

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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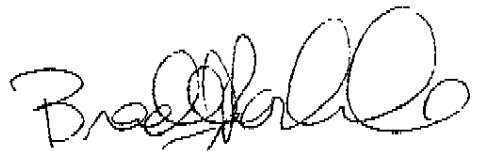
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IN RE: AIMSTER COPYRIGHT	:	No. 01 C 8933
LITIGATION	:	
	:	Judge Marvin E. Aspen

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**PLAINTIFFS' MOTION FOR ORDER  
TO SHOW CAUSE RE CONTEMPT**

Plaintiffs, through their attorneys, respectfully requests this Court, for an Order to Show Cause (1) why Defendants should not be held in contempt of the Preliminary Injunction Order; (2) why a compliance officer should not be appointed; (3) why JD CI, LLC should not be ordered to pay daily fines; and (4) why Defendants should not be ordered to compensate Plaintiffs for their reasonable attorneys' fees and costs in connection with this proceeding, together with any other relief the Court deems proper. In support of this motion, Plaintiffs are filing concurrently herewith a Memorandum in Support.

Dated: November 20, 2002




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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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IN RE:	AIMSTER COPYRIGHT LITIGATION	:	MASTER FILE No. 01 C 8933  Judge Marvin E. Aspen
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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION  
FOR ORDER TO SHOW CAUSE RE CONTEMPT**

**INTRODUCTION**

This Court unequivocally ordered Defendants immediately to prevent all infringements of Plaintiffs' copyrighted works from occurring on the Aimster System and Service.<sup>1</sup> Request for Judicial Notice Exhibit 1, Preliminary Injunction Order, ¶ 1. Defendants willfully violated this Court's Preliminary Injunction Order. As a result, Defendants' massive copyright infringement, and the irreparable harm to Plaintiffs caused by Defendants' contempt of this Court's Preliminary Injunction Order, continues unabated. Given Defendants' flagrant disregard of this Court's Order, Plaintiffs bring this Motion for Order to Show Cause re Contempt seeking the appointment of a compliance officer to do that which this Court already has ordered Defendants to do: shut down the Aimster System and Service until Defendants comply with the Preliminary Injunction Order. Also, Plaintiffs request termination of all payments or payment obligations that Defendants (and those acting in concert with Defendants) receive, or are to receive, from the operation of the Aimster System and Service.

<sup>1</sup> The Aimster System and Service, which previously was provided through its website at [www.aimster.com](http://www.aimster.com), has now been renamed "Madster," and now is located at [www.madster.com](http://www.madster.com). To avoid confusion, however, Plaintiffs will continue to refer to the software and system as "Aimster."

## BACKGROUND

On September 4, 2002, this Court issued a Memorandum Opinion and Order granting Plaintiffs' motion for preliminary injunction against Defendants' operation of the Aimster System and Service, "a service whose very *raison d'etre* appears to be the facilitation of and contribution to copyright infringement on a massive scale." See In re: Aimster Copyright Litigation, \_\_\_ F. Supp. 2d \_\_\_, 2002 WL 31006142 \*1 (N.D. Ill. Sept. 4, 2002). On October 30, 2002, this Court entered its Preliminary Injunction Order, enjoining Defendants from continuing to infringe Plaintiffs' copyrighted works on, over, through or via the Aimster System and Service. Preliminary Injunction Order, ¶ 1. The Preliminary Injunction Order became "effective upon the posting of a bond by Plaintiffs in the amount of Five Hundred Thousand Dollars (\$500,000)." Preliminary Injunction Order, ¶ 8. On October 31, 2002, Plaintiffs posted the required bond and notified Defendants of the posting.<sup>2</sup>

The Preliminary Injunction Order is clear. The Court ordered Defendants to implement a method to stop all infringement of Plaintiffs' copyrighted works on the Aimster System and Service, and to shut down the Aimster System and Service until such method was implemented. Defendants admit in their Compliance Report that they have done neither, and have not even attempted to do anything. Despite the Order, Aimster users continue to have unhindered access to Plaintiffs' copyrighted works on the Aimster System and Service, and Defendants continue to enable and facilitate infringement of those works.

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<sup>2</sup> On November 4, 2002, Plaintiffs posted a bond with an amended title listing each Defendant by name. The October 31st bond reflected the MDL caption to which the Defendants objected.

Accordingly, Plaintiffs respectfully request that the Court issue an Order to Show Cause (1) why Defendants should not be held in contempt of the Preliminary Injunction Order; (2) why a compliance officer should not be appointed; (3) why JDCI, LLC should not be ordered to pay daily fines; and (4) why Defendants should not be ordered to compensate Plaintiffs for their reasonable attorneys' fees and costs in connection with this proceeding, together with any other relief the Court deems proper.

**I. DEFENDANTS ARE IN CONTEMPT OF THE PRELIMINARY INJUNCTION ORDER.**

The Court unequivocally ordered Defendants to: (a) cease "directly, indirectly, contributorily, or vicariously infringing" Plaintiffs' copyrighted works, (b) "immediately disable and prevent any and all access" to Plaintiffs' copyrighted works; and (c) shut down the Aimster System and Service entirely, if necessary, until such time as Defendants implement measures to prevent any and all infringements of Plaintiffs' copyrighted works on the Aimster System and Service. Preliminary Injunction Order ¶¶ 1, 2, and 3.

Defendants have refused to comply with any of these requirements. First, the overwhelming majority of Plaintiffs' copyrighted works identified in their Complaints still are available on the Aimster System and Service. See Declaration of Linda Bodenstein, ¶ 3; Declaration of Frank Creighton, ¶ 4. Defendants cannot plausibly claim they are unaware that Plaintiffs own these copyrighted works. Not only are these works specifically listed in the Complaints filed over a year and a half ago, but Plaintiffs relied on evidence of downloads of these same works in support of their motion for preliminary injunction.

Second, Plaintiffs' most popular recent releases, including those listed on the Billboard Hot 100, currently are available on the Aimster System and Service. See Declaration of Linda Bodenstein, ¶ 2; Declaration of Nancy Schafer, ¶ 2; see also Declaration of Frank Creighton, ¶ 5. Many of these songs were first released after issuance of the Preliminary Injunction Order. See Declaration of Frank Creighton, ¶ 5. Virtually all of the music listed in the Billboard Hot 100 is owned or controlled by Plaintiffs. See Declaration of Frank Creighton, ¶ 5.

Third, the Aimster System and Service continues to track, list, and specifically link to the music most often infringed on its system by listing that music in the "Madster Top 40 List" in Club Madster, virtually all of which is owned by Plaintiffs. See Declaration of Nancy Schafer, ¶ 3; Declaration of Frank Creighton, ¶ 6. Defendants cannot claim they are unable to remove the "Madster Top 40 List" from their website. See Declaration of Daniel Farmer ("Farmer Decl."), ¶ 21.

Fourth, *Defendants are continuing to profit from the continuing operation of the Aimster System and Service.* See Declaration of Terence Devine, ¶ 2. New users can continue to sign up for, and have access to, "Club Madster" by agreeing to pay \$4.95 each month, and existing users continue to get charged the same monthly fee. See Declaration of Terence Devine, ¶ 2. Deep reports he has over 9,000 "Club Madster" users and receives from them approximately \$45,000 a month. See Declaration of Terence Devine, ¶ 2. Further, users can continue to download the Madster software. See Declaration of Linda Bodenstein, ¶ 4; Farmer Decl., ¶ 18; Declaration of Frank Creighton, ¶ 2. Defendants are capable of disabling the entire website (Farmer Decl. ¶¶ 21-22), which necessarily would prevent new subscribers from signing up and prevent users from downloading software from the website.

The Court also ordered Defendants to "affirmatively monitor and patrol for, and preclude access to, Plaintiffs' Copyrighted Works (as defined in the Order) on, over, through, or via the Aimster System and Service." Preliminary Injunction Order, ¶ 4. There is no evidence Defendants are monitoring or patrolling the Aimster System and Service. Also, as noted above, the works identified in the Complaint, along with newly released works, and innumerable other works, remain on the Aimster System and Service in great abundance.

The Court further ordered Defendants to file and serve Compliance Reports "identifying all steps it has taken to comply with" the Preliminary Injunction Order. Preliminary Injunction Order, ¶ 5. In their "Compliance Report," filed November 12, 2002, Defendants fail to identify any steps they have taken to comply with the Preliminary Injunction Order. Rather, the Compliance Report confirms that Defendants have done nothing to comply with the Preliminary Injunction Order. Indeed, in bold defiance of this Court's Order, Defendants declare, without any support, that "it is impractical" -- they never say it is impossible -- to comply with the Court's Preliminary Injunction Order. Request for Judicial Notice Exhibit 2, Compliance Report, at 10, Conclusion.<sup>3</sup>

Finally, the Court ordered Defendants to "maintain a complete list of any and all sound recordings and musical compositions available on" the Aimster System and Service, and provide the lists to Plaintiffs on five business days' notice. Preliminary

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<sup>3</sup> The "Compliance Report" simply argues that the Preliminary Injunction Order itself is improper. "[R]earguments attacking the validity of the preliminary injunction provide no basis for objecting to the recommendation of contempt." Advent Elect., Inc. v. Buckman, 1996 WL 473658 \*1 (N.D. Ill. Aug. 12, 1996)(Aspen, J.).

Injunction Order, ¶ 6. Defendants are neither creating nor maintaining such lists. See Declaration of Terence Devine, ¶ 5.<sup>4</sup>

"The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." Grove Fresh Dist., Inc. v. John Labatt Ltd., 888 F. Supp. 1427, 1435 (N.D. Ill. 1995), aff'd, 134 F.3d 374 (7th Cir.), cert. denied, 525 U.S. 877 (1998) (quoting Young v. United States ex rel Vuitton et Fils S.A., 481 U.S. 787, 796 (1987)). "To win a motion for civil contempt, a party must prove by clear and convincing evidence that the opposing party violated a court order." See Goluba v. School Dist of Ripon, 45 F.3d 1035, 1037 (7th Cir. 1995)(citations and quotations omitted). The evidence submitted in support of this Motion more than satisfies this standard.

Defendants unquestionably are in violation of the clear terms of the Preliminary Injunction Order. Defendants also unquestionably have the ability to comply with the Preliminary Injunction Order. See Request for Judicial Notice Exhibit 3, Declaration of John Deep in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed January 21, 2002, ¶ 19 ("The only way Defendants could block a user's access is to shut down the whole system.") ¶ 46 ("Because Defendants do not have the software to block all of the files on individual users' hard drives that allegedly contain copyrighted data,

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<sup>4</sup> On November 15, 2002, Plaintiffs sent a letter to Connelly Robert & McGiveney LLC, Defendants' counsel, requesting Defendants provide, within five (5) business days pursuant to paragraph 6 of the Preliminary Injunction Order, lists of any and all sound recordings and musical compositions made available on, over, through, or via its system. See Exhibit I to this Motion. Connelly Robert & McGiveney LLC responded that they "forwarded the request to Mr. Deep," but claimed, as local counsel, they were "not in a position to confirm what the defendants will or will not do." See Exhibit I hereto. Connelly Robert & McGiveney LLC has filed an appearance in this litigation. See N.D. Illinois Local Rule 83.15(a). Moreover, it is the only counsel currently appearing for the corporations listed as Defendants.



Aimster would have to completely shut down."); see Exhibit 2 hereto; Transcript of Hearing on Motion for Preliminary Injunction, July 24, 2002, at 29.

Aimster depends on a few key computers to operate its file-distribution and copying system, including servers that allow Aimster users to connect and log on to the service, search for files on the computers of other users connected to the Aimster system, and download files from other Aimster users. Defendants could turn these systems off easily in several ways, including simply turning off the power to the servers that Aimster operates and disconnecting those servers from the system. If the system was turned off, infringement on the Aimster system necessarily would cease. Farmer Decl., ¶¶ 17-23.

Moreover, as discussed in Plaintiffs' Memorandum in Support of Preliminary Injunction Order, Defendants also could comply with the Preliminary Injunction Order by implementing a filtering system. Deep obviously has rejected implementation of a filtering system. Several companies have developed and maintain sound file data, including "acoustic" or "digital" fingerprints of the file, that can be used to "filter in" (or, as required, to "filter out") sound recordings on the Internet.<sup>5</sup> See Request for Judicial Notice Exhibit 4, Declaration of Patrick Breslin ¶ 8 ("Breslin Decl."), see also Request for Judicial Notice Exhibit 5, Declaration of Vance Ikezoye ¶ 4 ("Ikezoye Decl."). Such technologies also are capable of accurately identifying millions of digital audio files without any significant, negative impact on even a large-scale network's performance. Breslin Decl. ¶ 2.<sup>6</sup> These technologies are effective for all forms of audio files, regardless of the digital format into which the audio has been encoded. See Ikezoye

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<sup>5</sup> A "filter in" method is the on-line version of the traditional process of obtaining permission from a copyright owner prior to copying or distributing copyrighted works.

<sup>6</sup> For example, one filtering company's database currently contains fingerprint data for approximately 3.4 million copyrighted sound recordings, which represent almost all of the music available for retail purchase in North America, including music from the major and leading independent record companies. Ikezoye Decl. ¶ 10.

Decl. ¶ 4. Moreover, and most important, these technologies can be used to identify audio files irrespective of whether the files have been mislabeled – or even not labeled at all. Breslin Decl. ¶ 12. Such digital filtering technology is available to Aimster. Breslin Decl. ¶ 19; Ikezoye Decl. ¶ 11.<sup>7</sup>

In addition, Deep has admitted that, not only does a viable filtering technology exist, but that he already has developed his own filtering technology. See Request for Judicial Notice Exhibit 6, Affidavit of Debtor in Support of Order Authorizing Transfer of Interest in Property of the Estate, ¶ 5 (this new technology Deep has developed will "facilitate digital downloads of licensed copyrighted music, movies, and video games with the explicit permission of the copyright holder").

**II. A COMPLIANCE OFFICER SHOULD BE APPOINTED TO SHUT DOWN THE AIMSTER SYSTEM AND SERVICE UNTIL DEFENDANTS COMPLY WITH THE PRELIMINARY INJUNCTION ORDER.**

Deep admits he controls the Aimster servers. See Declaration of Terence Devine, ¶¶ 3-4. Defendants admit that shutting down the Aimster servers would effectuate the Preliminary Injunction Order. Despite ability and control, and the likely effectiveness of a shut down, Defendants refuse to adopt a simple technological fix to stop the continuing massive infringement on the Aimster System and Service. See Farmer Decl., ¶ 22. All the while, Deep is creating a "new" software program to enhance the Aimster System and Service. See Exhibit 3 to this Motion (Los Angeles Times Article, dated November 1, 2002).

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<sup>7</sup> If, for example, Aimster chose to implement a technology that would "filter in" only licensed works, today's technology is capable of recognizing whether certain files offered by a user are authorized to be made available to others for download. Ikezoye Decl. ¶ 11; Breslin Decl. ¶ 19. If, on the other hand, Aimster chose to adopt a technology that would "filter out" unauthorized works, fingerprint technology could be used to preclude the distribution of infringing works. Ikezoye Decl. ¶ 11; Breslin Decl. ¶ 20.

Traditional monetary remedies for contempt likely will not effectuate compliance with the Preliminary Injunction Order. Countless infringements of Plaintiffs' copyrighted works are occurring on the Aimster System and Service daily, causing Plaintiffs to suffer massive irreparable harm that a monetary fine cannot adequately recompense. Further, Defendants' continuing pattern of delay and refusal to comply with Court Orders demonstrates that the imposition of daily fines is unlikely to be an effective coercive remedy in this instance. That much is evident from Defendants' continuing their unlawful conduct in the face of the probability Plaintiffs will be awarded huge monetary damages for Defendants' willful copyright infringement.

Despite the Court having provided Defendants with adequate time to comply with the Order, nothing has been done. As discussed above, access to the Aimster System and Service can be prevented in its entirety; Defendants merely are refusing to take the Aimster System and Service offline. Therefore, Plaintiffs seek the appointment of a compliance officer to do that which the Court already has ordered Defendants to do, but which Defendants refuse to do – shut down the Aimster System and Service until such time as Defendants implement measures to "prevent any and all access by any person or entity ('User') to any of Plaintiffs' Copyrighted Works available on, over, through, or via" the Aimster System and Service. Preliminary Injunction Order, ¶ 2. A&M Records, Inc. v. Napster, Inc., 284 F 3d 1091, 1095 (9th Cir. 2002) (court shut down Napster after Napster failed to comply with preliminary injunction). The compliance officer's duties should be narrow and ministerial, including, subject to this Court's order, taking the Aimster System and Service off line, and, if the Court deems it necessary and appropriate, terminating any and all Internet access, on-line network connectivity, or related services for the Aimster System and Service, until further order of the Court. See Farmer Decl., ¶ 22.

"A district court has broad discretion to fashion an appropriate coercive remedy in a case of civil contempt, based on the nature of the harm and the probable effect of alternative sanctions." Cannon v. Loyola Univ. of Chicago, 676 F. Supp. 823, 828 (N.D. Ill. 1987)(Aspen, J) (citing N.A. Sales Co. v. Chapman Indus., 736 F.2d 854, 857 (2d Cir. 1984) and United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947)), order vacated in part on other grounds, 687 F. Supp. 424 (N.D. Ill. 1988). This discretion includes the power to appoint an individual to enforce compliance with the court's order. See Omaha Indem. Co. v. Wining, 949 F.2d 235, 239 (8th Cir. 1991) (affirming appointment of a receiver after defendants "rendered themselves unable, as well as unwilling, to obey the court's prior order"); Morgan v. McDonough, 540 F.2d 527, 533 (1st Cir. 1976), cert. denied, 429 U.S. 1042 (1977); ("receiverships are and have for many years been a familiar equitable mechanism"); Morales Feliciano v. Hernandez Colon, 771 F. Supp. 11, 12 (D. P R. 1991) (appointing a "special master" to comply with the court's order after the defendants failed to comply). "[W]hen the usual [contempt] remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as a receivership, to get the job done." United States v. City of Detroit, 476 F. Supp. 512, 520 (E.D. Mich. 1979)(appointing mayor as "administrator" to oversee, and ensure compliance with, a consent judgment requiring the city to comply with EPA standards)(citations and quotations omitted).<sup>8</sup>

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<sup>8</sup> Plaintiffs do not seek a broad receiver pursuant to Federal Rule of Civil Procedure 66. Rather, Plaintiffs seek the appointment of a compliance officer with limited authority. Even if the Bankruptcy Court had not lifted the stay for to allow this Court to enforce its own orders, the appointment of a compliance officer to uphold this Court's order would not violate the automatic stay. See Securities and Exchange Comm. v. Liberian, 131 F. Supp. 2d 10, 15 18 (D. D.C. 2001).

**III. THE COURT SHOULD ORDER TERMINATION OF ALL PAYMENTS ATTRIBUTABLE TO "CLUB MADSTER"; UNTIL ALL PAYMENTS ARE STOPPED, JDCl, LLC SHOULD BE REQUIRED TO PAY DAILY MONETARY FINES TO THE COURT.**

Before Deep, AbovePeer, and BuddyUSA filed for bankruptcy, Deep diverted all monies derived from the Club Madster's \$4.95 monthly fee into an account owned by JDCl, LLC, a non-bankrupt company wholly owned by Deep (that reportedly controls Defendants BuddyUSA and AbovePeer). See Declaration of Terence Devine, ¶2. JDCl, LLC collects all proceeds paid by users for "Club Madster" – approximately \$45,000 a month. Id. Clearly, JDCl, LLC is "acting in concert" with Defendants to violate this Court's Preliminary Injunction Order. See Preliminary Injunction Order, preamble. See Fed. R. Civ. P. 65(d); Reliance Ins. Co. v. Mast Ins. Co., 84 F.3d 373, 376-77 (10th Cir. 1996).

Plaintiffs request the Court order the termination of all payments or payment obligations that Defendants (and those acting in concert with Defendants) receive, or are to receive, from the operation of the Aimster System and Service, or, if appropriate, that the compliance officer be ordered to effectuate such termination.

Until such time that the proceeds are suspended, Plaintiffs request the Court order the imposition of daily fines against JDCl, LLC. See United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947)(civil contempt may be employed to coerce compliance with a court's order); Guess v. Chang, 912 F. Supp. 372, 378 (N.D. Ill. 1995) (Aspen, J.) (daily fine imposed; defendant "obviously had the ability to comply with this portion of the turnover order, and could have completely avoided the fine had he made the materials available to Guess? by [the deadline]"); accord W. Schwarzer, et al., Federal Civil Procedure Before Trial, ¶ 13:252 (Rutter 2001) ("Monetary sanctions may also be

imposed to coerce future compliance (e.g., a fine of \$5,000 a day until defendant complies)).

Plaintiffs seek a fine of \$1,500 a day, payable to the Court. This amount is not unreasonable under the circumstances. Deep has stated, *under oath*, that he collects up to \$45,000 a month from the "Club Madster's" \$4.95 monthly fee. Fining Deep in the approximate amount he obtains daily through his illegal conduct may effectuate compliance with the Preliminary Injunction Order.

**IV. PLAINTIFFS ARE ENTITLED TO THEIR ATTORNEYS' FEES AND COSTS INCURRED IN CONNECTION WITH THIS CONTEMPT PROCEEDING.**

In a civil contempt proceeding, "a court may, at its discretion, order reimbursement to the complainant, as part of the civil relief, of the party's fees and expenses incurred in bringing the violation to the court's attention." South Suburban Housing Center v. Berry, 186 F.3d 851, 855 (7th Cir.1999)(quoting Commodity Futures Trading Commission v. Premex, Inc., 655 F.2d 779, 785 (7th Cir. 1981)). "[A]n award of expenses and fees in civil contempt proceedings is proper and is independent of any award of compensatory damages." Commodity Futures Trading Commission v. Premex, Inc., 655 F.2d 779, 785-86 (7th Cir. 1981)(citations omitted). Plaintiffs seek an award of their attorneys' fees and costs incurred as a result of this contempt proceeding, including the costs incurred by Plaintiffs to monitor the Aimster System and Service, the very conduct this Court ordered Defendants to do, but that Defendants failed to do. See Grove Fresh Dist., Inc. v. John Labatt Ltd., 888 F. Supp. 1427, 1435 (N.D. Ill. 1995) *aff'd* 134 F.3d 374 (7th Cir.), *cert. denied*, 525 U.S. 877 (1998) (contempt sanctions may include "awarding attorney's fees and costs for preparing and prosecuting a contempt petition, and such fees include factors such as overhead and support personnel").

**CONCLUSION**

For the reasons discussed herein, Plaintiffs respectfully request that the Court issue an Order to Show Cause (1) why Defendants should not be held in contempt of the Preliminary Injunction Order; (2) why a compliance officer should not be appointed to do the things described above; (3) why JDCl, LLC should not be ordered to pay daily fines to the Court; and (4) why Defendants should not be ordered to compensate Plaintiffs for their attorneys' fees and costs in connection with this proceeding, together with any other relief the Court deems proper.

Dated: November 20, 2002



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