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CENTRAL DISTRICT OF CALIFORNIA

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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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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
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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
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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
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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
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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.¹

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

25 ¹ 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.²

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25 ² Each proposed Special Master must meet the requirements of Rule
26 53(a)(2), which states that a master "not have a relationship to the
27 parties, counsel, action, or court that would require
28 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."

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4. Compensation of Special Master


Pursuant to the Court's inherent authority and Rule 53(h), the compensation allowed to a master may be fixed by the court and taxed to the parties. See Fed. R. Civ. P. Rule 53(h). The Special Master shall submit to the Court monthly statements of the hours expended in the course of his service. The Court shall fix the Master's compensation based upon his submissions and standard billable rate, and, shall for the interim tax the compensation equally to the parties.

III. CONCLUSION

In accordance with this Proposed Order, the parties are to submit their list of individuals who can serve as a Special Master within two (2) weeks of the date of this Order.

IT SO ORDERED.

DATED: 11/24/07


STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE