. This mechanism does not give LW the ability to monitor or control the activities of its users. Instead, it gives LW the ability to tune various performance and operational aspects of client interactions with the network. Gribble Decl. at ¶ 78.

37. From time to time, a new version of the LimeWire client software becomes available. The LimeWire client contains an “in-network update” mechanism; a

viral message can notify a client that a software update is available, and the client can find and download a copy of the software update using the Gnutella network itself. Using these two mechanisms (a viral message with an update notification and the “in-network” transfer of the update using the Gnutella network itself), LW can cause a new version of the client software to be pushed out to user’s hosts quickly and efficiently. Gribble Decl. at ¶ 80.

38. The LimeWire client is capable of discovering and downloading a software update automatically. However, once the update has been downloaded, the user is notified of the update and given the opportunity to approve or reject the installation of the update. Thus, LW does not have the ability to force an update installation on its users; the user has complete control over whether updates are installed. The fact that the LimeWire client downloads the update automatically serves as a performance optimization, but the downloaded update is only installed with the consent of the user. Gribble Decl. at ¶ 81.

39. LW does not operate any services that are necessary for a LimeWire client to interact with the Gnutella network, assuming that the LimeWire client has made it past its initial post-installation “bootstrap.” Gribble Decl. at ¶¶ 93-95.

40. The LimeWire software application is a tool that allows users to connect and communicate with other people over the Gnutella network. The Gnutella network is “self-organizing,” in that users communicate with each other without assistance from any central server or network, including LW. LW does not operate any computers, software programs or services or perform any function to support the function of the Gnutella network. Declaration of Sam Berlin (“Berlin Decl.”) at ¶ 4.

41. LimeWire is a peer-to-peer software application that allows users to connect with others on the Gnutella network to exchange all sorts of digital files. It is content agnostic which means that the file-sharing capabilities of LimeWire do not favor one form of file over another. There are several other Gnutella-based software programs that interact with LimeWire to form the Gnutella network, including FrostWire, Morpheus) and Shareaza. These programs independently join together to form a network of millions of interconnected but independently-owned and controlled computers which comprise the Gnutella network. LimeWire is designed to interact with other computers on the user-created Gnutella network. Berlin Decl. at ¶ 5.

42. LimeWire is distributed in two versions: a free version called Basic and a paid-for version called Pro. Basic and Pro essentially operate in the same fashion except that the Pro version includes a few minor enhancements that allow users the ability to locate files easier and download files more quickly. Pro users also have access to technical support. Berlin Decl. at ¶ 6.

43. If a person wishes to download LimeWire, it can obtain it from several sources. First, a person can download the software directly from LW's website (in fact, this is the only location to purchase a Pro version). Second, one can download it from certain websites over the Internet such as Download.com, which offers for downloading hundreds of software applications typically free of charge. A third source would be other locations over the Internet, such as oldversion.com. Also, in the past, LW has distributed certain versions via CD-ROM. Berlin Decl. at ¶ 7.

44. LimeWire users may search for and share any kind of computer file (including text, images, audio, video, and software files) with any other user of the

Gnutella network regardless of whether the other users are running the LimeWire software application or some other Gnutella-based application, such as FrostWire. Berlin Decl. at ¶ 8.

45. There are a number of ways a user can locate other computers on the Gnutella network. The initial search for another computer connected to the Gnutella network is known as “bootstrapping,” because the computer must locate another computer without first knowing the location of that computer; effectively “pulling” itself onto the Gnutella network “by the bootstraps.” Berlin Decl. at ¶ 10.

46. LimeWire can “bootstrap” in two ways; by “entering an IP address,” or by contacting a “hostcache.” Berlin Decl. at ¶ 11.

47. First, a LimeWire user can connect to the Gnutella network by typing in the IP address of another computer connected to the Gnutella network. The user obtains the IP address by “plain old” word of mouth (talking to another network user) or by using an Internet search engine such as <http://www.Google.com>, which finds websites listing IP addresses of connected computers. Berlin Decl. at ¶ 12.

48. Second, LimeWire can contact a computer known as a “hostcache” to obtain a list of IP addresses of other computers active on the Gnutella network. A hostcache is a computer that keeps a running list of the IP addresses of Gnutella “client” computers which have contacted it recently and are, presumably, “active” on the Gnutella network. A number of computers on the Internet serve as hostcaches for the Gnutella network. Hostcaches generally do not receive or store any information regarding the content being transferred or shared by the computers that contact it. The Gnutella client contacts the hostcache computer, which sends the Gnutella client a list of “active” IP



addresses, while at the same time logging the Gnutella client's IP address, adding it to the hostcache's list of "active" IP addresses. The next Gnutella client contacting the hostcache will thus receive a list of IP addresses similar to the previous Gnutella client, plus possibly the IP address of the previous client. In this way, the hostcache keeps the list of IP addresses as current as possible. Berlin Decl. at ¶ 13.

49. Once LimeWire obtains at least one IP address for a "possibly active" computer on the Gnutella network, it contacts the computer or computers until it locates a computer that is linked to the global Gnutella network. Berlin Decl. at ¶ 44.

50. After the initial "bootstrap," LimeWire keeps its own list of "active" IP addresses and can rely on its own list of IP addresses to connect to the network during subsequent connection attempts. Berlin Decl. at ¶ 15.

51. In order to operate the peer-to-peer functionality of LimeWire, users are not required to identify themselves with any "user name" or other unique word or code. The Gnutella network does not require or support a user-specific account or unique name. Thus, it is not currently possible to identify a Gnutella user with a unique screen name, user name, or account identifier. LimeWire also does not utilize such identifiers as a requirement for using the peer-to-peer functionality of LimeWire. Berlin Decl. at ¶ 16.

52. The only identifying information required for connecting to the Gnutella network is an IP address, which enables other computers to locate and interact with each other while connected to the Internet. An IP address is not an effective method of identifying an individual user because IP addresses for LimeWire users typically change each time the user logs onto the Internet. LW does not maintain any log of the IP addresses of users who connect to the Gnutella network. Berlin Decl. at ¶ 17.

53. A LimeWire user who chooses to search the Gnutella network, must enter a search term or terms (a “search string”) into the LimeWire software’s search screen on the user’s computer. The LimeWire software then begins transmitting the search request to a computer known as an “ultrapeer” which is directly connected to another ultrapeer, which in turn pass along the search request to other computers or “leafs,” which themselves pass along the request to other computers. LimeWire also searches a file’s “metadata” – information that is not part of the file’s content, but contains information about the file’s content, such as author, file formatting, date of original creation, or the like. Like a giant game of “Telephone,” the search request propagates through the Gnutella network to other computers connected to the ultrapeer. The use of ultrapeers is not unique to LimeWire, several other Gnutella applications could select users on high-performance computers to serve as “ultrapeers” as well. In this role, the high-performance computer provides indexing services for a number of lesser-performing computers, thereby improving the efficiency of searches in the network. The LimeWire software selects ultrapeers by employing its own internal algorithms – LW plays no role in promoting or demoting computers to or from ultrapeer status. At no time does any search request from a Gnutella client (including any edition of LimeWire) pass through any computer owned or controlled by LW. Berlin Decl. at ¶ 18.

54. LimeWire allows users to search and download files from other computers on the Gnutella network. To obtain a file from a search result, a user of LimeWire must select a file from the search result. Selecting a file from the search results establishes a direct connection between the searching user’s computer and the computer on which the desired file is located (the “host computer”). Berlin Decl. at ¶ 19.

55. Because the Gnutella network is self-organizing, LW has no involvement whatsoever in a LimeWire user's use of the peer-to-peer functions of the application. For users who choose to utilize the peer-to-peer functionality of LimeWire, all processes necessary to carry out that function are performed by computers or entities other than LW. LW does not maintain any indexes of files on the Gnutella network, does not process search results to or from a user, and does not monitor searches or displays of search results. LimeWire does not report any information on the content of searches to any LW computer server. LW's servers do not participate in identifying locations or titles of user files, do not participate in requesting those files for transfer, do not participate in the transfer of files from one user to another, do not control or monitor transfer of files, and do not control or monitor management or use of files. LW's servers receive no information regarding any particular files being transferred among users. Berlin Decl. at ¶ 20.

56. The LimeWire product is widely available from third parties and on various peer-to-peer networks (the LimeWire software places "install" files in a user's shared folder, thus making it widely available), and on the Internet at large sites such as CNET's Download.com. Because the product has already been widely distributed, LW cannot stop a particular person or computer from obtaining a copy of the LimeWire product and cannot disable the peer-to-peer functionality of any particular installed program. Berlin Decl. at ¶ 21.

57. Once a user has installed LimeWire, LW has no effective control over a user's sharing of files on the Gnutella network. Users must elect to run the software, and determine what (if any) files they wish to place in their "shared folder" on their hard

drive. Users decide whether to use the software to connect to the Gnutella network, a public, decentralized network not affiliated with or in any way controlled by LW. LW cannot control what users decide to search for, find, make available, or download over the Gnutella network. Because the Gnutella network does not require or accept unique usernames or other identifiers, LW has no control over LimeWire users' access to the Gnutella network. Berlin Decl. at ¶ 23.

58. If LW ceased to operate, its servers became inoperative (as has happened on occasion owing to technical malfunctions or maintenance), or if all network connections to LW servers were severed, the searching, indexing, transferring, downloading, managing, display, and play functions of LimeWire would continue unaffected. Indeed, there currently exists a number of users of former, outdated versions the LimeWire software product who have chosen not to upgrade to newer LimeWire versions, but nevertheless have joined together and continue to operate a peer-to-peer user network using LimeWire software. That these networks are able to continue to operate without LW's involvement demonstrates that LW has extremely limited ability to control the users' use of the peer-to-peer function of the product. Berlin Decl. at ¶ 24.

59. LW has never condoned the use of its software for copyright infringement. LW has always sought to warn its users to not use the software for copyright infringement. For example, LW maintains several pages on its website dedicated to informing users and potential users that it is illegal to use LimeWire to download copyrighted files without permission. Berlin Decl. at ¶ 25.

60. Before a user could download LimeWire version 4.16, the user had to agree that he or she would not use the software to commit copyright infringement. The

user is shown a page in which the “copyright infringement” question is asked. If the potential user does not agree to not use Lime Wire for copyright infringement, he or she will not be allowed to download the software. Berlin Decl. at ¶ 26.

## **II. Noninfringing Uses of LimeWire**

61. It is the aim of Project Gutenberg to make information, books, and other materials available free of charge to the general public in a general form that the vast majority of computers, programs, and people can easily read, use, quote, and search. This is an important difference from the various other eBook projects around the world, which use markup languages that limit users to certain reading and searching programs. Declaration of Gregory Newby (“Newby Decl.”) at ¶ 4.

62. Today, Project Gutenberg has coordinated the efforts of thousands of volunteers worldwide. These volunteers enter public domain works into computers, format these works as simple eBooks so that they can be used by the widest variety of computers, including the new “Palm Powered” PDAs, and make these eBooks available to the general public over the Internet through various servers located around the world on every continent. These are all operated by volunteers on their own time and expense. Newby Decl. at ¶ 5.

63. Since its inception in 1971, Project Gutenberg has made over 5,600 eBooks available. It is expected that number will grow to over 6,000 by the end of 2002. The vast majority of these are works in the public domain, and Project Gutenberg licenses the remainder from the copyright owners for Project Gutenberg distribution as eBooks. Newby Decl. at ¶ 6.

64. Because most Project Gutenberg eBooks are public domain works, those who download them are entitled to do anything they like with them. One can quote from them, abridge them, or create new works based on them. One can re-post them on their site, print them, distribute them, and convert them to other formats. In fact, because the original goal of Project Gutenberg was to make information and literature available to the general public at a cost truly “too cheap to meter,” redistribution of eBooks is encouraged. Although it may be expensive and cumbersome to collect thousands of public domain works in paper formats, Project Gutenberg hopes to reduce those costs so every person with a computer can have free, convenient access to a vast library of public domain works. The average new computer today costs under \$700, and 100 gigabyte drives are between \$100 and \$200 depending the brand and place of purchase. With gigabytes approaching \$1 each, that means the entire Project Gutenberg collection wouldn’t cost even \$10 to store, and perhaps another \$10 to make backups on a CD writer. By the end of 2002, a person should be able to put 5,000 Project Gutenberg eBooks on one of these new computers by using up just \$10 of your drive space. Newby Decl. at ¶ 8.

65. With zero labor and material costs, P2P file-sharing technologies promise to be the ultimate public resources for widespread dissemination of public domain and authorized eBooks. Numerous authorized and public domain Project Gutenberg eBooks are made available on Morpheus, Kazaa, Gnutella, Grokster, and similar software products. This sharing is a great advantage to both Project Gutenberg and the public since the public domain eBooks can be disseminated without adding any additional costs to the Project or to the public. Project Gutenberg welcomes this widespread sharing of

public domain eBooks using these software products, since they assist it in meeting its objectives, while providing a tremendous public benefit by spreading knowledge and culture to those who might not have access to the public domain eBooks through more traditional means. Newby Decl. at ¶ 12.

66. The Archive is a 501(c)(3) public nonprofit that was founded to build an “Internet library” with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in digital format. The Archive currently maintains the largest collection of text in the world, and these collections are publicly available through the Internet. Physically located in the Presidio of San Francisco, California, the Archive receives data and financial donations from a multitude of resources, including libraries, educational institutions, and private companies. Declaration of Brewster Kahle (“Kahle Decl.”) at ¶ 4.

67. While the importance of the public domain is widely recognized, providing universal public access to this vast cultural resource has, as a practical matter, been difficult. Publishers have been unwilling to keep public domain works in publication, which means that only a small fraction of the books published in the United States before 1910 are available for purchase from any publisher worldwide. The same is true for many of the films of the silent era. Libraries and archives, for their part, have been hampered by limited geographic reach and the costs of acquisition, preservation, and storage of physical materials. Kahle Decl. at ¶ 5.

68. By harnessing digital technology, however, it has become possible to make the full range of public domain information and knowledge freely and universally

available. Recognizing this, governments, libraries, and private corporations around the world have embarked on projects to digitize public domain works. Kahle Decl. at ¶ 6.

69. One of the primary aims of the Archive is to harness the unique power of the Internet to make our cultural heritage freely accessible to all. For example, the Archive has digitized almost 2,000 important public domain archival films from the collection of the Prelinger Archives. These films are now available at no charge for download on the Internet at <http://www.archive.org/movies> Kahle Decl. at ¶ 7.

70. During late 2001, the Prelinger films were downloaded from archive.org over one hundred thousand times. In contrast, during the entirety of the year 2000 only 2,000 or so of the Prelinger Archives' collection of 48,000 films were accessed by the public through purchases of stock footage. During that same year, only 200 physical visits to the archives occurred. The popularity of the Prelinger films on archive.org continue unabated. To date, Prelinger films have been downloaded from archive.org over ten million times, including almost a quarter-million times in June 2008 alone. Kahle Decl. at ¶ 8.

71. Digital archiving and distribution of public domain films is particularly valuable at a time when digital technologies are putting new tools of expression into the hands of an unprecedented number of people. For example, for the last several years, every Apple computer has come bundled with iMovie software that permits individuals to manipulate and edit video footage, including the Prelinger films offered by the Archive. Kahle Decl. at ¶ 9.

72. Unfortunately, while the Internet today has great promise as a low-cost, global distribution mechanism, it still leaves much to be desired for digital libraries like



the Archive. Much of the media on the Internet is delivered from centralized servers that either permit individuals to make a copy of a file via download or to access the file in near real-time via streaming. Each approach requires that the Archive bear the costs associated with data storage and bandwidth. Kahle Decl. at ¶ 10.

73. With respect to bandwidth costs, in particular, there is the additional cost penalty that comes with popularity. Where a central server is used, the more popular a work is, the more bandwidth expense will be associated with making it available. To take one example, when network traffic to the Archive servers exceeded the bandwidth anticipated, the result was a very large “overage” bill from the Archives’ Internet service provider. This creates perverse incentives, as libraries and archives who would otherwise be eager to make available the most popular public domain works may find themselves hampered by the “popularity penalty.” Kahle Decl. at ¶ 11.

74. Centralized server solutions have other limitations, as well. For example, efforts to make information globally available from a central server often face the realities of network congestion and capacity limits on transnational telecommunication conduits. As a result, it is far more effective to distribute copies of files to a global network of servers, maximizing the chances that a requesting party will be able to access a work from a local server. Companies like Akamai Technologies provide this service to the corporate sector, but at a high cost that cannot be supported by free archives. Kahle Decl. at ¶ 12.

75. Peer-to-peer file sharing technologies, like those offered by the LimeWire software, overcome many of the limitations of centralized download and streaming

technologies and constitute a valuable advance in technology for those seeking to provide universal access to public domain material. Kahle Decl. at ¶ 13.

76. In a peer-to-peer file sharing network, bandwidth and storage costs are shouldered by the community of users rather than the Archive. This is especially crucial where large multimedia files are concerned, such as the Prelinger films. Kahle Decl. at ¶ 14.

77. Peer-to-peer file sharing technologies also can function as a “public Akamai.” As a file is downloaded and shared within a peer-to-peer file-sharing network, it spreads to locations around the world, thus offering the same sort of global network infrastructure offered by companies like Akamai. Because this global redundancy is a natural outgrowth of peer-to-peer networks, however, this feature is provided at no cost to the originating library or archive. Kahle Decl. at ¶ 15.

78. Peer-to-peer file sharing technologies also offer a solution to the perverse incentives that arise from the “popularity penalty” discussed above. In a peer-to-peer network, the more popular a work is, the more users will be sharing it. This, in turn, will lower the bandwidth costs to the originating library because the content will be accessible from other members of the peer-to-peer community. These benefits arise organically, without the need for any central administration or expense on the part of the archive or library. Kahle Decl. at ¶ 16.

79. There is a striking elegance to the fact that in a peer-to-peer file-sharing network, the costs of providing access to public domain resources is borne by the community of users themselves. Archives and libraries can thus devote a greater share of

their resources to digitizing and preserving public domain works, rather than to expenses associated with access and distribution. Kahle Decl. at ¶ 17.

80. The Prelinger films are well-suited to distribution through peer-to-peer networks. Those who download the Prelinger films from archive.org are entitled to redistribute those files, and the Archive welcomes their redistribution on peer-to-peer networks, including the LimeWire community of users. Kahle Decl. at ¶ 18.

81. The Internet Archive currently hosts about 947,472 books and music, software, and video items. Approximately 10 terabytes of data are downloaded from the Internet Archive each day. This is the equivalent of 2 million MP3 songs being downloaded each day. Kahle Decl. at ¶ 19.

82. Prelinger Archives has assembled a collection of over 60,000 “ephemeral” (advertising, educational, industrial, documentary, and amateur) films produced between 1903 and 1990. Approximately 60% of this material is in the public domain; Prelinger Archives owns rights to approximately 5%; and the remainder, currently under copyright, is available for on-site reference use only. Prelinger Archives are known in the industry for both breadth of imagery and high image quality, and for their exclusive coverage of many aspects of American cultural and social history. Declaration of Richard Prelinger (“Prelinger Decl.”) at ¶ 5.

83. Prelinger Archives is a commercial, for profit venture. The market for their stock images and sounds is wide and continues to broaden as the number of media outlets increases. They license footage to motion picture producers both in and out of Hollywood; broadcast and cable television networks and production companies; software developers and publishers; educational media producers; corporate video producers for

both in-house and external use; to advertising agencies for commercials, print advertisements and presentations; to concert promoters and theatrical promoters for use in conjunction with their events and productions; to government agencies at every level; to artists and nonprofit organizations for a wide variety of projects; and clients in many other market areas. Prelinger Decl. at ¶ 6.

84. Historically, collectors or custodians of public domain materials have exercised a high degree of physical and contractual control over the material in their possession. This custom has caused problems because it leads to a monopoly and exclusivity of imagery, which does not serve the interests of research, education, and free expression. Though Prelinger Archives shared this controlling perspective out of concern for widespread unauthorized copying when Prelinger Archives began in business, we quickly found this to be shortsighted. Prelinger Decl. at ¶ 7.

85. In 1987, Prelinger Archives partnered with The Voyager Company, a pioneer publisher of videodiscs and CD-ROMs, to publish two one-hour anthologies of key ephemeral films from our collection. Though the first two compilations sold only some 20,000 copies, they proved influential in building Prelinger Archives' reputation as a source for unique and evocative historical imagery within the production community, and, though Prelinger Archives had not anticipated that they would so function, ended up serving as excellent "demo reels" of their holdings, bringing them new business (as well as national publicity on every major television network). Prelinger Decl. at ¶ 8.

86. In 1994, Prelinger Archives began production on an expanded anthology of 12 CD-ROMs, 10 of which were published, that contained a substantial number of historical films from their collection together with contextual material. This anthology

also brought them a good deal of press attention and new business. Prelinger Archives did not prohibit users of this second anthology from copying the movies and using them for their own purposes. Prelinger Decl. at ¶ 9.

87. Prelinger Archives' experience with these digital anthologies convinced them that widespread distribution of its films, along with the resultant publicity, built our "brand" in the area of archival footage. Their willingness to distribute freely in digital format also served to differentiate them from the growing pool of other companies specializing in this area. Prelinger Decl. at ¶ 10.

88. As a result of their early experiences with digital distribution, Prelinger Archives in 2001 started the process of arranging to have many of their most popular public domain films digitized and made available through the Internet Archive. As of today, close to 2,000 such films are available through the Internet Archive, and by the end of this year that number will be over 2,500. In an effort to maximize the commercial value of this wide distribution, further reuse and redistribution of the digitized films (whether by the community of peer-to-peer software users or otherwise) has been left unrestricted. Prelinger Decl. at ¶ 11.

89. Prelinger Archives' partnership with the Internet Archive has addressed many business issues for them in a promising way. Prelinger Decl. at ¶ 12.

90. First, by building the largest publicly available archival film collection on the Web, Prelinger Archives has accomplished an enviable goal – the capability of providing demo reels to anyone, anywhere, at no cost to it. When a prospective client requests a copy of a given film or image, it is usually already available online for free. This means that their active involvement with the transaction begins after the choice has

been made, and they do not have to pass through the laborious research stage. Prelinger Decl. at ¶ 13.

91. Second, free distribution through the Internet Archive, and from there, further redistribution through other sources, has increased brand visibility for Prelinger Archives. Prelinger Decl. at ¶ 14.

92. Third, since the images in the Internet Archive are freely downloadable, they can be used more readily than images in other collections. In the stock image business, ubiquity equals sales. From Prelinger Archives' perspective, frequent use of their images increases the frequency of demand for them. And, indeed, this has been borne out in practice. Since 2002, Prelinger Archives has seen a steady and sometimes dramatic increase in income from stock footage sales. Prelinger Archives is much more financially secure than it was prior to beginning its efforts with Internet Archive. Prelinger Decl. at ¶ 15.

93. Fourth, Prelinger Archives can now refer worthy but financially-challenged users to the website, where they can get material for free without Prelinger Archives having to incur any costs. Prelinger Archives still gains from the publicity it generates for it, and the visibility of the images these users use ultimately benefits Prelinger Archives. Their materials are also used for educational purposes at all levels of education, from home schooling to universities. Prelinger Decl. at ¶ 16.

94. Peer-to-peer networks represent a very exciting opportunity, as they will propagate images even more widely without increasing Prelinger Archives' costs. Prelinger Archives believes that widespread, unrestricted digital distribution of our films brings important commercial benefits. Prelinger Archives welcomes further

redistribution of the Prelinger films made available at Internet Archive by individuals using peer-to-peer software. Many of the Prelinger films are available on peer-to-peer networks. Prelinger Decl. at ¶ 17.

95. By voluntarily “hosting” Prelinger Archives’ films and making them available to the millions of others in the peer-to-peer community, the users of these peer-to-peer software products are amplifying the availability of the Prelinger films, extending their reach beyond that of Internet Archive alone. To the extent this is done without imposing any additional costs on Prelinger Archives, whether in the form of hosting or bandwidth charges, this is great for it. Prelinger Decl. at ¶ 18.

96. On July 16, 2008, a search was conducted using LimeWire in All Types of files for “Mark Twain.” The search found several Mark Twain books that were downloaded using Microsoft Reader or as text files, including The Adventures of Tom Sawyer, The American Claimant, The Adventures of Huckleberry Finn, A Double Barreled Detective, Captain Stormfield’s Visit to Heaven, Is Shakespeare dead, On the Decay of Lying, Man that Corrupted Hadleyburg, A Dog’s Tale, The Prince and the Pauper, Tom Sawyer Abroad, and The Stolen White Elephant. Declaration of Susan E. Cates (“Cates Decl.”) at ¶ 11.

97. On July 17, 2008, LimeWire was utilized to conduct a search on [www.archive.org/index.php](http://www.archive.org/index.php) for “String Cheese Incident 2001-31.” The link for the December 31, 2001 concert was located, and thereafter the song “Magic Carpet Ride” from that concert was downloaded. Cates Decl. at ¶ 14.

98. On July 17, 2008, a search was conducted on [www.archive.org/index.php](http://www.archive.org/index.php) for “String Cheese Incident 2002.” The June 22, 2002 Bonnaroo Music Festival was

located and the song “Kashmir” was downloaded. On July 15, 2008, LimeWire was utilized to search for Audio files for artist String Cheese Incident. The search found “Kashmir” which was downloaded. Cates Decl. at ¶ 15.

99. On July 17, 2008, a search was conducted on [www.archive.org/index.php](http://www.archive.org/index.php) for “Tea Leaf Green 2005.” Tea Leaf Green’s March 3, 2005 concert was located and the songs “Garden III” and “Gasaholic” were downloaded. On July 15, 2008, LimeWire was utilized to search for Audio files by artist Tea Leaf Green. The search found “Garden III” and “Gasaholic” from the March 3, 2005 concert, which were downloaded. Cates Decl. at ¶ 16.

100. Some up-and-coming musicians who do not have a large record label promoting their work rely on P2P technology to create a buzz. Subscription Internet copy of Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. Times, Sept. 22, 2003, at C1. Declaration of Charles S. Baker (“Baker Decl.”) at Exh. 3.

101. Established artists are also using P2P technology. Katie Dean, *Winwood: Roll With P2P. Baby*, Wired Magazine, July 9, 2004, which can also be found at: <http://www.wired.com/entertainment/music/news/2004/07/64128>. Baker Decl. at Exh. 4.

102. Some well-known bands are encouraging their fans to share recordings of their live shows. Subscription Internet copy of Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in the Middle*, N.Y. Times, Sept. 14, 2003, at A1. Baker Decl. at Exh. 5.

103. Other artists are releasing their content unrestricted over the Internet. *Nine Inch Nails Surprise Fans by Web-Releasing New “Ghosts” Album*, Rollingstone.com, March, 3, 2008, which can be found at:



<http://www.rollingstone.com/rockdaily/index.php/2008/03/03/nine-inch-nails-surprise-fans-by-web-releasing-new-ghosts-album/>. Baker Decl. at Exh. 6.

104. Even EMI's new president of its digital unit finds this "fascinating." Greg Sandoval, *Will Former Google Exec Help Save the Music Industry?*, CNET News.com, April 2, 2008, which can be found at: [http://news.cnet.com/8301-10784\\_3-9909513-7.html?tag=b](http://news.cnet.com/8301-10784_3-9909513-7.html?tag=b). Baker Decl. Exh. 7.

105. A survey of artists and musicians concluded that the Internet made it possible to make more money than they were to say that it had made it harder to protect their work from piracy. PEW Internet and American Life Project, *Artists, Musicians and the Internet*, Dec. 5, 2005, which can be found at: [http://www.pewinternet.org/pdfs/PIP\\_Artists.Musicians\\_Report.pdf](http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf). Baker Decl. at Exh. 8.

106. Discussing the same surveys, Subscription Internet copy of Tom Zeller, Jr., *Pew File-Sharing Survey Gives a Voice to Artists*, N.Y. Times, Dec. 6, 2004, at E1. (Baker Decl. Exh. 9).

107. The Internet Archive provides access to authorized recordings of over 50,000 live performances by more than 3000 artists such as Hank Williams III, Maroon5, the Grateful Dead, and Vanessa Carlton. Kahle Decl. at ¶ 20.

108. Beginning in August, 2003, LW began offering a service called MagnetMix. MagnetMix is a web-based portal that allows content owners, such as musicians, software programmers, etc., to freely distribute their works over the Internet, including the Gnutella network. This service distributes independent works using web-based "magnet links," which offer a direct link to content over the Gnutella network.

Since the implementation of this feature, hundreds of artists and other content owners have submitted their content for distribution. LW has also entered into agreements with several independent record labels representing hundreds of independent artists so as to allow their content to be distributed over MagnetMix. Declaration of Gregory L. Bildson (“Bildson Decl.”) at ¶ 10.

109. LimeWire’s software allows users to locate and download myriad computer files directly from another user of the same communications protocols. This particular distributed computing technology, which requires no central website servers, has enormous commercial potential. The ability to make content available without a web server improves the ability to locate a larger selection of content at a lower cost than otherwise. It allows for more efficient content distribution and maintenance of a larger inventory of available content files than centralized distribution architectures can support. Rather than placing all bandwidth cost on the original distributor, with P2P technology the distribution cost is spread among millions of Internet users. Spreading distribution costs gives content owners far more flexibility in making their works available to the public. P2P has empowered not only content providers, but also has spawned many new business applications that utilize the distributing computing technology similar to that which forms the core of the Lime Wire software. Declaration of Martin C. Lafferty (“Lafferty Decl.”) at ¶ 6.

110. Skype is the first Internet telephony technology to use P2P distributed computing. P2P telephony utilizes decentralized networking technology to significantly increase call completion rates compared with more costly, centralized voice-over-IP technologies. Skype allows for free calls to other Skype users, paid calls to land and

cellular telephones, file transferring, and instant messaging. Skype relies on P2P technology not only for completing phone calls, but also for distributing its telephony software by bundling its application with popular P2P software. Lafferty Decl. at ¶ 8.

111. GridCasting from GridNetworks is an Internet Television Delivery Service that enables content owners and rights holders (television networks, online video outlets, cable operators, video portals, community organizations, etc.) to deliver broadcast-quality programming to broadband Internet users for display on either their personal computers or televisions. The GridCasting platform was explicitly designed to enable the secure delivery of commercial content from known sources, utilizing a “one-to-many” delivery control model that is well understood by conventional broadcasters. In order to meet the required performance, reliability, scale, and cost requirements for this emerging market, GridCasting employs many advanced networking principles derived from grid computing and grid networking technology. Lafferty Decl. at ¶ 9.

112. Joost is an online video platform, delivering high-quality, full screen, professionally-produced video content to users on a free (advertising supported) basis using P2P technology. Distributing high quality video requires significant bandwidth, and by utilizing P2P technology to harness the combined bandwidth of its users, Joost has developed an efficient and scalable distribution model, which enables content producers and advertisers to reach new audiences, and gives consumers access to a range of professionally-produced video content that they cannot find on traditional television. Joost distributes its video files in encrypted fragments, so that no video file resides in its entirety on any user’s computer, and this, combined with Joost’s ability to control users’ access to content on a territory-by-territory basis, has made Joost an attractive and

legitimate distribution platform for a wide range of content owners, including a number of the Plaintiffs in the current action. Lafferty Decl. at ¶ 14.

113. Pando Networks, Inc. (“Pando”) distributes P2P software that makes downloading, streaming, and sharing large media files fast and easy. Pando’s software allows users to email large attachments, instant message a folder, publish downloadable videos to the Web, and watch full-screen HD Internet TV. Pando is a managed, hybrid P2P content delivery platform. All networking communications are routed via Pando’s trackers and web services. Consumers only supply bandwidth and storage to content that they have proactively consumed. Lafferty Decl. at ¶ 15.

114. Jun Group, LLC (“Jun Group”) is an internet marketing company that utilizes P2P technology. It creates branded music, video, sports, and game programming, which it delivers to consumers using P2P networks. Jun Group created the first music video program featuring major artists that was distributed over P2P networks, which was comprised of two music videos featuring singers Ne-Yo and Jay-Z for Coca-Cola. The Ne-Yo video garnered 3.2 million downloads, with the Jay-Z video reaching an even larger audience. Lafferty Decl. at ¶ 16.

115. Jun Group also released one previously unavailable song and two videos from rock legend Steve Winwood on behalf of Access Hollywood over P2P networks. Within 5 weeks, nearly 3 million users had obtained the files and over 208,000 consumers visited the Access Hollywood Web site. Album sales increased 1300% in the markets in which it was promoted and the album became the #3 online seller for 4 weeks on FYE.com. Lafferty Decl. at ¶ 17.

116. Jun Group released five previously unavailable tracks from recording artist Kevin Martin and the HiWatts over P2P networks. Within two weeks, over 3 million users had downloaded the files. The Yoo-hoo web-site experienced the largest spike in traffic since its inception and websites around the world linked to the Yoo-hoo site of their own volition. Lafferty Decl. at ¶ 18.

117. Three tracks from Lake Trout, a new recording artist, were distributed by Jun Group three days prior to release of the artist's first album. Within two weeks, over 2 million users had obtained the files and chat rooms were filled with hundreds of users discussing the artist. In fact, CD sales quadrupled expectations for the first month, with no support from traditional marketing, advertising, or public relations. Lafferty Decl. at ¶ 19.

118. Jun Group released footage from "Starting Over," a daytime television program, into the file-sharing community for promotional purposes. Within two weeks, the footage was viewed by over 500,000 users, over 95,000 users participated in chats and "threaded" conversations in forums, and more than 200,000 users viewed postings in online forums. The client reported a measurable spike in ratings for four straight days during the promotion. Lafferty Decl. at ¶ 20.

119. The Scene, Jun Group's first original P2P series was a huge success. Each of the first three episodes has been downloaded 1 to 2 million times. More than 650 websites currently link to the series' Website and downloads have been recorded in over 70 countries. Lafferty Decl. at ¶ 21.

120. Printouts from the pages of the Jun Group Internet website can be found at <http://www.jungroup.com/>. Baker Decl. at ¶ 11.

121. The Hybrid P2P Network uses a central server to communicate with each user. However, the actual stream may be provided by either the server itself or, more likely, by another user or users who simply redirects the stream or portions of the stream. Declaration of Michael James King (“King Decl.”) at ¶ 1.

122. P2P technology, from a pure technological perspective, is the most efficient way to distribute data in a network. The fact that people have used P2P technology for infringing purposes does not alter the viability of the technology. All different types of commercial ventures, including Abacast, use P2P technology for legitimate commercial purposes. King Decl. at ¶ 2.

123. Without P2P technology, Abacast would not be possible. P2P offers adaptability that cannot be accomplished with a central server. For instance, P2P technology provides a client-side application that allows real time monitoring of the quality of service. In other words, as a result of P2P technology, Abacast can ensure the quality of data delivery. If one server goes down, users will be rerouted to another peer group immediately, allowing Abacast to correct data transmission problems in real time. P2P technology promotes adaptable, efficient service for users in the technology marketplace. King Decl. at ¶ 3.

124. RazorPop is a developer of file-sharing technology, much like LimeWire. RazorPop is the owner, developer, and distributor of TrustyFiles, a multi-peer-to-peer network software. TrustyFiles allows a user to access other networks such as Gnuetella and Bit Torrent, just like LimeWire. Declaration of Marc Freedman (“Freedman Decl.”) at ¶ 1.

125. RazorPop's Street Team is an effort to get artists to use RazorPop's software in order to distribute media, music, and videos. Perhaps the most well-known artist who has used TrustyFiles to distribute his music is Grammy award-winning artist Sananda Maitreya, formerly known as Terence Trent D'Arby. Sananda Maitreya is best known for hits such as "Wishing Well," "Sign Your Name," and "If You Let Me Stay." In 2002, Sananda released his Wildcard! album for free over the Internet. In 2004, he became the first major artist to use TrustyFiles to distribute his "Angels and Vampires" project. In fact, Sananda made two new songs and a video exclusively available over P2P. Freedman Decl. at ¶ 2.

126. The artists that use P2P technology to distribute their music, such as Sananda Maitreya, benefit in several ways from the technology. P2P provides artists a great deal of exposure. Consumers who would not otherwise have known about the artist gain exposure to the artist's music. Consumers also have a chance to sample the artist's music, which may lead the consumer to purchase the music or attend a live concert. Freedman Decl. at ¶ 3.

127. Raketu is a leader in peer-to-peer based communications, information, entertainment, and social networking services. Raketu's proprietary P2P services utilize distributed peer nodes in a networked environment to significantly reduce costs, improve quality and reliability, and decrease security risks associated with other P2P and centralized services. Raketu allows free calls to other Raketu users, free and paid calls to land and cellular phones, free and paid calls from phone-to-phone, file transfers, instant messaging, offline messaging, and distribution and viewing of P2P-based streaming content (webTV). Declaration of Greg Parker ("Parker Decl.") at ¶ 1.

128. Since its formation in 2006, Raketu has utilized P2P technology as the backbone of its business. Without P2P technology, Raketu could not be competitive in the current marketplace. P2P technology changes the way that companies like Raketu are able to deliver services. P2P technology allows Raketu to minimize costs, both operationally and with regard to capital expenditures. As a result, Raketu is able to pass its savings on to its user base, making Raketu's services less expensive than its competitors' services. Parker Decl. at ¶ 2.

129. In addition to allowing Raketu to offer services at a lower cost, P2P technology enables Raketu to offer a better quality product than its competitors that use centralized servers. For instance, Raketu's call completion rates are superior to its competitors as a result of P2P technology. In other words, Raketu's customers have access to better quality services for more affordable prices, which would not be possible without P2P technology. P2P technology promotes innovation and better quality products in the technology marketplace. Parker Decl. at ¶ 3.

130. Some content owners are using P2P to distribute their products. James Pearce, *Lindows Offers Software For Free Over P2P*, CNET News.com, Jan. 30, 2004, which can be found at: [http://news.cnet.com/lindows-offers-software-for-free-over-P@P/2100-7344\\_3-5150931.html?tag=st.rm](http://news.cnet.com/lindows-offers-software-for-free-over-P@P/2100-7344_3-5150931.html?tag=st.rm), Baker Decl. at Exh. 10.

131. An example of software freely distributed. Printout from the Internet that can be found at: [www.winzip.com/elicense.htm](http://www.winzip.com/elicense.htm). Baker Decl. at Exh. 12.

132. Another example of software being freely distributed. Printout from the Internet that can be found at the following site: <http://distribution.openoffice.org/p2p/magnet.html>. Baker Decl. at Exh. 13.



133. iMesh uses P2P technology to distribute licensed musical content. Printouts from pages of the iMesh Internet website that can be found at <http://www.imesh.com/>. Baker Decl. at Exh. 14).

134. QTrax professes to be the “world’s first free and legal P2P music download network.” Printouts from the pages of the Qtrax Internet website that can be found at <http://www.qtrax.com/>. Baker Decl. at Exh. 15.

135. [REDACTED]

136. The Labels are using P2P to market their content. Article entitled *BigChampagne Is Watching You*, Wired Magazine, Issue 11.10, Oct. 2003, which can be found at: [http://www.wired.com/wired/archive/11.10/fileshare\\_pr.html](http://www.wired.com/wired/archive/11.10/fileshare_pr.html). Baker Decl. at Exh. 6.

137. [REDACTED]

138. [REDACTED]

139. Viacom has allowed some of its TV shows to be freely traded over P2P networks. Printout from the Internet that can be found at: <http://opinion.latimes.com/bitplayer/2008/06/promoting-new-t.html>. Baker Decl. at Exh. 17.

140. The U.S. Army has used Gnutella to distribute a video game. Subscription Internet copy of Seth Schiesel, *On Maneuvers With The Army's Game Squad*, N.Y. Times, Feb. 17, 2005, at G1. Baker Decl. at Exh. 18.

141. The U.S. Army has used Gnutella to distribute a video game. Aliya Sternstein, *Gnutella Wants You*, Forbes Magazine, Nov. 10, 2003, which can also be found at: [http://www.forbes.com/forbes/2003/1110/077sidebar\\_print.html](http://www.forbes.com/forbes/2003/1110/077sidebar_print.html). Baker Decl. at Exh. 19.

142. The armed forces are utilizing P2P technology on the battlefield. Paul Rubens, *Army Tactics Are The Business*, Financial Times, Nov. 26, 2003, which can also be found at: <http://groove.net/pdf/armytactics.pdf>. Baker Decl. at Exh. 20.

143. The Berklee College of Music is using P2P to share its music lessons to the public. Katie Dean, *Teaching Music Traders A Lesson*, Wired News, Nov. 12, 2003, which can also be found at: <http://www.wired.com/entertainment/music/news/2003/11/61173>. Baker Decl. at Exh. 21.

144. This has helped Berklee College. Printout from the Internet that can be found at the following site: <http://berkleeshares.com/press/pressrelease2>. Baker Decl. at Exh. 22.

145. P2P networks are being utilized to express political views. Kim Zetter, *Downloading for Democracy*, Wired News, Jul. 19, 2004, which can also be found at: <http://www.wired.com/politics/law/news/2004/07/64237>. Baker Decl. at Exh. 23.

146. Numerous government documents are accessible over P2P networks. Printout from the Internet that can be found at the following site: <http://www.outragedmoderates.org/HowtoUseP2PNetworks.html>. Baker Decl. at Exh. 24.

147. Supreme Court oral arguments are available on P2P networks. Printout from the Internet that can be found at the following site: <http://www.cbsnews.com/stories/2003/08/06/tech/main567017.shtml>. Baker Decl. at Exh. 25.

148. Oral argument from the *Sony* case is available here. Printout from the Internet that can be found at the following site: [http://www.oyez.org/cases/1980-1989/1982/1982\\_81\\_1687/](http://www.oyez.org/cases/1980-1989/1982/1982_81_1687/). Baker Decl. at Exh. 26.

149. People in China are unable to freely access Internet. *New Technology May Foil PRC Attempts At Censorship Efforts*, The China Post, Mar. 12, 2003, which can also be found at: <http://chinapost.com.tw/print/35737.htm>. Baker Decl. at Exh. 27.

150. Discussing Freenet-China, a Mandarin language version of a widely used P2P network that the Chinese government censors. Heather Green, *The Underground Internet*, Business Week, Sept. 15, 2003, at 80, which can also be found at: [http://www.businessweek.com/print/magazine/content/03\\_37/b3849089\\_mz063.htm?chan=mz](http://www.businessweek.com/print/magazine/content/03_37/b3849089_mz063.htm?chan=mz). Baker Decl. at Exh. 28.

151. The Tiananmen Papers have appeared on P2P networks in China. Subscription Internet copy of Jennifer Lee, *Grass-Roots War Heats Up Against Government Web Blocks*, Chicago Tribune, Oct. 14, 2002, at 4. Baker Decl. at Exh. 29.

152. One of the top P2P networks in China is “Six/Four System.” Jim Rapoza, *Six/Four: The Internet Under Cover*, Eweek from ZDWire, Mar. 6, 2003, which can also

be found at: <http://www.eweek.com/c/a/Past-Reviews/SixFour-The-Internet-Under-Cover>. Baker Decl. at Exh. 30.

153. LW has never condoned the use of its software for copyright infringement. LW has always sought to warn its users to not use the software for copyright infringement. For example, LW maintains several pages on its website dedicated to informing users and potential users that it is illegal to use LimeWire to download copyrighted files without permission. Berlin Decl. at ¶ 25.

154. Before a user could download LimeWire version 4.16, the user had to agree that he or she would not use the software to commit copyright infringement. The user is shown a page in which the “copyright infringement” question is asked. If the potential user does not agree to not use Lime Wire for copyright infringement, he or she will not be allowed to download the software. Berlin Decl. at ¶ 26.

155. On July 14, 2008, a search using LimeWire was conducted for the track “Nin – the slip” in All Types of files. The search found track six, “Head Down,” from The Slip, and it was downloaded. Cates Decl. at ¶ 6.

156. Using LimeWire, the live version of the track “Ride Me High,” a track that appears to be freely available, was located and downloaded. Cates Decl. at ¶ 8.

157. On July 15, 2008, the track “Most Events Aren’t Planned” from the July 9, 2002 concert of Vida Blue, a track that appears to be freely available, was located and downloaded using LimeWire. Cates Decl. at ¶ 17.

158. On July 15, 2008, a search was conducted using LimeWire for the artist Tryad. The freely-available tracks “Breathe,” “Listen,” and “Struttin’” were downloaded. Cates Decl. at ¶ 9.

159. On July 15, 2008, LimeWire was used to conduct a search for the track “My Drive Thru,” a freely-available song. The search found “My Drive Thru” and it was downloaded. Cates Decl. at ¶ 10.

160. On July 16, 2008, Susan Cates, an attorney at the Porter & Hedges law firm went to [www.magnetmix.com](http://www.magnetmix.com). There was a section of the page about Alfie Zappacosta. In that section, there was a link titled “Download the MP3 ‘Start Again’ from the album Saint Something.” She clicked on the link and LimeWire popped up with the “Start Again” song downloading on LimeWire itself. She then went to page 3 of the audio downloads and clicked on “Download ‘The Only One’ in a section on American Analogue Set. Similarly, the song downloaded in LimeWire. She also clicked on “Download the MP3 ‘Fight Song’ from the album the Two Conversations in a section on The Appleseed Cast and that song downloaded in LimeWire. She also clicked on the Literature icon and then on the link to “Download ‘Down and Out in the Magic Kingdom.”” The book downloaded in LimeWire in pdf format. Cates Decl. at ¶ 12.

161. BuyDRM was incorporated in 2001. BuyDRM provides a digital rights platform called KeyOS to its customers, which allows BuyDRM’s customers to market, monetize and monitor their services using peer-to-peer technology. Declaration of Christopher Levy (“Levy Decl.”) at ¶ 1.

162. For instance, Brand Asset Digital f/k/a P2P Engineering (“Brand Asset Digital”), a customer of BuyDRM, markets its digital media products by using KeyOS to seed or peer digital media content into peer-to-peer networks. A user opens the content sent by Brand Digital Asset over a P2P network (such as a free song) and receives marketing content via KeyOS along with the free content. Levy Decl. at ¶ 2.

163. Ellusionist, another customer of BuyDRM, uses KeyOS to monetize its products by utilizing P2P technology. Ellusionist delivers pay-per-view content to magicians worldwide and when new users discover Ellusionist's content in P2P networks, they are able to purchase it and become customers. Another BuyDRM customer, QTrax, uses KeyOS to enable customers to discover, download, and listen to free music using the Gnuetella network. KeyOS allows QTrax to monetize their offering by bundling advertising with the music. Levy Decl. at ¶ 3.

164. At one point in time, the U.S. Army allowed MagnetMix to distribute a promotional video game it had made. It is still available on MagnetMix. Bildson Decl. at ¶ 11.

165. On July 13, 2008, Ms. Cates conducted a search on LimeWire for "King – I have a Dream" in All Types of files. The search found Martin Luther King Jr.'s speech "I have a Dream" in mp3 format. She was then able to download Dr. King's speech. Cates Decl. at ¶ 3.

166. On July 14, 2008, Ms. Cates conducted a search on LimeWire for "declaration of independence" in All Types of files. The search found the United States Declaration of Independence in Adobe format. She was able to download the document. Cates Decl. at ¶ 4.

167. On July 14, 2008, Ms. Cates conducted a search on LimeWire for "US Constitution" in All Types of files. The search found the Preamble to the United States Constitution in word format. She was able to download the document. Cates Decl. at ¶ 5.

168. On July 14, 2008, Ms. Cates conducted a search on LimeWire for “shakespeare” in Documents. The search found several Shakespeare plays that she was able to download utilizing Microsoft Reader. Specifically, she downloaded the following plays: Hamlet, Twelfth Night, Antony and Cleopatra, Love’s Labour’s Lost, Macbeth, All’s Well That Ends Well, and Richard III. Cates Decl. at ¶ 7.

169. Amicus Brief filed by Creative Commons in the *Grokster* case. Baker Decl. Exh. 32.

Dated: July 18, 2008.

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing pleading was filed by means of the Court's ECF system on the 18th day of July, 2008. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via Federal Express.

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