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OCT 25 2007  
CENTRAL DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs, )

v. )

GROKSTER, LTD., et al., )

Defendants. )

CV 01-8541 SVW (FMOx) ✓  
CV 01-9923 SVW (FMOx)

PROPOSED ORDER RE APPOINTMENT  
OF SPECIAL MASTER

\_\_\_\_\_  
JERRY LEIBER, et al., )  
Plaintiffs, )

v. )

CONSUMER EMPOWERMENT BV, et )  
al., )

Defendants. )

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1  
2 **I. INTRODUCTION**

3 On September 27, 2006, this Court granted Plaintiffs' motion for  
4 summary judgment on the question of liability as against StreamCast  
5 Networks, Inc. ("StreamCast"). In that Order, the Court recounted  
6 this case's procedural history, and engaged in a detailed analysis of  
7 the factual record pertaining to StreamCast's inducement of copyright  
8 infringement. See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster,  
9 Ltd., 454 F. Supp. 2d 966, 971, 975-92 (C.D. Cal. 2006). StreamCast  
10 is the only defendant remaining in this case. It operates and  
11 distributes the Morpheus System and Software.

12 On October 15, 2007, this Court granted in part Plaintiffs'  
13 motion for a permanent injunction against StreamCast. In its  
14 discussion, this Court recognized the difficult technical issues  
15 presented by the implementation of a successful system of filtering  
16 given the state of technology and the claims of the parties. The  
17 Court stated that "StreamCast will be required to use the most  
18 effective means available to reduce the infringing capabilities of  
19 the Morpheus Software and System, while preserving its core  
20 noninfringing uses." Metro-Goldwyn-Mayer v. Grokster, CV 01-8541,  
21 Order Granting in Part Plaintiffs' Motion for a Permanent Injunction  
22 Doc. No. 1287, at 83 (October 16, 2007). In light of the complex  
23 technical nature of imposing a filtering system on the Morpheus  
24 Software, the Court finds that it would be beneficial to appoint a  
25 Special Master to determine the most effective means of filtering, as  
26 well as to implement and supervise the final decree. As the Court  
27 previously elaborated on the issues involved in issuing the permanent  
28

1 injunction, this Order shall focus on the responsibilities and duties  
2 of the Special Master.

3  
4 **II. SPECIAL MASTER**

5 **A. Authority of the Court**

6 1. Appointing of a Special Master

7 "The federal courts have the inherent power to appoint persons  
8 unconnected with the court to aid judges in the performance of  
9 specific duties." Constant v. Advanced Micro-Devices, Inc., 848 F.2d  
10 1560, 1566 (Fed. Cir. 1988) (citing Ex parte Peterson, 253 U.S. 300,  
11 312 (1920)). The Court may do so with or without the consent of the  
12 parties. Id.

13 In addition to its inherent authority, the Court may  
14 specifically appoint Special Masters pursuant to Rule 53 of the  
15 Federal Rules of Civil Procedure. Rule 53(a)(1)(C) provides that a  
16 master may be appointed to "address pretrial and post-trial matters  
17 that cannot be addressed effectively and timely by an available  
18 district judge or magistrate judge of the district." Fed. R. Civ. P.  
19 53(a)(1)(C). Unlike the standard for trial masters, the Court in  
20 pretrial and post-trial matters need not find that appointment is  
21 warranted by "some exceptional condition." Fed. R. Civ. P.  
22 53(a)(1)(B)(I). In this case, however, although such a finding is  
23 unnecessary, the Court concludes that the complexity of the issues  
24 requires a special master with technical knowledge.

25 By augmenting its judicial resources in this manner, the Court  
26 seeks to ensure its paramount obligation of securing "the just,  
27 speedy and inexpensive determination" of both the instant action, and  
28

1 of other cases that would undoubtedly suffer should this case consume  
2 an inordinate share of the Court's limited resources. Fed. R. Civ. P.  
3 1.

4 Procedurally, Rule 53(b)(1) provides that "[t]he court must give  
5 the parties notice and an opportunity to be heard before appointing a  
6 master." Fed. R. Civ. P. 53(b)(1). The Advisory Committee Notes  
7 state that "[t]o the extent possible, the notice should describe the  
8 master's proposed duties, time to complete the duties, standards of  
9 review, and compensation." Fed. R. Civ. P. 53 (2003 Advisory  
10 Committee Notes). Accordingly, the remainder of this Order describes  
11 the duties and responsibilities of the Special Master in the instant  
12 action.

#### 13 14 2. Necessity of Special Master in Present Litigation

15 As discussed in the Court's Order partially granting imposition  
16 of the permanent injunction, this case involves a number of complex  
17 technical issues relating to the filtering of StreamCast's Morpheus  
18 Software. As there are at least three possible forms of filtering -  
19 artist and title matching, hash value matching, and acoustical  
20 fingerprinting - all with their own benefits and deficiencies, the  
21 Court would benefit from the assistance of a Special Master in  
22 addressing these technical issues.

#### 23 24 **B. Duties of Special Master**

25 The Master shall proceed with all reasonable diligence in  
26 providing recommendations on the issues set forth below. As stated  
27 in Rule 53, the Special Master has the "authority to regulate all  
28

1 proceedings and take all appropriate measures to perform fairly and  
2 effectively the assigned duties." Fed. R. Civ. P. 53(c). The  
3 Special Master is instructed by the Court to prepare one or more  
4 Reports and Recommendations. Such reports will be disclosed to the  
5 parties, and an opportunity to be heard will be afforded prior to  
6 action by the Court. Thereafter, the Court may or may not adopt such  
7 reports, in whole or in part.

8  
9 1. Issues to be determined by Special Master

10 The Special Master is to examine and report on the issues  
11 relating to filtering technology in StreamCast's Morpheus software.  
12 As discussed in this Court's Order partially granting a permanent  
13 injunction, the imposition of filtering technology must effectively  
14 cope with the copyright infringement made possible through the  
15 current Morpheus system while simultaneously preserving the core  
16 noninfringing uses of the peer-to-peer system.

17 Currently, as the Court understands the position of the parties,  
18 there are three alternative systems for filtering that may be imposed  
19 on the Morpheus software, all with varying levels of cost and  
20 effectiveness. These systems are not mutually exclusive, but rather  
21 can function in conjunction with other forms of filtering in order to  
22 provide better protection. The most rudimentary form of filtering  
23 would examine the artist name and title of the work on the Morpheus  
24 system, comparing those files to a database of names and titles of  
25 Plaintiffs' copyrighted works. A second system would rely on the  
26 "hash values" in the underlying files themselves; the files' digital  
27 fingerprint. This fingerprint is not based on the audio content  
28

1 within the file, but rather is a multi-character number associated  
2 with the given file. Finally, another proposed system of filtering  
3 is the use of acoustical fingerprinting. This technology relies on  
4 the actual content within the files and will compare the sound  
5 recording in Morpheus to a database of works that have already been  
6 fingerprinted.<sup>1</sup>

7 Given the technical nature of the matters involved in filtering  
8 the Morpheus software and the StreamCast network, the guidance of the  
9 Special Master will elucidate the best tools through which effective  
10 filtering technology can be put in place. When examining the  
11 proposals set forth by the parties, the Special Master should look to  
12 impose a technologically feasible filter that will eliminate the  
13 greatest number of infringing works while allowing the core  
14 noninfringing uses of Morpheus to continue. The possibilities are  
15 not necessarily limited to those discussed above, but rather the  
16 Special Master should examine the possibilities presented by the  
17 parties and recommend the most effective filter given the technology  
18 available. The Special Master should also consider the effectiveness  
19 of StreamCast's present filtering technology if it implemented the  
20 names of artists and the titles of works that are claimed to be  
21 infringing. In making a determination on the effectiveness of the  
22 filtering system the Special Master, the cost imposed on StreamCast  
23 should be of secondary concern. The cost of the systems would come  
24 into consideration of the final filtering technology only where the

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25 <sup>1</sup> This is, of course, a basic overview of the possible methods of  
26 filtering in this case. For a more detailed explanation of the  
27 alternative methods of filtering available, see Metro-Goldwyn-Mayer  
28 v. Grokster, CV 01-8541, Order Granting in Part Plaintiffs' Motion  
for a Permanent Injunction, Doc. No. 1287, at 10-13 (October 16,  
2007).

1 difference in effectiveness is minimal and the discrepancy in cost is  
2 substantial.

3 The Special Master shall make a further recommendation  
4 concerning the Legacy version of the Morpheus software that is  
5 currently in use. The recommendation should discuss the most  
6 effective means by which Morpheus can encourage the current users of  
7 the Legacy software to upgrade to a version that possesses the  
8 requisite filtering technology.

9 Through an analysis of all of the above stated issues, the  
10 Special Master is to issue to the Court a final Report and  
11 Recommendation setting forth the proposed filtering system for  
12 StreamCast and a method of updating the Legacy software. The final  
13 Report shall include a comprehensive regimen of the actions  
14 StreamCast needs to undertake, the forms of filtering necessary, and  
15 the methods for implementation of these tools. Such a Report is to  
16 include any details of the filtering, such as how StreamCast can  
17 adopt keyword filters, common misspellings, and file extensions into  
18 filtering technology. To the extent that StreamCast must take any  
19 actions in order to impose the filtering system, the Special Master  
20 will provide a detailed explanation of the steps required to achieve  
21 such filtering. The Court further expects that the Special Master  
22 will be involved with the monitoring of the filtering system that  
23 he/she imposes at periodic points in the future.

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1            2. Communication with Parties

2            The Special Master shall have the authority to communicate with  
3 the parties in order to further his investigation of the filtering  
4 technology necessary in this case. Communications between the  
5 parties and the Special Master shall consist of written requests with  
6 written notice given to the opposing party. Pursuant to Rule 53(c),  
7 the Special Master has the "authority to regulate all proceedings and  
8 take all appropriate measures to perform fairly and efficiently the  
9 assigned duties."

10           3. Next Steps

11           In accordance with Rule 53, the Court will give the parties two  
12 (2) weeks to meet and confer so that they may recommend a Special  
13 Master for the Court to appoint. If the parties cannot agree on a  
14 Special Master, they should each submit the names and curricula vitae  
15 of three (3) individuals who can serve the role. Fed. R. Civ. P.  
16 53(b)(1). Each proposed Special Master should include an affidavit  
17 attached to his or her C.V. which discloses any conflict, if any  
18 exists, or states that there are no grounds for disqualification in  
19 the matter.<sup>2</sup>

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26           <sup>2</sup> Each proposed Special Master must meet the requirements of Rule  
27           53(a)(2), which states that a master "not have a relationship to the  
28           parties, counsel, action, or court that would require  
              disqualification of a judge under 28 U.S.C. § 445 unless the parties  
              consent with the court's approval to appointment of a particular  
              person after disclosure of any potential grounds for  
              disqualification."

