

Nos. 00-16401 and 00-16403

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A & M RECORDS, INC., a corporation,
(For Continuation of Caption See Next Page)

Plaintiffs / Appellees,

v.

NAPSTER, INC., a corporation,

Defendant / Appellant

JERRY LEIBER, individually and doing business as JERRY LEIBER MUSIC;
(For Continuation of Caption See Next Page)

Plaintiffs / Appellees,

v.

NAPSTER, INC., a corporation,

Defendant / Appellant

Appeal from the United States District Court
for the Northern District of California, San Francisco Division
Civil Nos. C 99-5183 MHP (ADR) (A&M Records, et al.)
and C 00-0074 MHP (ADR) (Leiber, et al.)
The Honorable Judge Marilyn Hall Patel

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ATLANTIC RECORDING CORPORATION, a corporation, ISLAND RECORDS, INC., a
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ELEKTRA ENTERTAINMENT GROUP INC., a corporation, ARISTA RECORDS, INC., a
corporation, SIRE RECORDS GROUP INC., a corporation, POLYGRAM RECORDS, INC., a
corporation, VIRGIN RECORDS AMERICA, INC., a corporation, and WARNER BROS.
RECORDS INC., a corporation,

Plaintiffs/Appellees.

MIKE STOLLER, individually and doing business as MIKE STOLLER MUSIC; and FRANK
MUSIC CORP., on behalf of themselves and all others similarly situated

Plaintiffs/Appellees.

CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1.

Respondent POLYGRAM RECORDS, INC. has been renamed UMG RECORDINGS, INC.

Respondents A&M RECORDS, INC., GEFFEN RECORDS, INC., ISLAND RECORDS, INC., MCA RECORDS, INC., and UNIVERSAL RECORDS, INC., were merged into UMG RECORDINGS, INC. on November 30, 1999. They have no subsidiaries that have issued shares to the public. Their parent corporations are Universal Studios, Inc., the Seagram Company, Ltd., a publicly traded corporation, and Matsushita Electric Industrial Co., Ltd., also a publicly traded company.

Respondent SONY MUSIC ENTERTAINMENT INC.'s parent companies are Sony Music Holding Inc., Sony Software Corp., Sony Corporation of America, Sony America Holding Inc., and Sony Corporation (Tokyo), a publicly held company.

Respondent ATLANTIC RECORDING CORPORATION's parent companies are Warner Bros. Records Inc., Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company. (Time Warner Inc. has announced plans to merge with America Online, Inc. This transaction, which is subject to regulatory approval, has not yet been consummated.)

Respondent CAPITOL RECORDS, INC.'s parent corporations are EMI Group North America Holdings Inc. and EMI Group plc, a publicly traded company.

Respondent ELEKTRA ENTERTAINMENT GROUP, INC.'s parent corporations are Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company.

Respondent ARISTA RECORDS, INC.'s parent corporations are Bertelsmann Music Group, Inc., Bertelsmann Inc., and Bertelsmann AG.

Respondent SIRE RECORDS GROUP, INC. has been renamed LONDON-SIRE RECORDS INC. Its parent corporations are Warner Music Group Inc., Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company.

Respondent VIRGIN RECORDS AMERICA, INC.'s parent corporations are EMI Group North America Holdings Inc., and EMI Group plc, a publicly traded company.

Respondent WARNER BROS. RECORDS INC. s parent corporations are Warner Communications Inc., Time Warner Cos. Inc., and Time Warner Inc., a publicly traded company.

Respondent FRANK MUSIC CORP. is wholly owned by MPL Communications, Inc.

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STATEMENT OF ISSUES

1. Did the District Court abuse its discretion in finding Plaintiffs were likely to succeed on their contributory and vicarious copyright infringement claims?
2. Did the District Court abuse its discretion in finding Plaintiffs are suffering both presumed and actual irreparable injury?
3. Are the terms of the preliminary injunction overly broad, particularly where Plaintiffs have provided Napster with means to ascertain the identity of the works enjoined?
4. Did the District Court abuse its discretion in setting the bond amount?

STATEMENT OF THE CASE

Plaintiffs supplement Napster's statement as follows:

Upon filing their complaint, Plaintiffs sought expedited discovery for the purpose of seeking preliminary injunctive relief. ER4305. At the hearing on that motion, over Plaintiffs' objection, Napster convinced the District Court to defer Plaintiffs' preliminary injunction motion so that Napster could move for summary adjudication, claiming to be a mere conduit under §512(a) of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. §512. On May 12, the Court denied Napster's motion. A&M Records, Inc. v. Napster, Inc., 54 U.S.P.Q.2d 1746 (N.D.Cal. 2000). Plaintiffs immediately requested, and the

District Court ordered, a discovery and briefing schedule, which culminated in the July 26 hearing and Order.

STATEMENT OF FACTS

A. Introduction.

Users will understand that they are improving their experience by providing information about their tastes without linking that information to a name or address or other sensitive data that might endanger them (*especially since they are exchanging pirated music*). SER1641.¹

This is how Napster's co-founder described its service and business model. As the District Court summarized, [t]he matter before the Court concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings. Opinion (OP)2[ER4225]. Following established legal standards from Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 416 (1984) and Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1995), the District Court made extensive factual findings (fully supported by the record) and concluded that Napster intended to and did cross that boundary -- knowingly and purposefully. The massive infringement Napster enables is not the inevitable byproduct of a

¹ Emphasis in quotations is added unless noted. ER refers to Excerpts of Record; SER refers to Plaintiffs' Supplemental Excerpts of Record.

new technology ; Napster is not a technology. It is a business created to facilitate the anonymous theft of music.

The District Court s findings and the record that supports them are as follows:

Napster s business strategy from the inception was to use Plaintiffs music to usurp and undermine the record industry, to take over, or at least threaten, plaintiffs role in the promotion and distribution of music. OP5-6 [ER4228-4229]; SER1640. Napster sought to build and monetize an enormous user base by making available -- without authorization or payment -- the most popular music, unhindered by cumbersome copyright schemes. OP4-5 [ER4227-4228]; SER1478. The key, Napster planned, is to coexist with the record industry, *at least temporarily* [and] ultimately *bypass the record industry entirely* SER1561. Napster anticipated that [u]ltimately Napster could evolve into a full-fledged music distribution platform, usurping the record industry as we know it today, but cautioned that we should focus on our realistic short-term goals while wooing the industry before we try to undermine it. OP6[ER4229]; SER1640.

In order to build its necessary user base, Napster promoted its service as the world's largest MP3 music library. OP3-4[ER4226-4227]; SER1683.² It promised the availability of *every song* online by connecting you live with millions of songs found in other MP3 listeners' music collections. SER1683. Using Napster, it invited: you'll never come up empty handed when searching for *your favorite music* again!, and *you can forget about wading through page after page of unknown artists*. OP6-7[ER4229-4230]; ER 1681, 1683. (After this lawsuit, Napster deleted these incriminating statements from its website.) Absent was any mention of sampling, space-shifting, the new artist program, or any other purported use of the Napster system. OP6-7[ER4229-4230]. As the District Court found: The ability to download myriad popular music files without payment seems to constitute the glittering object that attracts Napster's financially-valuable user base. OP33[ER4256]; see also OP4, 24[ER4227, 4247].

Napster succeeded in creating illegal copying on a scale that is without precedent. OP40[ER4263]. When Plaintiffs filed this action, Napster had approximately 200,000 users. SER1588. By the injunction hearing, it had over 20 million. ER4134. By the end of this year, Napster estimates it will have **75 million**. OP4[ER4227]; SER1514. Every day, Napster enables, encourages, and

² By most accounts, the predominant use of MP3 is the trafficking in illicit audio recordings . . . Recording Indus. Assn of America v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074 (9th Cir. 1999).

directly benefits from the infringement of **12 to 30 million** copyrighted works.

OP4[ER4227]; ER4133.

[V]irtually all Napster users download or upload copyrighted files and . . . the vast majority of the music available on Napster is copyrighted.

OP5[ER4228]. Over 87% of the music copied and distributed on Napster is pirated. Id.; SER912-913; ER670-672, 726-727.³ Nearly all of Plaintiffs' music is available over Napster. OP13[ER4236]; SER4, 912-913, 935-936. Thus, Napster provides for free the same product Plaintiffs spend enormous sums to create, manufacture, market, and sell. OP13-14[ER4236-4237]; ER605-606.

The District Court found Plaintiffs are suffering tangible, irreparable harm in the sale of their music through traditional outlets **and** in the burgeoning Internet distribution market. OP15-16, 20-22[ER4238-4239; 4243-4245]; SER899. The Court also found Napster is devaluing Plaintiffs' copyrights by engendering the belief that music should be free on the Internet. OP16-17, 22[ER4239-4240, 4245]; ER608, 665-666; SER899, 1255, 1278-1279, 1378. Napster not only deprives Plaintiffs of control over their property and of compensation, it also harms artists, musicians, producers, unions, and other

³ The remaining 13% also is protected by copyright (see note 5, infra), and the vast majority also likely is infringing. The owners simply could not be identified in the short time after Napster provided the court-ordered sample listing of music downloaded by its users. SER912; ER672, 727. Napster has not produced evidence this music is authorized.

legitimate sellers of music, both traditional and Internet. OP13-14[ER4236-4237]; SER1, 870-871, 875-876, 878-880, 1254-1255, 1277-1279, 1360-1361, 1377-1379, 1395.

After considering an extensive record, the District Court found Plaintiffs had not just a reasonable likelihood of success but a strong likelihood of success on their contributory and vicarious infringement claims. ER4197. The injunction issued does not inhibit the Internet or any technology. File-transferring technology is not new, merely an existing technology that Napster put to a familiar use: music piracy. The injunction, too, is a familiar one; requiring Napster to do only what users of copyrighted works have done from the inception of copyright law, whether they be publishers, entertainment media, or Internet businesses: obtain permission of the copyright owner.

B. Plaintiffs Music

Plaintiffs own the overwhelming majority of music copyrights. SER1; Diamond, 180 F.3d at 1074.⁴ The Record Company Plaintiffs devote substantial resources to create, manufacture, sell, and promote recorded music. The Music Publishing Plaintiffs are songwriters and music publishers who own

⁴ Napster does not dispute this, but argues, without credible evidence, that 98% of artists are not signed to record contracts. This figure, even if true, is meaningless. Plaintiffs presented uncontroverted evidence that less than 1.2% of the music distributed and copied over Napster belongs to so-called new or unsigned artists. SER1921-1923, 1926.

copyrights in popular musical compositions. OP13[ER4236]; SER1, 868-869, 874-875, 1248-1250, 1271-1274, 1356-1358, 1373-1374, 1389-1391.⁵ Only 10 to 15 percent of records are commercial successes; thus, Plaintiffs rely on their hit records to recoup their investments, make a profit, and continue to make new product. OP13[ER4236]; SER1273, SER870-871, 874. By contrast, Napster invests nothing in the content of music which means that, compared with plaintiffs it incurs virtually no costs in providing a wide array of music to satisfy consumer demand -- a demand created by *Plaintiffs* marketing efforts for *Plaintiffs* music. OP13[ER4236]; ER606.

C. Napster s Infringing Business

Napster s business model is premised on attracting a large user base by providing copyrighted music for download in an anonymous setting. OP4-5

⁵ Musical compositions have been protected by copyright since 1831. United States v. Moghadam, 175 F.3d 1269, 1271 (11th Cir. 1999). Sound recordings -- the reproduction of sounds as opposed to musical notation -- have been protected by copyright since 1972. Id. at 1271. Sound recordings fixed before 1972 are protected under state law. 17 U.S.C. §301(c); *e.g.*, Cal. Civ. Code §980(a)(2); United States v. Goldstein, 412 U.S. 546, 571 (1973). Thus, *all* recordings are protected. The unauthorized reproduction or distribution of records infringes the sound recordings and the musical compositions embodied therein. 17 U.S.C. §106(1), (3); Moghadam, 175 F.3d at 1271; Goldstein, 412 U.S. at 551.

Plaintiffs use the word copyrighted to also include pre-1972 recordings protected under state law, and music to include the Record Company Plaintiffs sound recordings and the Music Publishing Plaintiffs musical compositions.

[ER4227-4228]. Napster does not provide Internet access -- it is not an Internet service provider like AT&T, Earthlink, or Netcom.⁶ Nor is it a generalized search engine, like Yahoo!, that refers subscribers to Internet websites. Napster does not search for or link to websites; it locates individual infringing *files* on the computers of Napster users. OP3-4, 9[ER4226-4227, 4232]; SER1723, 1725, 1734, 1762. Moreover, Napster does not send its users to Internet websites. Its value comes from keeping and servicing them within the Napster system -- controlling the environment of its users' experience -- resulting in Napster's continual participation in the infringing conduct. SER1674.

Napster is a comprehensive service, including software, servers, indexing, and search functions. OP41 n.2[ER4264]. Napster converts users into public servers and hosts, able to distribute infringing files to millions of others simultaneously signed onto Napster. OP9[ER4232]; SER1751, 1757, 1764.

Napster first provides its users with proprietary MusicShare software, downloaded from Napster's website after the user agrees to Napster's terms of use. OP7-8[ER4230-4231]. This software, necessary to access Napster, interacts with and connects users to one of Napster's servers. OP9[ER4238]; SER1732-1734. Each time a user signs on, Napster's software inventories that

⁶ Napster's references to itself as an ISP are misleading. The District Court earlier found that Napster was *not* a mere conduit (like Netcom) under §512(a) of the DMCA. OP28[ER4251]; A&M Records, supra.

users' MP3 directories, validates that each file is an authentic MP3 file, and indexes only those that are validated. OP9[4232]; SER1749, 1762. It then provides Napster's servers with song title, artist, and other technical information about the user's MP3 files, which Napster uploads onto a directory and index. This index lists the names of all MP3 music files then available for copying and distribution. OP9-11 [ER4232-4234]; SER1732-1734. Napster continuously updates its index to reflect the addition or deletion of available music files as its users log on and off. Id.

Using the Napster software, users search Napster's index by entering the name of a song or artist. OP9[ER4232]. Napster's server-side software searches Napster's directory of music files and returns a list of music files responsive to the search. Napster enables users to specify the audio quality of the MP3 file desired and the connection speed of the host user's computer. OP10[ER4233]; SER1746-1748, 1750-1751, 1778.

To download a music file, the user clicks on the file name provided by Napster. Napster verifies that the specific file requested is available and establishes the link between the two users, automatically transferring the file from one to the other. OP10-11[ER4233-4234]; SER1762. Once the download is completed, Napster immediately updates its index to reflect that the newly downloaded recording is available for others to copy from the receiving user --

proliferating exponentially the availability of Plaintiffs' music. OP21[ER4244].⁷

The actual transfer is the only part of the process done through the Internet. See generally OP7-11[ER4230-4234]; A&M Records, 54 U.S.P.Q.2d at 1747. Napster servers remain connected to its users during the entire distribution/copying process and are advised when a transfer is completed. SER1764-1765. Throughout, Napster promises and provides users complete anonymity. OP8[ER4231]; SER1606-1608, 1641.

Napster never challenges the District Court's finding that Napster materially contributes to its users' infringements. OP11, 29-30[ER4234, 4252-4253]; A&M Records, 54 U.S.P.Q.2d at 1747.

D. Napster's Knowledge Of And Benefit From Infringement

Napster also does not challenge the finding it has knowledge of the piracy it designed its system to facilitate. The District Court referenced Napster's documents in finding that facilitating the unauthorized exchange of copyrighted music was a central part of [Napster's] business strategy from the inception. OP6, 27[ER4229; 4250]; SER1606-1608, 1641, 1643. The Court

⁷ Napster claims its users choose whether to allow other users to copy music files from them; however, a Napster user would have to perform affirmative steps to *prevent* her music from being copied by other users. The default setting on Napster's software is to permit copying (ER1812; SER689-690) and, of course, Napster exists only because its users allow copying.

found convincing evidence that Napster executives *actually knew* about and sought to protect use of the service to transfer illegal MP3 files. OP27[ER4250].

The record evidence was overwhelming. Before the law suit, Plaintiffs notified Napster of over 12,000 infringing files being copied and distributed over Napster. OP26-27[ER4249-4250]; SER1, 9-684. Plaintiffs complaints listed additional music being infringed. OP27[ER4250]; ER1-39. This music still is available on Napster. Id.; SER935-936.

Napster executives have extensive recording industry experience; thus, they know that all music is copyrighted and the vast majority of popular music is owned by record companies and music publishers. OP29[ER4252]; SER1483. Napster understands intellectual property law, posting interpretations of that law on its website (SER778), filing patent applications (SER1767-1785), licensing software to its users (SER1795-1797), and invoking the law to protect its intellectual property -- even threatening to sue a band that copied the Napster logo. OP29[ER4252]; SER1865-1866. Napster promoted its service as providing every song, its users favorite music -- recorded by the artists they want to hear -- and boasted that its users could avoid wading through page after page of unknown artists. OP6-7[ER4229-4230]; SER1478, 1623, 1681, 1683. All of the most popular music by the most popular artists is available on Napster, including music owned by Plaintiffs and not yet released. SER4, 1361. Discovery revealed that

Napster executives (even its DMCA-designated copyright compliance agent) use Napster for the same purpose as other users -- to download infringing music, including by Madonna, Bruce Springsteen, The Rolling Stones, and Neil Diamond (to name just a few). Even some of the music specifically identified in the complaint was copied by Napster's executives. OP29[ER4252]; SER1433-1437, 1545-1553, 1595, 1613-1617, 1655-1656, 1661-1663.

Countless newspaper articles (including those from Napster's files) emphasize that Napster users primarily pirate music (SER1799-1833); users on Napster's message boards boast of their infringing activity. SER1835-1837, 1852-1859. Napster even illustrated its service to potential investors and business partners with mock-ups of its system listing infringing files (including Pearl Jam and The Grateful Dead). SER1472, 1475. And, Napster described its search function with examples of popular artists, including Led Zeppelin. SER1635.

Knowing and intending that its users would be committing piracy, Napster set out to build *a valuable business*, capitalizing on music infringement on a scale that is without precedent. OP40[ER4263]. The Court found that the Napster service attracts more and more users by offering an increasing amount of quality music for free and that Napster plans to drive [sic] revenues directly from increases in userbase. OP32[ER4255]. Napster recognized that [d]eveloping our user base early on *and achieving that critical mass of*

available songs will be important to our success. SER1640. Napster planned to monetize its user base, including by advertisements, subscriptions, product sales, sale of demographic information, and, ultimately, sale of the company. Id. Napster already has obtained investments exceeding \$13 million. SER1440-1445. Napster's former CEO admitted: Napster is not a non-profit organization. OP4[ER4227]; SER1450. Thus, the District Court found that the value of the [Napster] system grows as the quantity and quality of available music increases OP4[ER4227]; SER1447-1448), and that the Napster service arguably has little commercial value without the availability of copyrighted popular music (OP24 n.20[ER4247]) -- the overwhelming portion of which is Plaintiffs'. Again, Napster does not challenge these findings.

E. The Harm To Plaintiffs

Although the obvious and intuitive harm from the free copying and distribution of millions of Plaintiffs' recordings requires no proof, the District Court nevertheless specifically found that, despite Napster's infancy, Plaintiffs produced evidence that Napster use harms the market for their copyrighted musical compositions and sound recordings in at least two ways -- the raising of barriers to Plaintiffs' entry into and ability to compete in the emerging market for digital distribution of music, and reduced CD sales. OP20[ER4243]; ER398, 472, 486, 604-610.

First, the uncontroverted evidence showed that the Record Company Plaintiffs are currently implementing plans to distribute their music over the Internet. Each Record Company Plaintiff has spent years, thousands of hours, and millions of dollars in preparation; and each either already has launched or is about to launch its digital distribution initiative. OP13-14, 23[ER4236-4237, 4246]; SER1251-1256, 1274-1279, 1358-1362, 1375-1379, 1391-1395. The District Court found that plaintiffs have invested in the digital downloading market and their business plans are threatened by a service that offers the same product for free. OP13,38[ER4236,4261]. (The court finds that, in choosing between the free Napster service and pay-per-download sites, consumers are likely to choose Napster.)⁸ This result is so self-evident that even Napster's economist agreed. ER1884 (It goes without saying that the purchaser will have a strong preference for buying the same download for a lower price. . .).

The District Court also found that defendant has contributed to a new attitude that digitally-downloaded songs ought to be free -- an attitude that creates formidable hurdles for the establishment of a commercial downloading market. OP16[ER4239]. The evidence showed that perhaps the greatest danger posed by Napster . . . is that consumers are beginning to consider free music to be an

⁸ Sony Music Entertainment was the first Record Company Plaintiff to distribute its music online. Each song it sells for downloading is available on Napster for free. OP23[ER4246]; SER1276.

entitlement. This concept, of course, ignores and completely devalues both the work done by artists to create music and the funds invested by record companies and retailers to bring that music to the consumers. SER899, 1852-1859; ER665-666. Once consumers become accustomed to obtaining something for free, they resist paying for it. . . *If the perception of music as a free good becomes pervasive, it may be difficult to reverse.* ER608.

Plaintiffs' survey determined that college students (a key demographic of Napster) *already* are buying fewer CDs because of Napster. Plaintiffs' survey was corroborated by empirical evidence showing a decline in CD purchases at colleges. OP15[ER4238]; ER399, 472, 486-488, 4276-4277. Further, the more music users have downloaded from Napster, the fewer CDs they report buying. OP37-38[ER4260-4261]; ER472, 486-488. Weighing the evidence, the Court found that Napster use is likely to reduce CD purchases by college students, whom defendant admits is a key demographic. OP15[ER4238].⁹ Congress, too, has recognized that online services providing music on demand pose the greatest threat to traditional sales of records and compact discs. Digital Performance Right in Sound Recordings Act of 1995, S.Rep. No. 104-128 at 27 (1995).

F. Napster's Efforts To Disguise Its Essential Purpose

⁹ The Court found that the report of Napster's survey expert was gravely flawed and does not provide credible evidence that music file-sharing on Napster stimulates more CD sales than it displaces. OP15, 24[ER4238, 4247].

After this lawsuit, desperate to preserve the enormous economic value conferred by Plaintiffs' copyrighted music, Napster tried to distance itself from the pirated music that is its *raison d'être*. Napster recognized that it had to **appear** to be unaware of the piracy. An e-mail discussion between Napster moderators (provided by Napster to help users) is telling:

admitting that we know Napster is used for the transfer of illegal MP3 files might not be the best thing to do . . . I mean . . . obviously people are going to use it for that purpose . . . but . . . we might not want to actually say we know that *shrug* just semantics I guess . . . but eh . . . being sued can be a bitch

Napster co-founder Shawn Fanning ultimately responded: this is an excellent point, cautioning moderators, try to avoid discussions similar to this . . . you should all be very aware of what you say . . . (it appears my hypocrisy knows no bounds). SER1533, 1566.

Publicly, Napster began to claim that it designed its service to promote unknown, unsigned artists -- and that infringing files on its service were merely an unavoidable byproduct.¹⁰ This was an abrupt about-face from Napster's pre-lawsuit claims that it was the place to **avoid** wading through page after page of unknown artists. ER4249. Napster did not even begin to implement its new

¹⁰ Napster's former CEO proclaimed that Napster was a way to promote local bands and not about Madonna. SER1460-1462. Later, court-ordered discovery revealed her computer contained five unauthorized Madonna MP3 files copied using Napster, plus numerous other infringing files. OP26[ER4249]; SER1461-1462.

artist program until many months after Plaintiffs filed this action; the District Court correctly called it an afterthought (OP26[ER4249]) that did not become central to defendant's business strategy until this action made it convenient to give the program top billing. OP6, 25[ER4229, 4248]; SER2212-2215. Internally, Napster executives referred to a new artist strategy as totally hokey (SER1640), and admitted the obvious -- we are in the business of aggregating users and *putting up unsigned artists to distract the RIAA*[.] SER1626-1627.

Not surprisingly, bona fide new artists constituted a very small percentage of music available on Napster. OP26[ER4249]. Of Napster's claimed 17,000 new artists who authorize their songs to be downloaded, only 11 new artists and 14 of their music files appeared in a sample of 1,150 Napster downloads. OP7[ER4230]; SER1922-1923, 1926. In the end, the District Court found that Defendant's representations about the primacy of its legitimate uses thus appear to be disingenuous. OP33[ER4256].

G. The Injunction Does Not Ban File-Sharing Technology Or Require Napster To Shut Down

The District Court did not shut Napster down or ban its file-transferring process. ER4218. The injunction only prohibits Napster from facilitating infringement of *Plaintiffs* copyrights. Contrary to Napster's protests, the District Court did not enjoin a technology -- it enjoined a business practice that

adapts and implements a routine file transfer system to violate the law on an unprecedented scale. Napster did not create a new technology; it uses a structure that has existed from the inception of the Internet, which Napster calls peer-to-peer. Napster's counsel conceded that Napster's distributed file system is a structure of distribution or access to the Internet that has long been in place[.] SER819-820; see also ER4214-4215.

Napster glaringly misrepresents the record when it asserts that the un rebutted evidence was that the injunction would force Napster to close its business. (AOB72). To the contrary, as Plaintiffs' expert explained, there are several potentially viable methods of limiting the Napster service to music files authorized for sharing. OP34[ER4257]. Napster could compile a database of works authorized by copyright owners to be distributed and copied, and permit the indexing, searching, and downloading only of those works; or Napster could compile a database of Plaintiffs' works and prevent indexing of (and thus access to) just those works, while still allowing file transferring of music not owned by Plaintiffs. SER2205-2206. Either of these should be a relatively simple matter, since Napster already creates and updates its index every time a user logs onto its system -- inventorying and validating every MP3 file before it is added. OP9[ER4232]. Napster never really denies the ability to comply, equivocating that

it would not be practical or would require it to make changes in its system.

ER1821-1822, 1826.¹¹

The District Court required Plaintiffs to cooperate with defendant in identifying the works to which they own copyrights. Plaintiffs have complied, filing a written plan with the District Court (SER2688-2695), thus obviating Napster's unfounded (and legally irrelevant) claim that it would be burdensome to determine what music is owned by Plaintiffs. Ultimately, however, Napster is the company that operates its system and must ensure compliance with copyright law. Numerous companies that distribute digital music and provide legitimate resources for new artists (or established artists, for that matter) permit copying only after obtaining authorization. SER887-891; ER 657-661, 1477-1483, 1581-1586, 1597-1600.

If Napster complies with the injunction, any artist -- known or unknown -- who owns and wants her music distributed over Napster can continue to allow it. Napster also can continue to operate its virtual community through

¹¹ Napster planned from the outset to exploit its large base of active users by using real-time analysis of usage patterns allowing for unprecedented targeting of *each user's specific musical tastes*. SER1637; ER3960-3963; SER2688-2695. When the District Court ordered Napster to produce a sample listing of users' downloads, within a few days it was able to do so, providing a list of over 574,000 specific music files requested by users for downloading using the Napster system. SER911. Napster also has a precedent for obtaining authorizations, requiring new artists to give written authorization before Napster includes them in its new artist database. ER1742-1743, 1757-1758.

its chat rooms, message board, and website, as the District Court found.

OP10[ER4233]. If Napster suspends operation, it is not because the injunction requires it, but because, as the District Court found, Napster has no desire to operate a business unless it can offer its users free, unauthorized access to all of Plaintiffs copyrighted music.

Napster recognizes that anything less than the relief granted would be ineffective. Napster's suggestion that its only obligation should be to respond to notices identifying specific song files or individual Napster users is cynical, as the District Court concluded from a document written by one of Napster's co-founders:

If the RIAA decides the best way to react to Napster is to request that we remove links...that would be good new [sic] for napster. ***We can easily remove any listed links, and doing so would have little to no effect on us. The burden the RIAA will have documenting each case for each user before the link would be removed could also amount to a seriously onerous task.*** Frankly, this seems to be the ideal way to frame the issue from our perspective. SER2234.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in finding Plaintiffs were likely to prevail on their claim for contributory infringement because Napster knowingly and materially contributes to its users' infringements; or on their claim

for vicariously liability because Napster has the ability to supervise its users and financially benefits from their infringements.

Nor did the District Court err in rejecting Napster's grab-bag of affirmative defenses:

- " Section 1008 of the Audio Home Recording Act (AHRA), by its express terms, only immunizes consumer use of certain statutorily-defined recording devices -- which do not include computers, computer hard drives, or MP3 files. Additionally, the distribution of millions of such files among anonymous strangers is not the private, noncommercial use contemplated by this limited exemption.
- " The staple article of commerce doctrine never has been applied to shield a defendant who does more than deliver a product into the stream of commerce with no further involvement. Napster is the operator of an ongoing service, and its continued participation is essential for infringement.
- " The District Court's findings that Napster has no substantial or commercially significant uses other than infringement are not clearly erroneous. Napster's proffered fair uses of sampling and space-shifting are anything but fair, and those and its other proffered noninfringing uses are *de minimis*, pretextual, and/or severable from Napster's intended and overwhelming infringing uses.

- " The District Court correctly found that Napster's other affirmative defenses (waiver, misuse, and the First Amendment) were meritless.
- " The injunction granted by the Court properly enjoined Napster from facilitating the infringement of Plaintiffs' copyrights. It was reasonable and not overbroad.
- " The amount of the bond was within the District Court's wide discretion.

ARGUMENT

I. STANDARD OF REVIEW.

A preliminary injunction is proper upon a showing of (1) likelihood of success on the merits and the possibility of irreparable injury, or (2) serious questions on the merits and the balance of hardships favoring plaintiffs. Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000). In copyright actions, likelihood of success establishes a *presumption* of irreparable harm. Micro Star v. FormGen, Inc., 154 F.3d 1007, 1109 (9th Cir. 1998).

A preliminary injunction is subject only to limited review . . . much more limited than review of an order involving a permanent injunction, where all conclusions of law are freely reviewable. Walczak v. EPL Prolong, Inc., 198 F.3d 725, 730 (9th Cir. 1999). It is reversible only for abuse of discretion. United States v. Estate Preservation Services, 202 F.3d 1093, 1097 (9th Cir. 2000); Federal Trade Commission v. Affordable Media, 179 F.3d 1228, 1233 (9th Cir.

1999). Only if the District Court made clearly erroneous findings or employed an erroneous legal standard will its conclusion be disturbed. Estate Preservation Services, 202 F.3d at 1097. Findings are clearly erroneous only where the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Walczak, 198 F.3d at 730.¹²

The denial of an evidentiary hearing is reviewed for abuse of discretion, Kenneally v. Lungren, 967 F.2d 329, 335 (9th Cir. 1992); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 546 (9th Cir. 1969), as are rulings concerning admissibility and weight of expert testimony, E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1292-93 (9th Cir. 1992), and the bond amount, Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999); Fed. R. Civ. P. 65(c).

¹² Contrary to Napster's contention (AOB18), the clearly erroneous standard applies regardless of whether an evidentiary hearing was held. Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986). Even the Fifth Circuit case cited by Napster concurs. Hall v. National Gypsum Co., 105 F.3d 225, 228 (5th Cir. 1997) (absence of evidentiary hearing does not, however, mean that our review is *de novo* . . . Rule 52(a) unmistakably sets forth the clear-error standard).

II. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT NAPSTER IS LIABLE FOR BOTH CONTRIBUTORY AND VICARIOUS INFRINGEMENT.

The District Court found that Plaintiffs demonstrated a strong and substantial likelihood of success on their contributory and vicarious infringement claims. ER4206, 4208, 4210. Napster does not seriously challenge the evidence supporting these findings.

A. Napster Users Are Direct Infringers.

Direct infringement by Napster users is indisputable: virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music. OP18[ER4241]; ER671-672; SER912. Uploading and downloading music files constitutes infringement of the reproduction right (by the downloader) and the distribution right (by the uploader). 17 U.S.C. §§106(1),(3); Playboy Enterprises, Inc. v. Webbworld, Inc., 991 F.Supp. 543 (N.D. Tex. 1997), aff'd, 168 F.3d 486 (5th Cir. 1999); Sega Enterprises, Ltd. v. MAPHIA, 948 F.Supp. 923 (N.D.Cal. 1996); Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F.Supp. 503 (N.D.Ohio 1997); Playboy Enterprises, Inc. v. Chuckleberry Publishing System, Inc., 939 F.Supp. 1032 (S.D.N.Y. 1996). Merely making copyrighted music *available* through Napster violates Plaintiffs' distribution right. Hotaling v. Church of Jesus Christ of Latter Day Saints, 118 F.3d 199, 203 (4th Cir. 1997).

B. The AHRA Does Not Immunize Napster's Users.

The AHRA has no relevance to Napster and its users for two independent reasons: (1) under the statute's plain language, as this Court held in Diamond, the AHRA applies *only* to those devices and musical recordings defined in the statute, and does *not* apply to the hard drives of computers or recordings on those hard drives -- the only types of devices and recordings at issue here; and (2) distribution of copyrighted music to millions of strangers is not the noncommercial, home copying for personal use covered by the AHRA.

1. The AHRA Does Not Apply To Computer Hard Drives.

The AHRA regulates specifically defined digital audio recording devices. The AHRA requires manufacturers of such devices to incorporate technology to control second generation copying (copies from copies) and to pay royalties. 17 U.S.C. §§1002, 1003. In return, section 1008 affords immunity from copyright infringement suits to the manufacturers of digital audio recording devices and to consumers for certain enumerated uses of such devices. By its terms, section 1008 does not extend immunity beyond the statutorily-defined digital audio recording device :

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a *digital audio recording device*, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer *of such*

a device or medium for making *digital musical recordings* or analog musical recordings.¹³

This language is plain: the exemption is limited to uses of digital audio recording devices (*such a* device) to make digital musical recordings -- as those terms are defined in section 1001. Napster's strained interpretation omits the entirety of the limiting language at the end of the section. If Congress had desired to extend immunity to all consumer copying, it easily and simply could have so stated. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (courts must presume that a legislature says in a statute what it means and means in a statute what it says there).

This Court held in Diamond that neither a general-purpose computer nor its hard drive is such a device covered by the AHRA: Under the plain meaning of the [AHRA's] definition of digital audio recording devices, computers (and their hard drives) are not digital audio recording devices.... Diamond, 180 F.3d at 1077. The Court concluded that the legislative history was consistent with the [AHRA's] plain language -- computers are not digital audio recording devices. Id. at 1078 n.6. Computers are the only devices involved here.

Moreover, this Court in Diamond also held that [t]here are simply no grounds in either the plain language of the definition or in the legislative history

¹³

Analog devices and recordings are not at issue here.

for interpreting the term digital musical recording to include songs fixed on computer hard drives. 180 F.3d at 1077. Those are the only type of songs copied and distributed by Napster users. See 2 M. & D. Nimmer, Nimmer On Copyright § 8B.02[A][1][a] at 8B-29 (hereinafter Nimmer) (The AHRA s structure, whereby computers are excluded from its thrust, places the Internet essentially outside the statute s purview).

In sum, Napster ignores the plain language of the AHRA and the Diamond decision. Instead, Napster refers to out-of-context statements in the legislative history and dicta in Diamond to support its untenable position that the AHRA applies to *all* non-commercial copying and distribution. However, those statements were made in discussing the statute s express applicability only to certain defined devices. They are not evidence of any intent to broaden the AHRA beyond its plain, limited language, nor could they be interpreted as such.

2. The AHRA Addresses Noncommercial Copying, Not Widespread Distribution To Millions Of Anonymous Strangers.

Napster s arguments about the meaning of the word noncommercial are irrelevant because, as described above, section 1008 does not apply to the conduct of Napster s users. Additionally, even if it did, Napster ignores that the noncommercial use referenced in the AHRA is limited to *copying* (*making*

digital musical recordings). The AHRA does not immunize *distribution* of copyrighted music, much less to millions of anonymous strangers -- an activity entirely different from the private home *copying* covered by the AHRA and addressed in Diamond. The legislative text and history, and this Court's reasoning in Diamond, confirm that section 1008 was a "home taping exemption" and limited to *private, noncommercial* use. 180 F.3d at 1079 (emphasis in original). Nothing in the statute or legislative history even suggests that Congress intended to give consumers license *to distribute* copies of copyrighted music over the Internet -- any more than a license to make copies of copyrighted music and distribute them from a street corner to all comers, with or without charge.

Napster's interpretation also is at odds with the No Electronic Theft (NET) Act of 1997, 17 U.S.C. §506(a), which imposes *criminal* penalties for copyright infringement over the Internet, even when not for monetary gain. Recognizing the dangers of piracy over the Internet, especially [of] computer software, compact discs, and movies, H.R. Rep. No. 105-339 at 4 (1997), Congress "establish[ed] criminal fines and penalties for reproducing and distributing copyrighted works by electronic means even if the perpetrator does not benefit financially from the theft. Id. at 6. This was intended to "enable authorities to prosecute someone . . . who steals or helps others to steal copyrighted works but who otherwise does not profit financially from the theft. Id. at 7. If in

1992 Congress had intended the AHRA to allow all non-commercial distribution, as Napster argues, it obviously would not have subjected the same activity to criminal penalties in 1997.¹⁴

C. The District Court Correctly Found That Plaintiffs Were Likely To Succeed On Their Contributory Infringement Claim.

The standard for contributory infringement is [o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. Fonovisa, 76 F.3d at 264, quoting Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). Although not required, the District Court found that Napster had actual knowledge of the infringements. OP27-29[ER4250-4252]. Napster does not challenge the findings of material contribution or that Napster executives actually knew about and sought to protect use of the service to transfer illegal MP3 files. OP27[ER4250].

¹⁴ Napster's resort to legislative history of the Record Rental Amendment, 17 U.S.C. § 109(b)(1)(A), enacted many years earlier in an unrelated context, seriously misapprehends that amendment and is not useful to interpret the AHRA. To the extent this Court looks to legislative history, the more recent NET Act, enacted in the specific context of the Internet and directly dealing with the same type of infringement as here, speaks more directly to congressional intent.

**1. The Specific Knowledge Argued For By Napster Is Not
The Correct Standard.**

Napster claims that it must have *specific* knowledge, on a file-by-file basis, of *each* of the tens of millions of infringing music files distributed and copied by each of its millions of users. Under Napster's theory, the more massive the infringement, the more onerous the burden on copyright holders. As Napster argues, it could have actual (albeit general) knowledge that 99% of the music files on its system were infringing, yet successfully claim it did not have the requisite specific knowledge as to any single file.

This plainly is not correct under the common law or the DMCA. For example, the flea market operator in Fonovisa could not have known, by title, the thousands of counterfeit cassette tapes sold by its vendors, yet this Court held there was no question that generalized knowledge (*e.g.*, letters from the sheriff notifying the flea market operator that vendors were selling counterfeit tapes) satisfied the knowledge element. Fonovisa, 76 F.3d at 261, 264; Hardenburgh, 982 F.Supp. at 514; Sega Enterprises Ltd. v. MAPHIA, 857 F.Supp. 679, 686-87 (N.D.Cal. 1994) (element satisfied [e]ven if defendants do not know exactly when games will be uploaded or downloaded from its service); RSO Records v. Peri, 596 F.Supp. 849, 858 (S.D.N.Y. 1984) (knowledge found where very nature of product would suggest infringement to a rational person); A&M Records, Inc. v.

General Audio Video Cassettes, 948 F.Supp. 1449, 1457-58 (C.D. Cal. 1996)

(Although there is no direct evidence that [defendant] knew he was contributing to the illegal copying of each of [the] 156 different sound recordings [at issue], the testimony at trial indicated that [defendant] was aware that he was contributing to the counterfeiting of many different sound recordings).¹⁵

Napster urges deference to Congress on matters involving new technologies (AOB23), but ignores that, in enacting the DMCA, Congress already has spoken on the activities at issue. Congress, recognizing that copyright owners will hesitate to make their works readily available on the Internet without reasonable assurances that they will be protected against massive piracy, S. Rep. No. 105-190 at 8 (1998) (DMCA S.Rep.), struck a balance among various interests through the DMCA s safe harbor provisions, §512(a)-(d).

Section 512(d) addresses information location tools, which Napster claims to be. Such service providers are disqualified from safe harbor protection by failing to act expeditiously after *either* receiving a statutorily prescribed notification from the copyright holder (§512(d)(3)) *or* possessing actual

¹⁵ Religious Technology Center v. Netcom Online Communication Services, Inc., 907 F.Supp. 1361 (N.D.Cal. 1995), relied on by Napster for its specific knowledge standard, supports no such standard. The Court did not find the evidence of knowledge insufficient for contributory liability, as Napster claims (AOB46); to the contrary, the court *denied* Netcom s motion for summary judgment on that issue. The other cases on which Napster relies (AOB47) do not even mention, let alone require, specific knowledge.

knowledge that the material or activity is infringing (§512(d)(1)(A)) *or* becoming aware of facts or circumstances from which infringing activity is apparent (§512(d)(1)(B)).¹⁶

Each of these provisions contradicts Napster's proffered specific knowledge standard. First, §512(d)(1)(B) on its face does not require any heightened standard of specific knowledge. It requires, by design, less than actual knowledge; it is, as Congress put it, a common-sense red flag test. DMCA S.Rep. 49.¹⁷ Congress clearly expressed that it intended to exclude sophisticated pirate directories, like Napster, by virtue of the §512(d)(1)(B) standard:

The important intended objective of this standard is to exclude sophisticated pirate directories -- which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted -- from the safe harbor. Id. at 48.

¹⁶ Napster argues the District Court ignored §512(d)(1)(C), which gives a service provider an opportunity to act[] expeditiously to remove or disable infringing material upon obtaining the requisite knowledge or awareness under §§512(d)(1)(A) or (B). The District Court, however, recognized that provision has no relevance to Napster, which had such knowledge from its inception and did nothing to address the infringing material or activity.

¹⁷ Some amici have raised the question of whether the awareness standard of §512(d)(1)(B) is higher than constructive knowledge -- and, if so, how much higher. Napster never argued that §512(d)(1)(B) is different than constructive knowledge. Regardless, the District Court found that Napster has actual knowledge, and the facts found by the District Court clearly would satisfy any threshold of red flag knowledge.

This is inconsistent with the specific, file-by-file knowledge Napster advocates. Second, §512(d)(1)(A) speaks to knowledge of infringing material *or* activity -- nowhere suggesting that specific file-by-file knowledge is intended, rather just the opposite. Third, the notification provisions expressly do *not* require file-by-file notification, but provide that a representative list is sufficient to give notice of multiple copyrighted works. §512(c)(3)(A)(ii); 512(d)(3). Congress explained this provision, making clear that file-by-file knowledge was *not* required:

Thus, for example, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary that the notification list every musical composition or sound recording that has been, may have been, or could be infringed at that site. Instead, it is sufficient for the copyright owner to provide the service provider with a representative list of those compositions or recordings in order that the service provider can understand *the nature and scope* of the infringement being claimed. H.R. Rep. No. 105-551, pt. 1, at 55 (1998).

2. The DMCA Is Not Just A Notice-And-Takedown Statute.

Ultimately, Napster really is arguing that copyright holders must give specific notice in order to trigger any claim. AOB5 (Issue 5), 54 (referring to §512(d)(1) as a takedown upon notice provision). But this confuses the DMCA's knowledge provisions, codified at §512(d)(1), with the DMCA's notice provision, codified at §512(d)(3) -- and would undermine the framework Congress sought to achieve.

Under the DMCA's express terms, §512(d)(3)'s notification provision and §512(d)(1)'s knowledge provisions are independent conditions of eligibility, each of which Napster must satisfy to qualify for safe harbor. Contrary to Napster's arguments, a copyright holder is not obliged to provide notification under §512(d)(3) to enforce its rights:

Section 512 does not require use of the notice and take-down procedure. A service provider wishing to benefit from the limitation on liability under subsection (c) [incorporated into (d)] must take down or disable access to infringing material residing on its system or network of which it has actual knowledge or meets the red flag test, ***even if the copyright owner or its agent does not notify it of a claimed infringement.*** DMCA S.Rep. 45.

Emphasizing the point, Congress continued: For their part, copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights. Id.; see also 1 Nimmer §12B.04[A][3].

The DMCA clearly provides that Napster cannot, as it did, ignore its actual knowledge and repeated red flags. The District Court correctly found that, by any standard, Napster's knowledge of the massive infringements it enables was sufficient both for liability as a contributory infringer and to disqualify Napster from any DMCA safe harbor. Given the District Court's finding that virtually all Napster users download or upload copyrighted files and that the vast majority of the music available on Napster is copyrighted (OP5[ER4228]), Napster is the

quintessential pirate directory that Congress intended to exclude from the DMCA's safe harbor.

At bottom, Napster's argument for a specific knowledge standard is, as its internal memorandum reflects, a not-so-subtle attempt to create a seriously onerous task for copyright holders which would have little or no effect on us [Napster]. SER2234.¹⁸

D. The District Court Correctly Found That Plaintiffs Were Likely To Succeed On Their Vicarious Liability Claim.

A defendant is vicariously liable if it has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities. Fonovisa, 76 F.3d at 262. Adopting near verbatim language, the DMCA disqualifies a service provider from eligibility for safe harbor if it receive[s] a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity. 17 U.S.C. §512(d)(2).¹⁹

¹⁸ Napster also argues at length its purported compliance with §512(i). This issue was not decided by the District Court. The District Court presumed compliance with the threshold requirements of §512(i), for purposes of the preliminary injunction motion, but found Napster ineligible for safe harbor under §512(d).

¹⁹ These conditions for eligibility for safe harbor in §512(d)(2) are independent of the conditions based on knowledge in §512(d)(1) and notification in §512(d)(3). A service provider must satisfy *each* set of conditions to be entitled

1. Napster Derives Direct Financial Benefit From Copyright Infringement.

The financial benefit element is satisfied when infringing activities enhance the attractiveness of the venue to potential customers. Fonovisa, 76 F.3d at 263 (the sale of pirated recordings . . . is a draw for customers); see also PolyGram International Publishing, Inc. v. Nevada/TIG, Inc., 855 F.Supp. 1314, 1332 (D. Mass. 1994) (trade show participants derived a significant financial benefit from the attention that attendees gave to the playing of infringing music); Playboy Enterprises, Inc. v. Webbworld, Inc., 968 F.Supp. 1171, 1177 (N.D.Tex. 1997); Sega, 857 F.Supp. at 684.²⁰ The DMCA legislative history adds the following guidance: In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one. DMCA S.Rep. 44.

Napster does not challenge the findings that establish the financial benefit element. The District Court found that the ability to download myriad popular music files without payment seems to constitute the glittering object that attracts Napster's financially-valuable user base (OP33[ER2456]), and that,

to safe harbor.

²⁰ The only case Napster cites, Netcom, 907 F.Supp. at 1376, relies on the *district court* opinion in Fonovisa. This Court specifically reversed that opinion on this precise point. 76 F.3d at 263-64.

because Napster plans to monetize its user base, the value of the system grows as the quantity of available music increases. OP4-5[ER4227-4228]. Under Fonovisa and any common-sense, fact-based approach, it is clear that Napster's business and its value and anticipated revenue stream (OP4-5[ER4227-4228]), fundamentally are built on piracy.²¹

2. The District Court Correctly Found That Defendant Supervises Napster Use.

Napster attempts to cast the District Court's finding of ability to supervise as resting solely on Napster's admitted ability to terminate users' accounts. This alone is legally sufficient, but the record is more extensive and overwhelmingly supports the finding that defendant supervises Napster use (OP31[ER4254]):

[B]efore the [Napster] client software uploads MP3 file names to defendant's master servers, it validates the files stored in the user library directories. ... to ensure that they are indeed MP3 files, checking to see whether they contain the proper syntax specification and content.

OP9[ER4232]. As the District Court noted (OP34[ER4257]), and as explained supra, pp. 20-21, Napster could modify the existing validation

²¹ This fundamentally distinguishes Napster from legitimate Internet businesses for which copyright infringement can only be described as economically incidental.

process to allow transferring of only authorized files or, alternatively, to prevent trafficking in Plaintiffs' music.

Napster's moderators oversee users, and have authority to punish them for misconduct. SER1577-1581. A Napster document describes a range of user punishments including "kill <jerk>" (temporarily disconnecting a user who is causing problems), "muzzle <loudmouth>" (removing a user's chat privileges), and "ban <user/IP Address/subnet>" (banning a user's static IP address for repeated offenses). SER1577-78. Moderators also are empowered unilaterally to change a user's control settings, such as line speed and data ports. SER1579-80.

Napster's terms, to which each user must agree, give Napster "the right to refuse service and terminate accounts in their discretion, including, but not limited to, if Napster believes that user conduct violates applicable law or is harmful to the interests of Napster, its affiliates, or other users, or for any other reason in Napster's sole discretion, with or without cause." SER1795-1797.

Internal Napster planning documents show that Napster considers its business as "controlling its users' environment" (SER1674), "coordinat[ing] file transfers between users" (SER1762), and "becom[ing] the interface

between the user and their MP3 playing/MP3 getting experience (SER1642).

Napster controls what is copied -- only those files indexed and provided by Napster in response to a search request can be copied; and it controls when and from whom copies can be made -- only when users are logged onto the Napster system (OP7-10[ER4230-4233]). Finally, as the District Court noted, Napster takes pains to inform the court of its improved methods of blocking users about whom rights holders complain. . . . This is tantamount to an admission that defendant can, and sometimes does, police its service. OP31[ER4254]; ER1817-1819.

Napster is liable even if it does not *exercise* control because it *is capable* of doing so. Fonovisa, 76 F.3d at 262-63; Gershwin, 443 F.2d at 1161-63. In Shapiro, Bernstein and Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963), the reasoning of which this Court adopted in Fonovisa, the defendant was not actively involved in the sale of records and the concessionaire -- not the defendant -- controlled and supervised the individual employees. Fonovisa, 76 F.3d at 263. Nevertheless, the defendant's *ability to police* its concessionaire -- which parallels Cherry Auction's ability to police its vendors under Cherry Auction's similarly broad contract with its vendors -- was sufficient to satisfy the control requirement. Id.; see also Netcom, 907 F.Supp. at 1375-76 (rejecting Netcom's argument on

summary judgment that it had no ability to supervise, because it reserved the right to take remedial action against subscribers ; with easy software modification Netcom could identify postings that contain particular words ; had acted to suspend subscribers accounts on over one thousand occasions ; and could delete specific postings).

III. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT THE NAPSTER SERVICE IS NOT A STAPLE ARTICLE OF COMMERCE.

Napster seeks what amounts to a permanent license for its ongoing infringing conduct by advocating an unprecedented expansion of Sony s staple article of commerce doctrine. Sony was decided on a significantly different record, and applied the staple article of commerce doctrine much more narrowly than Napster contends. Indeed, the doctrine never has been applied to a business, like Napster, that has ongoing involvement with its users.

In Sony, the Supreme Court applied a fact-intensive standard; was it manifestly just to impose liability on Sony for the infringing activities of third parties? 464 U.S. at 437. Repeatedly, the Court accepted and relied on the district court s factual findings. For example, the Supreme Court hinged its analysis on the finding that the primary use of the Betamax, private noncommercial time-shifting in the home, was fair use. Id. at 423. Also key to the Supreme Court s

analysis were findings that plaintiffs over-the-air public television programming was something consumers had been invited to witness in its entirety free of charge, id. at 449; was copied for the purpose of playing once at a later time, then erased, id. at 423; and accounted for well below 10% of television programming subject to Betamax copying. Id. at 443. Still other facts relied on by the Court were the district court's finding that Sony had no ongoing relationship with Betamax users, and thus had no actual knowledge of their activity and was in no position to control unauthorized uses of copyrighted material, id. at 437-38; and that plaintiffs were not likely to suffer any harm from the Betamax, id. at 454.

Moreover, the primary use of Napster -- ***distribution*** of copyrighted works -- pointedly was absent in Sony. The Court was careful to emphasize that its ruling applied only to the ***private, home use*** of VTR s...No issue concerning the ***transfer of tapes to other persons*** was raised. Id. at 425.

The District Court here made the fact-intensive inquiry that Sony mandates. The Court meticulously followed the analytic road map Sony created, making detailed findings on all the critical fact issues, but made findings diametrically opposed to the district court findings in Sony.

Thus, while Sony had no ongoing relationship with its users, here the District Court found that Napster is inextricably intertwined with and could control its users' infringements. OP8-12, 31[ER4231-4235, 4254]. While the vast

majority of Betamax uses were found to be noninfringing, here the overwhelming uses of Napster were found to be infringing. OP18, 41 n.6 [ER4241, 4264 n.6]. While the plaintiffs in Sony were found to have a minimal market share, the Plaintiffs here were found to command the vast majority of the relevant market of copyrighted materials and the overwhelming amount of the infringing music distributed and copied using the Napster system. And while the district court in Sony found no harm to plaintiffs, here the District Court found direct competition from Napster. OP16[ER4239]. These findings are not clearly erroneous.

A. Because Napster Has A Direct, Ongoing Relationship With Its Users, Sony Is Inapplicable.

In Sony, the issue was whether the *sale of* petitioners copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act. Id. at 419. Critical to the Court's analysis was that Sony had no direct involvement with any Betamax purchasers who recorded copyrighted works off the air. Id. at 426. The District Court expressly found that no employee of [defendants] had either direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air. Id. at 438. *The only contact between Sony and the users of the Betamax . . . occurred at the moment of sale.* Id. This crucially distinguished Sony from the traditional contributory infringement cases involving

an *ongoing relationship* between the direct infringer and the contributory infringer at the time the infringing conduct occurred. Id. at 437.²²

Napster, by contrast, does not merely manufacture a product and inject it into the stream of commerce, thus ending all relationship with the product and purchaser. Napster operates a service, and has direct and ongoing relationships with its users. Without Napster's active involvement up to and at the point of infringement, infringement is not possible. Napster can no more raise the staple article of commerce doctrine than could a defendant whose business consisted of providing customers with copyrighted movies, video recorders, and a room to duplicate them, see Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 62 (3d Cir. 1986), or the flea market in Fonovisa, which clearly provided facilities that were capable of substantial non-infringing uses (*e.g.*, vendor booths, parking lots, concession stands, public restrooms), and had vendors that sold legitimate merchandise, or the trade show operator in PolyGram, 855 F.Supp. at 1317-18, which accommodated legitimate exhibitors who did not use its services to support infringement.

Every court that has considered Sony in the context of a continuing relationship between the defendant and the direct infringer has found it

²² This is consistent with the origins of the staple article of commerce doctrine in patent law, Sony, 464 U.S. at 439-40, where it applied to sellers of products. 35 U.S.C. §271(c).

inapplicable. Illustrative is RCA Records v. All-Fast Systems, Inc., 594 F.Supp. 335 (S.D.N.Y. 1984). The plaintiffs (owners of copyrights in music) sought to enjoin the defendant retail copy service from enabling customers to copy plaintiffs music. Defendants operated a Rezound copying machine that allowed customers to copy plaintiffs music onto specially designed cassettes, which defendants sold to customers who used the machine. Id. at 336-37. In finding contributory infringement, the Court drew a sharp distinction between the defendants -- operators of the machine used for infringement of plaintiffs recordings -- and the manufacturer of the machine: [T]he Sony Corp. decision extends protection only to the **manufacturer** of the infringing machine, not to its operator. Id. at 339.

[T]he [Supreme] Court recognized that contributory infringer status had traditionally been given to those who were in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner. It did not purport to alter this long-standing rule. ***The manufacturer of the machine does not fit this definition since it has no such control once the machine is sold. Defendant, in contrast, is in a position to exercise complete control over the use of the Rezound machine.*** Id. at 339.

In General Audio Video, defendant sold to counterfeiters blank cassettes specifically timed to the length of copyrighted recordings, and also maintained an ongoing relationship with the counterfeiters. Regardless of whether timed cassettes could be used for substantial noninfringing uses (*e.g.*, by individuals to record their own music), the Court found that the evidence in this case indicated

that [defendant s] actions went far beyond merely selling blank, time-loaded tapes, and included *act[ing] as a contact between his customers and other suppliers of material necessary for counterfeiting*. . . 948 F.Supp. at 1457.

Therefore, even if Sony were to exonerate [defendant] for his selling of blank, time-loaded cassettes, this Court would conclude that [defendant] knowingly and materially contributed to the underlying counterfeiting activity. Id.; see also Cable/Home Communication v. Network Prods., 902 F.2d 829, 846 (11th Cir. 1990) (In Sony, the Court was impressed by the district court s finding that the petitioner, Sony Corporation, had not influenced or encouraged unlawful copying); Dobbins, Computer Bulletin Board Operator Liability for Users Infringing Acts, 94 Mich. L. Rev. 217, 234-35 (1995) (operator of computer bulletin board should be ineligible for consideration under Sony); Tickle, The Vicarious Liability Of Electronic Bulletin Board Operators For The Copyright Infringement Occurring On Their Bulletin Boards, 80 Iowa L. Rev. 391, 410 (1995).

The limited applicability of Sony also is illustrated by the very few cases in which it successfully has been interposed as a defense to a contributory infringement claim.²³ Napster cites only three, and they do not support its position:

²³ Moreover, although Sony sometimes used the term vicarious in a generic sense, the only claim before the Supreme Court was for contributory infringement. 464 U.S. at 420. Neither Sony, nor any court since Sony, has

Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1998), involved, like Sony, a *manufacturer* of a product (computer diskettes) commonly used for the noninfringing purpose of making permissible archival copies of software under 17 U.S.C. § 117. Mathieson v. Associated Press, 23 U.S.P.Q.2d 1685, 1687 (S.D.N.Y. 1992), did not allege contributory infringement and also involved sale of a product (a photograph) which plaintiff had authorized to be used. And in RCA/Ariola Int'l v. Thomas & Grayston Co., 845 F.2d 773, 781 (8th Cir. 1988), even though the district court found the product (a tape recorder) to be a staple article of commerce, the Court of Appeals held the retailer and manufacturer liable for vicarious infringement: the retailer because its employees did more than simply supply tape as the Sony defendant supplied video recorders; [they] helped the customers copy a whole tape, . . . and the customers kept the tape, rather than erasing it ; and the manufacturer because it exercised control over the retailer's use of the machines.

B. Napster Separately Does Not Qualify Under Sony Because Its Intended And Principal Use Is Infringement, And It Has No Substantial Noninfringing Use.

applied the staple article of commerce doctrine to a claim for vicarious infringement.

The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly, and the rights of others freely to engage in *substantially unrelated* areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is *widely used for legitimate, unobjectionable purposes*. Sony, 464 U.S. at 442.

The Supreme Court declined to enjoin the manufacture and sale of the Betamax because the *average member of the public* uses a VTR *principally* to record a program he cannot view as it is being televised and then to watch it once at a later time. Id. at 421. Surveys by both sides showed that the *primary use* of the machine for *most owners* was time-shifting -- the practice of recording a program to view it once at a later time, and thereafter erasing it. Id. at 423.²⁴

Thus, the mere availability of a noninfringing use is insufficient. Napster has the burden of proving a substantial noninfringing use, which Sony discussed in the context of a product *widely used* for legitimate, unobjectionable purposes, and capable of *commercially significant* noninfringing uses.

Although the Sony Court never quantified the amount of noninfringing use that

²⁴ Unlike here, in Sony the copying of the respondents' programs represent[ed] a *small portion* of the total use of VTRs. Id. at 434; see also id. at 443 (Plaintiffs' combined market share . . . is well below 10%).

may be substantial, the facts and language of the opinion confirm that the Court considered both quantitative (widely used) and qualitative (commercially significant) substantiality. Sony, 464 U.S. at 442. See Cable/Home Communications, 902 F.2d at 846 (substantial noninfringing use is wide use for legitimate, unobjectionable, purposes); General Audio Video, 948 F.Supp. at 1456 (although time-loaded cassettes can be used for legitimate purposes, these purposes are insubstantial given the number of [defendant s] customers that were using them for counterfeiting purposes); Sega, 857 F.Supp. at 685 (video game copiers not capable of noninfringing uses because *such incidental capabilities* have not been shown to be the *primary use* of such copiers); Atari, Inc. v. JS&A Group, Inc., 597 F.Supp. 5, 8 (N.D.Ill. 1983) (device not capable of substantial noninfringing uses because it primarily was used to infringe video games and the one theoretical legitimate use did not make economic sense); Worlds of Wonder v. Vector Intercontinental, Inc., 653 F.Supp. 135, 139-40 (N.D.Ohio 1986) (sale of unauthorized audio tapes used in toy was contributory infringement, even though tape could be played alone and thus be noninfringing because there is little likelihood of market success based on the audio track alone).²⁵

²⁵ The Court s use of the phrase capable of commercially significant noninfringing uses in connection with its analysis, cannot mean, as Napster contends, that the possibility of future authorization by copyright owners is enough. If that were the case, *everything* would be capable of noninfringing uses because any infringer could, in the future, hypothetically obtain licenses and

C. The District Court Correctly Found That Alleged Space Shifting and Sampling Over Napster Are Not Fair Uses.

The constitutional purpose of copyright is to motivate the creative activity of authors and inventors by the provision of a special reward. Sony, 464 U.S. at 429. The limited purpose of fair use is to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law was designed to foster. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); Micro Star, 154 F.3d at 1112 n.6. The rationale for the doctrine was that a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus ... frustrate the very ends sought to be attained. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 549 (1985) (internal quotations omitted).

The fair use defense does not exist to satisfy the convenience of Napster, its users, or consumers. It exists to further the objective of copyright: the purpose of fair use is to serve the copyright objective of stimulating *productive thought* and *public instruction* without excessively diminishing the incentives for creativity. H.R. Rpt. No. 102-836 at 2555 (1992).

thereby provide nonfringing services. The Court in Sony was referring to a machine capable of present, actual, and substantial noninfringing use. As Napster would have it, a service that was primarily or even completely infringing could continue to operate and infringe indefinitely based on some future, possible noninfringing use. No case has stretched Sony nearly this far.

Fair use is codified in 17 U.S.C. §107:

the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four factors are to be considered together in light of the purposes of copyright, not in isolation. Sony Computer Entertainment America, Inc. v. Bleem, LLC, 214 F.3d 1022, 1026 (9th Cir. 2000).

Napster essentially concedes that the second and third factors militate against finding that sampling and space-shifting are fair uses. Plaintiffs' works are highly creative renderings in which Plaintiffs invest substantial time effort and money -- the very type of works at the core of intended copyright protection. Campbell, 510 U.S. at 586 (music is at the core of intended copyright protection); Micro Star, 154 F.3d at 1113 (fair use defense will be

much less likely to succeed when it is applied to fiction or fantasy creations).

And Napster users copy the entirety of Plaintiffs' music. Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983) (this Court has long maintained the view that wholesale copying of copyrighted material *precludes application of the fair use doctrine*); 4 Nimmer §13.05[A][3] at 13-180-81 (whatever the use, generally, it may not constitute a fair use if the entire work is reproduced).

In finding that the first and fourth factors also favored Plaintiffs, the District Court correctly rejected Napster's efforts to expand the fair use doctrine ... to encompass the massive downloading of MP3 files by Napster users. OP2[ER4225].

1. So-Called Space-Shifting Is Not A Fair Use.

The term space-shifting derives indirectly from the Court's discussion of time-shifting in Sony. But space-shifting is different in kind from time-shifting, as the distinctions between this case and Sony again demonstrate: Sony involved the taping of over-the-air public television programming which, the Court emphasized, the public had been invited to witness in its entirety free of charge. 464 U.S. at 449; see also id. at 447 n.28 (with regard to television, the copyright holder receives compensation in the form of advertising revenues ; the user of the copyrighted work is not required to pay a fee for access). By contrast, the sale of physical or digital copies of sound

recordings is precisely how Plaintiffs are compensated for their creative efforts and financial investments. OP21[ER4244].

Additionally, time-shifting as implicated in Sony involved the practice of recording a program to view it once at a later time, and thereafter erasing it -- a practice that only enlarge[d] the television audience. 464 U.S. at 421, 423. Music is not shifted in a comparable way; to the contrary, it is archived in permanent collections and listened to repeatedly -- a practice known as librarying. The Sony Court did not hold that librarying was fair use, but rather took pains to draw a distinction between librarying and time-shifting. 464 U.S. at 451, 453 n.39; see also 2 Nimmer §8B.01[D][2] at 8B-19 (space-shifting of music is different than time shifting of a television show because audio copying is almost always done for librarying purposes, and almost never for time-shifting purposes).

The vast difference between time-shifting in Sony and Napster's so-called space-shifting is illustrated by the fact that the record on harm in Sony was unequivocal: Harm from time-shifting is speculative and, at best, minimal ; No likelihood of harm was shown. Id. at 454. The District Court here found that Plaintiffs' business plans are threatened by a service that offers the same product for free. OP38[ER4261].

Finally, the Sony Court made clear it was dealing only with private, home use and not the transfer of tapes to other persons. 464 U.S. 425. But Napster is fundamentally a distribution vehicle. Any Napster user who downloads a song to space shift obtains it, in the first instance, from another Napster user who lacks authority to distribute it. As the District Court recognized, a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester. OP19[ER4242]. Even if the downloading user is assumed to be space-shifting, the distributing user cannot take advantage of the fair use defense. See, e.g., Los Angeles News Services v. Tullo, 973 F.2d 791, 797 (9th Cir. 1998); Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996) (*en banc*). Napster is designed such that the unauthorized distribution and the unauthorized reproduction necessarily occur by virtue of the same mouse click. Moreover, the downloading user is doing more than simply copying. At the moment the download is completed, that downloader becomes a distributor of the recording, creating the potential for viral distribution to millions of people. OP21[ER4244].²⁶

²⁶ This case does not require the Court to decide whether a consumer who uses ripping software to copy her own CD onto her computer hard drive (see OP3[ER4226]) -- a practice some call space-shifting -- is engaged in fair use. The issue raised is whether so-called space-shifting *via Napster uploads and downloads* is fair use.

Napster's heavy reliance on the Diamond Court's reference to the term "space-shifting" in discussing the AHRA is misplaced. Diamond did not involve fair use or copyright claims. As discussed above, the AHRA requires covered devices to incorporate copying control technology known as "Serial Copy Management System" (SCMS). SCMS seeks to prevent the proliferation of unlimited copies of digital recordings by only permitting copies from originals, not from other copies. This is the exact opposite of Napster. The Rio device at issue in Diamond did not contain SCMS but, by its design, could *not* make duplicates of any of the files it stored, and could *not* transfer or upload those files to computers, other devices, or the Internet. 180 F.3d at 1075. Thus, in finding that the Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive, the Diamond Court characterized such limited copying (without distribution to third parties) as "paradigmatic noncommercial personal use entirely consistent with the purposes of the Act [AHRA]." Id. at 1079. The unlimited copying and distribution enabled by Napster is the antithesis of this -- and is anything but fair use.

2. The Nature And Character Of Space-Shifting Militates Against A Finding Of Fair Use.

The inquiry under the first factor is guided by the examples given in the preamble to §107, looking to whether the use is for criticism or comment, or

news reporting, and the like. Campbell, 510 U.S. at 578-79. Mindful that fair use must serve the purposes of copyright, the central purpose of this investigation is to assess whether the new work merely supersede[s] the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative . . . the more transformative the new work, the less will be the significance of other factors. Id.

The exact duplication of Plaintiffs' music -- simple copying (id. at 590 n.21) -- does not add anything or infuse those works with new expression, meaning, or message. It simply transfers music from a plastic disk (a CD) to a metal disk (a hard drive). In fact, at oral argument, Napster conceded that space-shifting is not transformative. ER4152. While Napster inexplicably claims that the District Court ignored this factor (AOB32 n.10), the Court in fact concluded that downloading MP3 files does not transform the copyrighted music.

OP19[ER4242]. See American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 923 (2d Cir. 1994) (Texaco's photocopying merely transforms the material object embodying the intangible article that is the copyrighted work.... [and] cannot properly be regarded as a transformative use of the copyrighted material); Los

Angeles News Service v. Reuters Television Int l., 149 F.3d 987, 993 (9th Cir. 1998); Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998).

Also relevant under the first factor is whether the use is of a commercial nature or is for nonprofit educational purposes -- recognizing that the commercial nature of a use is a matter of degree, not an absolute. Los Angeles Times v. Free Republic, 54 U.S.P.Q.2d 1453, 1465 (C.D.Cal. 2000). Here, it is undisputed Napster is a for-profit, commercial entity, and that its users bartering of recordings has no relation to any educational, nonprofit purpose.

Ultimately, the crux of this consideration is whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price. Harper & Row, 471 U.S. at 562. In this regard, the District Court found that the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use. OP18-19[ER4241-4242]. Accord American Geophysical, 60 F.3d at 924 (commercial use when defendant photocopies journal articles, in part, to avoid purchasing multiple copies); 2 Nimmer §8B.01[D][2] at 8B-20 (The individual who engages in audio home recording may not be seeking a commercial advantage by selling the recordings, but for fair use purposes his motivation is nevertheless commercial. By engaging in audio home recording, he avoids the cost of purchasing records or prerecorded tapes).

Finally, in evaluating character and purpose, the Court cannot ignore that Napster had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right. Harper & Row, 471 U.S. at 562.

3. The Adverse Effect On The Market For And Value Of The Works Militates Against Finding Fair Use.

The District Court found that Plaintiffs have produced evidence that Napster use harms the market for their copyrighted musical compositions and sound recordings by displacing CD sales and undermining Plaintiffs opportunities to digitally distribute their music. OP20[ER4243].²⁷

The focus under the fourth factor is not on any single user's challenged use but the harm to existing and potential markets if that use should become widespread. Harper & Row, 471 U.S. at 568. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a

²⁷ Although the issue is somewhat obviated by the District Court's finding that the use made by Napster users is appropriately considered commercial, fair use is an affirmative defense and Napster had the burden of proving all elements of the defense—including the fourth factor. Campbell, 510 U.S. at 590-91 (proponent of fair use is responsible for carrying the burden of demonstrating fair use); Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997) (same); 1992 H.R. Rpt. 2555 n.3 (burden of proving fair use is always on the party asserting the defense, regardless of the type of relief sought by the copyright owner); American Geophysical, 60 F.3d at 918 (party asserting fair use typically carries the burden of proof as to all issues in dispute).

major inroad on copyright that must be prevented. Id. at 569 (citations omitted). It is axiomatic that absent the ability to make unauthorized copies, some meaningful group of users would in fact purchase music in a new format, even if they own an earlier format. The history of music is that -- whether vinyl, eight-track, cassette, or CD -- consumers have paid to shift their music collections to new formats as technologies have advanced. Napster's own expert opines that Napster users would be prepared to pay \$15 a month to access the Napster service [ER 1885], which Napster argues is primarily used to space-shift and sample (AOB34). See 2 Nimmer §8B.01[D][2] (If the fourth factor of fair use ever is to militate against application of the fair use defense, it would seem that it should do so in the case of audio home recording).

Additionally, to the extent users space-shift via Napster, it is because, for whatever reason, they perceive some value in obtaining MP3 copies from **downloading** rather than from their own CDs using freely available ripping software.²⁸ Napster appropriates that value, which rightfully belongs to **Plaintiffs**, the owners of the music. This Court does not have to even consider whether users would perceive sufficient value from this alleged form of space-shifting to pay for

²⁸ On this point, this case is very different than Sony, where users had no other means to time-shift and no other way to view a program. Sony, 464 U.S. at 425 n.8 (the district court in Sony found that time-shifting was not just a matter of convenience ; access to over-the-air broadcasts has been limited not simply by inconvenience but by the basic need to work).

it. Napster's own business plan is premised on the fact that, in the Internet economy, eyeball accumulation is itself a form of currency. ER596. Plaintiffs, or business partners licensed by Plaintiffs, could offer free downloads of music already purchased and reap the tremendous rewards that derive from increased site traffic. Infinity, 150 F.3d at 111 (Infinity, in the exercise of its business judgment, has decided that its best current use of listen lines is to offer them at no additional cost to certain valued customers).

The record below is replete with evidence that Plaintiffs are actively pursuing ventures, partnerships, and licensing arrangements to leverage their key asset -- their music -- on the Internet. SER1246-1425. Napster undermines these commercial opportunities in this potential market. Campbell, 510 U.S. at 592; Harper & Row, 471 U.S. at 559; Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 145-46 (2d Cir. 1998); UMG Recordings, Inc. v. MP3.com, Inc., 92 F.Supp.2d 349, 352 (S.D.N.Y. 2000).

The District Court correctly concluded space-shifting is not a fair use. In the end, however, space-shifting was irrelevant to the Sony analysis because the District Court found that:

Defendant fails to show that space-shifting constitutes a commercially significant use of Napster. Indeed, the most credible explanation for the exponential growth of traffic to the website is the vast array of free MP3 files offered by other users -- **not** the ability of each individual to space-shift music she already owns. Thus, even if

space-shifting is a fair use, it is not substantial enough to preclude liability under the staple article of commerce doctrine. OP24-25[ER4247-4248].

4. Making Permanent, Exact Copies Of Entire Works For Purposes Of Sampling Is Not A Fair Use.

As the District Court found, Plaintiffs carefully regulate the degree and manner in which consumers may sample their works, lest the sample substitute for a purchase.²⁹ Unlike traditional authorized methods of sampling that Napster cites (listening booths, radio broadcasts, or song excerpts transmitted over Internet sites), with so-called sampling on Napster, [w]hether or not they decide to buy the CD, they still obtain a permanent copy of the song -- a complete copy, not a sample. OP21[ER4244].³⁰ Authorized sampling of music on the Internet is limited to 30 and 60 second clips, not entire songs. OP14,21[ER4237, 4244]. E.g.,

²⁹ Plaintiffs only make promotional downloads available on a highly restricted basis. OP20-21[ER4243-4244] (promotional downloads from Plaintiffs are often timed-out, *i.e.*, they expire after a certain amount of time and can no longer be listened to).

³⁰ Napster's statement that 90% of sampled music is deleted is unreliable (culled from newspaper articles rejected by the District Court). OP15 n.15[ER4238]. It is also incredible -- if that were the case, why are millions of infringing MP3 files available over Napster? Why does the average Napster user provide 100 files for copying? OP4[4227]. Indeed, nowhere does Napster begin to define the parameters of what sampling even means on Napster. How long are Napster users allowed to keep a song before it loses its status as a so-called sample? And what of users who make permanent copies of sampled MP3 files onto recordable CDs, or further distribute the sampled work?

Campbell, 510 U.S. at 586-76; Twin Peaks Prods., Inc. v. Publications Int'l. Ltd., 996 F.2d 1366, 1375-76 (2d Cir. 1993) (under the third fair use factor, the use copying cannot exceed what is necessary for the purpose).

On the fourth factor, Napster's extended discussion of how Napster sampling may benefit Plaintiffs' sales of *physical CDs* misses the point. Plaintiffs also sell digital downloads of their music. The emerging digital download market is not potential or speculative; it exists. Napster acknowledges its importance. SER1639. Napster downloads involve the same songs, customers, and medium as Plaintiffs' commercial downloads. ER605-606. Thus, as the District Court found, widespread sampling of the sort enabled by Napster clearly would injure Plaintiffs in that market: Plaintiffs are vulnerable to direct competition from Napster, Inc. ... The court finds that, in choosing between the free Napster service and pay-per-download sites, consumers are likely to choose Napster. OP16[ER4239]. What Napster asserts to be sampling with regard to the physical CD market is substitution in the digital download market. A work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superceding use, fulfilling demand for the original. Campbell, 510 U.S. at 587-88.

As the District Court also recognized, there is an existing market for legitimate sampling of 30 to 60 second clips of Plaintiffs' music and Plaintiffs

are *compensated* for *licensing* those samples. OP14, 21[ER4237, 4244]; SER2235-2243. Napster ignores the evidence and misstates the record when it claims the contrary (AOB36 n.12). Unauthorized sampling on Napster also undermines this market. ER606.

Finally, in addition to being contrary to the District Court's factual findings,³¹ Napster's contention that sampling may increase Plaintiffs' sales of CDs is legally irrelevant. Ringold v. Black Entertainment Television, Inc., 126 F.3d 70, 81 n.16 (2d Cir. 1997) (use not fair even if it might increase poster sales); DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982); UMG, 92 F.Supp.2d at 352 (Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works).

D. The District Court Correctly Found That Any Other Purported Noninfringing Uses of Napster Are De Minimis And Severable.

³¹ Napster tries to change the record below by *recoding* the survey verbatims of Plaintiffs' expert. AOB37-38 & n.13. Napster's recoding is wildly inaccurate, which is hardly surprising since coding of survey verbatims customarily is the subject of *expert* testimony. Napster's recoding is offered only by Napster's lawyers. The recoding also was not in the record below, and should not be considered. Tele-Communications, Inc. v. Commissioner, 104 F.3d 1229, 1232-33 (9th Cir. 1997). What *is* in the record is the finding of Plaintiffs' expert that, of survey participants who stated they downloaded music on Napster to decide what to buy, nearly three times as many reported reduced purchases of CDs as a result of using Napster (14.4%) as reported increased purchases (5.6%). SER2086-2087.

Beyond proffering sampling and space-shifting which are infringing, not fair, uses the alleged noninfringing uses Napster relies upon are its purported 17,000 new artists, and other artists who have authorized Napster to make their music available.³² The District Court found these claimed non-infringing uses to be insubstantial: [A]ny potential non-infringing use of the Napster service is minimal or connected to the infringing activity, or both. The substantial or commercially significant use of the service was, and continues to be, the unauthorized downloading and uploading of popular music, most of which is copyrighted. OP18[ER4241]. The record amply supported this finding. The undisputed evidence, for example, was that less than **1.2%** of Napster downloads involve new artists. SER1921-1923, 1926.

The Court also found Napster's new artist program, chat rooms, and message boards were satellite activities that Plaintiffs did not seek to enjoin and

³² Napster also refers to copying live performances. However, the unauthorized copying of live performances (bootlegging) is unlawful, 17 U.S.C. §1101, and also is infringement of the musical composition performed, 17 U.S.C. §106(4). Moreover, the few artists who may authorize copying of live performances as souvenirs for concert-goers do not necessarily (as Napster assumes) authorize worldwide distribution of the copies, as is done over Napster. Napster has not presented any evidence that they do.

Napster also refers to copying and distribution of music in the public domain. However, no sound recordings are in the public domain. See n.5 supra.

could continue despite the injunction. OP26[ER4249].³³ Ultimately, Napster never denies these functions could continue, as could distribution of authorized music. These uses are severable and, thus, cannot constitute substantial noninfringing uses. Vault, 847 F.2d at 263-64 & n.16 (issue is whether separate objectionable feature, not device as a whole, had substantial noninfringing uses); Compaq Computer Corp. v. Procom Technology, Inc., 908 F.Supp. 1409, 1424 (S.D. Tex. 1995); RCA Records, 594 F.Supp. at 339-40.

IV. NAPSTER'S OTHER DEFENSES ARE MERITLESS.

A. Plaintiffs Have Not Waived Their Right To Relief.

Waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it. United States v. King Features Entertainment, Inc., 843 F.2d 394, 399 (9th Cir. 1988). Napster posits that Plaintiffs have waived their right to sue for infringement of all of their copyrights in MP3 format for all time. No case has ever so held. The cases relied on by Napster clearly showed a deliberate waiver of the right to sue (akin to an implied license) for the specific works being litigated. The record here does not

³³ The only other non-infringing use Napster alludes to is the transfer of secure [*i.e.*, non-MP3] file formats. AOB27. But Napster introduced no evidence of the existence or number of such files. Moreover, the unauthorized copying and distribution of secure files is no less an infringement just because the files are supposedly secure.

begin to rise to the level of waiver of a single copyright, much less an entire catalog of music for an entire industry.

First, as the District Court found, the limited evidence fails to convince the court that the record companies created the monster that is now devouring their rights. OP36[ER4259]. Plaintiffs did not invent MP3 technology, and accord importance to the security of music offered by them over the Internet. OP14[ER4237].

Second, Plaintiffs have responded aggressively to Internet infringements: The RIAA fights a well-nigh constant battle against Internet piracy, monitoring the Internet daily, and routinely shutting down pirate websites by sending cease-and-desist letters and bringing lawsuits. Diamond, 180 F.3d at 1074. Here, Plaintiffs demanded Napster cease infringement of their copyrighted music shortly after Napster debuted, then filed this suit when Napster refused. SER6, 935.

Finally, Napster's argument that Plaintiffs have waived their right to sue because they purportedly stated they would not individually sue the 20 million plus Napster users is factually unsupported (there is no such evidence in the record) and legally unavailing. See, e.g., Micro Star, 154 F.3d at 1113-14 (even where manufacturer/distributor of computer game encouraged players to make

and freely distribute new levels it did not overtly abandon its rights to profit commercially from new levels); UMG, 92 F.Supp.2d at 353.

B. Plaintiffs Have Not Misused Their Copyrights.

Napster did not present any evidence that Plaintiffs have sought to do anything other than protect their copyrights. The District Court evaluated Napster's meager evidence of misuse and found it wholly inadequate. Plaintiffs are not seeking to control online music distribution or destroy MP3 technology; they seek redress for Napster's infringement of their copyrights. Action by copyright holders to enforce their copyrights is not misuse. Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832, 845-46 (Fed. Cir. 1992); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp. 1522, 1538-39 (S.D.N.Y. 1991) .

Moreover, contrary to Napster's assertion, this Court does not take a broad view of copyright misuse. In all the cases cited by Napster, copyright misuse was found *only* where the copyright owner attempted to impose terms on a licensee that restrained competition beyond the limited monopoly granted by copyright, or engaged in fraud to obtain copyright protection. E.g., Practice Management Information Corp. v. American Medical Ass'n, 121 F.3d 516, 521 (9th Cir. 1997).

V. NAPSTER IS CAUSING PLAINTIFFS IRREPARABLE HARM AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN PLAINTIFFS FAVOR.

In copyright cases, irreparable harm is *presumed* upon a showing of a reasonable likelihood of success. Cadence Design Systems, Inc. v. Avant! Corp., 125 F.3d 824, 827 (9th Cir. 1997), cert. denied, 523 U.S. 1118 (1998); Micro Star, 154 F.3d at 1109; Triad Systems Corp. v. Southeastern Express Co., 64 F.3d 1330, 1335 (9th Cir. 1995); OP17[ER4240]. The District Court found that Plaintiffs were entitled to the presumption (OP38[ER4261]), and also that they made a strong showing of actual harm (see pp. 58-61 supra).

The District Court thus was not required to balance the hardships. Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999) (presumption [of irreparable harm] means that the balance of hardships issue cannot be accorded significant if any weight . . .); Cadence, 125 F.3d at 829-830. Nevertheless, the District Court found the balance firmly in Plaintiffs favor:

Any destruction of Napster, Inc. by a preliminary injunction is speculative compared to the statistical evidence of massive, unauthorized downloading and uploading of plaintiffs copyrighted works -- as many as 10,000 files per second, by defendant s own admission. The court has every reason to believe that, without a preliminary injunction, these numbers will mushroom as Napster users, and newcomers attracted by the publicity, scramble to obtain as much free music as possible before trial. OP38-39[ER4261-4262].

Napster does not directly address these dispositive findings. Instead, Napster argues an injunction will put it out of business. The District Court appropriately rejected this argument (OP38[ER4261]), and its determination was not an abuse of discretion.

First, Napster can continue to operate and obey the copyright law. There is no dispute that Napster can continue its new artist program, chat rooms, instant messaging, and other music community features. Napster also should be able to continue to permit distribution and copies of authorized music files. See pp. 20-21, supra.

Second, the District Court found that even if Napster chooses to temporarily suspend file transferring operations, the court doubts that a preliminary injunction would destroy defendant's user base . . . there is a reasonable likelihood that they will switch back, especially considering defendant's claim to offer more music and more efficient search tools than its competitors. OP45 n.30[ER4268].

Third, even if Napster were to suffer some lasting market injury from a temporary closure pending trial, the District Court's weighing of the equities was correct. Dr. Seuss, 109 F.3d at 1406 (where defendants created the all-or-nothing predicament in which they currently find themselves, product would be preliminarily enjoined); Los Angeles News Service, 149 F.3d at 995; Hardenburgh,

982 F.Supp. at 510-11 (If Defendants cannot divine an efficient way to operate a computer BBS free of copyrighted material. . .then Defendants have the option of leaving the industry); Orth-O-Vision v. Home Box Office, 474 F.Supp. 672, 686 n.14 (S.D.N.Y. 1979) ([W]hen, as here, it is technologically impossible to separate out the infringing material the copyright owner ought not go unprotected).

Finally, since Napster s business is built upon piracy, it would have been error for the District Court to deny injunctive relief. See Cadence, 125 F.3d at 829 (error to deny preliminary injunction because it would be devastating to [defendant s] business when that business was based on infringement); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d Cir. 1983); Atari, 672 F.2d at 620; Helene Curtis Indus. v. Church & Dwight Co., 560 F.2d 1325, 1333-34 (7th Cir. 1977); Webbworld, 968 F.Supp. at 1175.

VI. THE INJUNCTION WAS TAILORED TO STOP THE HARM NAPSTER IS CAUSING PLAINTIFFS.

A. Prohibiting Infringement Of Plaintiffs Works Is Routine In Copyright Cases.

The District Court enjoined infringement of all copyrighted music owned by Plaintiffs. Such relief is appropriate in light of the magnitude of the infringement. OP40[ER4263]. In cases of widespread infringement, prohibiting

infringement of *all* plaintiffs copyrighted works is necessary and appropriate. See, e.g., Walt Disney Co. v. Powell, 897 F.2d 565, 568 (D.C. Cir. 1990); Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, 1349 (8th Cir. 1994); Sega, 857 F.Supp. at 690; Picker International Corp. v. Imaging Equipment Services, Inc., 931 F.Supp. 18, 45 (D. Mass. 1995); Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156, 1187 (W.D.N.Y. 1982). Absent such an injunction, Plaintiffs would have to file innumerable, identical actions to obtain complete relief.

In asserting that the District Court failed to require Plaintiffs to submit copyright certificates for all of their music, Napster confuses the necessity to register works before filing an action with the scope of injunctive relief. See Pacific and Southern Company, Inc. v. Duncan, 744 F.2d 1490, 1499 (11th Cir. 1984) (statute provides for injunctions to prevent infringement of a copyright, not necessarily the registered copyright that gave rise to the infringement action), cert. denied, 471 U.S. 1004 (1985). The cases Napster cites do not deal at all with the permissible scope of injunctive relief and do not even refer to the issue.

B. The Injunction Is Specific.

Not a single case cited by Napster to support its argument that the injunction is vague is a copyright case (AOB64-66), and for good reason. The language of the injunction is typical of language found in copyright infringement

cases. See, e.g., General Audio Videocassettes, 948 F.Supp. at 1460; Sega, 857 F.Supp. at 690-91; Walt Disney Co. v. Video 47, Inc., 972 F.Supp. 595, 604 (S.D.Fla. 1996); Central Point Software, Inc. v. Nugent, 903 F.Supp. 1057, 1060 (E.D.Tex. 1995).

In addition, the District Court required plaintiffs to cooperate with defendant in identifying the works to which they own copyrights and to file a written plan no later than September 5, 2000, describing the most expedient method by which their rights can be ascertained. OP40[ER4263]. Although the burden is on the infringer (Napster) to comply with the injunction, the plan filed by Plaintiffs obviates any claim by Napster that the injunction is overbroad. SER2688-95; see Triad Systems, 64 F.3d at 1337.

C. The Injunction Is Not Circumscribed By The DMCA.

Napster improperly relies upon the limitation on injunctive relief in the DMCA that applies, as it admits, only to qualifying service providers. §512(j). Since Napster does not qualify for the §512(d) safe harbor (see pp. 34-36 supra), it does not qualify for a limitation on injunctive relief.

D. Enjoining Copyright Infringement Does Not Violate The First Amendment.

Facilitating the theft of intellectual property is not protected by the First Amendment. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562,

577 & n.13 (1977); Dr. Seuss, 109 F.3d at 1403 n.11; Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979) (First Amendment is not a license to trammel on legally recognized rights in intellectual property); Universal City Studios, Inc. v. Reimerdes, 82 F.Supp.2d 211, 223 (S.D.N.Y. 2000) ([I]t no longer is open to doubt that the First Amendment does not shield copyright infringement).

Courts have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine. Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999); Harper & Row, 471 U.S. at 555-60. See also Religious Technology Center v. Netcom On-Line Communication Services, Inc., 923 F.Supp. 1231, 1258 (N.D. Cal. 1995) (the Copyright Act itself embodies a balance between the rights of copyright holders, and the protections of the First Amendment).

The injunction does no more than prohibit Napster from enabling the theft of Plaintiffs' music, and it mirrors orders routinely granted in copyright infringement cases. See Cable/Home Communications, 902 F.2d at 849 (rejecting First Amendment defense and holding injunctive relief is a common judicial response to infringement of a valid copyright). Napster facilitates, and the District Court enjoined, common piracy. All of the authority on which Napster

relies involved political speech or other protected expression, not the theft of intellectual property.

E. Napster Is Not Entitled To A Compulsory Royalty.

Citing only the reversed opinion in Sony, Napster argues that, instead of an injunction, the District Court should have ordered an unspecified and undefined compulsory royalty. The Supreme Court in Sony stated that the remedies for infringement are only those prescribed by Congress. Sony, 464 U.S. at 430. Congress has legislated compulsory royalties only in limited, specifically-enumerated circumstances, e.g., 17 U.S.C. §115, and this is not one of them. In any event, Napster never explains how the Court could set rates or terms of a royalty, how such a royalty would be calculated or supervised, or how it possibly could pay a royalty for the millions of songs unlawfully copied.

F. The District Court Did Not Abuse Its Discretion In Denying An Evidentiary Hearing.

Without explaining what an evidentiary hearing would have accomplished, Napster argues that the District Court abused its discretion in denying one. Napster's perfunctory request to the District Court for an evidentiary hearing did not explain why a hearing was needed nor specify any contested issues. The parties took over 30 depositions, and submitted thousands of pages of testimony, expert reports, documents, and declarations. The Court had a full

record, and did not abuse its discretion. International Molders Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986); Kenneally, 967 F.2d at 334-35; San Francisco-Oakland Newspaper Guild, 412 F.2d at 546.

VII. THE BOND WAS WITHIN THE DISTRICT COURT S DISCRETION.

This Court repeatedly has rejected requests to increase bonds. E.g., GoTo.com, Inc. v. The Walt Disney Company, 202 F.3d 1199, 1211 (9th Cir. 2000); Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1043-1044 (9th Cir. 1999). Courts have wide latitude to set preliminary injunction bonds. The District Court had all of the facts before it, including the nature, scope, and development of Napster's business. The District Court found that Plaintiffs had a strong case, and that, in the unlikely event Napster prevailed at trial, its users would likely return, thereby limiting any damage. OP45 n.30[ER4268]. The Court did not abuse its discretion. See Fed. R. Civ. P. 65(c); Walczak, 198 F.3d at 733-734.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the stay should be lifted immediately and the preliminary injunction affirmed.

Dated: September 8, 2000

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By _____
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**FORM 8" CERTIFICATION OF COMPLIANCE TO
FED. R. APP. P32(a)(7)(C) AND CIRCUIT RULES 32-1 AND 32-2
FOR CASE NOS. 00-16401 and 00-16403**

I certify, pursuant to Fed. R. App. P32(a)(7)(C) and Circuit Rules 32-1 and 32-2, that the attached opposition brief of Plaintiffs-Appellees A & M Records, Inc., Geffen Records, Inc., Interscope Records, and Sony Music Entertainment Inc., MCA Records, Inc., Atlantic Recording Corporation, Island Records, Inc., Motown Record Company L.P., Capitol Records, Inc., LaFace Records, BMG Music d/b/a/ The RCA Records Label, Universal Records Inc., Elektra Entertainment Group Inc., Arista Records, Inc., Sire Records Group Inc., Polygram Records, Inc., Virgin Records America, Inc., and Warner Bros. Records Inc. is proportionately spaced, has a typeface of 14 point or more, and contains 16,902 words (based on the word processing system used to prepare the brief).

Dated: September 8, 2000

MITCHELL SILBERBERG & KNUPP LLP

By: _____

Russell J. Frackman
Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

CIRCUIT RULE 28-2.6

This statement is made pursuant to Circuit Rule 28-2.6. Plaintiffs-Appellees A & M Records, Inc., Geffen Records, Inc., Interscope Records, and Sony Music Entertainment Inc., MCA Records, Inc., Atlantic Recording Corporation, Island Records, Inc., Motown Record Company L.P., Capitol Records, Inc., LaFace Records, BMG Music d/b/a/ The RCA Records Label, Universal Records Inc., Elektra Entertainment Group Inc., Arista Records, Inc., Sire Records Group Inc., Polygram Records, Inc., Virgin Records America, Inc., and Warner Bros. Records Inc. state that, apart from the two cases consolidated in this appeal, there is no case pending in this Court that is deemed related to the instant case pursuant to Circuit Rule 28-2.6.