RUSSELL J. FRACKMAN (State Bar No. 049087)
GEORGE M. BORKOWSKI (State Bar No. 133416)
JEFFREY D. GOLDMAN (State Bar No. 155589)
DREW E. BREUDER (State Bar No. 198466)
MITCHELL SILBERBERG & KNUPP LLP
11377 West Olympic Boulevard
Los Angeles, California 90064-1683
Telephone: (310) 312-2000
Facsimile: (310) 312-3100

STEVEN B. FABRIZIO (Pro Hac Vice)
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
1330 Connecticut Avenue NW, Suite 300
Washington, DC 20036
Telephone: (202) 775-0101
Facsimile: (202) 775-7253

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA -- SAN FRANCISCO DIVISION

A&M RECORDS, INC., a corporation; GEFFEN RECORDS, INC., a corporation; INTERSCOPE RECORDS, a general partnership; SONY MUSIC ENTERTAINMENT INC., a corporation; MCA RECORDS, INC., a corporation; ATLANTIC RECORDING CORPORATION, a corporation; ISLAND RECORDS, INC., a corporation; MOTOWN RECORD COMPANY L.P., a limited partnership; CAPITOL RECORDS, INC., a corporation; LA FACE RECORDS, a joint venture; BMG MUSIC d/b/a THE RCA RECORDS LABEL, a general partnership; UNIVERSAL RECORDS INC., a corporation; 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,

v.

NAPSTER, INC., a corporation, and DOES 1 through 100,

Defendants.

CASE NO. C-99-5183 MHP

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT NAPSTER, INC.'S, MOTION FOR SUMMARY ADJUDICATION ON THE APPLICABILITY OF THE 17 U.S.C. ' 512(a) SAFE HARBOR AFFIRMATIVE DEFENSE

Date: March 27, 2000
Time: 2:00 p.m.
Ctrm: Hon. Marilyn H. Patel

INTRODUCTION

Defendant Napster, Inc. ("Napster"), has filed a motion for summary judgment under one particular provision of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(a).[1] Section 512(a) is the narrowest of four separate "safe harbors" provided by the DMCA, each covering different functions, some or all of which may be performed by any given service provider. Section 512(a) covers those limited functions of a service provider that are considered "passive conduit" functions as defined in 512(a). Section 512(a) has no applicability to any other functions a service provider may perform. Accordingly, Napster's motion should be denied on two separate grounds:

First, as is plain from Napster's own evidence and admissions, the heart of what it provides its users are directory, indexing, search engine and "linking" functions -- classic "information location tool" functions -- which, if eligible for any DMCA safe harbor, must be analyzed under 512(d) (which, by its express terms, governs information location tools). These are the core Napster activities that form the basis of this action. Napster's entire motion is based on the flawed premise that it can invoke the protections of 512(a) for ***all*** of its myriad functions, as long as it can fit ***any*** of those functions into the narrow safe harbor provided by 512(a). By attempting to do so, Napster ignores the express language of the DMCA, which requires that each of a purported service provider's functions be analyzed ***independently*** to determine whether those functions could fit under any of the four safe harbors (512(a), (b), (c), and/or (d)). In this regard, the DMCA expressly provides that, even if a service provider qualifies for a safe harbor for certain of its functions, it nevertheless can be liable for copyright infringement based on other of its functions that do not qualify for safe harbor protection. 512(n). Consequently, whether Napster performs certain limited functions that might qualify as "conduit" functions under 512(a) is irrelevant. Those are ***not*** the functions that form the basis of plaintiffs' action against Napster.

[1] References in this memorandum to 512(a), 512(b), etc., refer to those sections of the Copyright Act, 17 U.S.C. ' 512(a) et seq.

Second, Napster does not perform the passive conduit function defined in 512(a). Section 512(a) addresses the narrow function where the service provider allows potentially infringing material to travel through its system or network in the course of transmission. Yet, Napster designed its system deliberately to avoid having the MP3 files in question travel "through" its "system" at all, and specifically ***disavows*** in any way being a "conduit" for those MP3 files. Napster avoids the plain meaning of 512(a) by completely ignoring the critical text.

It is not surprising that Napster attempts to characterize all of its functions as 512(a) passive conduit functions, and not more accurately as 512(d) information location tools. While the actions of a service provider constituting contributory or vicarious infringement would disqualify that service provider from safe harbor protection under 512(d), that is not necessarily the case under 512(a). Because Napster cannot otherwise escape liability for its contributory and vicarious copyright infringement, Napster seeks refuge under 512(a) at all costs.

Napster's attempt to fit itself within the "passive conduit" safe harbor of 512(a) is as disingenuous as its efforts to cast itself as a mere "innocent bystander" to the massive infringement of plaintiffs' copyrighted sound recordings. In both respects, Napster's arguments are invented for litigation and belied by its own statements and characterizations outside of this courtroom.

Indeed, while Napster now protests that its service is not designed to facilitate piracy of mainstream recordings, but to promote unknown artists who have authorized their sound recordings to be distributed over the Internet, Napster was more forthright about its true purpose before it was sued. On its Internet site, Napster advertised itself as the source for ***all*** music, not just the music of a few new or unknown artists:

> ***"Napster is the world's largest MP3 music library.***
>
> Napster ensures the availability of ***every song online*** by connecting you live with ***millions of songs*** found in other MP3 listeners' music collections. With Napster,

> you'll ***never come up empty handed*** when searching for your ***favorite music*** again!" (Frackman Decl., Ex. 5) (emphasis added).

Leaving little doubt about its disregard for the unknown artist, Napster's web site continued:

> "Napster virtually guarantees you'll find the music you want, when you want it … and ***you can forget about wading through page after page of unknown artists***." (Frackman Decl., Ex. 4) (emphasis added).[2]

When plaintiffs announced their intention to file this suit, Napster deleted ***all*** of this problematic evidence from its web site. Not surprisingly, while Napster produced numerous copies of its ***current*** web site in discovery, it did not produce to plaintiffs a single copy of its pre-litigation web site containing the above admissions.

Similarly, in making its current claim that it is merely a "passive conduit" under 512(a), and not an "information location tool" under 512(d), Napster also is less than completely forthright. Just prior to telling this Court that it is ***not*** an "information location tool" -- which would be eligible for DMCA protection, if at all, under 512(d) -- Napster was saying the exact opposite to the rest of the world. On the "MP3 Copyright Policy" page of its web site, using the precise words of 512(d), Napster described itself as: "a free ***information location tool*** and integrated browser and communications service . . . ." (Kessler Depo., Ex. 1).[3] However, if the

[2] Compare this to the statements of Napster's CEO after plaintiffs made their claims known: "We are about new artists, unknown artists ... about community and sharing." Wired News, Nov. 15, 1999. "It's not about known artists like Madonna." SonicNet, Nov. 18, 1999. (Frackman Decl., Ex. 6).

[3] Excerpts of the deposition of Napster's designee and Vice President, Engineering, Edward J. Kessler, and the exhibits thereto cited in this memorandum are attached as Exhibits 1 and 2, respectively, to the Frackman Declaration filed herewith.

Court were to visit Napster's web site today, it would not find the statement quoted above. Once again, just days before filing its current motion, Napster altered its web site, deleting the words "information location tool," and provided only that sanitized version to the Court (Kessler Decl., Ex. F).

A. The Digital Millennium Copyright Act.

The DMCA is not, as Napster argues (Napster Mem. at 1-2), a one-sided framework that exists only to shield service providers from liability. To the contrary, in the passage that immediately preceded the one quoted by Napster (Napster Mem. at 2-3), Congress made clear that, in enacting the DMCA, it was equally concerned about the interests of copyright holders: "Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet ***without reasonable assurance that they will be protected against massive piracy***." S. Rep. No. 190, 105th Cong., 2nd Sess. at 8 (1988) (emphasis added).[4] The DMCA recognizes that the "law must adapt in order to make digital networks ***safe places*** to disseminate and exploit copyrighted materials." Id. at 2 (emphasis added).

But, the Court need not look beyond the plain language of the DMCA to decide this motion -- the words of the statute itself demonstrate that Napster cannot shield itself from liability by claiming protection under 512(a) and arguing that it is something that it is not.

Each of the four separate DMCA safe harbors, 512(a)-(d), begins by describing the specific function covered by that safe harbor, and then setting out the conditions of eligibility for

[4] Each time a copyrighted sound recording is uploaded and downloaded, both the exclusive reproduction and distribution rights of the copyright owner are infringed. See, e.g., MAI Systems Corp. v. Peak Computer, 991 F.2d 511, 518 (9th Cir. 1993); Playboy Enterprises, Inc. v. Webbworld, Inc., 968 F. Supp. 1171, 1174-75 (N.D. Cal. 1997). Napster's contribution to and facilitation of this infringement constitute contributory copyright infringement, see, e.g., Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) ("providing the site and facilities for known infringing activity is sufficient to establish contributory liability") and vicarious copyright infringement (id. at 263-64); see also Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 686 (N.D. Cal. 1994) ("Even if Defendants do not know exactly when games will be uploaded or downloaded from the MAPHIA bulletin board, their role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement.").

the specific function covered. The DMCA expressly recognizes that any given service provider may perform ***several*** of these functions at the same time, and that, for purposes of the safe harbors, ***each*** function must be examined separately to determine whether the service provider meets the requirements of the safe harbor applicable to ***that*** function. 512(n).

Importantly, under the construct of the DMCA, the less a service provider does, the easier it is to qualify for a safe harbor limitation on liability. As the Register of Copyrights testified during early consideration of the DMCA, it is "calibrated to particular degrees of [service provider] involvement and responsibility."[5] This is reflected directly in the definitions of the specific functions covered and in the corresponding conditions that a service provider performing those functions must meet in order to be eligible for the safe harbor.

Section 512(a) -- the safe harbor Napster seeks to invoke -- describes a function that consists of merely transmitting, routing or providing connections for what might be infringing material:

> "the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, . . ."

The language of 512(a), as well as its legislative history, make clear that these are the most ***narrow*** of functions -- essentially protecting companies for the function of passively carrying Internet traffic much like a telephone company -- "in which a service provider ***plays the role of a 'conduit' for the communications of others***." H.R. Rep. No. 551, 105th Cong., 2nd Sess., pt. 2, at 51 (1998) (emphasis added); see also S. Rep. No. 190 at 41-42. Congress, one of the authors of the DMCA, the Copyright Office, and commentators all have recognized what the

[5] Testimony of Marybeth Peters, Hearings on H.R. 2180 & 2281 Before the House Judiciary Subcomm. on Courts and Intellectual Property, 105 Congress, 1st Session at 53 (Sept. 16, 1997).

text of 512(a) makes plain: That only this type of ***passive conduit*** function is eligible for protection under 512(a) --

> "This free standing definition [of service provider under 512(a)] is derived from the definition of 'telecommunications' found in the Communications Act of 1934 . . . in recognition of the fact that the functions covered by new subsection (a) are essentially conduit - only functions." H.R. Rep. No. 551 at 63.
>
> * * *
>
> "Subsection (a)(1) through (5) limit the range of activities that qualify under this subsection to ones in which a service provider plays the role of a 'conduit' for the communications of others." H.R. Rep. No. 551 at 51; S. Rep. No. 190 at 41.
>
> * * *
>
> "In general terms, Section 512(a) limits the liability of service providers in circumstances where the provider merely acts as a data conduit...." The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary, Dec. 1998, at 10.
>
> * * *
>
> "In general, for providing digital network communications, a service provider qualifies for the safe harbor if in fact it is ***only*** engaged in transmitting, routing, and providing connections for the Internet, that is, acting as a 'mere conduit.'" Sen. O. Hatch [one of the DMCA authors], Essay: Toward a Principled Approach to Copyright Legislation At the Turn of the Millennium, 59 U. Pitt. L. Rev. 719, 750 (1998) (emphasis added).[6]

[6] See also, S. Halpern, New Protections for Internet Service Providers: An Analysis of "the Online Copyright Infringement Liability Limitations Act," 23 Seton Hall L. Rev. 359, 390 (1999) ("The first type of service provider activities that are protected by the Act are those that

Precisely because 512(a) applies only to a passive conduit function, which is basic and essential to Internet communications, only minimal conditions to eligibility are required. Thus, this safe harbor is not conditioned on the service provider's lack of knowledge of the infringing activity, lack of financial benefit, or any notice and take-down procedures.

By contrast, 512(d), applicable to "information location tools," describes more active functions where the service provider assists users in locating information online by means of directories, indexes, search engines, pointers, links, and the like. Correspondingly, 512(d) imposes more stringent conditions to eligibility. Because of the nature of the functions covered, 512(d) requires that, before a service provider can benefit from its provisions, it first must designate an agent to receive notification of claimed infringement, and further must act expeditiously to remove or disable access to infringing material brought to its attention. 512(d)(3). Most important here, mirroring traditional definitions of contributory copyright infringement and vicarious liability, this safe harbor does not apply to a service provider that knows or has reason to know of infringing activity (512(d)(1)), or that receives a financial benefit and has the right and ability to control infringement (512(d)(2)).[7]

---

merely function as >passive conduits'"); C. Andrepont, Legislative Update: Digital Millennium Copyright Act: Copyright Protections for the Digital Age, 9 J. Art & Ent. Law, 397, 413 (1999) (512(a) applies "when the 'provider serves merely as a conduit'"); C. Beame, The Copyright Dilemma Involving Online Service Providers: Problem Solved . . . For Now, 51 Fed. Comm. L.J. 823, 841 (1999) (subsection (a) "covers actions by a user where the OSP acts as nothing more than a conduit").

[7] The other two safe harbors (excluding the provisions for educational institutions) are 512(b), "system caching" (the function of intermediate and temporary storage of material on a system or network under certain circumstances to facilitate access by users) and 512 (c), "information residing on systems or networks at direction of user" (largely hosting services that store material on a system or network at the direction of a user). These are not relevant to this motion. Both also follow the same pattern of balancing the nature of the functions covered with their eligibility requirements.

B. Napster Is A Fully Integrated Online Service.

Napster has described itself as an "information location tool and integrated browser and communications service." (Kessler Depo., Ex. 1). So it is. But it is also much more than that. Napster has created its own integrated system -- a system that, as a whole, enables its users to make all of the MP3 music files on their computer hard drives available for downloading by other Napster users logged onto the Napster system at the same time. Napster's system is comprised of the following principal components (Kessler Depo., Ex. 2): a bank of central computer servers to which Napster's users connect (currently about 150 servers) (Kessler Depo. at 71:22-23); proprietary "MusicShare" software that Napster provides to users and which users install on their computers (Kessler Depo. at 44:16-45:7); and proprietary software that Napster runs on its own servers ("server-side software") which controls and manages the entire process (Kessler Depo. at 54:16-56:10). These components work in unison to form a fully integrated online service. (Farmer Decl., ¶ 20).

Without doubt, Napster provides its users with all of the tools they require to engage in music piracy -- easily, efficiently, and safely. As Napster puts it, Napster "takes the hassle out of searching for MP3s ... you can locate and download your favorite music in MP3 format from one convenient, easy-to-use interface." (Kessler Depo., Ex. 6).

A typical Napster user experience would go as follows:[8] Having previously downloaded Napster's MusicShare software from its web site, the user opens the Napster MusicShare program from his or her computer; the Napster MusicShare software interacts with the Napster server-side software and automatically connects the user to one of the 150 servers maintained by Napster; the Napster MusicShare software scans the designated location on the user's hard drive to gather information about the user's MP3 music files; Napster validates the information and, immediately upon connecting to Napster's servers, communicates the information to Napster's server-side software; the Napster server-side software then adds the

[8] At the hearing on this motion, plaintiffs will make available to the Court a demonstration of Napster.

information about the user's MP3 music collection to a large directory and index which is maintained by Napster on its servers, and which lists the names of all the MP3 music files available from all users logged onto that Napster server at that time. Thus, Napster builds its directory and index. (Farmer Decl., ¶¶ 13-14).

Through this same process, Napster turns its individual users into public "servers" or "hosts" (as Napster calls them) from which the infringing MP3 files can be accessed and downloaded by countless other Napster users. (Kessler Depo. at Ex. 2 [user "acts as both a client and server"]; Kessler Decl., ¶ 10 [user becomes a "host"]). But for Napster's creating its own private system, those MP3 music files would not be subject to widespread copying and distribution, but rather would remain the private collections of the individual Napster users.

Once logged onto Napster's system, to locate a desired song, the user would go to the page in the MusicShare program titled "Search," enter the name of a song or of a recording artist whose sound recordings he or she is interested in downloading, and simply click on the button titled "Find It!"; this prompts the Napster server-side software to undertake a search of the current directory of MP3 music files maintained on the Napster server; the Napster server-side software will then generate a listing of MP3 files responsive to the user's search (a listing of up to 250 sound recordings, as well as other information about each identified MP3 music file). Thus, Napster operates as a search engine. (Farmer Decl., ¶¶ 15-16).

To download a file, the user would then use the Napster MusicShare software to highlight the desired file and click on the button titled "Get Selected Song(s)"; because each listed MP3 file name is also a "hypertext link" created by Napster's server-side software (using IP address information provided by the Napster MusicShare software), the Napster user downloading the sound recording is connected, via the Internet, to the Napster user on whose computer the sound recording is stored; the downloading from the one Napster user to the other begins without any further action on the part of the user. Thus, Napster provides "links" to its users' MP3 music files. (Id., ¶¶ 17-18).

When the download is completed, the user can switch to the "Library" page in the MusicShare program and see a listing of all MP3 files on the user's hard drive, including the newly downloaded recording, and play any song by highlighting the desired file and clicking on the play button; when the user logs off the Napster system, the Napster MusicShare software communicates with the Napster server-side software, which immediately removes that user's MP3 music collection from the MP3 directory maintained by Napster on its server. Thus, Napster constantly updates its index and directory. (Id., & 19).

In order to provide this user experience -- to take "the hassle out" of locating and downloading MP3 music files -- Napster is involved in managing its integrated system from beginning to end. Specifically:

? Napster provides its users with proprietary MusicShare software (and free upgrades) easily downloaded to their personal computers at no cost from Napster's web site. Not until Napster's users have downloaded its software are they able to access and use the Napster system to copy the MP3 music files of other users. (Kessler Depo. at 44:16-45:7; see also Frackman Decl., Ex. 3).

? Napster takes an inventory of MP3 files in the designated locations on each user's computer hard drive. (Kessler Depo., Ex. 4; 154:5-24; 230:18-21).

? Napster creates and provides its users with an index and directory to all MP3 music files available for copying at any given time on the particular Napster server to which Napster has connected those particular users. (Kessler Depo., Ex. 4; 69:25-70:12; 73:20-25; 76:17-79:18; 152:12-154:11).

? Napster "validates" the MP3 music files it indexes and that its users make available for copying over its system to verify that those files are, in fact, properly formatted MP3 files. (Kessler Depo., Ex. 2; 145:2-14). Napster does not provide

non-validated MP3 files in response to a user's search request. (Kessler Depo. at 145:15-18).

? Napster continuously updates its directories to reflect the addition or deletion of music files as Napster users log on or log off the Napster system -- maintaining a current index of all MP3 music files immediately available for copying through the Napster system. (Kessler Depo. at 69:22-71:21).

? Napster makes MP3 files downloaded by its users immediately available to its other users, thereby increasing the availability and accessibility, at any given time, of specific sound recordings. (Kessler Depo. at 120:15-121:6; 141:21-142:15).

? Napster provides a search function that enables its users to search Napster's directories by artist name or song title to locate any sound recording a user wants to copy. (Kessler Depo. at 54:16-56:10). Napster makes so many music files available to its users that, according to Napster itself, it "virtually guarantees you'll find the music you want, when you want it." (Frackman Decl., Ex. 4).

? Napster provides its users with specific information about the quality and download speed of each of the millions of sound recordings that Napster makes available on its system: file size; bit rate; frequency; length; the login "name" of the user on whose hard drive the recording resides; the line speed of the user's connection; and the ping (or "echo") time for that particular sound recording. (Kessler Depo. at 153:16-154:11).

? Napster further enables its users to tailor their searches by specifying the technical parameters of the search. A user can specify the minimum bit rate,

frequency, ping time, and line speed associated with any sound recordings for which a user searches. (Kessler Depo. at 137:8-138:9; 140:9-21).

? Napster obtains and assigns a digital "fingerprint" (also known as a "checksum") uniquely identifying every single MP3 music file that Napster makes available through its system, so that any incorrect or incomplete transmission can be detected. (Kessler Depo. at 112:3-13).

? Napster determines if a new user is behind a firewall.[9] When one Napster user wants a music file from a second user who is behind a "firewall" (which otherwise would prevent the first user from requesting the file from the second user), Napster arranges for the "firewall" to be circumvented so that the second user can deliver the requested music file to the first user. (Kessler Depo. at 125:13-127:8).

? When the Napster user conducting the search is the one behind the "firewall," Napster intervenes to tailor the search results to omit all responsive files that would be inaccessible because the Napster user on whose computer the file is stored also is behind a "firewall," and thus cannot provide MP3 music files for downloading and copying. (Kessler Depo. at 131:18-132:13).

? Napster provides individuals to act as "moderators" (Kessler Depo. at 57:18-25), who intervene to facilitate copying and whose responsibility it is to assist users on the Napster service, even providing "some changes in settings for users if their settings are configured incorrectly" to permit downloading of MP3 music files. (Kessler Depo. at 61:21-62:10; 128:9-130:15).

[9] A firewall "prevents computers in the organization's network from communicating directly with computers external to the network and vice versa." Microsoft Computer Dictionary at 186 (4th ed. 1999).

? Napster creates "links" directly to the individual MP3 files on each of its user's computers, so that one user can download MP3 music files directly from another user. (Kessler Depo. at 102:3-105:25).

? Napster monitors each user's downloading activity, defers user requests to download MP3 music files that cannot be accomplished immediately, and "queues" them until the particular file can be downloaded. (Kessler Depo. at 80:2-18; 106:1-7).

? Napster servers remain connected to its users during the entire downloading/copying process (Kessler Depo. at 108:15-25; 124:4-13), and are advised as soon as a transfer is successfully completed. (Kessler Depo. at 109:23-110:17). In Napster's words, it "coordinates file transfers between users." (Kessler Depo., Ex. 2).

? Although Napster apparently ceased this function after this lawsuit was filed, Napster provided its users with an "Auto Resume" feature through which Napster actively worked to cure any interrupted MP3 downloads. (Kessler Depo. at 114:1-9; 117:8-119:8). As Napster described this function on its web page: "When a transfer is interrupted [Napster] will automatically search the entire network until it finds another copy of the exact same recording of the same song. When it finds the file, it automatically resumes the transfer where it left off." (Frackman Decl., Ex. 4).

? Even today, if an attempted download is not successful, Napster servers are notified and receive information about the failed transfer, in particular the length of the music file requested and the "checksum" or fingerprint of the file intended to be downloaded. (Kessler Depo. at 110:21-112:21). The user also is

able (through the Napster client software) to keep track of incomplete attempted transfers. (Id., and at 106:18-24).

? Through its "Hotlist" function, as an alternative to conducting searches by artist or song title, Napster enables its users to search for MP3 music files by browsing the complete collections of other individual users, and to download songs from the other user's personal library. (Kessler Depo. at 55:13-56:1; 221:15-25). Napster notifies users when other users on their "Hotlist" are online and available to transfer MP3 music files. (Kessler Depo. at 59:16-60:23). The Hotlist "lets you keep track of your favorite MP3 libraries for later browsing." (Frackman Decl., Ex. 4).

? Napster provides its users with an "audio player" which "plays MP3 files from right inside Napster in case you don't have an external player or would prefer not to use one," and which enables users to compile playlists of all or any of the sound recordings they have downloaded. (Frackman Decl., Ex. 4).

? Napster provides and manages a chat room and chat channels organized by musical category through which its users can obtain information to facilitate infringement (Frackman Decl., Ex. 4), or contact Napster moderators for help in the infringement process. (Kessler Depo. at 61:21-62:6). When a user "enters" the chat room, the number of MP3 music files he or she has available for downloading is displayed next to his or her user name.

? Napster provides a web site that encourages infringement by its users. For example, through its web site Napster has told users: "Start building your MP3 collection today -- faster and easier than you ever dreamed possible"; and "[Y]ou can forget about wading through page after page of unknown artists." (Frackman Decl., Ex. 4).

? Napster does all of the foregoing while making great efforts to ***assure its users that their identities will remain anonymous*** and will not be available to Napster or anyone else who might seek to notify them of (or to prevent) their infringing conduct. (See infra at 24-25).

ARGUMENT

II. NAPSTER'S ADMITTED INFORMATION LOCATION TOOL FUNCTIONS ARE NOT ELIGIBLE FOR SAFE HARBOR PROTECTION UNDER 512(a).[10]

A. Each Of Napster's Functions Must Be Analyzed Independently.

Napster does not deny that it provides numerous and varied functions, to its users, including, among many others, directory and indexing functions, search engine functions, and linking functions. These are, after all, the functions by which Napster defines itself. Rather, Napster's entire motion must hinge on Napster's argument that if ***any*** of its functions fall under the transitory digital network communications function of 512(a), ***all*** of its functions and its ***entire*** system and method of operation are protected under the 512(a) safe harbor. Thus, Napster argues "a service provider's actions fall within the section 512(a) safe harbor if they comprise ***part of***, or are taken ***in conjunction with***, the 'transmission, routing, or providing of connections' functions performed by the service provider." (Napster Mem. at 14) (emphasis added).

Napster's position is contradicted by the controlling statutory provision of the DMCA. Section 512(n) of the DMCA -- addressing the very issue raised by Napster -- requires

[10] The DMCA safe harbor provisions are affirmative defenses: "The exemption and limitations provided in this subsection are affirmative defenses, like the exceptions and limitations established elsewhere in title 17. . . . [A] defendant asserting this exemption or limitation as an affirmative defense in such a suit bears the burden of establishing its entitlement." See H.R. Rep. No. 551, 105 Cong., 2nd Session, pt. 1, at 26 (1998). Because these safe harbors are narrow, specific exceptions to a statute that protects the property rights of copyright owners, they must be interpreted and applied strictly. See Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975) (statute that establishes exception to exclusive copyright rights that otherwise would exist must be strictly and narrowly construed).

that ***each*** function of a service provider be analyzed and qualify ***independently*** for DMCA protection under the relevant provisions:

> "Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and ***shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.*** 512(n) (emphasis added).[11]

Napster simply ignores this controlling statutory provision. Napster's memorandum does not even reference 512(n).

Nevertheless, the situation Napster presents is not novel among service providers, and was anticipated specifically in enacting the DMCA. Congress considered the precise situation that would arise when service providers that may provide 512(a) conduit functions (as Napster claims to do here) also provide other functions (as Napster does here). Under these circumstances, 512(n) provides that the service provider must satisfy the specific statutory requirements for each function it provides, as illustrated by the following example in the legislative history:

> "Consider, for example, a service provider that provides a hyperlink to a site containing infringing material which it then caches on its system in order to facilitate access to it by its users. This service provider is engaging in at least three functions that may be subject to the limitation on liability: transitory digital network communications under new subsection (a); system caching under

[11] See also H.R. Rep. No. 551, pt. 2 at 65 ("New Section 512's limitations on liability are based on functions, and each limitation is intended to describe a separate and distinct function").

> new subsection (b); and information location tools under new subsection (d) . . . . If it is deemed that the same company is committing infringement by using information location tools to link its users to infringing material, as defined in new subsection (d), ***then its fulfillment of the requirements to claim the system caching liability limitation does not affect whether it qualifies for the liability limitation for information location tools; the criteria of new subsection (d), rather than those of new subsection (b), are applicable***." H.R. Rep. No. 551, pt. 2 at 65 (emphasis added).

Thus, the argument that Napster advances here was rejected explicitly in 512(n).

It could be no other way. Were Napster correct that a service provider could obtain protection for ***all*** of its other functions simply because it ***also*** performed a minimal conduit function, the DMCA>s carefully designed limitations would be eviscerated. This is particularly so given that many Internet service providers that provide certain functions (such as caching, hosting or information location tools) also may transmit data within the ambit of 512(a). (Farmer Decl., ¶¶ 21, 23); see also Apple Computer v. Formula Int'l, Inc., 594 F. Supp. 617, 623 (C.D. Cal. 1984) (exception from liability should not be construed "in a manner that would effectively emasculate the protections . . . contained in other sections of the Copyright Act"). Indeed, if Napster, with all it does, were considered a "mere conduit" for the infringing MP3 files, it is difficult to imagine an "information location tool" that would not be deemed a 512(a) mere conduit, making 512(d) and its limitations largely superfluous. Boise Cascade Corp. v. United States Environmental Protection Agency, 942 F.2d 1427, 1432 (9th Cir. 1991) (statute not to be interpreted in a manner that renders other provisions superfluous); Aluminum Co. of America v. Bonneville Power Admin., 903 F.2d 585, 593 (9th Cir. 1989) (same).

It makes no sense to give (and the DMCA does not permit) ***blanket*** protection to a service provider that engages in ***any*** covered function. What does make sense (and what the DMCA specifically requires) is that a service provider's liability is limited, if at all, based on a

function-by-function analysis. Consequently, even if ***any*** functions of Napster qualify for the narrow 512(a) safe harbor (itself a questionable proposition, as demonstrated below), each of its ***other*** admitted functions must be evaluated separately and under the particular safe harbor provision, if any, applicable to those functions.

B. Napster Has Admitted That It Functions As A 512(d) Information Location Tool.

Whatever other functions Napster may perform, there is no dispute that it performs functions readily classified as information location tool functions:

> "The term ***information location tools*** includes, for example a ***directory or index*** of online sites or material ***such as a search engine*** that identifies pages by specified criteria, a reference to other online material such as a list of recommended sites . . . or ***hypertext link*** which allows users to access its material without entering its address." S. Rep. No. at 47 (emphasis added).

See also 512(d) (information location tools include "a directory, index, reference, pointer or hypertext link"); U.S. Copyright Office Summary at 12 ("Section 512(d) relates to hyperlinks, online directories, search engines, and the like").

These are the core functions Napster performs for its users:

? "Directory" and "index" functions are basic information location tool functions -- and they are functions Napster provides to its users. (Kessler Depo. at 17:8-17; 142:5-15 [acknowledging Napster provides directory and indexing functions]; Ex. 2 [Napster "keeps a real-time index"]; Kessler Decl., & 12; see also supra at 8).

? "Search engine" functions are basic information location tool functions -- and they also are functions Napster provides to its users. (Kessler Depo. at 17:2-17; Ex. 2 [Napster "conducts searches"]; see also Ex. 6 [referring to "search

feature"]; Kessler Decl. at ¶¶ 4, 10). In its patent application, Napster even characterizes its technology as a "Real-Time Search Engine" (Kessler Depo., Ex. 5; see also supra at 8-9).

? Providing "links" is also a basic information location tool function -- and it, too, is a function Napster provides to its users. (Kessler Depo. at 102:3-104:7; Ex. 4 [referring to "links" provided by Napster] ; Kessler Decl. & 11; [acknowledging Napster provides "links" to facilitate users' downloading of MP3 files]; see also supra at 9).

Indeed, before this litigation (and its 512(a) "defense"), Napster adopted the very wording of the DMCA in describing itself on its web site as: "a free ***information location tool*** and integrated browser and communications service." (Kessler Depo., Ex. 1) (emphasis added).[12] While Napster deleted the words "information location tool" from its web site shortly before filing this motion, its Rule 30(b)(6) designee had to admit that Napster is, in fact, a "free information location tool." (Kessler Depo. at 21:2-19).

Thus, while Napster may do many things that go beyond the "information location tool" functions defined in 512(d) (Farmer Decl., & 22), the heart of what Napster provides its users is a constantly updated index and directory of MP3 files, a sophisticated means to search that directory, and direct "links" to the MP3 files to facilitate the downloading of those files. (Farmer Decl., && 14, 16, and 18). These are information location tool functions and, therefore, Napster must qualify under 512(d).

[12] This description was not happenstance. On the very same page of its web site, Napster made specific reference to the DMCA and to the DMCA's "notice and takedown" procedures, which apply to 512(d), but ***not*** to 512(a).

III. NAPSTER DOES NOT PERFORM THE PASSIVE CONDUIT FUNCTION ELIGIBLE FOR PROTECTION UNDER SECTION 512(a).

Because it is Napster's activities as an information location tool -- and not any passive conduit functions -- that form the basis of this action, the Court need go no further in order to deny Napster's motion. However, Napster's motion should be denied for another, independent reason. Of all the functions Napster does perform, the function of a mere conduit under 512(a) is not among them. Indeed, by Napster's own admission, it has designed its system deliberately to ***avoid*** in any way being a conduit for the infringing MP3 music files.

Structurally, 512(a) defines the conduit function that may be subject to its safe harbor, and, in subsections 512(a)(1)-(5), provides five additional conditions that a service provider must prove it meets in order to be eligible for the safe harbor. Most fundamental, in order to be considered for the 512(a) safe harbor, the service provider actually must perform the conduit function defined in 512(a). Purporting to satisfy the conditions in subsections (1)-(5) is of no consequence if the service provider does not fall within the definition of conduit under 512(a) in the first place. See Boise Cascade, 942 F.2d at 4132 (each word in statute must be given effect).

This point apparently is lost on Napster. Napster discusses subsections (1)-(5) at length, but never addresses the statutory language of 512(a) that delineates the conduit function that 512(a) covers.

In pertinent part, omitting only subsections (1)-(5), 512(a) provides as follows:

> **"Transitory digital network communications.** A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material ***through a system or network*** controlled or operated by or for the service provider, or by reason of the intermediate and transient

storage of that material in the course of such transmitting, routing, or providing connections, if . . . ." 512(a) (emphasis added).

The defining characteristic of 512(a)'s conduit function, reflected in express statutory language that Napster (again) ignores, is the transmission of material (here the MP3 files) "***through***" the system or network of the service provider attempting to claim the safe harbor. The "through a system or network" language modifies each element of the function defined in 512(a) -- the "transmitting" and "routing" functions; the "providing connections for" functions; and the "intermediate and transient storage" functions. It is the essence of what a "conduit" is.[13] Consistent with the construct of the DMCA, 512(a) covers those service providers that perform only a limited, passive function -- providing a system or network "through" which infringing material passes. As the language of the statute reflects, and as discussed above, 512(a) applies only to activities "in which a service provider plays the role of a ***'conduit'*** for the communications of others." H.R. Rep. No. 551, pt. 2 at 51 (emphasis added).

However, Napster deliberately has designed its system to avoid being a conduit for the MP3 files. Napster has admitted -- indeed, flaunted -- the fact that ***no infringing material passes through Napster's system or network***. As Napster's Vice President, Engineering has stated:

> "Napster itself provides no MP3 files directly to any of its users. Napster's servers do not store any MP3 files and do not copy any of the MP3 files transferred among its users. ***Transmission of MP3 files do not even pass through Napster's servers.*** Instead, files reside on the computers of Napster users, and are transmitted directly between those computers."

[13] Even the lay definition of conduit reflects this. Webster's defines a conduit as "a natural or artificial channel ***through which*** something (as a fluid) is conveyed." Webster's New Collegiate Dictionary (1977) (emphasis added).

(Kessler Decl., at & 14 (emphasis added); see also Napster Mem. at 4-5 [Napster servers "do not store any music files, and do not copy, even on a transitory basis, any of the music files transferred between users"]; at 13 ["the Napster system does not store any MP3 files for any length of time, and the Napster servers do not copy any of the MP3 files"]; id. ["the content of the MP3 files are routed without even passing through Napster's servers"]).

Therefore, by definition, Napster does not perform the function of a mere conduit and cannot qualify for 512(a) safe harbor protection.

At various times in discovery for this motion, Napster has suggested that it considers its individual users (and their computers) to be "part of" the Napster system when those users are connected. If this is in fact true, then the transmission of MP3 files from one Napster user to another might very well be a "mere conduit" function, as the MP3 files would travel "through" the Napster system. However, this approach to defining Napster's "system" has its own problems for Napster's position.

First, characterizing Napster's system to include the computers of each of its users is at odds with how Napster characterized its system in its opening memorandum. As quoted above, Napster asserted repeatedly that "the content of the MP3 files are routed without even passing through Napster's servers." (Napster Mem. at 15).

Second, and more to the point, because ***permanent*** and not just "intermediate or transitory" copies of the infringing files are stored on the computers of Napster's users every time a song is downloaded, if those users were considered to be part of Napster's "system," Napster would be disqualified from any 512(a) safe harbor under 512(a)(4). Pursuant to subsection 512(a)(4), one of the conditions of eligibility, a service provider performing a mere conduit function is not eligible for safe harbor if a copy of the material is

> "maintained on the system or network in a manner ordinarily accessible to anyone other than the anticipated recipients [or if the] copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is

> reasonably necessary for the transmission, routing, or provision of connections." 512(a)(4).

Here, if Napster users are part of its system, then the copy is maintained "on the system" far longer than necessary for the transmission. The copy "on the system" is permanent and maintained in "a manner ordinarily accessible" by other Napster users. Under these circumstances, Napster would not satisfy the eligibility condition of 512(a)(4).[14]

Accordingly, whether or not Napster users are deemed to be part of Napster's system, Napster is not eligible for the 512(a) safe harbor. And, as explained above, even if Napster did perform some limited "passive conduit" function, that would not entitle Napster to safe harbor protection for any of the numerous other functions Napster performs, including the core information location tool functions it provides users.

IV. NAPSTER DOES NOT MEET THE GENERAL "CONDITIONS FOR ELIGIBILITY" FOR DMCA PROTECTION UNDER ANY SECTION.

A party seeking the benefit of any DMCA safe harbor must, as a threshold matter, meet the conditions of eligibility contained in 512(i):

> "The limitations on liability established by this section shall apply to a service provider only if the service provider . . . has ***adopted and reasonably implemented***, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of

[14] Napster's counsel clearly recognizes this. In an article published on the Fenwick & West web site, Mr. Hayes concludes that the section 512(a) safe harbor "will not be available to a Service Provider that initiates, selects, or modifies the content of a transmission, ***or stores it on a system in a way that its content becomes generally accessible to third parties***." David L. Hayes, Esq., "Advanced Copyright Issues on The Internet," September 1999, at p. 101 <http://www.fenwick.com/pub/ip_pubs/Advenced_Copyright_1999/advenced_copyright_1999.

htm> (emphasis added). But if Napster's users are considered part of its system, then Napster must be disqualified from the 512(a) safe harbor -- for Napster's very purpose is to make the MP3 files stored on its system (as defined) "generally accessible to third parties."

subscribers and account holders of the service provider's system or network who are repeat infringers[.]" 512(i) (emphasis added).

This provision was designed to ensure that "those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access." H.R. Rep. No. 551, pt. 2, at 61. Thus, the DMCA requires that a repeat infringer policy be adopted prior to the infringing conduct, be disseminated, and be implemented effectively. By contrast, Napster only recently has purported to adopt its so-called policy and, most important, has ensured that it cannot be implemented in any meaningful way.

First, while Napster claims now to have a formal "policy," Napster does not disclose that the drafting of its policy was commenced only after this lawsuit was filed and that the policy was not completed until around ***February 7, 2000*** (one week before its motion was filed). (Kessler Depo. at 189:17-191:3, Ex. J). Before then, it claims to have had a vague policy, not in writing anywhere, and not provided to any user. (Kessler Depo. at 191:13-192:16; 250:2-22). Thus, for all Napster's activities and for the millions of infringements occurring before February 7, 2000, Napster cannot claim any DMCA safe harbor protection as a matter of law.

Second, it is basic to the DMCA that to take advantage of any DMCA safe harbor, a service provider must have some meaningful ability to terminate repeat infringers. Napster cannot do this. Simply put, Napster refuses to know the identity of its users. (Kessler Depo. at 60:24-61:10; 255:20-257:22). Napster's desire to provide its users with anonymity (which for obvious reasons Napster considers a major selling point) has ensured that it cannot effectively implement the policy required by the DMCA. Napster goes to such great lengths to remain ignorant of its users' identities that it deliberately does not associate in its database the user names and the real names and physical addresses of its users that it collects. This information easily could be and normally is retained so that a specific user name could be associated with his or her real name and physical address. (Farmer Decl., & 30). But, Napster makes sure that it cannot do

that, so there is no way to connect the two for purposes of terminating repeat infringers. (Kessler Depo. at 257:1-13).

Even in those few instances where Napster claims to have terminated a repeat infringer, it has not really done so. All it has done is changed the password of those infringers so that when they attempt to log on to the Napster service, they will be denied access under their old password. (Kessler Decl. & 23). Napster has not, for example, acted to block specific user IP addresses (Kessler Depo. at 205:4-7), even though it possesses them (Kessler Depo. at 156:10-157:10), and could, at least to a large extent, do so. (Farmer Decl., && 25-27). Those supposedly terminated repeat infringers readily may reapply to Napster using a different user name and password and obtain access to the Napster system to recommence their infringing downloading and uploading of MP3 music files. (Kessler Depo. at 210:1-212:2; Farmer Decl., ¶¶ 28-29). By design, Napster cannot even determine whether, or how often, this has happened. (Kessler Depo. at 212:12-20).

In sum, Napster seeks protection for a system which it deliberately designed to prevent effective identification of infringers and implementation of a repeat infringer policy. Since Napster fails to comply with its obligations under the DMCA necessary to protect copyright owners, it cannot take advantage of the benefits accorded under the statute to qualifying service providers.

CONCLUSION

If Napster's goal in interposing a 512(a) defense was to delay merits discovery while it continues to expand its service, then it has accomplished that goal. The very limited discovery Napster provided in connection with its current motion reveals that the volume of infringing activity that Napster enables has grown considerably. At any given time, as many as ***300,000 to 400,000 Napster users*** may be logged onto Napster, offering "nearly ***20 million" MP3 music files*** (Kessler Depo. at 71:22-23; 74:1-6; Kessler Depo., Ex. 11) -- the overwhelming majority of which are infringing copies of copyrighted sound recordings owned by plaintiffs.

(Declaration of Frank Creighton previously filed; copy (without exhibits) filed herewith, ¶¶ 10-13).

For the foregoing reasons, plaintiffs respectfully submit that the Court should rule as a matter of law that Napster is not entitled to the 512(a) safe harbor. The Court also should rule that, because Napster does not meet the minimum eligibility conditions of 512(i), Napster is not entitled to invoke any of the DMCA safe harbors. Finally, because Napster's continuing (and ever expanding) activities are causing substantial and irreparable harm to plaintiffs, this Court should order expedited discovery on the merits of plaintiffs' claims so that plaintiffs may, as the earliest feasible date, present the Court with an application to enjoin Napster's ongoing infringements.

Dated: March 1, 2000 MITCHELL SILBERBERG & KNUPP LLP

By_____
Russell J. Frackman
Attorneys for Plaintiffs