

1 INTRODUCTION

2 Napster's opposition represents the latest in a long line of Napster's attempts to reinvent  
3 itself and its legal position. Napster devotes far less attention to responding to the key issues before  
4 this Court ~ contributory and vicarious infringement ~ than it does to arguing patently baseless  
5 defenses:

6 . The Audio Home Recording Act ("AHRA") does not immunize Napster's users for  
7 reproducing and distributing millions of copies of copyrighted music files to countless third party  
8 strangers, and RIAA v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999), nowhere  
9 implies, let alone says, it does. Indeed, even today, Napster's website acknowledges precisely the  
10 contrary, telling its users:

11 "Unauthorized copying, distribution, modification, public display, or  
12 public performance of copyrighted works is an infringement of the  
copyright holders' rights."

13 . Because Napster is operating an ongoing service, not merely selling a product like a  
14 VCR, the "staple article of commerce" doctrine, as a matter of law, simply does not apply to  
15 Napster. Even if it did, the doctrine would not provide a defense here because Napster  
16 overwhelmingly is used for infringement (regardless of how many incidental or severable uses it tries  
17 to concoct).

18 . Courts routinely have held that the "fair use" doctrine does not protect the  
19 wholesale, nontransformative copying and distribution of the entirety of plaintiffs' creative works.

20 . Napster's other defenses, including copyright misuse and waiver, are meritless,  
21 mirroring those that the Court in UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349  
22 (S.D.N.Y. 2000), recently dismissed as "essentially frivolous."

23 In the end, Napster's opposition uses euphemisms like "sharing" to avoid the real issue:  
24 Napster is a business that already claims a value in the billions, based overwhelmingly on the piracy  
25 of millions of plaintiffs' copyrighted works. The truth is, the making and distributing of  
26 unauthorized copies of copyrighted works by Napster users is not "sharing," any more than stealing  
27 apples from your neighbor's tree is "gardening."  
28

1 I. NAPSTER ENABLES COPYRIGHT INFRINGEMENT THAT IS NOT PROTECTED  
2 EITHER BY THE AHRA OR AS FAIR USE.

3 Napster's defense essentially has been reduced to the proposition that Napster's users are not  
4 engaged in infringement when, on a daily basis, they copy and distribute *millions* of copies of every  
5 popular recording. But, Napster's users are not engaged in private, home copying for personal use.  
6 Napster admits it turns every user into a public server ~ a worldwide distributor of the music on her  
7 hard drive. Kessler Decl., ¶¶ 7-8. Courts that have examined the issue have all held that the  
8 operator of an Internet site offering copyrighted works for download (i.e., distribution and copying)  
9 is liable for copyright infringement ~ and in almost all of those cases, the activity ostensibly was  
10 "noncommercial." E.g., Sega Enterprises, Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994)  
11 ("Sega I") & 948 F. Supp. 923 (N.D. Cal. 1996) ("Sega II"); Playboy Enterprises, Inc. v. Russ  
12 Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997); Playboy Enterprises, Inc. v. Frena, 839 F.  
13 Supp. 1552 (M.D. Fla. 1993); Playboy Enterprises, Inc. v. Webbworld, Inc., 968 F. Supp. 1171  
14 (N.D. Tex. 1997) & 991 F. Supp. 543 (N.D. Tex. 1997); Playboy Enterprises, Inc. v. Chuckleberry  
15 Publishing System, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996); Sega Enterprises, Ltd. v. Sabella, 1996  
16 WL 780560, at \*7 (N.D. Cal. 1996); Creative Labs, Inc. v. Cyrix Corp., 42 U.S.P.Q. 2d 1872 (N.D.  
17 Cal. 1997). Napster users whose hard drives are made accessible over the Internet via Napster are  
18 no different, in this respect, than the operators of such pirate sites, and each download of a  
19 copyrighted recording is an infringement of both the reproduction and distribution rights. Further,  
20 merely making a copyrighted recording available through Napster violates the distribution right.  
21 Hoteling v. Church of Jesus Christ of Latter Day Saints, 118 F.3d 199, 203 (4th Cir. 1997)  
22 (distribution occurs "when a public library adds a work to its collection, lists the work in its index or  
23 catalog system, and makes the work available to the borrowing or browsing public").

24 A. The AHRA Has No Relevance To The Napster Service.

25 The current centerpiece of Napster's defense is its newly minted contention that the AHRA  
26 exempts the copying and distribution of MP3 files to millions of unknown users. The AHRA does  
27 no such thing. The AHRA balances the interests of manufacturers, consumers, and copyright  
28 owners by "plac[ing] restrictions only upon a specific type of recording device," defined in the  
statute, and requiring such devices to be equipped with copy protections and that royalty payments

1 be made based on their sale. Diamond, 180 F.3d at 1075; see also AHRA, 17 U.S.C. § 1002  
2 (“Incorporation of copying controls”) and § 1003 (“Obligation to make royalty payments”). As part  
3 of this balance, Section 1008 exempts consumers from copyright infringement lawsuits for private  
4 uses of AHRA- covered devices.

5 Tellingly, nowhere does Napster quote the relevant language of Section 1008 (relegating to a  
6 footnote a truncated version, with the critical language replaced with an ellipsis). Opp. at 5 n.3.

7 The full text of Section 1008 reveals the speciousness of Napster’s argument:

8 “No action may be brought under this title alleging infringement of  
9 copyright based on the manufacture, importation, or distribution of a  
10 **digital audio recording device**, a digital audio recording medium, an  
11 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.”  
(Emphasis added.)

12 First and foremost, a general-purpose computer is not a “digital audio recording device” and,  
13 therefore, is not within the scope of Section 1008. In Diamond, the Ninth Circuit addressed this  
14 very issue in considering whether a portable device (the “Rio”) ~ to which consumers transferred  
15 MP3 files from their own computer hard drives for playback, but from which no further copying or  
16 distribution could be made ~ was a “digital audio recording device” or “medium” within the AHRA.  
17 180 F.3d at 1074-75. The Court ruled: “Under the plain meaning of the [AHRA’s] definition of  
18 digital audio recording devices, computers (and their hard drives) are not digital audio recording  
19 devices...” Id. The Court also concluded that the legislative history was “consistent with the  
20 [AHRA’s] plain language ~ computers are not digital audio recording devices.” Id.<sup>1</sup> Simply stated,  
21 because Napster’s users who transfer MP3 music files from and to each others’ computers are not  
22 engaged in the use of a “digital audio recording device,” this alone ends any debate about the  
23 applicability of Section 1008 to their conduct. See also 2 Nimmer, Nimmer On Copyright

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25 <sup>1</sup> Diamond also held that the MP3 files contained on computer hard drives are not  
26 “digital musical recordings.” 180 F.3d at 1076. The Court concluded: “There are simply no  
27 grounds in either the plain language of the definition or in the legislative history for interpreting  
28 the term ‘digital musical recording’ to include songs fixed on computer hard drives.” 180 F.3d at  
1077. Thus, a copy made by one Napster user of an MP3 file residing on another Napster user’s  
computer hard drive is not a copy of a “digital musical recording,” and is not immunized by  
Section 1008. 17 U.S.C. § 1001(4)(A). 3

1 § 8B.02[A][1][a] at 8B-29 (hereinafter “Nimmer”) (“[T]he AHRA’s structure, whereby computers are  
2 excluded from its thrust, places the Internet essentially outside the statute’s purview”).

3 Second, even if computers somehow were covered by the AHRA (and thus bound by its copy  
4 control and royalty requirements), the exempt “noncommercial use” contemplated by Section 1008  
5 does not apply to the wholesale distribution of music files among millions of anonymous strangers.  
6 Section 1008 deals only with private copying (“*making*” digital musical recordings) ~ not  
7 *distribution*. But, this case is not about the lawfulness of a consumer making MP3 copies of her  
8 own compact discs for her own use. This case is about copying and widespread distribution to  
9 millions of Napster users ~ an activity that always has been considered an infringement of copyright,  
10 and which never was raised or discussed in Diamond. The AHRA’s legislative history fully supports  
11 this conclusion. Congress did *not* give consumers a license to distribute copies of copyrighted music  
12 over the Internet to millions of persons ~ any more than Congress gave consumers a license to make  
13 home copies of copyrighted music and distribute them from a street corner to all comers. That is  
14 why the congressional statements quoted by Napster all use the terms “personal” or “private” to  
15 describe the limited “noncommercial” AHRA exemption. Even the Court in Diamond, when  
16 quoting this legislative history, *emphasized* the words “private, noncommercial use” ~ yet when  
17 Napster quotes Diamond on this point, it *omits* the Court’s emphasis. Opp. at 5.

18 Further, although Napster again neglects to mention it, the very section of the OTA report  
19 on which Napster so heavily relies specifically states that distributing copies of music *to the public* is  
20 *not* “personal use”:

21 “Thus, home copies are used privately within the household  
22 (including personal vehicles) and are not used for implicit or explicit  
23 commercial purposes. Admission is not charged and users *are a*  
24 *household and its normal circle of friends, rather than the public*.  
25 Homemade copies that were subsequently used for commercial  
26 purposes or public performances would not be considered home  
27 copies.” U.S. Congress, OTA, Copyright and Home Copying:  
28 Technology Challenges the Law, OTA-CIT-422, at 5 (U.S. GPO, Oct.  
1989) (emphasis added).

29 This statement confirms common sense ~ the copying and widespread public  
30 distribution of copies of music is not an exempt use.<sup>2</sup>

31 \_\_\_\_\_  
32 <sup>2</sup> Napster’s argument also is directly at odds with Congress’ most recent  
33 pronouncement on the subject. In 1997, Congress enacted the No Electronic Theft (NET) Act to  
34 impose criminal penalties for copyright infringement over the Internet, even when not done for

1           **B.     Napster's Users Are Not Engaged In Fair Use.**

2           The purpose of the fair use doctrine is “to avoid rigid application of the copyright statute  
3 when, on occasion, it would stifle the very creativity which that law is designed to foster.” Campbell  
4 v. Acuff-Rose Music, Inc., 510 U.S. 569, 577, 114 S. Ct. 1164 (1994). Examining the four fair use  
5 factors, 17 U.S.C. § 107, confirms the obvious: downloading complete copies of plaintiffs’ music  
6 does not enhance or encourage creativity.

7           Napster essentially concedes that two of the four factors favor plaintiffs: “Plaintiffs’ works are  
8 undoubtedly creative in nature” (Opp. at 11);<sup>3</sup> and Napster users copy the entirety of the works.  
9 The latter point should alone be dispositive, because the Ninth Circuit “has long maintained the  
10 view that wholesale copying of copyrighted material *precludes application of the fair use doctrine.*”  
11 Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983) (emphasis added); see also MP3.com, 92 F.  
12 Supp. 2d at 352 (defendant used “the entirety of the copyrighted works here in issue, thus again  
13 negating any claim of fair use”).

14           Napster focuses its argument on the remaining two factors: purpose and character of the use  
15 and the effect on the potential market. Napster claims the purpose of its users’ copying is  
16 “noncommercial.” However, the backscratching arrangement among Napster users has a  
17 commercial purpose. See Section I(A) supra. Further, making a copy to avoid paying for a work is  
18 commercial use. American Geophysical Union v. Texaco Inc., 60 F.3d 913, 924 (2d Cir. 1995) (use  
19 commercial because defendant circulated photocopies of journals to avoid having to purchase  
20 multiple copies); 2 Nimmer, § 8B.01 [D][2] at 8B-20 (“The individual who engages in audio home  
21 recording may not be seeking a commercial advantage by selling the recordings, but for fair use

22  
23 traditional commercial purposes. 17 U.S.C. § 506(a). In addition, explicitly to address the case of  
24 U.S. v. LaMacchia, 871 F. Supp. 535 (D. Mass 1994) ~ in which the infringer was acquitted of  
25 criminal copyright infringement charges because, instead of charging a fee for providing the  
26 unauthorized works (pirated software), he asked those downloading to provide him with  
27 additional copyrighted works in exchange ~ the NET Act defined the term “financial gain” to  
28 include the “receipt, or expectation of receipt, of anything of value, *including the receipt of other*  
*copyrighted works.*” 17 U.S.C. § 101 (emphasis added). Of course, the mutual “receipt of other  
copyrighted works” is the very premise on which Napster is founded. If Congress had intended to  
immunize this activity from civil liability, it would not subsequently have subjected the same  
conduct to possible criminal penalties.

<sup>3</sup> Creative works such as songs are<sup>5</sup> at the core of copyright’s intended protection.  
Campbell, 510 U.S. at 586; see also Micro Star v. Formgen, 154 F.3d 1107, 1113 (9th Cir. 1998).

1 purposes his motivation is nevertheless commercial. By engaging in audio home recording, he  
2 avoids the cost of purchasing records and prerecorded tapes”).

3 Consideration of the “purpose and character of the use” factor “also involves inquiring into  
4 whether the new use essentially repeats the old or whether, instead, it ‘transforms’ it by infusing it  
5 with new meaning, new understandings, or the like.” MP3.com, 92 F. Supp. 2d at 351; Los Angeles  
6 News Service v. Reuters Television Int’l, Ltd., 149 F.3d 987, 993 (9th Cir. 1998) (copying of news  
7 footage not transformative where defendant “does not explain the footage, edit the content of the  
8 footage, or include editorial comment”). Napster’s claim that the mere act of copying an MP3 file  
9 from one computer to another is “transformative” is unsupportable. Even converting a recording  
10 from one medium to another (e.g., CD to MP3) would be “an insufficient basis for any legitimate  
11 claim of transformation...” MP3.com, 92 F. Supp. 2d at 351; Micro Star, 154 F.3d at 1113 n.6  
12 (compact disc copy of levels of video game was “anything but” transformative).

13 Napster also incorrectly claims its users’ conduct does not affect the market for plaintiffs’  
14 works. “[T]o negate fair use one need only show that if the challenged use ‘should become  
15 widespread, it would adversely affect the potential market for the copyrighted work.’” Harper &  
16 Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 568, 105 S. Ct. 2218 (1985); Campbell,  
17 510 U.S. at 590. The Record Company Plaintiffs have expended millions of dollars to enter, and to  
18 expand their presence in, digital downloading of music ~ selling the exact same audio files that  
19 Napster makes available for free in the exact same electronic medium. See initial Memorandum at  
20 30. It is self-evident that free copying via Napster would impact the sale of the same product by  
21 plaintiffs. See 2 Nimmer, § 8B.01[D][2] (“the creation of a permanent recording [by a consumer]  
22 must inevitably have a harmful impact upon the potential market for the sale of those sound  
23 recordings”); see also Teece Rpt. pp. 16-18; Jay Rpt. pp. 3-4, 18-21; Fine Rpt. pp. 2-5. Further, the  
24 activities of Napster’s users “on their face invade plaintiffs’ statutory right to license their  
25 copyrighted sound recordings to others for reproduction.” MP3.com, 92 F. Supp. 2d at 352; see  
26 also Texaco, 60 F.3d at 923.

27 Napster’s unsupported argument that its users’ acts are fair use because they might enhance  
28 plaintiffs’ CD sales, or help develop the demand for digital downloaded music, has been routinely  
rejected. Reingold v. Black Entertainment Television, Inc., 126 F.3d 70, 81 n.16 (2d Cir. 1997)

1 (unauthorized use is not fair even if it “might increase poster sales”); DC Comics Inc. v. Reel  
2 Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) (“even a speculated increase in DC’s comic book sales  
3 as a consequence of RFI’s infringement would not call the fair use defense into play as a matter of  
4 law”); MP3.com, 92 F. Supp. 2d at 352 (“Any allegedly positive impact of defendant’s activities on  
5 plaintiffs’ prior market in no way frees defendant to usurp a further market that directly derives  
6 from reproduction of the plaintiffs’ copyrighted works....This would be so even if the  
7 copyright holder had not yet entered the new market in issue”).

8 Napster asserts that some of its users may delete some music files after “sampling” for  
9 possible purchase. Even if this doubtful proposition were true,<sup>4</sup> this would not be a fair use. A  
10 consumer does not need to make a complete copy of music to “sample” it. Making a complete,  
11 potentially permanent copy of music is not sampling ~ it is infringement, and no court has ever held  
12 to the contrary. Opportunities abound on the Internet for consumers to sample plaintiffs’ music  
13 before buying. Indeed, online CD retail stores typically allow consumers to listen to clips of  
14 plaintiffs’ music before buying. Importantly for any fair use analysis, plaintiffs are *compensated* for  
15 *licensing* the rights to sample their music in that way. See Declaration of David Lambert, ¶¶ 2-3.  
16 Thus, even this claimed use, which usurps plaintiffs’ licensing opportunities, is not fair.<sup>5</sup>

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25 <sup>4</sup> A user might delete an MP3 file for numerous reasons ~ to make room for new,  
26 more desired songs, or because the user has recorded it onto a CD or some other storage device.

27 <sup>5</sup> That Napster’s purported sampling of complete copies of plaintiffs’ music is not  
28 fair use also is directly supported by the Copyright Act. If the purported sampling were fair use  
(on the theory that the recordings ultimately are deleted), then it clearly also would be fair use for  
Internet services to use streaming technology (in which a song is digitally performed, but no copy  
ordinarily is made) to permit consumers to sample music. But the Copyright Act prohibits such  
unrestricted streaming without a license. 17 U.S.C. § 114(d) *et seq.*