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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

PLAYMEDIA SYSTEMS, INC., a )  
California corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
AMERICA ONLINE, INC., *et al.*, )  
 )  
Defendant. )

CASE NO. CV01-3506 AHM (Ex)  
ORDER GRANTING MOTION FOR  
PRELIMINARY INJUNCTION

**I.  
INTRODUCTION**

This is a copyright infringement case. Plaintiff PlayMedia Systems, Inc. (“PlayMedia”) claims that the use by defendant America Online, Inc. (“AOL”)<sup>1</sup> of PlayMedia’s AMP computer software infringes PlayMedia’s copyright. The fact of copying, however, is not at issue. AOL freely admits copying the AMP software, but claims it is permitted to do so by a licensing agreement between PlayMedia and Nullsoft, a company later acquired by AOL. PlayMedia argues that AOL’s use exceeds the scope of that agreement.

The AMP software, which was developed by PlayMedia, is a “decoder” that serves the

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<sup>1</sup>The parties have agreed that the correct name and identity of the defendant is AOL, even though the defendant initially named in the caption is “AOL Time Warner, Inc.”

1 function of decoding digital audio files compressed in the MP3 format.<sup>2</sup> PlayMedia licenses  
2 AMP to serve as a decoding engine within certain larger software applications that can play  
3 MP3 files on personal computers.

4 In 1999 PlayMedia sued Nullsoft for copyright infringement, claiming that Nullsoft  
5 used the AMP software without permission in Nullsoft's MP3 player known as "WINAMP," a  
6 stand-alone audio player that plays music on computers that use the Windows operating  
7 system. PlayMedia alleged that WINAMP was using, and indeed dependent on, PlayMedia's  
8 AMP source code.<sup>3</sup> Nullsoft claimed that its MP3 decoder, which it called "Nitrane," was not  
9 derived from AMP source code. PlayMedia sought a preliminary injunction. That triggered  
10 the filing of several declarations, including experts' declarations which, among other things,  
11 involved comparisons of the source code in Nullsoft's Nitrane product with the AMP source  
12 code. One of the key declarants was Nullsoft's founder and WINAMP's creator, Justin  
13 Frankel. (His 1999 declaration is discussed below.) Before the hearing on PlayMedia's  
14 preliminary injunction motion, however, the case settled. As part of the Settlement Agreement  
15 PlayMedia granted Nullsoft the license at issue in this case, and in turn Nullsoft paid  
16 PlayMedia \$7.5 million.

17 The relevant portion of the Licensing Agreement provides:

18 PLAYMEDIA hereby grants NULLSOFT an irrevocable, non-exclusive, paid fully,  
19 perpetual worldwide license to versions 0.7.0 through and including 0.7.6 of the  
20 AMP source code (and every other version of the AMP source code that has been  
21 or will hereafter be made available for download over the Internet for non-  
22 commercial royalty-free use) with the right to make, have made, sell, offer to sell,  
23 use, copy, display, modify, distribute, prepare derivative works from and distribute  
24 in conjunction with WINAMP. NULLSOFT shall have the right to sublicense  
AMP or derivatives thereof in object code form only for use in conjunction with  
WINAMP only. This license does not permit NULLSOFT to sublicense AMP or  
derivatives thereof as a Stand Alone Product, whether in source code or object code  
form. Stand Alone Product as used herein means a product that is not distributed  
with WINAMP or derivatives thereof.

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25 <sup>2</sup> "MP3" refers to an internationally-accepted standard for digital compression.

26 <sup>3</sup> Generally, "source code" consists of human-readable programming instructions and "object  
27 code" consists of digital instructions (1s and Os) readable and executable by a computer. See M.  
28 Nimmer and D. Nimmer, Nimmer on Copyright (2001) at ¶13.03[F], p.13-114, n. 271. See also  
Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1515 at fn. 2 (9<sup>th</sup> Cir. 1993).

1           Within a few days after the Settlement Agreement was executed, AOL acquired  
2 Nullsoft for AOL stock worth some \$90 million and succeeded to Nullsoft's rights as licensee.  
3 In October 2000 AOL launched version 6.0 of its popular AOL software. One feature of AOL  
4 6.0 is the "AOL Media Player," which integrates an audio player that can play music files and a  
5 video player that can play video files on a personal computer. AOL calls its audio player the  
6 "Winamp Engine," and claims that this "Winamp Engine" is only a slightly modified version  
7 of WINAMP. AOL admits that its audio player<sup>4</sup> uses PlayMedia's AMP MP3 decoder, but  
8 claims that such use is within the scope of the Licensing Agreement.

9           PlayMedia argues that AOL's use of the AMP MP3 decoder in its audio player violates  
10 the Licensing Agreement in two ways. First, PlayMedia argues that AOL is using AMP in  
11 conjunction with an audio player that is not "WINAMP." PlayMedia argues that such use  
12 constitutes infringement because it exceeds the general grant of the license, which permits  
13 AOL to use the AMP source code "in conjunction with WINAMP." AOL responds that its use  
14 of AMP does not exceed the scope of the license because its audio player is only a slightly  
15 modified version of WINAMP. Moreover, AOL contends, the license permits it to use the  
16 AMP source code in conjunction with WINAMP and its derivatives. Because its audio player  
17 is a derivative of WINAMP, AOL argues, it has not exceeded the scope of the license.

18           Second, PlayMedia argues that even if AOL is using AMP "in conjunction with  
19 WINAMP," it is sublicensing AMP to AOL users in conjunction with AOL 6.0, in violation of  
20 the limited sublicensing grant of the license that permits AOL to sublicense AMP object code  
21 for use in conjunction with "WINAMP only." AOL responds that its WINAMP engine is the  
22 only software in AOL 6.0 that directly uses the AMP MP3 decoder; therefore, AOL argues,  
23 AMP is being used only in conjunction with WINAMP, within the scope of the Licensing  
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25           <sup>4</sup>When this order refers to AOL's "audio player," it is referring to the "engine" in the Media  
26 Player that is *not* RealPlayer (even though the Court recognizes that RealPlayer also has the ability  
27 to play audio files). *See* Biggs Decl. Exhibit D. Throughout this litigation, AOL has referred to this  
28 "engine" as the "WinAmp Engine," but the Court believes that this label is conclusory and unhelpful.  
Instead of referring to the "so-called 'WinAmp Engine,'" the Court instead will simply refer to this  
engine as AOL's "audio player."

1 Agreement. AOL further responds that the Licensing Agreement cannot be construed to  
2 prohibit AOL from embedding WINAMP in a larger software program such as AOL 6.0  
3 because WINAMP needs higher level programs to operate.

4 Thus, the two basic issues on this motion are (1) whether AOL is using “WINAMP” in  
5 AOL 6.0 in a manner intended by the parties to the Licensing Agreement, which requires the  
6 Court to answer the question, “What is WINAMP?”; and (2) whether the license prohibits AOL  
7 from using AMP in WINAMP when WINAMP is embedded in a larger software program, such  
8 as AOL 6.0.

9 PlayMedia has moved for a preliminary injunction. It seeks to restrain AOL from  
10 copying the AMP software into AOL 6.0 or any application other than WINAMP. PlayMedia  
11 also seeks an order requiring AOL to remove the AMP code from existing installations of AOL  
12 6.0.

13 In excellent briefs and spirited in-court examinations, both sides scored various points,  
14 but in the end the Court finds:

15 (1) Although AOL’s audio player shares some characteristics with WINAMP and  
16 borrows some source code from WINAMP’s main program, PlayMedia has established  
17 probable success in proving that AOL exceeded the general grant of the license by using AMP  
18 source code in conjunction with its audio player, which is not WINAMP.

19 (2) Although the foregoing finding standing alone is sufficient to warrant injunctive  
20 relief, the Court also finds that even if AOL is using the AMP source code in conjunction with  
21 WINAMP, PlayMedia has demonstrated probable success in proving that AOL violated the  
22 limited sublicensing grant because it is sublicensing to its users AMP in object code form other  
23 than “for use in conjunction with WINAMP only.”

24 (3) PlayMedia has established irreparable injury and the balance of hardships  
25 resulting from the issuance of an injunction does not warrant withholding injunctive relief.

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1 II.

2 GENERAL OBSERVATIONS

3 Conceptually, the parties' contentions appear anomalous at first, especially given that  
4 this lawsuit results from and follows in the wake of PlayMedia's suit against Nullsoft. In that  
5 case, PlayMedia contended that Nullsoft had no right to use *any* of the AMP code in  
6 WINAMP. Now that Nullsoft has acquired the right to use that code in WINAMP, PlayMedia  
7 contends that AOL is not making *enough* use of WINAMP in its audio player. Hence the  
8 anomaly: the copyright owner-licensor (PlayMedia) faults the previous alleged infringer  
9 (Nullsoft/AOL) for not incorporating *enough* of the previously infringing product (WINAMP)  
10 into the offending product (6.0 Media Player).

11 There is no single approach, much less an accepted standard, for evaluating whether in  
12 its audio player AOL is using WINAMP, or enough of WINAMP, to constitute compliance  
13 with the first sentence of the license. On this issue the parties have at various times compared  
14 the source code, the object code, the names of the files in which either source code or object  
15 code are stored and the parties' respective views of the "user experience" of each program. At  
16 the hearing they also used power point demonstrations and graphic testimony to illustrate their  
17 views.<sup>5</sup>

18 The following legal standards control the analysis in the sections that follow. A  
19 copyright license must be interpreted narrowly. *Apple Computers, Inc. v. Microsoft Corp.*, 759  
20 F. Supp. 1444, 1457 (N.D. Col. 1991), *aff'd*, 35 F.3d 1435 (9<sup>th</sup> Cir. 1994), *cert. denied* 513 U.S.  
21 1184 (1995). Copyright licenses are presumed to prohibit any use not authorized. *S.O.S., Inc.*  
22 *v. Payday*, 886 F.2d 1081, 1888 (9<sup>th</sup> Cir. 1989). A non-exclusive licensee such as  
23 Nullsoft/AOL has "no right to re-sell or sublicense the rights acquired unless he has been  
24 expressly authorized to do so." *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9<sup>th</sup> Cir.  
25 1984).

26 \_\_\_\_\_  
27 <sup>5</sup> Following the initial round of briefs and the first hearing on PlayMedia's motion, the Court  
28 issued a questionnaire to counsel. To the extent the Court incorporates the parties' answers in the  
following analysis, the citation to their respective Responses to Questionnaire will be "RTQ \_\_\_\_."

1 III.

2 **WHAT IS WINAMP AND IS AMP BEING**  
3 **USED IN CONJUNCTION WITH IT?**

4 This section of the Court’s order focuses on the language in the Licensing  
5 Agreement that permits AOL to use the AMP source code “in conjunction with WINAMP.” If  
6 AOL has used the AMP code in conjunction with something other than WINAMP, AOL has  
7 committed copyright infringement. *See S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087-88  
8 (9<sup>th</sup> Cir. 1989) (use of copyrighted work outside specified limits of license constitutes  
9 infringement).

10 **A. PlayMedia’s Opening Position**

11 PlayMedia argues that AOL has exceeded the scope of the Licensing Agreement  
12 because AOL 6.0 uses the AMP MP3 decoder in its Media Player, but the Media Player does  
13 not incorporate WINAMP, nor is it WINAMP itself. Pl.’s Mot. at 17. Therefore, PlayMedia  
14 argues, AOL is not using the AMP source code “in conjunction with WINAMP.” PlayMedia  
15 supports this argument by pointing out the most basic differences between WINAMP and the  
16 AOL Media Player: these two MP3 players have different names, look completely different,  
17 and, aside from the fact that they both play digital audio files, they share no common  
18 functionality. Pl.’s Mot. at 17.

19 **B. AOL’s Position**

20 AOL posits that it has not exceeded the scope of the Licensing Agreement because even  
21 though the Media Player contained in AOL 6.0 is not itself WINAMP, the Media Player  
22 incorporates WINAMP. Therefore, AOL asserts, the AMP MP3 decoder is being used “in  
23 conjunction with WINAMP.” In its Opposition Brief, AOL states, in no uncertain terms, that  
24 the AOL Media Player integrates WINAMP version 2.6.2: “The AOL Multimedia Player . . .  
25 has two programs, or engines, that are integrated into it. One engine is RealPlayer . . . . The  
26 other engine in the AOL Multimedia Player is Winamp version 2.6.2 (“Winamp”), which is  
27 audio playback software.” Opposition at 5. AOL goes on to declare: “The Winamp engine as  
28 embedded in the AOL Multimedia Player is a *nearly identical version* of WINAMP 2.6.2,

1 which was Nullsoft’s then-current version of its stand-alone WINAMP program.” Opposition  
2 at 6 (emphasis added);<sup>6</sup> *see also* Biggs Decl. ¶ 12. AOL argues that it only “modified” the  
3 WINAMP source code in relatively minor ways. Biggs Decl. ¶ 12.<sup>7</sup>

4 **C. PlayMedia’s Reply**

5 PlayMedia responded to AOL’s Opposition by filing an *ex parte* application to require  
6 AOL to produce the source code for WINAMP 2.6.2 so that it could evaluate AOL’s claim that  
7 the AOL Media Player incorporates a WINAMP engine that is “nearly identical” to WINAMP  
8 2.6.2. The Court thereupon ordered AOL to produce the source code. Although the parties  
9 have disputed whether AOL fully complied with that order, PlayMedia did conduct an analysis.  
10 It then argues in its Reply Brief (“Reply”) that the Media Player does not contain a “nearly  
11 identical” version of WINAMP 2.6.2. PlayMedia points out several ways in which the audio  
12 player used by the AOL Media Player differs from WINAMP 2.6.2, including, *inter alia*, that  
13 the AOL audio player uses only between 4-8% of the WINAMP Basic Software Application,  
14 the AOL audio player uses none of WINAMP’s resource files (which contain the digitized  
15 artwork, or graphics) and the file structures of the two programs are completely different. The  
16 largest single component borrowed by AOL from WINAMP 2.6.2, according to PlayMedia, is  
17 the AMP MP3 decoder itself.

18 PlayMedia concedes in its Reply that the Licensing Agreement permits AOL to use a  
19 version of WINAMP that was not necessarily the version in existence at the time of the  
20 Licensing Agreement. Specifically, it does not dispute that “WINAMP need not be the exact  
21 version of the product in existence when the license was granted, since it was understood that  
22 WINAMP would continue to be updated, with new versions being released periodically.”

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24 <sup>6</sup>“Then-current” in this statement refers to the time that AOL 6.0 was created, not to the time  
25 that Nullsoft and PlayMedia entered the Licensing Agreement.

26 <sup>7</sup>AOL claims that it modified WINAMP only as follows: First, AOL created an ActiveX  
27 control to integrate WINAMP into the Media Player. Second, AOL “simplified” the WINAMP  
28 interface. And third, AOL fixed some programming bugs in WINAMP and “tightened the code,”  
or reorganized some of the AMP code into “a more formal code style.” Opposition at 7; Biggs Decl.  
¶ 12.

1 Reply at 5. But, PlayMedia asserts, the program that AOL calls the “Winamp engine” in its  
2 Media Player is “so dramatically different in terms of function, so devoid of WINAMP source  
3 code, that it cannot honestly be represented to be WINAMP at all, let alone a ‘nearly identical’  
4 version of WINAMP 2.6.2.” Reply at 1.

5 Tellingly, in its response to the Court’s post-hearing questionnaire, AOL backs away  
6 from its prior assertion that the Media Player incorporates a “nearly identical” version of  
7 WINAMP 2.6.2. Indeed, it is now clear to the Court that AOL initially overstated its case  
8 when it asserted that the two programs are “nearly identical.”

9 **D. Legal Standards**

10 Courts apply principles of contract interpretation when interpreting the scope of a  
11 Licensing Agreement. *Mendler v. Winterland Production, Ltd.*, 207 F.3d 1119, 1121 (9<sup>th</sup> Cir.  
12 2000); *United States v. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9<sup>th</sup> Cir. 1988).  
13 The parties here dispute the meaning of “WINAMP” as used in the phrase “in conjunction with  
14 WINAMP.” In interpreting the Licensing Agreement, the Court’s job is to determine the  
15 meaning and intention of the parties at the time they entered the agreement. 5 CORBIN ON  
16 CONTRACTS § 24.5 (1998). At the outset, then, the Court must determine whether PlayMedia  
17 and Nullsoft attached the same meaning to the term “WINAMP” at the time they entered the  
18 Licensing Agreement. If so, “the contract is enforceable in accordance with that meaning.” *Id.*

19 The term “WINAMP” is vague because the Licensing Agreement only defines  
20 WINAMP as a “suite of software programs.” PlayMedia Exhibit 11 Recitals ¶ C. Moreover,  
21 there are many different versions of WINAMP in existence, and, as PlayMedia concedes, the  
22 Licensing Agreement does not restrict the licensee to using any particular version of WINAMP.  
23 Extrinsic evidence is therefore admissible to demonstrate what the parties intended by  
24 “WINAMP.” *King Features*, 843 F.2d at 398 (extrinsic evidence is admissible if evidence  
25 demonstrates that the language of a contract is susceptible to different meanings); *see also* 5  
26 CORBIN ON CONTRACTS § 24.7 (1998) (“If the disputed term is vague . . . the proffered  
27 extrinsic evidence may reveal which of a range of more precise meanings the parties had  
28 intended.”).



1 PlayMedia offers some highly probative extrinsic evidence to demonstrate what the  
2 parties intended when they used the term “WINAMP” in the Licensing Agreement. Justin  
3 Frankel, creator of the WINAMP software and President of Nullsoft at the time of the  
4 Licensing Agreement, described WINAMP in detail in a declaration in the prior Nullsoft  
5 litigation. PlayMedia Exhibit 6. In that declaration, Frankel explained that WINAMP is one of  
6 the leading audio players on the Internet. Frankel Decl. ¶ 2. He described the “current  
7 Winamp product,” meaning the product in use at the time of the prior Nullsoft litigation, as:

8 a general purpose audio player that plays digital audio files stored in a variety of  
9 formats, including those known in the industry as MP3, MP2, MOD, CD, WAV,  
10 MIDI and others. Winamp runs on personal computers using the Windows . . .  
11 operating systems, and includes a user-friendly graphical interface that mimics a  
standard stereo system. Winamp also has advanced features for an audio player  
such as a graphic equalizer, a play-list manager, visualization, a sounds effects  
module, and a minibrowser.

12 Frankel Decl. ¶ 5.<sup>8</sup>

13 PlayMedia asserts, and AOL does not dispute, that the contested language in the  
14 Licensing Agreement derives from the following statement in paragraph six of Frankel’s  
15 declaration: “Winamp [uses] a flexible and extensible architecture. Separate stand-alone pieces  
16 of software known as ‘plug-ins’ provide core and enhanced functionalities for Winamp.  
17 Specifically, separate plug-ins work *in conjunction with Winamp* to provide the functionality of  
18 decoding specific audio file formats . . .” (emphasis added). Van Dalsem Supp. Decl. ¶ 12.  
19 The AMP MP3 decoder is one of the plug-ins to which Frankel was referring. *Id.*

20 Frankel’s declaration also included a diagram that illustrates how WINAMP works in  
21 conjunction with various plug-ins. Frankel Decl. ¶ 6. Several boxes are contained in the

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23 <sup>8</sup>Some of these features are depicted in a document that was marked as Court Exhibit 1,  
24 which is attached to this Order. That exhibit was developed by the Court’s Special Advisor, David  
25 Kay, Lecturer in Computer Science in the Department of Information and Computer Science at the  
26 University of California, Irvine. He was appointed pursuant to the Court’s inherent authority. *See,*  
27 *In re Peterson*, 253 U.S. 300, 312 (1920); Fed. R. Evid. 706. The parties displayed exemplary  
28 cooperation with each other and with the Court in recommending the Special Advisor and consenting  
to his appointment, which proved invaluable to the Court. It should be noted that in Box K of Court  
Exhibit 1, Mr. Kay referred to the AOL audio player as “Winamp in the AOL Media Player,” a term  
that this Order does not use. *See supra* note 4.

1 “Winamp” box, including the playlist manager, the user interface, the output manager (for  
2 outputting sound to the computer), the DSP manager (for sound effects plug-ins), the main  
3 interface, the visualization manager (for visual effects plug-ins), and the input manager (for  
4 getting decoded information from the various audio file decoders, including the MP3 decoder).

5 PlayMedia argues that at the time Nullsoft and PlayMedia entered the Licensing  
6 Agreement, the parties understood that the license permitted Nullsoft to use the AMP code in  
7 the WINAMP audio player in the same manner that Frankel had detailed in his declaration,  
8 “namely, permitting its use and distribution ‘in conjunction with Winamp only.’” Pl.’s Mot. at  
9 11 (emphasis added).

10 PlayMedia’s argument is supported by Bruce Van Dalsem, the lawyer who represented  
11 PlayMedia during the prior Nullsoft litigation. Van Dalsem states that when Mark Kittredge,  
12 who represented Nullsoft during the prior litigation, first sent him a draft of the Licensing  
13 Agreement, it did not contain any product restrictions. Van Dalsem Supp. Decl. ¶ 9. Van  
14 Dalsem changed the Licensing Agreement to add the phrase “in conjunction with Winamp” at  
15 the end of the first sentence of the license in order to “limit[] Nullsoft’s right to use AMP to the  
16 Winamp product.” *Id.* ¶ 12. Van Dalsem understood that the AMP MP3 decoder “plugged in”  
17 to the main Winamp program, `winamp.exe`, and he used the phrase “in conjunction with  
18 Winamp” to capture this fact. *Id.* ¶¶ 12-13.

19 This extrinsic evidence is helpful, but it does not entirely resolve the vagueness inherent  
20 in the Licensing Agreement. The reference to “WINAMP” remains vague because, as Frankel  
21 stated in his declaration, “Winamp [uses] a flexible and extensible architecture.” Frankel Decl.  
22 ¶ 6. WINAMP itself has many different components, and different versions of WINAMP use  
23 varying types and numbers of these components. Moreover, as with all computer software,  
24 WINAMP’s code has evolved with later versions. This is another reason why it is difficult to  
25 ascertain what, precisely, the parties intended by “WINAMP.”

26 Despite the vagueness problem, the Court is convinced that the various characteristics  
27 of WINAMP described by Frankel in his declaration can and should serve as a benchmark for  
28 determining whether AOL is using the AMP source code “in conjunction with WINAMP.”

1 Van Dalsem’s declaration establishes that PlayMedia and Nullsoft intended that the AMP  
2 source code would be used in the manner Frankel described, namely by “plugging in” to  
3 WINAMP’s main program, winamp.exe. Even though PlayMedia does not (and cannot)  
4 state with precision what the parties intended by “WINAMP,” PlayMedia may prevail by  
5 demonstrating that AOL’s product differs so dramatically from the product described by  
6 Frankel that it necessarily falls outside of what the parties intended when they used the term  
7 “WINAMP.”

8 **E. PlayMedia Has Established That It Is More Probable Than Not That The Audio**  
9 **Player In AOL’s Media Player Is Not “WINAMP” For Purposes of the “In**  
10 **Conjunction With WINAMP” Requirement**

11 The first step in this analysis is to determine the appropriate methodology for  
12 comparing AOL’s audio player with WINAMP. The parties have proffered competing  
13 methodologies.

14 **1. AOL’s Proposed Methodology**

15 AOL would have the Court focus exclusively on the “core functionality” of the two  
16 software programs. AOL RTQ at 13. AOL defines the “core functionality” or “essence” of  
17 WINAMP, regardless of which version, as its ability to select a computer music file, decode it,  
18 and output the sound on a computer. AOL RTQ at 4. Because AOL’s audio player shares this  
19 “core functionality” with WINAMP, the “essence” of WINAMP is present in AOL’s Media  
20 Player. If so, AOL argues, that is sufficient for the Court to find that AOL is using the AMP  
21 MP3 decoder “in conjunction with WINAMP.”

22 **2. AOL’s Methodology Has Two Major Flaws**

23 AOL’s methodology is flawed for two main reasons. First, it is too broad because it is  
24 dependent on the fact that both WINAMP and AOL’s audio player can decode MP3 files. As  
25 will be explained in more detail below, because all of the code and functionality for decoding  
26 MP3 files is provided by the AMP MP3 decoder itself, the ability to decode MP3 files cannot  
27 possibly be the “essence” of WINAMP. Second, AOL’s methodology is too narrow because it  
28 minimizes the importance of source code and resource file comparisons, as well as

1 comparisons of the two audio players' features. The Court agrees with PlayMedia that all of  
2 these comparisons are relevant to the determination whether "WINAMP" is present in the AOL  
3 audio player.

4 **3. The Structure of WINAMP**

5 There are three primary components that make up WINAMP.

6 **a. Audio Input and Output Plug-Ins**

7 The first component consists of the various *audio input plug-ins* that input decoded  
8 audio information into a main program. PlayMedia's Exhibit 38; PlayMedia RTQ at 1. A  
9 plug-in is "a computer file used to alter, enhance or extend the operation of a parent  
10 application." Billett Decl. ¶ 14. The AMP MP3 decoder is an example of an audio input plug-  
11 in because, when used, it decodes a sound file in the MP3 format and then inputs that  
12 information into WINAMP's main program.<sup>9</sup> PlayMedia RTQ at 1. The second basic  
13 component of WINAMP consists of *audio output plug-ins*. As the name suggests, these plug-  
14 ins take information from WINAMP's main program and output it to the computer. All  
15 versions of WINAMP have at least the *wave* output plug-in. PlayMedia RTQ at 2.<sup>10</sup>

16 **b. The Main Program: winamp.exe**

17 The third basic component of WINAMP – and the most important component for  
18 purposes of the Court's analysis – is the main program, which is referred to by the parties as  
19 "winamp.exe," or the WINAMP Basic Software Application. Winamp.exe is the "stand-  
20 alone executable," and is the basic software application to which other components, such as the  
21 AMP MP3 decoder, plug-in. Billett Decl. ¶ 15. Winamp.exe does not have the capacity to

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23 <sup>9</sup>In the standard version of WINAMP, seven audio input plug-ins are provided in addition  
24 to the MP3 decoder. These plug-ins permit the user to listen to Windows Media files, Wave files,  
25 Midi files, Mjuice files, and Audiosoft files. Plug-ins are not restricted to audio; the standard version  
26 of WINAMP also includes an enhanced visualization plug-in that permits users to watch a light show  
while listening to music. See Box H in Court Exhibit 1.

27 <sup>10</sup>In the standard version of WINAMP, two audio output plug-ins are provided in addition  
28 to the wave output plug-in. These additional plug-ins permit the user to output "Direct Sound" and  
to copy music to a disk. Exhibit 38.

1 decode audio files; it provides the code and functionality for everything other than decoding  
2 such files and outputting music to the computer. Frankel Decl. ¶ 8. “Everything else” includes  
3 allowing the user to change the appearance of WINAMP’s interface, to adjust the music control  
4 levels, and to manage a playlist. Frankel Decl. ¶ 6. `winamp.exe` provides the user with  
5 “scores of interface features, from everything having to do with the sound and playing of  
6 music, to browsing on the Internet for music information.” PlayMedia RTQ at 4.

7 All versions of WINAMP – whether Lite, Minimal, or Standard<sup>11</sup> – use at least: (1) the  
8 same version of `winamp.exe`, (2) the AMP MP3 decoder (a.k.a. the MP3 input plug-in), and  
9 (3) the wave output plug-in. PlayMedia RTQ at 1. Versions of WINAMP differ from other  
10 versions only insofar as they have different numbers and types of plug-ins. Billett Decl. ¶ 16.  
11 For example, one version of WINAMP may give the user the ability to copy music to a disk  
12 because, in addition to the wave output plug-in, it has the “Out Disk Output Plugin.”  
13 PlayMedia Exhibit 38. Another version of WINAMP may give the user the ability to listen to  
14 Midi files because, in addition to the AMP MP3 Input Plugin, it has the “Midi Input Plugin.”  
15 PlayMedia Exhibit 38. But, no matter how many different plug-ins are used, all versions of  
16 WINAMP necessarily use the main program, `winamp.exe`.

#### 17 **4. AOL’s “Core Methodology” Test Is Too Broad and Too Narrow**

18 The respective capacities of WINAMP and AOL’s audio player to decode software are  
19 a constant, because both programs use the AMP MP3 decoder. The question is whether the  
20 AMP MP3 decoder is being used in conjunction with a product for which it is licensed; thus,  
21 the decoder (and the function it performs) cannot logically be a part of this analysis. AOL’s  
22 “core functionality” test makes relevant that both programs can decode music files, but the  
23 Court agrees with PlayMedia that this is not a relevant point of comparison. In this sense,  
24 AOL’s methodology is too broad.

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25  
26 <sup>11</sup>These are the terms the parties use to describe different installations of WINAMP. In the  
27 minimal installation of WINAMP, the main program comes with one audio input plug-in and one  
28 audio output plug-in. PlayMedia RTQ at 2. In the Standard installation of WINAMP 2.6.2, the main  
program comes with seven additional audio input plug-ins, an enhanced visualization plug-in, and  
two additional alternative output plug-ins.

1 But AOL's methodology also is too narrow because to answer the question, "What is  
2 WINAMP?", one must determine what WINAMP does, *apart from* its ability to decode music  
3 files. AOL's methodology ignores that determination. All of the features Frankel described as  
4 being part of WINAMP – the playlist management, the interface, and the minibrowser, for  
5 example – are supplied by the source code in `winamp.exe`. Frankel Decl. ¶ 5. Moreover,  
6 Van Dalsem crafted the phrase "in conjunction with Winamp" in the Licensing Agreement to  
7 reflect the fact that the AMP MP3 decoder "plugged in" to `winamp.exe`. Van Dalsem Supp.  
8 Decl. ¶¶ 12-13. Therefore, the Court agrees with PlayMedia that whether "WINAMP" is in  
9 AOL's Media Player should be determined in large part by the presence or absence of  
10 `winamp.exe` in AOL's Media Player. In short, a source code and resource file comparison of  
11 the two programs is highly relevant in determining the extent to which WINAMP is present in  
12 AOL's Media Player.

13 In addition, as explained more fully below, the Court agrees with PlayMedia that  
14 because the source code from `winamp.exe` that *is* present in AOL's Media Player may have  
15 been commented out (i.e. is present but made inoperable)<sup>12</sup> or supplemented to operate  
16 differently, a functional comparison of the two programs is also relevant. This functional  
17 comparison should not be restricted to the programs' ability to decode and play music. Rather,  
18 the Court will take into account the several so-called "ancillary" features that make WINAMP  
19 a unique audio player.

## 20 **5. Source Code and Resource File Comparison**

21 In attempting to demonstrate the absence of `winamp.exe` in AOL's Media Player,  
22 PlayMedia stresses that, at most, only 8% of the source code from `winamp.exe` is contained  
23 in the AOL Media Player. Billett Decl. ¶ 13; PlayMedia RTQ at 13. PlayMedia obtained this  
24 percentage by comparing the source code from WINAMP 2.6.2's `winamp.exe` with the  
25 source code in the corresponding AOL "main program," which is called `ampx.dll`. Billett  
26

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27 <sup>12</sup>Source code that has been "commented out" is present in the program but "is not compiled  
28 and is absent from the executable object code precisely as if it never existed." Billett Decl. ¶ 30.

1 Dec. ¶ 17. This comparison reveals that, of the total 16,366 lines of source code in  
2 `winamp.exe`, `ampx.dll` uses between 1277 and 1337 of these lines, or about 8%.<sup>13</sup>

3 AOL responds to this argument by pointing out that even though it only uses 8% of  
4 `winamp.exe` in its audio player, the code that it borrowed from WINAMP as a whole makes  
5 up 92.4% of its audio player. AOL urges the Court to look not at what AOL left behind in  
6 WINAMP, but at the fact that so much of AOL's audio player is made up of WINAMP code.  
7 AOL RTQ at 7.

8 But in fact, AOL includes in the 92.4% figure the AMP MP3 decoder source code, and  
9 the Court has already determined that the presence of the AMP source code is not relevant to  
10 determine whether AMP is being used in conjunction with WINAMP or whether WINAMP is  
11 present in AOL's audio player. Once the AMP source code is removed, the 8% of  
12 `winamp.exe` taken out of WINAMP 2.6.2 actually comprises about 63% of the  
13 corresponding AOL main program, `ampx.dll`. Stated another way, `ampx.dll` contains  
14 37% new code written by AOL. PlayMedia RTQ at 7.

15 AOL contends that even the 63% figure is sufficient for the Court to conclude that AOL  
16 is using the AMP MP3 decoder "in conjunction with WINAMP." It argues that a court could  
17 conclude in a "typical" copyright case that `ampx.dll` is, as a matter of law, a derivative of  
18 `winamp.exe`. AOL RTQ at 10 & n.11 (citing cases in which courts concluded that a  
19 subsequent work was a "derivative" of an earlier copyright-protected work, and therefore, that  
20 infringement had occurred).<sup>14</sup> According to AOL, because `ampx.dll` would be considered a

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22 <sup>13</sup>Dr. Billett stated that the AOL Media Player contains only 4.1% of unmodified WINAMP  
23 2.6.2 source code. Billett Decl. ¶ 13. After Dr. Billett made this statement, the parties disagreed  
24 about whether two "support libraries" used by WINAMP 2.6.2 when it compiles should be counted  
25 as "part" of WINAMP. PlayMedia RTQ at 13; AOL RTQ at 12. The Court will assume, without  
26 deciding, that these libraries should not be counted as part of WINAMP. When the source code for  
the libraries are not included in the analysis, the AOL Media Player contains about 8% of  
`winamp.exe`. PlayMedia RTQ at 13.

27 <sup>14</sup>The cases cited by AOL are *Rebis v. Universal CAD consultants, Inc.*, 1998 WL 470475,  
28 at \*3 (N.D. Cal. Aug. 11, 1998), *EPL, Inc. v. USA Federal Credit Union*, 173 F.3d 1356, 1360-62  
(11<sup>th</sup> Cir. 1999), *Montgomery v. Noga*, 168 F.3d 1282, 1292 (11<sup>th</sup> Cir. 1999), *United States v.*

1 derivative of winamp.exe in a “typical” copyright infringement suit, this Court should  
2 conclude that the AMP MP3 decoder is being used in conjunction with WINAMP.

3 The Court is not persuaded by this argument. The cases cited by AOL all involve the  
4 question whether a subsequent computer program infringed an earlier, copyright-protected  
5 program because it was impermissibly “based upon” the earlier program. *See, e.g., Integral*  
6 *Systems, Inc. v. Peoplesoft, Inc.*, 1991 WL 498874, at \* 11 (N.D. Cal. 1991) (citing Copyright  
7 Act, 17 U.S.C. § 106, which defines a “derivative work” as “a work based upon one or more  
8 preexisting works”). In the context of these cases, even if the subsequent program borrowed  
9 very little of the previous program, a court could still conclude that the subsequent program  
10 was a “derivative” if it was comprised mostly of the previous program.

11 The infringement question in those cases – whether a subsequent program was “based  
12 upon” an earlier program – is very different from the infringement question in this case, which  
13 is whether WINAMP is present in AOL’s product in a manner the parties to the Licensing  
14 Agreement intended. At best, AOL’s argument demonstrates that, in a “typical” copyright  
15 infringement case, its audio player might be found, as a matter of law, to be a derivative of  
16 WINAMP. The parties to the Licensing Agreement did not intend that Nullsoft could use the  
17 AMP source code “in conjunction with a product that could be found, in a ‘typical’ copyright  
18 case, to be a derivative of WINAMP.” Instead, the parties intended the AMP code to be used  
19 “in conjunction with WINAMP.” That so much of winamp.exe’s code is *missing* from  
20 AOL’s audio player is more relevant to demonstrating infringement in this context than the fact  
21 that some 63% of ampx.dll is comprised of winamp.exe’s source code. Accordingly,  
22 AOL’s argument, while initially appealing, ultimately is not persuasive.

23 AOL makes the additional argument that it is not violating the terms of the Licensing  
24 Agreement because the agreement permits it to distribute the MP3 decoder as part of another  
25 product so long as that product is a derivative of WINAMP. Because AOL is distributing the  
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27 \_\_\_\_\_  
28 *Manzer*, 69 F.3d 222, 227 (8<sup>th</sup> Cir. 1995), and *Integral Systems, Inc. v. Peoplesoft, Inc.*, 1991 WL  
498874, at \*11 (N.D. Cal. 1991).



1 MP3 decoder with a derivative of WINAMP, AOL argues, it has not exceeded the scope of the  
2 Licensing Agreement. Opposition at 11. AOL states: “Nothing in the license requires AOL to  
3 use only the current stand-alone version of Winamp, but to the contrary the license expressly  
4 permits AOL to distribute the MP3 decoder in conjunction with Winamp and its derivatives.”  
5 Opposition at 12.

6 But the license does not, in fact, permit AOL to use or distribute AMP in conjunction  
7 with WINAMP and its derivatives. A careful parsing of the agreement reveals that it grants the  
8 licensee two separate rights: first, the general right to use AMP (in source code form) “in  
9 conjunction with WINAMP,” and second, the limited right to sublicense and distribute AMP  
10 (in object code form only) for use “in conjunction with WINAMP only.”<sup>15</sup> Neither the general  
11 use grant nor the limited sublicensing grant permits the licensee to use or sublicense AMP  
12 “with WINAMP *or derivatives of WINAMP*.” All of the actions described in the general use  
13 grant<sup>16</sup> – including “prepare derivative works from” – refer to AMP, not WINAMP. The  
14 language contained in the parenthetical permits AOL to use future versions of AMP that may  
15 be created by PlayMedia.

16 So where does the concept that AOL relies on – “derivatives” of WINAMP – come  
17 from? It comes from the license’s *additional* prohibition against Nullsoft distributing AMP or  
18 derivatives thereof as a “Stand Alone Product.” Such a product is defined to be “a product that  
19 is not distributed with WINAMP *or derivatives thereof*.” (Emphasis added).<sup>17</sup>

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21 <sup>15</sup>PlayMedia also argues that AOL exceeded the scope of the limited grant by distributing  
22 AMP in conjunction with AOL 6.0, and not in conjunction with “WINAMP only.” The Court  
addresses this argument in the next section of this Order.

23 <sup>16</sup>This section states: “PLAYMEDIA hereby grants NULLSOFT [a] . . . license to . . . the  
24 AMP source code (and every other version of the AMP source code that has been or will hereafter  
25 be made available for download over the Internet for non-commercial royalty-free use) with the right  
26 to make, have made, sell, offer to sell, use, copy, display, modify, distribute, prepare derivative  
works from and distribute in conjunction with WINAMP.”

27 <sup>17</sup>This section states: “This license does not permit NULLSOFT to sell, license, or otherwise  
28 distribute AMP or derivatives thereof as a Stand Alone Product, whether in source code or object  
code form. Stand Alone Produce as used herein means a product that is not distributed with

1 AOL argues that this reference permits it to use AMP with any derivative of WINAMP.  
2 Kittredge Decl. ¶ 4 (supporting the view that AOL can use AMP with any derivative of  
3 WINAMP because “paragraph 9 [of the Licensing Agreement] specifically refers to ‘WINAMP  
4 or derivatives thereof.’”). But this *additional prohibition* on AOL’s use of AMP cannot be  
5 construed to *permit* AOL to use or distribute AMP with derivatives of WINAMP. The  
6 language in the last two sentences of Paragraph 9 does not augment AOL’s rights under either  
7 the general or limited grants of the license.<sup>18</sup> The purpose of this prohibition, rather, was “to  
8 address PlayMedia’s stated concern that . . . Nullsoft would be able to distribute or license the  
9 AMP decoder or its derivatives to third parties as a separate product by itself in direct  
10 competition with PlayMedia.” Kittredge Decl. ¶ 3; *see also* Van Dalsem Supp. Decl. ¶ 16.  
11 AOL is simply wrong when it asserts that this additional prohibition “expressly permits AOL to  
12 distribute the MP3 decoder in conjunction with Winamp and its derivatives.”

13 Given that PlayMedia concedes that it was not the intent of the parties to prohibit the  
14 licensee from using AMP in conjunction with different *versions* of WINAMP,<sup>19</sup> why can’t  
15 AOL use AMP in conjunction with a derivative of WINAMP? Is there a difference between a  
16 “version” and a “derivative”? The parties do not directly address this question, but the Court  
17 thinks that there is a distinction, and it is important.

18 The parties often refer to different “versions” of WINAMP, and these references are  
19 \_\_\_\_\_  
20 WINAMP or derivatives thereof.”

21 <sup>18</sup>Van Dalsem, PlayMedia’s lawyer during the prior Nullsoft litigation, puts it this way: “The  
22 Stand Alone Product restriction was intended as just that, a restriction. It was not intended to expand  
23 any of Nullsoft’s rights. Just because a product is not a Stand Alone Product does not mean that it  
24 is otherwise with[in] the scope of the source code license or the object code license.” Van Dalsem  
25 Supp. Decl. ¶ 17.

26 <sup>19</sup>Van Dalsem, who represented PlayMedia during the prior Nullsoft litigation, states: “Mr.  
27 Kittredge [Nullsoft’s lawyer] is correct that PlayMedia did not request a provision that would ‘lock’  
28 Winamp as it then existed. I understood and expected that the Winamp product would continue to  
be updated and improved, with new versions being released. I am familiar with the numerous  
versions of the Winamp product that have been released by Nullsoft during the past two years and  
those updates to Winamp are entirely consistent with what I understood would happen to the  
Winamp product following the grant of the license.” Van Dalsem Supp. Decl. ¶ 19.

1 always to different incarnations of the stand-alone WINAMP program freely made available by  
2 WINAMP's owner (now AOL) to users for download on the Internet. *See, e.g.* Biggs Decl. ¶  
3 14 (discussing WINAMP versions 2.6.2 and 2.7.6, and describing WINAMP 2.7.6 as “a  
4 version of the stand-alone Winamp program that was developed after the release of AOL 6.0”);  
5 Karplus Decl. ¶ 31 (discussing aspects of the object code in WINAMP version 2.5); *id.* ¶ 46  
6 (discussing how Nullsoft removed the AMP decoder in WINAMP version 2.2); Billett Decl. ¶  
7 26 (discussing the “updates to Winamp between version 2.6.2 and version 2.7.6”). However  
8 many versions of WINAMP there may be, PlayMedia has demonstrated that all versions of  
9 WINAMP, which are available for download at [www.winamp.com](http://www.winamp.com), have at least three basic  
10 components: the MP3 audio input plug-in, `winamp.exe`, and the wave audio output plug-in.

11         That this is the meaning, or at least the reference point, for a “version” of WINAMP is  
12 further supported by the manner in which the parties use the word in the context of AOL's  
13 software and the AMP program. For example, AOL's expert, David Biggs, explains that  
14 “‘AOL 6.0’ is version 6.0 of AOL's access software and is the most recent version that has  
15 been released to the public.” Biggs Decl. ¶ 3. Biggs also states that “[p]rior versions of AOL's  
16 access software include versions 1.0 through 5.0. . . . AOL plans to release AOL version 7.0 of  
17 its access software in the fall of 2001.” These statements tend to support the Court's  
18 conclusion that a “version” of a computer program is not simply any program that derives from  
19 a prior program; rather, a “version” is a new incarnation of a program that is released to the  
20 public by the owner of the program.

21         But “version” is not synonymous with “derivative.” The Licensing Agreement itself  
22 draws a distinction between a “derivative” and a “version.” Paragraph 9 grants Nullsoft a  
23 license “to versions 0.7.0 through and including 0.7.6 of the AMP source code” as well as a  
24 license to “every other version of the AMP source code that has been or will hereafter be made  
25 available for download over the Internet for non-commercial royalty-free use.” The license  
26 goes on to grant Nullsoft the right to “prepare derivative works” from AMP “in conjunction  
27 with WINAMP.” These terms and provisions suggest that a “version” of AMP is an  
28 incarnation of AMP made available by AMP's owner – PlayMedia – while a “derivative” of

1 AMP is a different incarnation of AMP created by a third party – Nullsoft.

2         Given this distinction between “version” and “derivative,” PlayMedia’s position makes  
3 sense. Essentially, it is arguing that AOL may use AMP only in conjunction with an  
4 incarnation of WINAMP that would be available for download at www.winamp.com. The  
5 Court agrees that, under the terms of the Licensing Agreement, this is not the same as using  
6 AMP in conjunction with a derivative of WINAMP. The latter is not authorized. Rather,  
7 AOL must show that it is using a version of WINAMP.<sup>20</sup>

8         PlayMedia further bolsters its argument that AOL’s audio player is not a version of  
9 WINAMP by going beyond a source code comparison. It also points out that AOL’s audio  
10 player does not use any of the resource files that are used by WINAMP 2.6.2. Resource files  
11 contain all of the digitized artwork, or graphics, used by the WINAMP graphical user interface,  
12 i.e. what the user sees when s/he uses WINAMP. Billett Decl. ¶ 20. The resource files are not  
13 expressed as source code, but are essential to the WINAMP program. *Id.* AOL does not  
14 dispute that it uses none of WINAMP’s resource files. This comparison explains why the  
15 Media Player does not look like WINAMP from the perspective of the user. Billett Decl. ¶ 21.

16         AOL challenges the source code and resource file comparisons PlayMedia proffers,  
17 primarily on the basis that a source code and resource file comparison is irrelevant because the  
18 Court should restrict its analysis to a comparison of the “core functionality” of the two

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19  
20  
21 <sup>20</sup>The Court agrees with PlayMedia that “WINAMP” in the Licensing Agreement should not  
22 include WINAMP 0.20a, the original release of the stand-alone WINAMP player. Smith Decl. ¶ 25.  
23 WINAMP 0.20a did not use plugin architecture and only consists of a single executable file. Van  
24 Dalsem Supp. Decl. ¶ 23. Accordingly, it does not meet the definition of WINAMP contained in the  
25 Licensing Agreement, i.e. that WINAMP is a “suite of software programs.” This version of  
26 WINAMP predated the prior Nullsoft litigation, and Van Dalsem was unaware of the existence of  
27 WINAMP 0.20a at the time he helped PlayMedia negotiate the Licensing Agreement with Nullsoft.  
28 Van Dalsem Supp. Decl. ¶ 21. In contrast, the version of WINAMP that was in existence at the time  
of the Nullsoft litigation, WINAMP 2.2.1, looks “the same” as WINAMP 2.6.2, and uses the plugin  
architecture. Van Dalsem Supp. Decl. ¶ 20. WINAMP 2.2.1 meets the “suite of software programs”  
definition because it consists of several programs that work together, including the main Winamp  
application, winamp.exe, and numerous other plugins. On the basis of Van Dalsem’s declaration,  
the Court holds that comparisons of AOL’s audio player with versions of WINAMP that predate the  
Licensing Agreement are irrelevant to this analysis.

1 programs. The Court has already rejected this argument.

2 AOL also objects that PlayMedia’s source code comparison is invalid because  
3 PlayMedia uses WINAMP 2.6.2 as the relevant point of comparison. The Licensing  
4 Agreement does not restrict the licensee to using the AMP MP3 decoder in conjunction with  
5 any particular version of WINAMP, and there may be other, smaller versions of WINAMP that  
6 have source code more similar to the source code in AOL’s audio player.

7 PlayMedia persuasively responds by pointing out that WINAMP 2.6.2 has been the  
8 relevant point of comparison throughout this litigation because *AOL itself* asserted, from the  
9 beginning, that its Media Player incorporated a “nearly identical version of WINAMP 2.6.2.”  
10 Opposition at 6. Based on this assertion, PlayMedia requested from AOL the source code for  
11 WINAMP 2.6.2 so that it could verify AOL’s claim. Billett Decl. ¶ 10. Until PlayMedia  
12 demonstrated that at least 92% of WINAMP 2.6.2’s main program was missing from the AOL  
13 Media Player, AOL maintained that the 2.6.2 version was the relevant point of comparison. It  
14 is only fair that PlayMedia have *some* point of comparison for evaluating AOL’s claim that  
15 WINAMP’s code is present in AOL’s product, and that the 2.6.2 version be that basis. AOL  
16 has not given PlayMedia the source code for any other version of WINAMP, nor has it  
17 demonstrated that a different comparison would yield a greater degree of similarity between  
18 WINAMP and AOL’s product, apart from version 0.20a, which the Court declines to consider.  
19 *See supra* note 20.

20 AOL next objects that it is not enough for PlayMedia to compare the source code from  
21 the two programs’ main executables. Rather, PlayMedia should also be required to compare  
22 the source code from their plug-ins. PlayMedia persuasively responds that whether WINAMP  
23 2.6.2 and the AOL audio player share plug-ins is not really the heart of the inquiry because the  
24 AMP MP3 decoder works by plugging into `winamp.exe`. It is not disputed that audio input  
25 plug-ins like the MP3 decoder are never used with each other at the same time. Rather, the  
26 main program can use only one audio input plug-in at any given time. Moreover, the plug-ins  
27 do not “plug in” to each other; they *only* “plug in” to the main program. And even if *all* of  
28 WINAMP’s plug-ins were present in AOL’s audio player, it would still not be accurate to state

1 that the AMP MP3 decoder was being used “in conjunction with WINAMP” if none of  
2 winamp.exe was present in AOL’s audio player. This view is confirmed by Frankel’s  
3 description of WINAMP in his declaration, where he states that the input, output and  
4 visualization plug-ins are not part of WINAMP, but are “separate, stand-alone pieces of  
5 software” that interact with WINAMP. Frankel Decl. ¶ 6; *see also* Billett Decl. ¶ 17 n.1. The  
6 AMP MP3 decoder is only used “in conjunction with” a main executable program. Therefore,  
7 the main executable program should be the focus of the inquiry.<sup>21</sup>

8 Finally, PlayMedia urges the Court to consider what is in the AOL audio player that is  
9 *not* in WINAMP 2.6.2. AOL’s audio player needs substantial AOL code to operate, none of  
10 which has been produced by AOL to PlayMedia. If all of the code written by AOL were taken  
11 out of ampx.dll, the main executable in AOL’s audio player, the player would not be able to  
12 play music.

13 The Court will now proceed to a functional comparison of the two audio players.

#### 14 **6. Functional Comparison**

15 A functional comparison has intuitive appeal: if AOL’s Media Player doesn’t walk like  
16 WINAMP, look like WINAMP, or quack like WINAMP, it’s probably not WINAMP. Aside  
17 from its intuitive appeal, a functional comparison is relevant because Frankel’s declaration  
18 describes WINAMP more in terms of its functions than in terms of source code or resource  
19 files. He described WINAMP’s “user-friendly graphical interface that mimics a standard stereo  
20 system,” and its “advanced features,” including “a graphic equalizer, a play-list manager,  
21 visualization, a sound effects module, and a minibrowser.” The parties intended the licensee to  
22 use the AMP source code “in conjunction with” a product that possessed these features.

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24  
25 <sup>21</sup>PlayMedia argues that even if it wanted to compare the programs’ plug-ins, AOL failed to  
26 produce an unadulterated version of the source code for the WINAMP 2.6.2 plug-ins. Billett Decl.  
27 ¶ 17. In addition, PlayMedia argues that even assuming that the plug-ins taken from WINAMP 2.6.2  
28 and used in the AOL audio player are an exact match, those plug-ins (other than the MP3 decoder)  
as measured by object code (because the source code has been changed, albeit slightly) only account  
for 163,328 bytes out of the total 1,292,945 bytes (or 11.8%) contained in the WINAMP plug-ins  
directory. Therefore, AOL has only taken a fraction of WINAMP 2.6.2’s plug-ins.

1 Therefore, if AOL's product lacks these features, AOL is using the AMP source code in a  
2 manner not authorized by the Licensing Agreement.<sup>22</sup>

3 A functional comparison of WINAMP 2.6.2 and the AOL Media Player weighs heavily  
4 in PlayMedia's favor because the AOL Media Player looks and performs very differently from  
5 WINAMP. *See* Billett Decl. ¶¶ 33-46 (listing numerous ways in which WINAMP and the  
6 Media Player differ in terms of features). For example, the Media Player has the dual  
7 capability to play audio and video files. Biggs Decl. ¶ 6. If a user opens a video *or* audio file,  
8 the Media Player is launched. *Id.* The Media Player is capable of playing video files because,  
9 in addition to its audio player, it incorporates RealPlayer, a third-party software program that  
10 plays back certain types of video and audio files. Biggs Decl. ¶ 7. In contrast, WINAMP only  
11 has the ability to play audio files, and cannot play video files.

12 Aside from having disparate functions, WINAMP and the Media Player look different.<sup>23</sup>  
13 AOL concedes that it "changed the user interface feature set normally displayed with the  
14 WINAMP standalone product . . . so that the AOL Media Player user interface would be  
15 simpler to use by typical AOL subscribers and would allow for a uniform [graphical user  
16 interface] regardless of whether the Winamp or RealPlayer engine were used for content  
17 playback." Biggs Decl. ¶ 12. In other words, an AOL Media Player user sees the same  
18 interface whether s/he is playing audio or video files. In contrast, WINAMP uses an interface  
19 that "mimics a standard stereo system." Frankel Decl. ¶ 5.

20 This basic difference between the two programs helps explain why WINAMP's  
21 interface includes a number of "stereo system" features that the Media Player does not. For

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22  
23 <sup>22</sup>A functional comparison is also appropriate because the mere presence of identical source  
24 code does not necessarily mean that the software is identical. *See* Billett Decl. ¶ 30 (describing the  
concept of "commented out" source code).

25 <sup>23</sup>For purposes of this comparison, PlayMedia's expert, Professor Karplus, compared  
26 WINAMP 2.7.6, the most current version available at the time he made the comparison on June 7,  
27 2001, with AOL's Media Player. Karplus Decl. ¶ 34. AOL criticizes PlayMedia for using the  
28 "wrong version" of WINAMP for purposes of its graphical user interface comparison. Biggs Decl.  
¶ 14. PlayMedia responds that WINAMP 2.7.6 has the same features as WINAMP 2.6.2, and AOL  
does not state otherwise. Billett Decl. ¶ 26.

1 example, WINAMP includes a spectrum analyzer and oscilloscope on its face. The AOL  
2 audio player does not. Karplus Decl. ¶ 39. WINAMP includes an equalizer, which modifies  
3 output levels for various frequency ranges. The AOL audio player does not include an  
4 equalizer. Karplus Decl. ¶ 42. There are multiple windows in WINAMP that dock seamlessly.  
5 The AOL audio player does not have multiple windows. Karplus Decl. ¶ 41. Playlist  
6 management is different in the two programs. Karplus Decl. ¶ 43. WINAMP includes a  
7 minibrowser, but the AOL audio player does not. Karplus Decl. ¶ 44. *See also* Billett Decl. ¶¶  
8 33-46.

9 WINAMP also permits users to change the “skin” of the interface, which changes the  
10 appearance of the player. Karplus Decl. ¶ 37. The ability to change the interface skin is “one  
11 of the features of Winamp most important to its users.” *Id.* AOL’s audio player uses an  
12 interface that does not have changeable “skins.” *Id.* ¶ 38.

13 AOL would have the Court ignore these “ancillary” features because even if all of these  
14 features are taken away, WINAMP would still play back audio files. Moreover, AOL asserts,  
15 many of WINAMP’s versions do not include some of these features.<sup>24</sup> Therefore, in AOL’s  
16 view, their absence in AOL’s audio player does not necessarily establish the absence of  
17 WINAMP.

18 The Court credits the declaration of Dr. Brian Billett, a PlayMedia expert who is  
19 intimately familiar with WINAMP, both in terms of its software structure and its outward  
20 appearance. Billett Decl. ¶ 52. Dr. Billett states that “the character, look, features, and internal  
21 composition of [WINAMP] have remained largely unchanged [from version to version],  
22 although they have been incrementally improved through updates.” *Id.* ¶ 52. Moreover, *all*  
23 versions of WINAMP – including the minimal installation – use the MP3 decoder in  
24 conjunction with the main executable, `winamp.exe`.

25 In addition, even though WINAMP could play back an audio file without all of the  
26

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27 <sup>24</sup>*See supra* note 20 (explaining that the Court will not consider comparisons of the AOL  
28 Media Player to WINAMP version 0.20a).



1 “ancillary” features, from the perspective of the user, those features are what make WINAMP  
2 unique. There is a sufficient basis in the record, and common sense dictates, that consumers do  
3 not choose WINAMP from the various competing audio players purely because of its ability to  
4 play an audio file, but at least in part because of its appearance and its functionality. As  
5 PlayMedia analogizes it, to dismiss these features as ancillary to WINAMP’s main function is  
6 comparable to “telling an audiophile that his expensive stereo system is the same as a record  
7 player that does not even have a volume or balance control.” PlayMedia RTQ at 4.

8 The Court is persuaded that the feature set provided by the main program,  
9 `winamp.exe`, must be a part of the determination whether WINAMP is present in AOL’s  
10 audio player. The near-complete absence of those features in AOL’s Media Player helps  
11 demonstrate that AOL is not using AMP in a way intended by the parties to the Licensing  
12 Agreement.

13 **F. Conclusion**

14 PlayMedia has demonstrated probable success in proving that AOL is not using the  
15 AMP MP3 decoder “in conjunction with WINAMP,” as required by the Licensing Agreement.  
16 AOL’s “core functionality” test is flawed because it ignores the extent to which `winamp.exe`  
17 is really at the heart of the inquiry whether WINAMP is present in AOL’s audio player.  
18 Determining whether `winamp.exe` is present in AOL’s audio player, in turn, requires the  
19 Court to compare the two programs’ source code, resource files, and functions.

20 The source code and resource file comparison help convince the Court that AOL is not  
21 using the AMP MP3 decoder “in conjunction with WINAMP.” Only 8% of WINAMP’s main  
22 executable program is present in the corresponding main executable program in the AOL audio  
23 player. The AOL audio player uses *none* of WINAMP’s resource files. AOL’s main  
24 executable needs a significant amount of source code written by AOL to operate. That a court  
25 in a different context could conclude that AOL derived its main executable program from  
26 `winamp.exe` does not mean that AOL is using AMP “in conjunction with WINAMP” in a  
27 manner intended by the parties. AOL’s assertion that its Media Player incorporates a “nearly  
28 identical” version of WINAMP 2.6.2 clearly is incorrect. Moreover, PlayMedia has provided

1 evidence that winamp.exe is a part of every version of WINAMP, and AOL has not rebutted  
2 this evidence by showing that a comparison of its main program, ampx.dll, with the main  
3 program of a different version of WINAMP would yield a different result. In addition, as the  
4 preceding section demonstrates, insofar as users would be likely to view it, the AOL Media  
5 Player does not function much like WINAMP. These comparisons all weigh heavily in  
6 PlayMedia's favor. For these reasons, PlayMedia has demonstrated a likelihood of success as  
7 to this issue.

#### 8 IV.

### 9 IS THE AMP OBJECT CODE BEING USED IN 10 CONJUNCTION WITH WINAMP ONLY?

#### 11 A. PlayMedia's Contentions

12 PlayMedia's position is simple. Incorporating AMP into a product other than  
13 WINAMP was beyond the scope of the license and in violation of the restrictions on  
14 sublicensing. The sublicensing grant states: "NULLSOFT shall have the right to sublicense  
15 AMP or derivatives thereof in object code form only for use in conjunction with WINAMP  
16 only." PlayMedia argues that "[a]s written, the word 'only' in the [sub]license follows the  
17 word 'WINAMP' and is a limitation on the product with which AMP may be sublicensed. It  
18 means, in plain English, that AMP may be sublicensed for use in connection with WINAMP,  
19 and no other product." Reply at 13; emphasis in original. According to PlayMedia, the  
20 "AMP® decoder in AOL 6.0 can *only* be used in conjunction with the entire AOL 6.0  
21 application." Billett Decl. at ¶¶ 47-50.<sup>25</sup> AOL 6.0 is not "Winamp only" and thus, AOL's  
22 sublicensing of the AMP®/Nitrane code for use in conjunction with AOL 6.0 exceeds the  
23 license.

24 During the 1999 PlayMedia-Nullsoft negotiations, the original form of the license

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25  
26 <sup>25</sup>At the hearing, AOL's witness, David Biggs, admitted that the code contained in the AOL  
27 folder ("AmpX" in Exh. 38) in which AMP and the plug-ins reside does not work by itself; it cannot  
28 operate except in conjunction with the entirety of the AOL program.

1 proposed by Nullsoft did not contain a product restriction on AMP. Van Dalsem Supp. Decl.  
2 ¶¶ 6, 7. Rather, Nullsoft proposed that PlayMedia grant it an “unrestricted” license to use the  
3 AMP source code. *Id.* ¶ 6. PlayMedia’s lawyer, Bruce Van Dalsem, removed the  
4 “unrestricted” language and added two product restrictions to Nullsoft’s ability to sublicense  
5 AMP. Van Dalsem Supp. Decl. ¶ 14. First, he restricted Nullsoft to sublicensing AMP “in  
6 object code form only.” Van Dalsem explains that he added this restriction because  
7 “PlayMedia did not want Nullsoft to be able to sublicense AMP in source code form.” *Id.* ¶ 15.  
8 PlayMedia wanted to preclude sublicensees from modifying the AMP source code and making  
9 new software products from it. AOL RTQ at 9. As the Court understands it, if Nullsoft could  
10 distribute that source code to third parties, that would make it easier for such parties to modify  
11 AMP because programmers write programs in source code. Object code is source code  
12 “translated” into instructions that a computer can understand (represented by binary or  
13 hexadecimal numbers), and cannot readily be used for programming. Karplus Decl. ¶¶ 14-16.  
14 At the very least, a programmer would have to go through many technical steps to translate  
15 object code back to source code.

16 Second, Van Dalsem limited Nullsoft’s right to sublicense AMP “for use in conjunction  
17 with WINAMP only.” Van Dalsem explained his intent in adding this restriction:

18 Limiting Nullsoft’s right to sublicense AMP “for use in conjunction with  
19 WINAMP only” was intended to mean that Nullsoft could sublicense AMP for use  
20 in conjunction with Winamp only and could not sublicense AMP for use in  
conjunction with any product other than Winamp.

21 Van Dalsem Supp. Decl. ¶ 15. Van Dalsem explained that the word “only” was not included in  
22 the general use grant because

23 PlayMedia was less concerned with how Nullsoft used the AMP source code  
24 internally and for development purposes, and we therefore allowed for the  
25 possibility that during the development of Winamp, there might be circumstances  
26 when the AMP code would be used in conjunction with some software other than  
27 Winamp, such as for testing purposes. PlayMedia was more concerned with what  
28 Nullsoft released to the public. Since software is typically not “sold” to a  
consumer, but is licensed for use by a consumer, limiting the right to sublicense  
AMP “for use in conjunction with Winamp only” limited to Winamp the consumer  
product in which AMP could be used.

*Id.*

1 **B. AOL's Contentions**

2 AOL also proceeds from a simple premise: the Licensing Agreement does not say that  
3 AMP cannot be licensed with software other than WINAMP. To that basic observation it adds  
4 the argument that if WINAMP could not incorporate the AMP decoder for use in conjunction  
5 with any other software program, WINAMP could not function and the license would be  
6 illusory. AOL RTQ at 6. The AMP decoder must always be embedded in and run in  
7 conjunction with other software, such as BIOS,<sup>26</sup> DOS,<sup>27</sup> and Windows. WINAMP could not  
8 launch the decoder to play music without such higher level programs. Indeed, WINAMP  
9 always has been and must be embedded in and used in conjunction with other software  
10 programs, such as Windows and support libraries such as zlib and ATL. AOL RTQ at 12.  
11 Moreover, contends AOL, PlayMedia contemplated that Nullsoft would have to use the AMP  
12 decoder in this manner.<sup>28</sup>

13 With AOL 6.0, the only time that the AMP MP3 decoder is used is when the user  
14 launches the so-called "Winamp engine." No other program in AOL 6.0 uses the AMP MP3  
15 decoder. AOL therefore contends that the AMP code is being used "in conjunction with  
16 WINAMP only." According to Mark Kittredge, the attorney who negotiated the Licensing  
17 Agreement on behalf of Nullsoft, all of the product restrictions added by PlayMedia – including  
18 the "in conjunction with WINAMP only" restriction – were "inserted into [the Licensing  
19 Agreement] to address PlayMedia's stated concern that, without those terms, Nullsoft would be  
20 able to distribute or license the AMP decoder or its derivatives to third parties as a separate

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22 <sup>26</sup> "BIOS, which stands for Basic Input/Output System, is software built into the computer  
23 and determines what a computer can do without accessing programs from a disk. For example,  
24 BIOS contains code required to control the keyboard, display screen, disk drives, serial  
communications, and several other miscellaneous functions." AOL RTQ at 1.

25 <sup>27</sup> "DOS refers to Disk Operating System and is the basic operating software for PCs." AOL  
26 RTQ at 1.

27 <sup>28</sup> At the hearing on this motion, Bruce Van Dalsem, the lawyer who represented PlayMedia  
28 in 1999 in the negotiations with Nullsoft, testified that during the negotiations PlayMedia  
contemplated that Nullsoft might be acquired by a much larger company, possibly Microsoft.

1 product by itself and in direct competition with PlayMedia.” Kittredge Decl. ¶ 3. (This  
2 assertion is inconsistent with Van Dalsem’s assertion that the addition of the “Winamp only”  
3 product restriction was “independent of the issue of head-to-head competition using the AMP  
4 code.” Van Dalsem Supp. Decl. ¶ 9.) Kittredge states that “at no time did PlayMedia claim  
5 that the language of the agreement and license mean that Nullsoft’s Winamp software products  
6 . . . containing the AMP decoder could not be distributed along with other software programs.”  
7 *Id.* ¶ 4; *see also* AOL RTQ at 6. AOL contends that because neither AOL 6.0 nor the Media  
8 Player are “Stand Alone Products,” i.e. products that are not distributed with WINAMP or a  
9 WINAMP derivative, AOL has not exceeded the scope of the sublicensing grant of the license.

10 **C. PlayMedia Has Established Probability of Success Concerning the “In**  
11 **Conjunction With WINAMP Only” Test**

12 As with the previous section, principles of contract law guide the Court’s analysis of  
13 whether AOL has exceeded the scope of the license. *Mendler*, 207 F.3d at 1121; *King*  
14 *Features*, 843 F.2d at 398. The parties disagree about the meaning of the phrase “in  
15 conjunction with Winamp only.” The first step in contract interpretation is to look at the “plain  
16 meaning” of the contract language. “When interpreting contract language, courts start with the  
17 assumption that the parties have used the language in a way that reasonable persons ordinarily  
18 do.” *Mendler*, 207 F.3d at 1121 (quoting E. ALLAN FARNSWORTH, CONTRACTS § 7.11 (1990)).  
19 Under California law, the parties may rebut this assumption by introducing extrinsic evidence  
20 to demonstrate that the contract language is “reasonably susceptible” to a meaning other than  
21 the “ordinary” meaning, even if the ambiguity does not appear on the face of the contract. *King*  
22 *Features*, 843 F.2d at 398 (citations omitted). “However, if after considering extrinsic  
23 evidence the court finds the language of the contract is not reasonably susceptible to the  
24 asserted interpretation and is unambiguous, extrinsic evidence cannot be received for the  
25 purpose of varying the terms of the contract.” *Id.* (refusing to consider extrinsic evidence to  
26 vary ordinary meaning of contract terms where extrinsic evidence did not demonstrate that the  
27 contract terms were susceptible to a different meaning); *see also Barris Industries, Inc. v.*  
28 *Worldvision Enterprises, Inc.*, 875 F.2d 1446, 1450-51 (9<sup>th</sup> Cir. 1989) (extrinsic evidence

1 inadmissible because it did not show that otherwise “unambiguous” contract language was  
2 “reasonably susceptible” to a different meaning); *Zenger-Miller, Inc. v. Training Team,*  
3 *GMBH*, 757 F. Supp. 1062, 1067-68 (1991) (holding that “preliminary consideration” of  
4 defendants’ extrinsic evidence did not “render the contract susceptible of two interpretations”  
5 and was therefore inadmissible to vary otherwise unambiguous terms of contract).

6 AOL asserts that “in conjunction with Winamp only” means that AOL may use AMP  
7 with any product it chooses, so long as it is simultaneously and exclusively accessed by the  
8 WINAMP program. The Court finds that this construction is not consistent with ordinary  
9 understanding. As PlayMedia correctly points out,

10 Putting aside for the moment that the remnants of Winamp code  
11 contained in the AOL Media Player do not transform that player into Winamp,  
12 the premise of AOL’s argument is flawed. AOL attempts to rewrite the license  
13 so that the word “only” in the license follows and modifies the word “use.” That  
14 is not correct. As written, the word “only” in the license follows the word  
15 “Winamp” and is a limitation on the product with which AMP® may be  
16 sublicensed. It means, in plain English, that AMP® may be sublicensed for use  
17 in conjunction with Winamp, **and no other product.** See e.g. *Farrell v.*  
18 *Commissioner of Internal Revenue*, 136 F.3d 889, 895 (2d Cir. 1998)(the plain  
19 meaning of “only” has the purpose and effect of excluding the remaining  
20 universe); *Shell Oil Co., Inc. v. Manley Oil Corp.*, 124 F.2d 714, 715 (7<sup>th</sup> Cir.  
21 1941)(“[t]he word ‘only’ is a limiting and restrictive term . . . and in that sense  
22 means ‘solely’ or the equivalent of the phrase ‘and nothing else.’”)

23 Here, the logic of the sentence provides the point. The word “only” is  
24 actually used twice in the sentence; first as a limitation to “object code form” and  
25 second as a limitation to “Winamp,” in both instances meaning “and nothing  
26 else.”

27 AOL’s attempt to rewrite the license would render the word “only”  
28 superfluous because the “use” of AMP® is already limited to “use” “in  
29 conjunction with Winamp” by the general grant of the license. Adding the word  
30 “only” in the context of “use” would be superfluous because the grant only  
31 allows “use” of AMP® “in conjunction with Winamp” in the first instance.  
32 Similarly, if AOL were correct that the license permitted it to sublicense AMP®  
33 for use in conjunction with *both* Winamp *and* AOL 6.0 so long as the AMP®  
34 code was invoked in conjunction with Winamp code, there would be no reason  
35 for the word “only” to follow the word “Winamp” in the sublicensing provision.

36 Reply at 13-14.

37 Under California law, AOL is permitted to introduce extrinsic evidence to demonstrate  
38 that the phrase, “in conjunction with Winamp only,” is “reasonably susceptible” to an alternate  
39 meaning. The only extrinsic evidence introduced by AOL to prove an alternate meaning is the

1 declaration of Mark Kittredge, who states that PlayMedia never claimed that the phrase “in  
2 conjunction with Winamp only” “meant that WINAMP containing the AMP decoder could not  
3 be distributed with other software programs.” Kittredge Decl. ¶ 4. This extrinsic evidence,  
4 however, is insufficient to demonstrate that the otherwise unambiguous language of the  
5 contract is reasonably susceptible to AOL’s asserted meaning. Accordingly, this evidence is  
6 not admissible to vary the ordinary meaning of the terms of the Licensing Agreement.

7 AOL also raises a practical objection to PlayMedia’s interpretation of the Licensing  
8 Agreement: If the Licensing Agreement is interpreted consistent with PlayMedia’s proffered  
9 meaning, the license to the AMP code that Nullsoft obtained is worthless because WINAMP  
10 must be embedded in a larger software program – such as an operating system – in order to  
11 work. If the license is interpreted to prohibit AOL from using AMP in WINAMP and *also* in  
12 conjunction with AOL 6.0, then it must similarly be interpreted to prohibit AOL from using  
13 AMP in WINAMP and also in conjunction with Windows, for example. AOL argues that  
14 PlayMedia itself could not possibly have intended this result, and that in fact PlayMedia  
15 understood that AOL would and could embed WINAMP (containing AMP) in a larger software  
16 program such as AOL 6.0.<sup>29</sup>

17 In their impressive presentations, the parties at times invoked a common analogy. They  
18 likened WINAMP to a car and the AMP source code to the car’s engine; the license explicitly  
19 permitted the use of the engine only in conjunction with a car. This court believes it is helpful  
20 to amplify on that analogy. Of course, a car (WINAMP) cannot run without its engine (AMP).  
21 Nor can the engine (AMP) take someone anywhere without being installed in the car

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22  
23 <sup>29</sup>AOL points out that in addition to the “music plug-ins” necessary to decode particular audio  
24 file formats and output them on users’ computers, many WINAMP versions work in conjunction  
25 with other types of optional “plug-in” software components, such as those allowing a user to change  
26 the interface (“general plug-ins”), to add special sound effects (“DSP” components), to adapt to  
27 different computer sound systems (“audio output” components) and to provide visual effects  
28 (“visualization” components). Immediately prior to the issuance of the license, there were numerous  
such optional software programs which worked in conjunction with versions of WINAMP that  
included the Nitrane decoder. These could be considered examples of embedding in ancillary or  
“third-party add-on” applications.

1 (WINAMP). Although the parties did not clearly provide whether they contemplated that the  
2 car could be driven on streets and highways, surely they did contemplate such use, for without  
3 roads, cars are pointless. Similarly, just as permission to use an engine in a car entails use of a  
4 road system, so does use of AMP in WINAMP contemplate use in a Windows operating  
5 environment, because in the world of computers it is inconceivable that anything can run  
6 without an operating system. That is, in this analogy Windows corresponds to roads, and  
7 therefore it is not surprising that the parties did not explicitly authorize WINAMP to be used in  
8 conjunction with Windows.

9 But the question before this Court is: What if the car has to be transported by means  
10 other than being driven directly on a roadway? Suppose it is an official car, such as the  
11 President's, required for a motorcade in another city? Or a vintage racing car to be brought to  
12 the Speedway in Indianapolis for an exhibition? Consistent with the license, could the car be  
13 placed on a railroad train that carries cars (a "car train") and transported via a larger railway  
14 system? That is, under this license could WINAMP be placed on the AOL Media Player and  
15 embedded into a larger system (AOL) that is not intrinsically essential to its operation?

16 In effect, PlayMedia says "no." It argues that the license permits AOL to use the engine  
17 (AMP) in the car (WINAMP) for driving on roads — and nothing more. AOL, in contrast,  
18 argues that the real question is not where WINAMP goes but where AMP is placed. So long as  
19 the engine (AMP) is in the car (WINAMP), there is no prohibition on it being carried on a car  
20 train (*i.e.*, embedded in the AOL Media Player) that is transported via the large AOL system.

21 The Court rejects AOL's arguments. The evidence provided by Mr. Van Dalsem is  
22 persuasive. First, from a grammatical and "plain language" perspective, the placement of the  
23 concluding "only" means just what it says. Second, his account of the Nullsoft-PlayMedia  
24 negotiations is largely unrefuted. It shows that PlayMedia sought to avoid precisely what it is  
25 now confronted with: the uncompensated use of AMP through the embedding of a WINAMP  
26 variant in a product (the AOL Media Player) that has many millions of customers. Although it  
27 may not be part of PlayMedia's business to sell AMP to AOL's subscribers directly, PlayMedia  
28 undoubtedly views such persons as potential, albeit indirect, customers, whose patronage of the



1 services that AOL provides, such as the Media Player, could generate license fees. In short,  
2 from a practical standpoint, PlayMedia’s proffered construction of the language “in conjunction  
3 with Winamp only” makes sense. Third, embedding WINAMP in AOL’s system is unlike  
4 using AMP in the Windows operating system, because the latter is essential in order for  
5 WINAMP to function at all, whereas WINAMP does not need AOL to function.

6 For these reasons, the Court finds that PlayMedia has demonstrated the probable  
7 success of its arguments concerning the sublicense.

8 **V.**

9 **OTHER REQUIREMENTS FOR INJUNCTIVE RELIEF**

10 **A. Irreparable Injury**

11 Having established the likelihood of proving that AOL exceeded the scope of the  
12 Licensing Agreement, PlayMedia satisfies this element. As the Ninth Circuit has stated,

13 Under federal copyright law . . . a plaintiff that demonstrates a likelihood of  
14 success on the merits of a copyright infringement claim is entitled to a  
15 presumption of irreparable harm. *See Cadence Design Systems v. Avant! Corp.*,  
16 125 F.3d 824, 826-27 (9th Cir. 1997), *cert. denied*, 523 U.S. 1118, 118 S.Ct.  
17 1795, 140 L.Ed.2d 936 (1998). That presumption means that "the balance of  
hardships issue cannot be accorded significant – if any – weight in determining  
whether a court should enter a preliminary injunction to prevent the use of  
infringing material in cases where . . . the plaintiff has made a strong showing of  
likely success on the merits." *Id.* at 830.

18 *Sun Microsystems v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9<sup>th</sup> Cir. 1999).

19 Even without this presumption, PlayMedia could qualify for injunctive relief if it  
20 succeeds in demonstrating “that an injunction is warranted under the traditional standard for  
21 preliminary injunctions, in which the court balances the likelihood of success against the  
22 relative hardships to [the plaintiff] and [the defendant].” *Id.* at 1123. Merely because the  
23 injury is compensable in money damages is no grounds to avoid applying it. *Cadence*, 125  
24 F.3d at 827.

25 The presumption of irreparable injury for copyright infringement is not easily rebutted.  
26 Factors that are relevant to rebutting the presumption are:

- 27 • The plaintiff unreasonably delayed bringing its motion for preliminary  
28 injunction. *Cadence* at 829. AOL argues that PlayMedia is guilty of such delay, but the Court

1 finds that PlayMedia acted reasonably.

2 • The parties are not in competition with each other. *Cadence*, 125 F.3d at 828  
3 (*dicta*). While that is the case here, the absence of competition, standing alone, is not enough  
4 to rebut the presumption. *See Beckman Instruments, Inc. v. Cincom Sys., Inc.*, 1998 WL  
5 783774, at \*1 (9<sup>th</sup> Cir. 1998) (*unpublished*).

6 • Whether defendant’s free speech interests are at stake in that the injunction  
7 would restrain something other than “the distribution of an average commercial product.”  
8 *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 n.10 (9<sup>th</sup> Cir. 1995) (*citing*  
9 *Belushi v. Woodward*, 598 F. Supp. 36 D.D.C. 1984)). This factor is not present here.

10 **B. Balance of Hardships**

11 **1. AOL’s Contentions**

12 Most of AOL’s arguments proceed from the premise that PlayMedia is seeking a  
13 mandatory injunction. As previously noted, one element of relief that PlayMedia seeks would  
14 preclude AOL from “permitting any user of the AOL service from completing an online  
15 ‘session’ on the AOL service without AMP being removed from the user’s copy of AOL 6.0  
16 by means of an AOL online ‘live update.’” PlayMedia concedes that this relief “might be  
17 construed as mandatory” and that if so a “heightened standard applies to the issuance of [the  
18 requested] injunction. *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9<sup>th</sup>  
19 Cir. 1994).” Reply at 3. As the *Stanley* court stated, “[w]hen a mandatory preliminary  
20 injunction is requested, the district court should deny such relief ‘unless the facts and law  
21 clearly favor the moving party.’” *Id.* (citation omitted). PlayMedia correctly argues,  
22 however, that the heightened standard is applicable only to that portion of the requested relief  
23 that is mandatory in nature. *Daishowa Int’l v. North Coast Export Co., et al.*, 1982 WL 1850,  
24 at \*7 (N.D. Cal. 1982).

25 AOL claims that it has approximately \$39 million of AOL 6.0 promotional materials,  
26 including software disks onto which the software is burned, that were prepared for distribution  
27 to the public. Gimpert Decl. ¶ 2. If the remedy required or entailed the destruction of these  
28 disks, contends AOL, it would lose “an estimated . . . tens of millions of dollars.” *Id.* ¶ 3. The

1 basis for this figure is not clearly established, however, and PlayMedia objects to this evidence  
2 as lacking foundation.

3 AOL also contends that if it were required to retrieve or replace all copies of AOL 6.0,  
4 numerous computer manufacturers would have to return to AOL some 4.2 million copies of  
5 free 6.0 CDs and obtain replacements. That would cost some \$12.6 million. If AOL were to  
6 replace the software, rather than just retrieve it, the cost would be an additional \$2.1 million.  
7 Ewert Decl. ¶ 2. And if AOL had to remove software from computers onto which original  
8 equipment manufacturers (OEM) already have copied AOL 6.0, that would cost an additional  
9 \$12-15 million. *Id.* ¶ 3. Again, however, AOL provides no foundation or factual basis for  
10 these figures.

11 Finally, AOL asserts that to disable or replace the Nitrane MP3 decoder currently in  
12 use on existing subscribers' computers would require it to deliver a "tool on demand (TOD)"  
13 to some 10 million AOL subscribers.<sup>30</sup> That would risk destabilizing those users' computer  
14 programs, would disrupt their service and would cause dissatisfaction within the customer  
15 base. Biggs Decl. ¶ 17. AOL contends that it would take at least three months to develop and  
16 deliver a TOD. *Id.* ¶ 18.

## 17 **2. PlayMedia's Contentions**

18 PlayMedia proffers a very different assessment of the impact on AOL of a "fix," and  
19 suggests an ostensibly neat solution. PlayMedia points out that AOL does not dispute that the  
20 AMP/Nitrane decoder can be removed and replaced by a TOD. PlayMedia argues that if a  
21 TOD were used to remove the AMP code, users could still use existing AOL 6.0 disks, and  
22 existing installations of AOL 6.0 on outstanding computers could remain. According to  
23 PlayMedia,

24 AOL acknowledges that since October, 2000, [the stand-alone version of]  
25

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26  
27 <sup>30</sup>AOL defines a TOD as "a software update that is delivered by download to accomplish  
28 some minor fix to the software that is currently on members' computers and it is usually delivered  
at the beginning or end of a user's session." Biggs Decl. ¶ 16.

1 Winamp has employed an MP3 decoder other than AMP/Nitrane.<sup>31</sup> . . . The  
2 new MP3 decoder in Winamp has been tested extensively in no less than  
3 eight versions of Winamp and has been downloaded and installed on  
4 millions of computers. Billett Decl. at ¶ 60 and Exhibit 84 . . . The  
5 computer file containing the AMP/Nitrane decoder can be deleted from  
6 AOL 6.0 and the new Winamp MP3 decoder copied into its place. When  
7 this is done, the AOL Media Player functions perfectly when playing MP3  
8 files and in all other respects. PlayMedia's expert has performed this  
9 decoder file replacement test on a variety of Windows operating systems  
10 . . . The MP3 decoder swap works every time. Billett Decl. at ¶¶ 58-63.  
11 A computer script to perform the swap is simple and would install quickly  
12 as a TOD. Billett Decl. at ¶ 61-62.

13 Reply at 20.

14 As to the promotional materials and software disks, PlayMedia states that the  
15 injunction it seeks would not prohibit the use of existing promotional materials and that  
16 according to AOL itself the 6.0 disks are soon to be rendered obsolete anyway because of the  
17 imminent release of the next generation of software, AOL 7.0.<sup>32</sup>

18 **3. The Balance of Hardships Does Not Preclude Entering a Preliminary**  
19 **Injunction**

20 The parties have presented no evidence as to how many TODs AOL issues per month,  
21 their average size, the percentage of all AOL users they affect and the extent (if any) to which  
22 the TODs cause problems that prompted customers to call customer support, much less  
23 terminate their subscriptions. This information, presumably, was readily available to AOL.  
24 But the evidence before the Court has demonstrated that the plug-ins at issue in this case are  
25 relatively small, even in the context of computer software. That means, in turn, that it takes  
26 precious little time to implement a TOD. PlayMedia's expert, Dr. Billett, estimated it would  
27 take 15 seconds for most dial-up users. Therefore, the risk of creating widespread customer  
28 dissatisfaction is small.

Similarly, given the relative frequency of TODs generally and the fact that the plug-in

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31What AOL said in the cited reference is that "Winamp version 2.6.5 was the last version to use the Nitrane MP3 decoder; subsequent versions have used a different decoder."

32Under the language of its proposed preliminary injunction order, PlayMedia sought to enjoin AOL from distributing the 7.0 application if it contained AMP source code. AOL represented during the hearing that the 7.0 version would not contain such code.

1 architecture that characterizes WINAMP reduces the likelihood of errors that could affect  
2 other features of the software, the litany of horrors that AOL recites appears to be exaggerated.  
3 Moreover, the financial costs of removing the infringed material are too speculative to warrant  
4 withholding relief.

5 Having found that PlayMedia qualifies for preliminary injunctive relief under the  
6 general *Cadence* standard anyway, the Court concludes that weighing the hardships does not  
7 warrant a different result. This conclusion is reinforced by the indisputable fact that AOL is  
8 the dominant Internet service provider and a key constituent business of a giant  
9 telecommunications conglomerate.

10 **C. Bond**

11 Having considered the parties' contentions concerning possible damage to AOL in the  
12 event this injunction is overturned or plaintiff ultimately fails to prevail, the Court finds that a  
13 bond in the amount of \$500,000 is appropriate.

14  
15 **PRELIMINARY INJUNCTION ORDER**

16 Defendant America Online, Inc., its subsidiaries, distributors, officers, agents,  
17 servants, employees and all those acting in concert with them or at their direction, are enjoined  
18 during the pendency of this action, from:

- 19 (a) copying the AMP® computer software owned by Plaintiff PlayMedia Systems,  
20 Inc. or any derivative of the AMP® computer software including without  
21 limitation Nitrate (collectively "AMP®") into AOL 6.0 or any other computer  
22 software application other than Winamp;
- 23 (b) creating derivative works based upon AMP® other than for use in conjunction  
24 with Winamp;
- 25 (c) distributing AMP® with AOL 6.0 or any other computer software application  
26 other than Winamp;
- 27 (d) purporting to license to any third party the right to copy, distribute or in any  
28 other manner use any version of AOL 6.0 that contains AMP®; and

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(e) permitting any user of the AOL service from completing an online “session” on the AOL service without AMP® being removed from the user’s copy of AOL 6.0 by means of an AOL online “live update.”

IT IS FURTHER ORDERED that AOL shall notify all licensees of AOL 6.0 of the issuance of this injunction.

A bond in the amount of \$500,000 shall be sufficient security for this injunction.

IT IS SO ORDERED.

DATED:

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A. HOWARD MATZ  
United States District Judge