

1 Napster also claims that some of its users may sometimes engage in "space shifting" by using  
2 Napster to obtain an MP3 copy of music they already own on a CD. Again, even if true, no court  
3 ever has held that "space shifting" is fair use. See 2 Nimmer, § 8B.01[D][2] ("space shifting" of a  
4 song is different than "time shifting" of a television show because "audio taping is almost always  
5 done for 'librarying' purposes, and almost never for time-shifting purposes").<sup>6</sup> Moreover, even if the  
6 person receiving the MP3 file is permitted to make a reproduction as a fair use, that does not excuse  
7 the violation of the distribution right by the third party sending the file. It is established that any  
8 fair use defense is a personal defense and does not excuse infringement by another person. E.g.,  
9 Los Angeles News Service v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992); Micro Star, 154 F.3d at  
10 1113. Thus, even if a CD owner has the right to make an MP3 copy of her own CD for private,  
11 personal use, it does not follow that the user can copy an MP3 file from a stranger over Napster.  
12 Finally, even assuming space shifting were a fair use, a consumer who uses Napster to download an  
13 MP3 file of music she already owns on a CD, does so because she views copying that file from  
14 Napster as easier or more convenient than making the MP3 from the CD she owns. To the extent a  
15 demand exists for this service, it is plaintiffs' exclusive right, not Napster's, to determine whether,  
16 when, on what terms, and with what protections, to provide it. Plaintiffs also are entitled to receive  
17 any benefit from it, including increased Internet site traffic. Harper & Row, 471 U.S. at 559; Castle  
18 Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 145-46 (2d Cir. 1998);  
19 MP3.com, 92 F. Supp. 2d at 352.

20 **II. NAPSTER CANNOT CLAIM PROTECTION AS A "STAPLE ARTICLE OF**  
21 **COMMERCE."**

22 Napster operates an ongoing *service* that is widely and overwhelmingly used for  
23 infringement ~ it does not merely manufacture a product like a VCR. Napster specifically was  
24 created, advertised, and promoted for music piracy. The de minimis and severable alternative uses  
25 posited by Napster, after-the-fact, to justify its continued infringement cannot turn its service into a  
26 product that is a "staple article of commerce."

27 **A. Napster Does Not Sell A Staple Article Of Commerce.**

28 <sup>6</sup> The dicta in Diamond merely suggested that private space shifting did not offend the AHRA's purpose because it permitted copying to the Rio player, which ~ in contrast to Napster ~ did *not* allow further copies to be made. The Court did not consider any issues related to fair use; indeed, the Diamond case did not involve allegations of copyright infringement at all.

1           The “staple article of commerce” doctrine, as a matter of law, does not apply to the  
2 operation of an ongoing service like Napster’s. The doctrine literally applies to “articles of  
3 commerce” ~ i.e., products like VCRs ~ and no court ever has applied it to an operation like  
4 Napster, which does far more than make and distribute a product. Without Napster’s ongoing  
5 participation, the service essentially would be useless. Napster is no more subject to the “staple  
6 article of commerce” doctrine than would be a defendant whose business consisted of providing  
7 customers with VCRs, copyrighted movies, and a room in which to duplicate them. See Columbia  
8 Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 62 (3rd Cir. 1986) (business which encouraged  
9 public to rent and make use of its private rooms to view plaintiffs’ copyrighted videocassettes that  
10 defendant provided was a contributory infringer).

11           In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774  
12 (1984), the defendant was not liable for contributory infringement because, among other things, it  
13 merely *manufactured* VCRs. Its involvement with the product ended the moment the device was  
14 sold by it, and the defendant had no further connection or relationship with the product or the  
15 consumers who used it. Id. at 440 (“when a charge of contributory infringement is predicated  
16 entirely on the *sale of an article* of commerce that is used by the purchaser to infringe a patent, the  
17 public interest in access to that article of commerce is necessarily implicated”) (emphasis added).

18           By contrast, the Sony Court recognized that, where there exists “an ongoing  
19 relationship between the direct infringer and the contributory infringer at the time the infringing  
20 conduct occur[s],” the doctrine does not apply. Id. at 437. Indeed, the only cases that have  
21 addressed this issue rejected the expansion of the doctrine beyond mere manufacturers. In RCA  
22 Records v. All-Fast Systems, Inc., 594 F. Supp. 335 (S.D.N.Y. 1984), the defendant operated a  
23 “Rezound” machine that enabled customers to make copies of pre-recorded tapes onto specially  
24 designed blank cassettes sold by the defendant. Id. at 336-37. The Court found the defendant  
25 liable for contributory infringement, specifically rejecting the staple article of commerce defense,  
26 and holding that “[t]he Sony Corp. decision extends protection only to the *manufacturer* of the  
27 infringing machine, not to its operator”:

28           “[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

1 use without permission from the copyright owner.' It did not purport  
2 to alter this long-standing rule. *The manufacturer of the machine*  
3 *does not fit this definition since it has no such control once the*  
4 *machine is sold. Defendant, in contrast, is in a position to exercise*  
5 *complete control over the use of the Rezound machine."* *Id.* at 339  
6 (emphasis added).

7 Accord RCA/Ariola International, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 777, 781 (8th  
8 Cir. 1988) (manufacturer of "staple article of commerce" nonetheless was liable "because it retained  
9 title to the [device used to accomplish infringement]...exercised control over the retailers' use of the  
10 machines [and] profited from that use"); A&M Records, Inc. v. General Audio Video Cassettes,  
11 Inc., 948 F. Supp. 1449, 1456-57 (C.D. Cal. 1996) ("the evidence in this case indicated that  
12 [defendant's] actions went far beyond merely selling blank, time-loaded tapes....Therefore, even if  
13 Sony were to exonerate [defendant] for his selling of blank, time-loaded cassettes, this Court would  
14 conclude that [defendant] knowingly and materially contributed to the underlying counterfeiting  
15 activity"). See also, Dobbins, Computer Bulletin Board Operator Liability for Users' Infringing  
16 Acts, 94 Mich. L. Rev. 217, 234-35 (1995); Tickle, The Vicarious Liability Of Electronic Bulletin  
17 Board Operators For The Copyright Infringement Occurring On Their Bulletin Boards, 80 Iowa L.  
18 Rev. 391, 395-96, 410 (1995).<sup>7</sup>

19 **B. The Overwhelming Use Of The Napster Service Is Infringement.**

20 Even if the operator of a service were eligible for consideration as a "staple article of  
21 commerce," Napster could not escape liability merely by postulating minimal or incidental uses ~  
22 particularly where those purported lawful uses are severable from the primary infringing use for  
23 which the product is widely used and could continue unaffected by an injunction against the  
24 infringing uses.

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27 <sup>7</sup> If the Napster service could be a "staple article of commerce," then so could a flea  
28 market, which clearly has substantial non-infringing uses and which may provide various products  
and services that are capable of substantial non-infringing uses such as vendor booths, parking  
lots, concession stands, and public restrooms. Indeed, the flea market in Fonovisa, Inc. v. Cherry  
Auction, Inc., 76 F.3d 259 (9th Cir. 1996), had all of these characteristics, but no court seriously  
would have entertained the argument that it was a "staple article of commerce."

1           Sony held that the staple article of commerce doctrine applied where the product at issue “is  
2 *widely used* for legitimate unobjectionable purposes,” 464 U.S. at 442 (emphasis added). Its result  
3 was predicated on the conclusion that the “*primary use* of the machine for most owners” was  
4 noninfringing. *Id.* at 423 (emphasis added). Here, Napster has not even attempted to dispute that  
5 nearly 90% of its use (and probably a lot more) clearly is for copying and distributing copyrighted  
6 music and that 100% of the Napster users sampled were engaged in some music piracy while on  
7 Napster. The remaining uses on which Napster relies ~ its new artist program and authorized  
8 downloads from a few independent artists ~ simply are not commercially significant in light of the  
9 massive piracy on which Napster is built (and the relief requested does not reach these activities).<sup>8</sup>

10           Courts understandably refuse to clothe defendants in the protection of the staple article of  
11 commerce doctrine merely because a small proportion of users may use their products lawfully. *See*  
12 *General Audio Video*, 948 F. Supp. at 1456 (“*Sony* requires that the product being sold have a  
13 ‘substantial,’ noninfringing use, and although time-loaded cassettes can be used for legitimate  
14 purposes, these purposes are insubstantial given the number of [defendant]’s customers that were  
15 using them for counterfeiting purposes”); *Sega I*, 857 F. Supp. at 685 (rejecting defendant’s reliance  
16 on “incidental capabilities” that “have not been shown to be the primary use” of defendant’s  
17 computer game copiers); *Atari, Inc. v. JS&A Group, Inc.*, 597 F. Supp. 5, 8 (N.D. Ill. 1983)  
18 (rejecting de minimis use that did not make economic sense); *Cable/Home Communication Corp.*  
19 *v. Network Productions*, 902 F.2d 829, 846 & n.30 (11th Cir. 1990) (rejecting defense where  
20 products were “utilized and advertised...primarily as infringement aids”).

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27           <sup>8</sup> Napster claims 17,000 new artists, each with an average of 1 to 3 recordings  
28 (Krause Depo. 71:11-14), compared to the tens of millions of unauthorized recordings made  
available and downloaded daily. No one can seriously contend that Napster has acquired a user  
base of several million in a few short months because it is used to search for unknown artists.  
Indeed, a statistical analysis reveals that only about 1.2% of Napster download traffic involves any  
of these allegedly new artists. *See Olkin Reply Decl.; Hausman Reply Decl.*



1 In the face of overwhelming evidence (including that its own executives have engaged in  
2 such conduct, and that the vast majority of the material available on Napster is unauthorized),  
3 Napster now admits that it has knowledge that copyrighted material is distributed and copied on its  
4 system. Still, Napster claims it is not liable because it does not know about each specific act of  
5 infringement as it is occurring. Even assuming that to be the case, that is not the standard. The  
6 knowledge Napster has clearly is sufficient. Hardenburgh, 982 F. Supp. at 514 (defendants had “at  
7 least constructive knowledge that infringing activity was likely to be occurring” on their adult  
8 bulletin board because “Playboy Magazine is one of the most famous and widely distributed adult  
9 publications in the world. It seems disingenuous for Defendants to assert that they were unaware  
10 that copies of photographs from Playboy Magazine were likely to find their way onto the BBS”);  
11 MAPHIA, 857 F. Supp. at 686-87 (element satisfied “[e]ven if Defendants do not know exactly when  
12 games will be uploaded to or downloaded from” its service); RSO Records v. Peri, 596 F. Supp. 849,  
13 858 (S.D.N.Y. 1984) (element satisfied where “the very nature of” the product “would suggest  
14 infringement to a rational person”); Gershwin Publishing Corp. v. Columbia Artists Management,  
15 Inc., 443 F.2d 1159, 1163 (2d Cir. 1971). In none of these cases was a defendant’s contributory  
16 liability limited to those particular infringements it specifically observed.<sup>10</sup>

17 The knowledge Napster admittedly possesses is consistent with the general standard of  
18 knowledge for contributory infringement. Id at 1162 (constructive knowledge sufficient), with the  
19 case law generally, Fonovisa, 76 F.3d at 261, 264 (“no question” that element satisfied by what was  
20 generalized knowledge), and with the DMCA, 17 U.S.C. § 512(d)(1)(A) (knowledge that “material  
21 *or activity*” is infringing). A contributory infringer cannot escape liability when it knows that  
22 virtually every one of its users is engaged in infringing conduct and the overwhelming activity it  
23 facilitates is infringement, just because it constructs a system where it does not or chooses not to  
24 know of *specific* infringements. See Hotaling, 118 F.3d at 204 (“no one can expect a copyright

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26 <sup>10</sup> The *only* two cases Napster cites to support its contention that “particularized  
27 knowledge” is required did not address the issue at all, and one was not even a copyright case.  
28 They involved Internet Service Providers, one whose sole role was to provide users with “access to  
the Internet,” Religious Technology Center v. Netcom On-Line Communication Services, Inc.,  
907 F. Supp. 1361, 1373-75 (N.D. Cal. 1995), and the other that was sued for a defamatory  
message posted by a subscriber, Lunney v. Prodigy Services Co., 723 N.E.2d 539, 542 (N.Y. 1999).

1 holder to prove particular instances of use by the public when the proof is impossible to produce  
2 because the infringing [defendant] has not kept records of public use”).

3 **B. Napster Materially Contributes To Its Users' Infringements.**

4 It is disingenuous for Napster to argue that it does not “materially contribute” to its  
5 users' infringements.<sup>11</sup> That its users could not connect to one another and copy each other's MP3  
6 music files without Napster's continued involvement conclusively ends this inquiry. Napster's  
7 contention that there are “other search engines, sites and methods to find the same MP3 files on the  
8 Internet” (Opp. at 19) is factually incorrect ~ Napster's users' MP3 files reside on their individual  
9 computer hard drives, not on any Internet site accessible other than through Napster. See A&M  
10 Records, 54 U.S.P.Q.2d at 1747. It also is irrelevant ~ that others may also contribute to music  
11 piracy on the Internet in no way absolves Napster of responsibility. See Sony Computer  
12 Entertainment America, Inc. v. Gamemasters, 87 F. Supp. 2d 976, 989 (N.D. Cal. 1999).<sup>12</sup>

13 **IV. NAPSTER IS VICARIOUSLY LIABLE.**

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18 <sup>11</sup> Preliminarily, Napster relies on an outdated legal standard. Plaintiffs need only  
19 show that Napster “induces, causes or materially contributes” to infringing conduct. After  
20 Fonovisa, “substantial participation” no longer is required. 76 F.3d at 1374; see also Segal II, 948  
21 F. Supp. at 933; Gross, Intellectual Property, 13 Berkeley Tech. L. J. 101, 105 (1998) (Fonovisa  
22 “relaxed” the test for material contribution from “substantial participation” to a more lenient  
23 “participation” standard); Weiskopf, The Risks of Copyright Infringement on the Internet: A  
24 Practitioner's Guide, 33 U.S.F. L. Rev. 1, 30-32 (1998) (in Fonovisa, “the Ninth Circuit expanded  
25 the definition of ‘material’ participation or contribution to the infringing activity...Other courts  
26 have found the reach of Fonovisa sufficient to hold the provision of Internet facilities enabling  
27 infringing activity enough to constitute contributory infringement as a matter of law”).

28 <sup>12</sup> Napster's argument that “providing a link to a location” is insufficient to create  
contributory infringement is similarly irrelevant ~ Napster does far more than this, see initial  
Memorandum at 17 n. 19 ~ and is directly refuted by one of the two cases Napster cites.  
Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, 75 F. Supp. 2d 1290, 1295 (D. Ut. 1999)  
(preliminary injunction **granted** against defendants who contributed to infringement merely by  
listing on their website the URL's of other sites containing the infringing material); Bernstein v.  
J.C. Penney Inc., 50 U.S.P.Q.2d 1063 (C.D. Cal. 1998) (merely rejecting with no analysis a  
dubious claim that J.C. Penney was liable for infringement where its web site was hyperlinked to  
an unrelated site which in turn was hyperlinked to a third unrelated site that contained two  
infringing photographs).