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and MusicCity Networks, Inc.

19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

21
22 METRO-GOLDWYN-MAYER)
23 STUDIOS INC., et al.,)

24 Plaintiffs,)

25 v.)

26 GROKSTER, LTD., et al.,)

27 Defendants.)

28 [Continued on Next Page]

Case No. CV 01-09923 SVW (PJWx)
(Consolidated with CV 01-08541 SVW (PJWx))

**MEMORANDUM OF DEFENDANTS
MUSICCITY.COM, INC. (NOW KNOWN
AS STREAMCAST NETWORKS, INC.)
AND MUSICCITY NETWORKS, INC. IN**

1 JERRY LEIBER, et al.,
2 Plaintiffs,

3 v.

4 CONSUMER EMPOWERMENT
5 BV a/k/a FASTTRACK, et al.,
6 Defendants.

7
8 AND COUNTERCLAIMS.
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**OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT OR,
ALTERNATIVELY, PARTIAL
SUMMARY JUDGMENT**

[Defendants' Statement of Genuine Issues of
Material Fact in Opposition to Plaintiffs'
Motion for Summary Judgment on Liability,
filed concurrently herewith; Compendium of
Declarations of Prof. Steven Gribble, Darrell
Smith and Matthew Lapple filed concurrently
herewith; Evidentiary Objections to be filed
prior to Hearing]

Date: December 2, 2002
Time: 1:30 p.m.
Ctm: 6 (Spring Street)
Hon. Stephen V. Wilson

**[FILED UNDER SEAL PURSUANT TO
PROTECTIVE ORDER]**

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Adobe Systems Inc. v. Canus Productions, 173 F. Supp. 2d
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Arista Records, Inc. et al. v. MP3Board, Inc., slip. op. 00 CV.
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Artists Music v. Reed Publishing, 31 U.S.P.Q.2d 1623
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Bevan v. CBS, Inc., 329 F. Supp. 601 (S.D.N.Y. 1971).....15

Brown Bag Software v. Symantec Corp., 960 F.2d 1465
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Compaq Computer v. Procom Tech., 908 F. Supp. 1409
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Ellison v. Robertson, 189 F. Supp. 2d 1051 (C.D. Calif. 2002) 10,16

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259
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Fonovisa, Inc. v. Napster, Inc., 2002 WL 398676
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Hendrickson v. Ebay, 165 F. Supp.2d 1082 (C.D. Calif. 2001)16

In re Napster Copyright Litigation, 191 F. Supp. 2d 1087
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RCA Records v. Allfast Systems, Inc., 594 F. Supp. 355
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Religious Tech. Ctr. v. Netcom On-Line Comm. Services, Inc.,
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Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 104
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Universal Pictures, et al. v. Sony Corp., 480 F.Supp. 429
(C.D. Calif. 1979) 17,18,30

Vault Corp. v. Quaid Software Ltd., 847 F.2d 255
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STATUTES:

Digital Millennium Copyright Act, Pub.L. No. 105-304, 112
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Consumer Broadband and Digital Television Promotion Act,
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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 In the hope that the Court might somehow confuse StreamCast for Kazaa,
3 Gnutella for Napster, and a technology’s distributor with its end-users, and ignoring
4 the plain mandate of *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th
5 Cir. 2001) (“*Napster II*”), Plaintiffs have improperly lumped together three sets of
6 co-defendants, two distinct technologies, and an avalanche of disputed and irrelevant
7 factual assertions surrounding Napster. But summary judgment cannot be based on
8 masses of irrelevant evidence, nor can the mashing together of two distinct
9 technologies and three sets of co-defendants obscure Plaintiffs true goal: to obfuscate
10 the true facts as to each defendant, and each software program, all in an effort to
11 avoid the detailed scrutiny required for summary judgment.

12 More troubling, however, are Plaintiffs’ efforts to transform copyright’s
13 judge-made secondary infringement doctrines into a judicially-administered tool for
14 technology policy. First, Plaintiffs attempt to whittle to nothing the staple article of
15 commerce doctrine announced in *Sony Corp. v. Universal City Studios, Inc.*, 464
16 U.S. 417 (1984) (“*Sony-Betamax*”). Under their crabbed view of the doctrine, even
17 Sony itself would find it impossible to escape contributory liability for the VCR.
18 Second, Plaintiffs seek to refashion vicarious liability so as to impose liability on a
19 technology company for failing to design its technology to the Plaintiffs’
20 specifications. This is not the law. *See Napster II*, 239 F.3d at 1024 (defendant has an
21 obligation only to police within the limits of the existing architecture). As the
22 Supreme Court recognized in *Sony-Betamax*, to impose secondary liability on a
23 technology vendor is to hold that Congress intended copyright owners to have the
24 exclusive right to design and distribute the technology in question. *See Sony-*
25 *Betamax*, 464 U.S. at 441, fn.21. Judge-made doctrines of secondary liability,
26 originally crafted to address concerns far removed from technology policy, simply
27 will not bear this weight with regard to the technologies at issue here. *See id.* at 431
28

1 (courts “must be circumspect in construing the scope of rights created by legislative
2 enactment which never contemplated such a calculus of interests”).

3 In order to resolve the cross-motions for summary judgment,¹ the Court must
4 evaluate the two technologies at issue (FastTrack and Gnutella), and then ask the
5 following: are there genuine issues of material facts about whether 1) StreamCast has
6 sufficient specific knowledge of infringing activity coupled with the capacity to act
7 to prevent such activity, and 2) StreamCast can control the allegedly infringing
8 activities of its users. Once this Court focuses on both the relevant issues and the
9 relevant evidence, it is clear that in seeking summary judgment here the Plaintiffs are
10 not only inviting the court to extend the law of secondary copyright liability far
11 beyond the limits set by both the *Napster II* and the *Sony-Betamax* courts, Plaintiffs
12 have also failed to shoulder their evidentiary burden in seeking summary judgment.

13 **II. WHAT MORPHEUS IS, WHAT IT ISN'T, AND HOW IT WORKS**

14 **A. What Morpheus Is**

15 At a conceptual level, the Morpheus software is essentially the Internet
16 equivalent of a megaphone. It allows a person who is connected to the Internet to
17 effectively lean out their window and ask his neighbors, “I’m looking for this, do
18 you have it?” Because his neighbors also have megaphones, they can lean out of
19 their windows and either answer, “yes, I have it, I’ll send it right over,” or relay the
20 request on down the block, “John in 7C is looking for this, do you have it?” In such a
21 circumstance, of course, no court could conclude that the megaphone manufacturer
22 should be held liable for any infringements committed by the neighbors.

23 Plaintiffs, of course, will contest this characterization, claiming that the
24 Morpheus software is more akin to Napster’s MusicShare software, which directed
25 all searches queries and responses through a central set of servers maintained by

26 ¹ As requested by the Court, the focus of the various summary judgment
27 motions is on liability. The application of defenses and limitations on remedies
28 (such as the safe harbor provision of the Digital Millenium Copyright Act
 (“DMCA”)) are appropriately reserved for another day, after discovery on these
 issues is completed.

1 Napster. In essence, rather than giving each neighbor a megaphone, the Napster
2 architecture required every user to send a note to a central office (“I’m looking for
3 this, does anyone have it?”), where the note was then compared against an index
4 compiled by Napster’s agents (“yes, John in 7C has it”). Napster would then courier
5 a note back to the asking party. This architecture afforded Napster perfect knowledge
6 and complete control over the file-sharing activities of its users, and thus satisfied the
7 traditional elements for secondary copyright infringement liability.

8 To decide whether StreamCast is more like the megaphone manufacturer or
9 more like the central index operator, this Court will need to understand how the
10 Morpheus software works. The Morpheus software, in all its versions, is a
11 communications tool that allows users to communicate directly with each other. The
12 network that is created by Morpheus users is decentralized, which is to say that it is
13 the users’ own computers, rather than StreamCast’s, that store all the files, send and
14 process all the search requests, and accomplish all the file transfers.

15 The Morpheus software has been based on two different technologies. While
16 Plaintiffs’ motion focuses primarily on the FastTrack technology, Plaintiffs also
17 attack the Gnutella technology, claiming there is little difference. However, because
18 each software version does in fact operate differently, and because the focus of this
19 Court should be on the architecture of each defendants’ activities and products, *see*
20 *Napster II*, 239 F.3d 1024 (secondary liability analysis must be “cabined by the
21 system’s current architecture”), the Court must begin by examining the architectures
22 at issue.

23 **B. How Morpheus Works**

24 **1. FastTrack²**

25
26
27 ² StreamCast invites the Court’s attention to the Opposition Declarations of
28 Professor Steven Gribble (“Gribble Opp. Decl.”) and Darrell Smith (“Smith Opp.
Decl.”) for a detailed description of the FastTrack-based Morpheus software program
and the network created by its users.

1 Versions of Morpheus prior to March 2002 (through Morpheus version 1.3.3)
2 were based on the “FastTrack” technology licensed from co-defendant Kazaa. All
3 FastTrack users (including Grokster and Kazaa) formed a single “self-organizing”
4 network, which is to say that the users communicated with each other without
5 assistance from StreamCast. The network itself shares and updates information, and
6 allocates different resources as needed.³

7 One of the central features distinguishing the FastTrack-based software from
8 later Gnutella-derived versions was the “dynamic,” or variable, use of “supernodes.”
9 A “node” is an end-point of the Internet, typically a user’s computer. A “supernode”
10 is a node that has a heightened function, accumulating information from multiple
11 other nodes. Smith Opp. Decl. ¶¶ 70-71. Each user’s copy of the Morpheus
12 software itself dynamically self-selected its own supernode status; a user’s node may
13 be a supernode one day and not on the following day, depending on resource needs
14 and availability on the network. Smith Opp. Decl. ¶ 72.

15 As a result of these automatically selected supernodes, the FastTrack user
16 network was comprised of regular user nodes clustered around a smaller number of
17 user supernodes. Upon starting the Morpheus software, a user’s computer would find
18 a supernode, thereby joining one of these clusters.⁴ These supernodes, in turn,
19 relayed user search queries and results between the other supernodes, thus efficiently

20
21 ³ As a licensee, StreamCast was never able to examine the source code to the
22 FastTrack versions of the Morpheus software. Accordingly, it was not able to
23 determine precisely what criteria the software used to advance nodes to supernode
24 status. It is undisputed, however, that this self-selection occurred autonomously,
without the involvement of any StreamCast servers. Smith Opp. Decl. ¶ 72.
Although it appears that Kazaa was able to communicate directly with supernodes
and alter their characteristics remotely, as a licensee, StreamCast never had this
capability. Smith Opp. Decl. ¶ 7.

25 ⁴ Morpheus users could obtain a list of supernodes in a variety of ways,
26 including from “root supernodes” maintained by Kazaa, or from internal lists that
27 came embedded in the Morpheus software. Smith Opp. Decl. ¶¶ 15-21. StreamCast
28 also operated a root supernode for a short period of time. In any event, Plaintiffs
have introduced no evidence that this “bootstrapping” function ever gave StreamCast
any ability to monitor or control the allegedly infringing activities of any Morpheus
user.

1 canvassing the largest number of other users with a minimum of redundant network
2 traffic. Smith Opp. Decl. ¶¶ 80-81.

3 When a user first operated the Morpheus software program, the program
4 interacted briefly with StreamCast's server to establish a unique username and
5 password for the user. If the software on subsequent occasions could not access the
6 StreamCast server, the user could still access the user-created network, but the user's
7 username would not be properly displayed and other users would not know that this
8 was the same user who had connected before. Smith Opp. Decl. ¶ 84.

9 StreamCast's involvement with users of the Morpheus software after delivery
10 of the software was very limited. The Morpheus FastTrack software connected to
11 one or more StreamCast's servers that provided background graphics to the user as
12 well as advertising. These functions, however, were wholly independent of the file-
13 sharing capabilities of Morpheus; when these servers failed from time to time (as
14 they did), the searching, sharing and downloading functions of Morpheus were
15 unaffected.⁵

16 Once a user had installed a copy of the Morpheus software program,
17 StreamCast had no effective involvement with, or control over, what information the
18 user searched for, downloaded, or shared. Smith Opp. Decl. ¶ 11. Users elected
19 whether to run the software, determined what (if any) files they wish to store on their
20 hard drive or to share, decided what bandwidth to allocate to the application, and
21 indicated whether they may be designated to serve as a transient supernode. Smith
22 Opp. Decl. ¶¶ 12, 72, 82. Thus, users decided whether to search for, find, send, or
23 receive files over the user-created network. The Morpheus product did not report any
24 information about a user's conduct to StreamCast's servers. Smith Opp. Decl. ¶ 64.

25
26 ⁵ On the instructions of Kazaa, StreamCast from time to time changed certain
27 networking parameters and notified users of updated versions of the software. At no
28 time did StreamCast have the ability to unilaterally undertake any of these actions.
Smith Opp. Decl. ¶ 12.

1 2. Gnutella⁶

2 Like the FastTrack technology, the Gnutella-based Morpheus software utilizes
3 no central servers that participate in any way in the file-sharing activities of its users.
4 Like the FastTrack technology, the search, download and sharing functions are
5 decentralized—after downloading and installing the Gnutella-based Morpheus
6 software on their computers, users decide for themselves what information to seek
7 out, send and receive with the software, without any further involvement from
8 StreamCast. Smith Opp. Decl. ¶ 45; Gribble Opp. Decl. ¶¶ 9-11.

9 In order to access the Gnutella user network (comprised of all users of
10 Gnutella-based software, including those distributed by companies like LimeWire,
11 BearShare, Gnucleus, and others), a user connects to another user who is connected
12 to the network; no user name is required to join.⁷ Once connected to another user on
13 the Gnutella network, a user who wishes to find a file sends out a search request to
14 the users to which he is connected, who in turn automatically pass-along the request
15 to each of the other users to whom they are connected, until a match is found or the
16 search request expires. Gribble Opp. Decl. ¶¶ 27-31. Upon receiving responses
17 directly from users who have potentially relevant files, the user selects which file he
18 wants to download and the two computers are then connected to begin a file transfer.
19 Gribble Opp. Decl. ¶¶ 32-33. Because this architecture lacks “supernodes,” it is even
20 more decentralized than the FastTrack network.

21 Like the FastTrack version, there are also several StreamCast servers that send
22 graphics and advertising to a user when the Morpheus application is running; and as
23

24 ⁶ For a more detailed description of how Morpheus Gnutella works,
25 StreamCast refers the Court to its Motion for Partial Summary Judgment on
Vicarious Liability (the “Vicarious Liability Motion”) at pp. 2-8.

26 ⁷ This initial connection to another user is usually performed automatically
27 after the user’s computer contacts one of the many publicly available repositories of
the IP addresses of those who are running Gnutella software. Smith Opp. Decl. ¶¶
28 32-33.

1 with the FastTrack versions, all of these server-generated interactions are totally
2 unrelated to what a user may decide to search for, download or share. Smith Opp.
3 Decl. ¶¶ 56-59; Gribble Opp. Decl. ¶ 44; StreamCast’s Statement of Genuine Issues
4 of Material Fact (“SGF”), § 6(n).

5 **C. What Morpheus Is Not**

6 Plaintiffs brazenly claim that because StreamCast “modeled” its “system”⁸ on
7 Napster,⁹ and provided the same “user experience” as Napster, that it should
8 somehow be automatically held liable. Not only are these accusations wholly
9 irrelevant, but secondary liability for copyright infringement requires more than just
10 a broad-brush comparison to Napster.¹⁰

11 In stark contrast to the Morpheus software, Napster relied upon many central
12 servers (all owned and maintained by Napster) whose sole function was to keep an
13 index of the music files available for downloading, and to provide the necessary
14 address for two computers to transfer music files. Each and every search query and
15 result passed through Napster’s central index. This afforded them perfect knowledge
16 and complete control over the specific file-sharing activities of their users. It was this

17 ⁸ As predicted, Plaintiffs continue to use (and abuse) the misnomer “system”
18 in describing what Morpheus is in order to fit Morpheus into the *Napster* decision.
19 Yet even they occasionally slip and instead, call Morpheus what it really is: a “tool”
20 that users can utilize to download, copy and exchange media files. *See* Plaintiffs’
21 Memorandum of Points and Authorities (“Pls. Mem.”), pp. 2, 3. In reviewing the
22 *Napster* case, it becomes absolutely clear why the Plaintiffs wish this Court to adopt
23 that terminology: if StreamCast has an “integrated system,” it can control that
24 “system” and thus is liable because it had a duty to remove any infringing material
25 from its “system.”

26 ⁹ There is simply no credible evidence that StreamCast modeled its business
27 after Napster. In fact, the only evidence reflects that StreamCast’s business plan,
28 from day one, was to develop a software program that would allow the graphic user
interface to change, or “morph,” so as to allow different applications to be interfaced
with the user. *See* Smith Opp. Decl. ¶ 90.

¹⁰ For a short time StreamCast operated an openNap service, which was
comprised of publicly-available openNap software and centralized servers. Plaintiffs’
secondary liability claims, however, are not based on infringements that may have
occurred during that time. It appears that Plaintiffs intend this evidence to somehow
relate to StreamCast’s alleged knowledge. For the reasons stated below, Plaintiffs are
mistaken, and thus any discussion of openNap is entirely irrelevant.

1 knowledge and control that brought Napster within the scope of the statutory
2 monopoly granted to copyright owners. Gribble Opp. Decl. ¶¶ 50-58.

3 Morpheus, on the other hand, operates in a completely different fashion. No
4 centralized “index” containing file names has ever been kept on any StreamCast
5 server, nor does any other aspect of the existing architecture afford StreamCast the
6 relevant knowledge or control of infringing activities. *Id.* In short, unlike Napster,
7 StreamCast does not operate a centralized service that participates in or can prevent
8 the infringing activities of Morpheus users, and it cannot (short of redesigning the
9 product) take action against a particular user based on knowledge that the user has
10 abused the product.

11 **III. VICARIOUS LIABILITY¹¹**

12 **A. Plaintiffs have Failed to Establish as a Matter of Law that** 13 **StreamCast has the Right and Ability to Control the Infringing** 14 **Activities of Morpheus Users**

15 It is black letter law that, in order to be held vicariously liable for the
16 infringing activities of another, a defendant must be shown to have had “the right and
17 ability to supervise *the infringing activity*” of the direct infringer. *Fonovisa, Inc. v.*
18 *Cherry Auction, Inc.*, 76 F.3d 254, 262 (9th Cir. 1996) (emphasis added); *accord*
19 *Adobe Systems Inc. v. Canus Productions*, 173 F. Supp. 2d 1044, 1053 (C.D. Cal.
20 2001) (vicarious liability of trade show operator turns on “ability to control *the sale*
21 *of infringing products at its shows*”) (emphasis added); *Banff Ltd. v. Limited, Inc.*,
22 869 F. Supp. 1103, 1110 (S.D.N.Y. 1994) (vicarious liability requires “some
23 continuing connection between the [direct and vicarious infringer] *in regard to the*
24 *infringing activity*”) (emphasis added). In order to prevail, therefore, Plaintiffs must

25 ¹¹ Except for the *Leiber* Plaintiffs, the parties have stipulated that for purposes
26 of summary adjudication and injunctive relief, ownership of the works at issue shall
27 be presumed. *See* Stipulation, attached as Ex.10 to Declaration of Matthew Lapple
28 (“Lapple Decl.”) Because the *Leiber* Plaintiffs refused to sign this stipulation,
however, StreamCast will be filing a Rule 56(f) motion asking for additional time to
conduct discovery on this issue or alternatively, requesting the Court to deny their
part of the joint summary judgment motion because they have violated this Court’s
mandate to postpone ownership issues until after this phase of the litigation.

1 show that there is no genuine issue of material fact that StreamCast has the right and
2 ability to control or supervise the allegedly infringing activities of Morpheus users—
3 in other words, the searching, sharing and downloading of Plaintiffs’ copyrighted
4 works.

5 In their motion for summary judgment, however, Plaintiffs have piled their
6 brief high with alleged evidence of StreamCast’s “control” over everything *but* the
7 allegedly infringing activities of Morpheus users.¹² With respect to the FastTrack
8 versions of Morpheus, what little *relevant* evidence Plaintiffs have produced is hotly
9 disputed, and thus cannot be the basis for summary judgment.¹³ With respect to the
10 Gnutella versions of Morpheus, moreover, Plaintiffs have failed to produce any
11 *relevant* evidence at all.

12 **B. There Exists Disputed Material Facts as to Whether StreamCast**
13 **Could Control Morpheus FastTrack Users**

14 **1. StreamCast’s alleged ability to influence how Morpheus**
15 **generally functions is not control over users.**

16 Plaintiffs make much of evidence (much of which is disputed) suggesting that
17 StreamCast at one time had the ability to influence certain networking characteristics
18 of the Morpheus software and user network. Pls. Mem., pp. 35-36. Such evidence,

19 ¹² StreamCast also believes that the facts offered by Plaintiffs to establish
20 “direct financial benefit” are inadequate to support summary judgment within the
21 meaning of traditional vicarious liability jurisprudence. In particular, Plaintiffs
22 premise their showing on the notion that infringing activities by some Morpheus
23 users may act as “a draw” for other users, in turn resulting in an indirect increase in
24 revenues to StreamCast. It is StreamCast’s view that this “benefit” is too indirect to
25 support a vicarious liability finding, although StreamCast concedes that Plaintiffs’
26 position is supported by binding Ninth Circuit precedent. StreamCast reserves the
27 right to raise this argument on appeal, if necessary.

28 ¹³ See SGF §§ 6-9. Plaintiffs also rely upon Professor Kleinrock to opine that
StreamCast controls its users. Not only is this testimony highly objectionable
(StreamCast will be filing extensive evidentiary objections), but it was discovered in
Prof. Kleinrock’s deposition that he relied upon other computer scientists to do the
brunt of his work. StreamCast has demanded that Plaintiffs produce for deposition
the key computer scientist, Kelly Truelove, but as of the filing of this memorandum,
Plaintiffs have refused. Accordingly, StreamCast will be filing a Rule 56(f) motion
asking that Dr. Truelove be produced or alternatively, that Prof. Kleinrock’s
declaration be stricken.

1 however, does not demonstrate StreamCast's control over what files Morpheus users
2 search for, share, and download.

3 Because vicarious copyright liability is rooted in respondeat superior
4 principles, liability will not be imposed unless the defendant has the ability to control
5 the direct infringer and his infringing activities. It is not enough to control other,
6 more general aspects of a premises or technology, on the theory that such
7 generalized control may indirectly influence infringing activities along with
8 noninfringing activities. Judge Pregerson's recent decision in *Adobe Systems v.*
9 *Canus* is instructive. There, Judge Pregerson held that, in evaluating the vicarious
10 liability of a trade show operator, the relevant question is whether the operator had
11 the "ability to control *the sale of infringing products at its shows.*" *Adobe v. Canus*,
12 173 F. Supp. 2d at 1053 (emphasis added). That the trade show operator could
13 control the size of booths, the price of admission, or any number of other general
14 characteristics of the show was not relevant, even though these other factors might
15 indirectly have influenced the incidence of infringing software sales.

16 Judge Cooper's recent ruling in *Ellison v Robertson*, 189 F.Supp.2d 1051
17 (C.D. Cal. 2002), teaches the same lesson. *Ellison* involved the unauthorized
18 reproduction of the literary works of author Harlan Ellison on the "alt.binaries.e-
19 books" newsgroup. *See id.* at 1053. Although it was originally a non-AOL subscriber
20 who reproduced and posted the works to the newsgroup, AOL's newsgroup servers
21 automatically reproduced, stored, and made the works available to AOL subscribers.
22 *See id.* at 1054. In ruling against Ellison's vicarious liability claim, the court found
23 that AOL was able to delete or block access to the infringing materials after they
24 appeared on AOL's servers. *See id.* at 1062 (finding that AOL "could delete or block
25 users' access to the infringing posting"). In addition, AOL obviously had complete
26 control over the operation of its own newsgroup servers and numerous other
27 characteristics of its network. Nevertheless, because AOL's right and ability to
28 control did not extend to the "infringing activity at the root level," the court went on

1 to hold this level of control was “insufficient to constitute ‘the right and ability to
2 control *the infringing activity*’ as that term is used in the context of vicarious
3 copyright infringement.” *Id.* (emphasis added). *Accord Banff Ltd.*, 869 F. Supp. at
4 1110.

5 The contrary rule urged by Plaintiffs would dramatically expand the scope of
6 vicarious liability as it applies to technology companies. For example, Xerox plainly
7 controls the general characteristics of the photocopiers that it manufactures, and
8 could alter those characteristics, indirectly reducing the incidence of copyright
9 infringement (e.g., by eliminating sheet feeders and other features that assist
10 infringing activity, as well as noninfringing activity). Microsoft could similarly alter
11 the general characteristics of its email and web browser software, as could Sony with
12 respect to its VCR and computer products. Fortunately, no court has ever held that
13 control over the general features of a technology is enough to create vicarious
14 liability.

15 Ignoring these distinctions, Plaintiffs’ evidence focuses on StreamCast’s
16 purported ability to control general characteristics of the Morpheus software and user
17 network. *See* Pls. Mem., pp. 35-37. At most, this evidence suggests that StreamCast
18 has some ability to influence the capabilities of *all* Morpheus users as a group, rather
19 than any ability to control or supervise the *infringing* activities of any particular user.
20 Even if this evidence were undisputed, it is simply irrelevant, as it sheds no light on
21 the question of whether StreamCast is able to influence or control what files
22 Morpheus users search for, share and download.

23 For example, Plaintiffs claim that StreamCast could alter the protocols and
24 encryption used by FastTrack versions of Morpheus by forcing users to upgrade to
25 new versions of the software.¹⁴ Pls. Mem., p. 37. This evidence, which is in any

26 ¹⁴ Perhaps most remarkably, Plaintiffs suggest that Kazaa’s successful attack
27 on the ability of the Morpheus software to connect to the FastTrack network
28 somehow establishes StreamCast’s ability to control infringing end-user activities.
Pls. Mem., p. 37. In fact, if StreamCast had any meaningful control over the
Morpheus software, it would certainly have exercised that control to *stop* the

1 event disputed in the record,¹⁵ does not establish any ability on the part of
2 StreamCast to control what files Morpheus users may decide to search for, share and
3 download. Gribble Opp. Decl. ¶¶ 42(b), (c) and 49. Where the Gnutella versions of
4 Morpheus are concerned, moreover, it is undisputed that StreamCast has no control
5 whatsoever over the open Gnutella protocol, that there is no encryption involved in
6 its network communications, and that StreamCast has never required Morpheus users
7 to accept upgrades to the software. Gribble Opp. Decl. ¶¶ 7-10, 47-49.

8 Similarly, Plaintiffs’ assertions regarding StreamCast’s ability to control the
9 “scope” of searches (*i.e.*, the way in which searches function for all Morpheus users)
10 does not suggest any ability to control what files Morpheus users may search for,
11 share or download. With respect to the FastTrack versions of Morpheus, moreover,
12 there is ample evidence in the record suggesting that StreamCast did not have the
13 power to change the searching characteristics of Morpheus—at all times, to the
14 extent there was any control over the technical details of the software, it rested with
15 defendant Kazaa. Smith Opp. Decl. ¶¶ 7-12; SGF § 6(k), (m) and (n). With respect to
16 the Gnutella versions of Morpheus, Plaintiffs point to StreamCast’s ability to
17 marginally affect certain “flow control” variables that govern the overall efficiency
18 of the software’s search functions. Pls. Mem., p. 35. Plaintiffs’ own expert, however,
19 admits that this capability does not give StreamCast any ability to control what files
20 a Morpheus user searches for, shares, or downloads. Lapple Decl. Ex. 6 (Kleinrock
21 Depo. T.) 67:16-68:8; 94:12-98:9; SGF § 6(e).

22 Plaintiffs’ evidence regarding StreamCast’s involvement in the
23 “bootstrapping”¹⁶ characteristics of the Morpheus software suffers from the same
24 network-wide shutdown of all the Morpheus software.

25 ¹⁵ See SGF § 6(a) & (c). For example, StreamCast has produced evidence
26 suggesting that it was Kazaa, not StreamCast, that had the ability to change the
27 protocol and encryption at the Morpheus client. See Smith Opp. Decl. ¶ 51; SGF §§
4, 6(a), (c), (k) & (m).

28 ¹⁶ “Bootstrapping” refers to a Morpheus user’s need to discover a FastTrack
supernode (in the case of the FastTrack versions) or Gnutella node (in the case of the

1 defect. Plaintiffs claim that StreamCast was involved in various ways with the
2 bootstrapping function of the FastTrack versions of the Morpheus software.¹⁷ Pls.
3 Mem., p. 35. None of Plaintiffs' evidence, however, suggests that this conferred on
4 StreamCast any ability to control what Morpheus users search for, share and
5 download once they have joined the network. Even if this evidence were relevant,
6 the record is rife with disputed factual issues as to the evidence offered by Plaintiffs
7 on this point.¹⁸

8 **2. StreamCast's ability to send messages to Morpheus users**
9 **cannot equate to control.**

10 Plaintiffs have also disingenuously attempted to equate StreamCast's ability to
11 send messages to Morpheus users with control over their activities. Pls. Mem., p. 36.
12 For example, StreamCast's web servers provide a portion of the graphics that adorn
13 the Morpheus software interface, and thus StreamCast has the ability to control the
14 content of the first screen that a user sees upon launching the software. SGF § 6(n).
15 Essentially, the opening screen functions like a billboard that StreamCast can fill
16 with graphics of its choice. Just as control over a road-side billboard does not give an
17 advertiser the ability to control speeding on the part of motorists, however, so too the
18 electronic billboard seen by Morpheus users confers no ability on StreamCast to
19 control the files that Morpheus users choose to search for, share, and download. *Id.*;
20 Gribble Opp. Decl. ¶¶ 41, 44 and 49. Plaintiffs have introduced no evidence to the
21 contrary. The same is true for the advertising banners and windows that appear while
22 the Morpheus software is in use, the email newsletter that StreamCast sends to

23 Gnutella versions) in order to join the network each time the program is launched.
24 Gribble Opp. Decl. ¶ 21.

25 ¹⁷ With respect to the FastTrack versions of Morpheus, these assertions
26 include StreamCast's brief maintenance of a "root supernode" and embedding
27 supernode IP addresses into the Morpheus software. It is undisputed that StreamCast
28 has no involvement in the bootstrapping functionality of the Gnutella versions of
Morpheus. The list of initial lists of IP addresses is entirely supplied by host caches
maintained by third parties. Gribble Opp. Decl. ¶ 21(a).

¹⁸ See SGF § 6(g) & (h).

1 Morpheus users who have chosen to receive it, and user “tutorials” contained on
2 StreamCast’s web sites.

3 Plaintiffs also point to evidence relating to StreamCast’s practice of notifying
4 Morpheus users when updated versions of the software are made available. Pls.
5 Mem., p. 35. Plaintiffs have introduced no evidence, however, suggesting that this
6 communication establishes any control over what individual Morpheus users choose
7 to search for, share or download.¹⁹

8 **3. Other features of the software do not amount to control.**

9 In another non sequitur, Plaintiffs assert that StreamCast has taken
10 “affirmative steps to prevent access by firms retained by copyright owners to
11 monitor and police copyright infringement.” Pls. Mem., p. 38. As an initial matter,
12 Plaintiffs’ implication that this action somehow is *per se* unlawful is belied by this
13 Court’s own precedents—investigators hired by copyright owners do not enjoy any
14 special rights beyond those of the public at large. *See Adobe v. Canus*, 173 F. Supp.
15 2d at 1047 (finding that trade show owner was entirely within its rights in ejecting
16 copyright investigators from trade show). Second, the facts surrounding this
17 allegation are in dispute. Smith Opp. Decl. ¶ 55; SGF §§ 4 (o), 6(i) & (l), 8(e). Third,
18 and most important, these allegations fail to establish that StreamCast had any ability
19 to control the files that Morpheus users search for, share and download. *Id.*

20 Plaintiffs reliance on the “terms of use” governing the use of FastTrack
21 versions of the Morpheus software also fails to support any inference of control over
22 the infringing activities of Morpheus users. Pls. Mem., p. 37. The terms of use
23 themselves expressly recognize and inform users that StreamCast has no ability to
24 control what Morpheus users choose to make available on the FastTrack user
25 network. SUF 6(c). The bare fact that there was a license agreement between

26 ¹⁹ With respect to the Gnutella versions of Morpheus, moreover, it is
27 undisputed that StreamCast has no ability to require users to accept the upgraded
28 software. Gribble Opp. Decl. ¶¶ 46-48. In fact, a large number of Morpheus users
continue to use the older 1.9 version of the Morpheus software notwithstanding the
availability of version 2.0. Smith Opp. Decl. ¶ 39.

1 StreamCast and users of the now-defunct FastTrack versions of Morpheus, without
2 any evidence that the agreement conveyed any ability to control the infringing
3 activities of users, cannot support a finding of vicarious liability. *See Banff Ltd.*, 869
4 F. Supp. at 1110 (noting that vicarious liability requires “actual control, rather than
5 simply the power to control”); *Bevan v. CBS, Inc.*, 329 F. Supp. 601, 610 (S.D.N.Y.
6 1971) (bare, unexercised contractual provision held insufficient to establish control).
7 With respect to the Gnutella versions of Morpheus, moreover, there is no contractual
8 relationship at all between StreamCast and Morpheus users. Smith Opp. Decl. ¶ 45;
9 SUF § 6(c).

10 Plaintiffs’ allegations regarding KazaaLib are not merely irrelevant, but verge
11 on frivolous. Quoting a document authored not by StreamCast but by Kazaa,
12 Plaintiffs claim that “all files in download directory [sic]...are always under
13 KazaaLib control.” Pls. Mem., p. 36. What Plaintiffs conveniently fail to mention is
14 that the software known as “KazaaLib” is a component of the Morpheus (and all
15 other FastTrack implementations at the time) software that resides on the *user’s*
16 computer. SGF § 6(c); Smith Opp. Decl. ¶ 26. Plaintiffs have come forward with no
17 evidence suggesting that StreamCast had any ability to control this component
18 remotely, or that it afforded StreamCast any ability to control what users chose to
19 search for, share or download. Plaintiffs’ contention is essentially the same as
20 pointing out that all the email messages on a person’s PC are “controlled” by the
21 user’s Microsoft Outlook software program. While this statement is surely correct, it
22 creates no inference that *Microsoft* controls the email of every person who uses
23 Outlook.

24 **4. Blocking alleged infringers from the user network.**

25 Plaintiffs also contend that StreamCast has the ability to block Morpheus users
26 from joining the user network, thus equating to “control.” Pls. Mem., p. 40.
27 Unfortunately, the evidence produced by Plaintiffs will not support summary
28 judgment on a claim of vicarious copyright liability.

1 With respect to the FastTrack-based versions of Morpheus, Plaintiffs point to
2 evidence that StreamCast had the ability to block individual Morpheus users from
3 accessing the FastTrack user network by deleting their names from the registration
4 database. Pls. Mem., p. 37. As a threshold matter, even Plaintiffs admit that this
5 method of “blocking” was ineffectual, as the software permitted users to
6 immediately create a new user name and rejoin the network. Creighton Decl. ¶ 12.
7 More importantly, however, there is ample evidence that, to the extent Plaintiffs
8 identified particular Morpheus users as alleged infringers by delivering
9 “infringement notices” to StreamCast, StreamCast deleted such users from the
10 registration database. SGF § 6(k). Accordingly, with respect to the ability to “block”
11 users of the FastTrack-based versions of Morpheus, there exists a disputed issue of
12 material fact regarding whether StreamCast “policed” its premises “to the fullest
13 extent.” *See Napster II*, 239 F.3d at 1023.

14 Moreover, even if there existed facts to show that StreamCast had the ability
15 to block access to the FastTrack user network or to block access to infringing
16 material, those facts in and of themselves do not establish “the right and ability to
17 control the infringing activity.” In *Ellison v. Robertson*, 189 F.Supp.2d at 1060-62,
18 the court held that AOL’s admitted ability to delete or block access to infringing
19 material, after those postings had already found their way onto the AOL network,
20 was insufficient to constitute the right and ability to control its users. The court
21 reasoned that, because the original act of infringement took place on the users’
22 computers rather than on AOL’s premises (i.e., its servers) and AOL had only post
23 hoc ability to remove the material, AOL could not be held vicariously liable.
24 Similarly, to the extent StreamCast ever had any ability to block users from joining
25 the network, that ability came after the infringing activity had taken place on
26 computers not owned or controlled by StreamCast. Since any infringement
27 admittedly occurs beyond the borders of StreamCast’s “premises,” it cannot be held
28 vicariously liable. *See id.* at 1062; *Hendrickson v. Ebay*, 165 F. Supp.2d 1082, 1094

1 (C.D. Calif. 2001) (online auction listings could not be held liable for infringing
2 activities completed by buyers and sellers outside the premises of the online service).

3 With respect to the Gnutella-based versions of Morpheus, Plaintiffs' showing
4 regarding "control over the infringing activity" is even weaker. The undisputed
5 evidence makes it clear that StreamCast simply has no right or ability to "block"
6 Morpheus users from joining the Gnutella user network. SGF § 6(k) & (l). As
7 discussed extensively in StreamCast's Vicarious Liability Motion, pp. 4-6,
8 StreamCast has not maintained a central registration database since March 2002, nor
9 has it maintained any "bootstrap" servers, or other mechanisms that would give it the
10 ability to block users from joining the Gnutella user network. SGF § 6(g); Gribble
11 Opp. Decl ¶ 21(b). Once a user has downloaded and installed the Gnutella version of
12 Morpheus, StreamCast has no ability to repossess the software or otherwise prevent
13 an individual user from using the software to access the Gnutella user network.

14 Rather than identifying any ability within the limits of the *existing* Morpheus
15 architecture to block particular users from the Gnutella user network, Plaintiffs are
16 left suggesting that StreamCast could take steps to either 1) disable the software for
17 all Morpheus users; or 2) modify the software to enable such a blocking ability. With
18 respect to the former option, there is "no case in which a defendant's 'power to
19 supervise' was based on his ability to terminate the business." *Universal Pictures,*
20 *Inc., et al. v. Sony Corp.*, 480 F. Supp. at 462. The latter course is discussed below.

21 **C. StreamCast Has No Duty to Redesign Its Software in the Absence of**
22 **a Finding of Liability**

23 The second category of evidence proffered by Plaintiffs to establish
24 StreamCast's ability to control the infringing activities of individual Morpheus users
25 comes in the form of the suggestion that StreamCast could have, and thus should
26 have, designed the technology differently, incorporating filtering technology to
27 prevent infringement. This argument suffers from insupportably circular logic. The
28 duty to modify a product only arises once liability has been established, which in

1 turn requires a demonstration that the defendant controls the directly infringing
2 activity. On Plaintiffs' view, the *ability* to redesign a product satisfies the "control"
3 element of vicarious liability, which gives rise to liability and a *duty* to redesign the
4 product. With this argument, Plaintiffs have invited the Court to transform the
5 doctrine of vicarious copyright liability into a general affirmative duty on the part of
6 technology vendors to design technologies to the specifications of copyright owners,
7 a position that finds no support in the vicarious liability jurisprudence and is flatly
8 inconsistent with the Ninth Circuit's ruling in the *Napster* case. In fact, Plaintiffs
9 made exactly this argument before the district court in the *Sony-Betamax* case, where
10 it was rejected. *See id.* (rejecting as evidence of "control" Sony's ability to redesign
11 the Betamax to include a jamming system or remove the tuner).²⁰ In *Napster*,
12 moreover, the Ninth Circuit specifically held that any duty to police that arises out of
13 vicarious liability principles "is cabined by the system's *current* architecture."
14 *Napster II*, 239 F.3d at 1024 (emphasis added). The court further noted that Napster
15 only had control over a central index of file names, and was not able to otherwise
16 "read" the content of files being shared by users. *Id.* Rather than premising vicarious
17 liability on Napster's failure to modify its technology to do more to protect
18 Plaintiffs' copyrights, the court stated that Napster's efforts to police were properly
19 limited to policing the existing "file name indices" maintained by Napster. *Id.*

20 The Ninth Circuit could not have spoken more plainly—vicarious liability
21 principles are cabined by a technology's "current architecture." *Accord Adobe v.*
22 *Canus*, 173 F.Supp.2d at 1054-55 (court evaluates "control" in light of the security

23
24 ²⁰ The district court also rejected the evidence of a hypothetical jamming
25 system by noting that such a system was not within Sony's unilateral capabilities.
26 *Universal Pictures*, 480 F. Supp. at 462. Similarly, the development of an effective
27 filtering system is not within the capabilities of StreamCast, requiring as it does the
28 creation of a database representing Plaintiffs' works. Smith Opp. Decl. p. 67.
StreamCast is obviously in no position to assemble such a database (the
reproductions of Plaintiffs' works required to create such a database may itself
constitute copyright infringement), and there is no evidence that Plaintiffs have made
any efforts to make such a master database available to the peer-to-peer community
or any third party who claims it has "filtering" technology.

1 force defendant trade show had hired, notwithstanding the fact that trade show could
2 have hired more, better trained security staff); *Artists Music v. Reed Publishing*, 31
3 U.S.P.Q.2d 1623, 1627 (S.D.N.Y. 1994) (vicarious liability imposes no duty on trade
4 show to hire copyright-savvy security staff). Accordingly, Plaintiffs' argument
5 regarding the kinds of filtering technologies that StreamCast *could have* built into the
6 Morpheus software is not only speculative and rife with disputed factual issues,²¹ but
7 is entirely irrelevant to the question of control for vicarious liability purposes.

8 What Plaintiffs' argument boils down to is an effort to use judge-made
9 vicarious liability principles to obtain a veto right over technologies that can be used
10 for infringement. Plaintiffs' notion takes us through the looking glass, into a world
11 where technology vendors are routinely held responsible for every act of
12 infringement committed by a customer, simply because the vendors could have
13 designed the product differently. In such a world, innovation would necessarily
14 suffer, as the specter of unlimited secondary copyright liability would chill the
15 efforts of technologists. If Plaintiffs believe this vision represents the proper balance
16 between copyright and innovation, they are free to advocate for their vision in
17 Congress.²² The Supreme Court, however, has made it clear that it is not the place of
18 copyright's judge-made secondary liability doctrines to resolve this policy debate.
19 *Sony-Betamax*, 464 U.S. at 441, n.21 ("It seems extraordinary to suggest that the
20

21 ²¹ Plaintiffs own declarants admit that none of their filtering systems have ever
22 been tested in a P2P network the size of either the FastTrack or Gnutella user
23 networks. Lapple Decl. Ex. 8 (Breslin Depo. T.) pp. 55-65; Lapple Decl. Ex. 9
24 (Ikezoye Depo. T.) pp. 33-42; Lapple Decl. Ex. 7 (Hyman Depo. T.) pp. 16-22, 53-
25 54. There is ample dispute in the record whether any of the filtering technologies
26 could feasibly be deployed while preserving the noninfringing capabilities of the
27 defendants' software. Gribble Opp. Decl. ¶¶ 59-64. Finally, it is not clear that the
28 coercive updates to the Morpheus software envisioned by Plaintiffs is consistent with
responsible computer software security practices. Lapple Decl. Ex. 5 (Gribble Depo.
T.) pp. 113:5-115:5.

²² In fact, several Plaintiffs have publicly stated their support for S. 2048, a
pending Senate bill introduced by Senator Hollings that would take substantial
strides toward precisely such a rule. See Consumer Broadband and Digital
Television Promotion Act, S. 2048, 107th, 2d Sess. (2002).

1 Copyright Act confers upon all copyright owners ... the exclusive right to distribute
2 VTR's simply because they may be used to infringe copyright.”).

3 **IV. CONTRIBUTORY INFRINGEMENT**

4 **A. Sony-Betamax**

5 In evaluating a contributory copyright infringement claim against a technology
6 vendor, the Supreme Court's *Sony-Betamax* opinion represents the starting point for
7 analysis. Realizing that courts must act cautiously when extending judge-made
8 secondary liability principals, the Court established the rule on which innovators of
9 all stripes have come to depend—that manufacturers and distributors of mass-market
10 technology for a variety of uses (“staple articles of commerce”) may not be subjected
11 to liability for distribution of the products to the general public so long as their
12 products are “merely capable of substantial noninfringing uses.” *Sony-Betamax*, 464
13 U.S. at 442. The rule applies even if the technology may be expected to be, and in
14 fact is, used by the public for infringing uses. As the Supreme Court stated:

15 [T]he sale of copying equipment, like the sale of other articles of commerce,
16 does not constitute contributory infringement if the product is widely used for
17 legitimate, unobjectionable purposes. Indeed, it need merely be capable of
18 substantial noninfringing uses. [¶] The question is thus whether the Betamax
19 is capable of commercially significant noninfringing uses.

20 *Id.* Holding that the Betamax video tape recorder was capable of at least two
21 noninfringing uses, taping programs authorized for recording by the copyright
22 owners, and fair use “time shifting” of programs, the Supreme Court upheld a
23 decision in favor of the manufacturer. *See id.* This decision has since been applied to
24 protect copying technology that had only a single noninfringing use. *See Vault Corp.*
25 *v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988).

26 **1. Substantial noninfringing uses of Morpheus.**

1 The undisputed evidence demonstrates that the Morpheus software, in both its
2 FastTrack and Gnutella incarnations, is capable of substantial noninfringing uses.
3 Plaintiffs have conceded as much in their opening papers.²³ See Plaintiffs’ SUF, pp.
4 58-65 (in addressing the *Sony-Betamax* defense, failing to contest substantial
5 noninfringing uses of Morpheus).²⁴ Plaintiffs’ own expert also agrees that Morpheus
6 is capable of substantial non-infringing users. See Lapple Decl. Ex. 6 (Kleinrock
7 Depo. T.) 125:1-7. As part of its motion for partial summary judgment regarding
8 contributory infringement, StreamCast has submitted voluminous evidence
9 establishing both current commercially noninfringing uses, as well as still-
10 developing potential noninfringing uses, of the Morpheus software. See pp. 4-8 of
11 StreamCast’s Contributory Infringement Motion.

12 Although the Supreme Court in the *Sony-Betamax* opinion did not have
13 occasion to explore the limits of what uses might be viewed as “substantial,” the uses
14 for Morpheus are “substantial” along any relevant dimension that can be imagined:
15 they are commercial,²⁵ and they further the important public policy goals that
16 animate copyright.²⁶

18 ²³ In fact, even using a blinkered search strategy, Plaintiffs’ own declarants
19 were unable to avoid finding works by Shakespeare, the King James Bible, the
20 Koran, the Communist Manifesto, and several Platonic dialogues, thus confirming
substantial noninfringing capabilities of the Morpheus software. See Creighton Decl.
Ex. 18, pp. 46-50 accompanying Plaintiffs’ Motion for Summary Judgment.

21 ²⁴ As discussed in StreamCast’s Motion for Partial Summary Judgment
22 Regarding Contributory Infringement (“Contributory Infringement Motion”) at pp.
23 10-11, Plaintiffs have the burden of providing evidence that the Morpheus software
is *incapable* of substantial noninfringing uses. They have failed to do so.

24 ²⁵ Mayers Decl. (J!VE Media is a for-profit company created to distribute
25 authorized works over P2P networks); Prelinger Decl. (Prelinger Archives, a for-
26 profit company, distributes works over P2P networks in order to generate additional
commercial business); Ian Decl. (describing increase in CD sales arising from P2P
distribution of music).

27 ²⁶ Kahle Decl. (P2P technologies will make the public domain more accessible
28 to the public); Newby Decl. (same). The evidence of noninfringing uses, at a
minimum, raises a disputed issue of material fact as to “substantiality,” thus barring
grant of Plaintiffs’ motion for summary judgment on this point.

1 Plaintiffs repeatedly suggest that the “substantiality” of noninfringing uses be
2 evaluated in light of the *proportion* of infringing and noninfringing uses, rather than
3 on the *capability* for noninfringing uses.²⁷ See p. 49, Pls. Mem. This is precisely the
4 rule, however, that the *minority* of the Supreme Court argued for in the *Sony-*
5 *Betamax* opinion. See *Sony-Betamax*, 464 U.S. at 491. The *majority* of the Court, in
6 contrast, rejected that approach in favor of a “capability” standard, holding that a
7 single noninfringing capability of the Betamax that qualified as “substantial” was the
8 capability to tape programs authorized by copyright owners for recording,
9 notwithstanding the fact that such uses accounted for merely seven percent of all
10 uses. See *id.* at 424. The Ninth Circuit, moreover, emphasized the “capability”
11 standard in its *Napster* ruling, criticizing the district court for its focus on current
12 uses, rather than capabilities. See *Napster II*, 239 F.3d at 1020-21.

13 2. **In order to overcome *Sony-Betamax*, Plaintiffs must show**
14 **that StreamCast had specific knowledge and the capacity to**
15 **act upon it.**

16 Notwithstanding the substantial noninfringing capabilities of the Morpheus
17 software, Plaintiffs contend that StreamCast has knowledge of infringing activity by
18 Morpheus users, and that such knowledge strips StreamCast of the protections of the
19 *Sony-Betamax* doctrine. Plaintiffs, however, are mistaken. They have produced no
20 evidence, much less undisputed evidence, that StreamCast had the kind of *specific*
21 *knowledge*,²⁸ coupled with *a capacity to act* on such knowledge, that is required to
22 impose contributory infringement liability upon a technology vendor.

23
24 ²⁷ To the extent that dicta in the recent preliminary injunction ruling in *In re*
25 *Aimster Copyright Litigation* suggests otherwise, StreamCast respectfully submits
that Judge Aspen erred in his analysis.

26 ²⁸ Specific knowledge can take the form of either constructive or actual
27 knowledge. See *Napster IV*, 2002 WL 398676 at *7 (noting that actual knowledge is
28 not required to overcome *Sony-Betamax*). The crucial question is whether a
defendant knows that a particular person is engaging in infringing activities, and
whether the defendant could have stopped the infringement, but failed to act.

1 Where a technology capable of substantial noninfringing uses is concerned,
2 contributory infringement liability requires *both specific knowledge* and a *capacity to*
3 *act*. See *Napster IV*, 2002 WL 398676 at *7 (“This combination of knowledge and
4 failure to act trumped *Sony-Betamax* concerns.”). Both the leading precedents and
5 common sense make this plain. The fundamental teaching of *Sony-Betamax* is that
6 generalized knowledge of infringing uses cannot satisfy the knowledge requirement
7 for contributory infringement where a technology is also capable of substantial
8 noninfringing uses. See *Sony-Betamax*, 464 U.S. at 439 (finding no precedent to
9 support liability against Sony based “on the fact that they have sold equipment with
10 constructive knowledge of the fact that its customers may use that equipment to
11 make unauthorized copies of copyrighted material.”); see also *Napster II*, 239 F.3d at
12 1020 (citing *Sony-Betamax* as rejecting the proposition that “merely supplying the
13 means to accomplish an infringing activity leads to imposition of liability”); *Vault*,
14 847 F.2d at 262. (software vendor had “actual knowledge that its product is used to
15 make unauthorized copies of copyrighted material”). Indeed, Sony knew that its
16 Betamaxes would be used for infringement, as does every vendor of VCRs, audio
17 cassette recorders, personal computers, broadband internet service, and photocopiers.
18 In fact, Sony’s own executives admitted during the *Sony-Betamax* proceedings that
19 they knew that the main use of the Betamax would be for infringement. See
20 *Universal*, 480 F. Supp. at 459. If general knowledge, absent the capacity to act,
21 were sufficient for imposition of contributory liability, then Sony would today be
22 liable for the infringing uses of VCRs by consumers, and Xerox would be liable for
23 the infringing activities at every copy shop in America.

24 The Ninth Circuit’s *Napster* opinion further supports the view that general
25 knowledge is insufficient. There, the Ninth Circuit began by noting that the record
26 supported the district court’s findings that Napster had both constructive and actual
27 knowledge of infringement by its users. *Napster II*, 239 F.3d at 1020. The court,
28 however, did not end its analysis there (as Plaintiffs would have this Court do).

1 Rather, the Ninth Circuit held that the Napster technology was capable of
2 noninfringing uses, that the *Sony-Betamax* doctrine applied, and thus required *more*
3 *than* generalized knowledge of infringement. *See id.*, at 1021-22. The court noted
4 that, “in an online context, evidence of *actual knowledge of specific acts of*
5 *infringement* is required to hold a computer system operator liable for contributory
6 infringement.” *Id.* at 1021. In the end, the court expressly conditioned contributory
7 liability on the conjunction of *specific knowledge* and *a capacity to act*: “Napster has
8 *actual* knowledge that *specific* infringing material is available using its system, that it
9 could block access to the system by suppliers of the infringing material, and that it
10 failed to remove the material.” *Id.* at 1022 (emphasis in original).²⁹

11 **3. Plaintiffs have failed to show that StreamCast had specific**
12 **knowledge of infringing activity at a time when it could have**
13 **acted to prevent such activity.**

14 In their recital of “knowledge” evidence, Plaintiffs appear to have taken their
15 cue from the original preliminary judgment ruling in *Napster*, lumping together all
16 manner of materials suggesting generalized knowledge that the Morpheus software
17 can be and is being used for infringement. *See A&M Records, Inc. v. Napster Inc.*,
18 114 F. Supp. 896, 918-19 (N.D. Cal. 2000), *aff’d in part, vacated in part*, 239 F.3d
19 1004 (9th Cir. 2001). Plaintiffs must still show that StreamCast knew about specific
20 infringing activity by a particular Morpheus user, and failed to act on such
21 knowledge. This they have failed to do.

22 The bulk of Plaintiffs’ “knowledge” evidence relates to general knowledge of
23 the *infringing capability* of the co-defendants’ software, rather than establishing
24 specific knowledge. For example, Plaintiffs make much of allegations that the co-

25 ²⁹ As articulated by the Ninth Circuit, this standard reflects the need to
26 accommodate common law concepts of secondary liability to the online context. *See*
27 *Napster II*, 239 F.3d at 1021 (citing with approval *Religious Tech. Ctr. v. Netcom*
28 *On-Line Comm. Services, Inc.*, 907 F. Supp. 1361, 1371 (N.D. Calif. 1995) “which
suggests that in an online context, evidence of actual knowledge of specific acts of
infringement is required to hold a computer system operator liable for contributory
copyright infringement”).

1 defendants “patterned themselves” after Napster.³⁰ Even if true,³¹ these allegations
2 are wholly irrelevant to the question of whether StreamCast had specific knowledge
3 regarding infringing activity by any particular Morpheus user. Plaintiffs’ entire
4 discussion of StreamCast’s involvement with openNap technology, is similarly
5 irrelevant, as awareness of possible infringing conduct relating to that earlier system
6 plainly cannot convey any information about the infringing activity of any particular
7 Morpheus users. Moreover, allegations regarding the use of copyrighted music in
8 internal company emails and network testing do not give rise to any *specific*
9 *knowledge regarding infringing activities by any particular Morpheus users*. Nor,
10 for that matter, does occasional personal use by StreamCast personnel of the
11 Morpheus software.³²

12 Plaintiffs’ entire recital of allegations going to “constructive knowledge”
13 misses the mark for the same reason. The fact that StreamCast personnel may have
14 approached copyright owners seeking licenses in relation to an earlier, streaming
15 media business plan, or that StreamCast protects its own intellectual property, or that
16 StreamCast personnel have experience in the entertainment industries, or that they
17 have seen media reports alleging widespread infringement among unidentified
18 Morpheus users—none of these allegations are relevant to the question of whether
19

20 ³⁰ It is also worth noting that, contrary to Plaintiffs’ rhetorical flights, there is
21 nothing inherently infringing about the P2P technologies pioneered by Napster, nor
22 anything inherently illegitimate about seeking to emulate its networking capabilities.
23 *See Napster II*, 239 F.3d at 1020 (“We are compelled to make a clear distinction
24 between the architecture of the Napster system and Napster’s conduct in relation to
the ... system.”). Nor is there anything unlawful about attempting to attract Napster’s
former users, none of whom were adjudged by any court to be an infringer and none
of whom were identified by Plaintiffs to StreamCast as being suspected infringers.

25 ³¹ Whether StreamCast set out to emulate the *infringing conduct* of Napster is
hotly disputed. *See* Smith Opp. Decl. ¶ 90; SGF § 3(f).

26 ³² Message traffic on StreamCast message boards, when such boards were in
27 existence, also could not give rise to specific knowledge of infringing activity by
28 particular Morpheus users, because the user names employed there had no
relationship to the user names used in connection with the Morpheus software. Smith
Opp. Decl. ¶ 88.

1 StreamCast had specific knowledge of infringing activity by any particular
2 Morpheus user, coupled with the capability to prevent such activity.³³

3 What Plaintiffs are left with are the voluminous “infringement notices” that
4 they have periodically delivered to StreamCast. Not only do these notices lack the
5 required specificity to put StreamCast on notice, but to the extent that these notices
6 actually create specific knowledge on the part of StreamCast of the infringing
7 activities of particular Morpheus users,³⁴ they nevertheless fail to establish that
8 StreamCast failed to act in response to them.

9 With respect to the FastTrack-based versions of Morpheus, StreamCast has
10 come forward with evidence showing that it did act in response to Plaintiffs’ notices,
11 taking steps to block access to the FastTrack network by eliminating entries from the
12 registration database. SGF § 6(k); Smith Opp. Decl. ¶ 84. The evidence indicates, at
13 a minimum, disputed issues of fact regarding whether StreamCast, once notified by
14 Plaintiffs of infringing activity by a Morpheus user, did everything within its power
15 to prevent such activities. *See Napster II*, 239 F.3d at 1022.

16 With respect to the Gnutella-based versions of Morpheus, the undisputed facts
17 establish that StreamCast lacks any capacity to act in response to the notices received
18 from Plaintiffs. SGF §§ 6(c), 7 (k); Smith Opp. Decl. ¶¶ 43-46; Lapple Decl. Ex. 6

19 _____
20 ³³ The district court in *Napster* explained the kind of constructive knowledge
21 of specific infringing activity that would be relevant in connection with overcoming
22 the *Sony-Betamax* doctrine: “For example, assume Napster tracked down a single
23 individual with a vast library of sound recordings, some of which Napster suspected
24 but did not know were copyrighted by other parties. If Napster extended an personal
25 invitation to that individual to join the Napster Music Community in order to
26 increase the number of songs available on its system, Napster’s conduct might render
27 it liable for the individual’s infringement.” *Napster IV*, 2002 WL 398676 at *7.

28 ³⁴ Plaintiffs have utterly failed to bring forth *any* evidence that would prove
that *Morpheus users* were making available for downloading any musical works.
They make very broad, sweeping allegations that Defendants’ users are infringing,
but a close review of the notice letters and the accompanying infringement reports
reflect a lack of any real proof that *Morpheus users* were committing copyright
infringement. *See* examples of Plaintiffs’ infringement reports, Lapple Decl. Exs. 14
& 15. At most the notice letters impart general knowledge that some users on the
FastTrack or Gnutella network were offering files for download. SGF § 2(b) & (c),
3(a). However, that fails to meet the specific knowledge requirements under *Napster*.

1 (Kleinrock Depo. T.) 129:14-130:9. As discussed in more detail in StreamCast’s
2 Contributory Infringement Motion, Plaintiffs’ notices by necessity arrived after the
3 distribution of the Morpheus program, at a time when StreamCast had no ability to
4 act upon the notices. StreamCast possesses neither the legal right to repossess the
5 software, nor the technical ability to disable it, just as Sony lacked the ability to
6 repossess or disable a VCR after distributing it to the public. Short of modifying the
7 basic architecture of the technology, StreamCast had no capacity to respond
8 meaningfully to the notices delivered by Plaintiffs.

9 **B. Plaintiffs’ efforts to invent prerequisites for *Sony-Betamax* find no**
10 **support in the law**³⁵

11 In a half-hearted attempt to whittle away the importance of *Sony-Betamax*,
12 Plaintiffs invent what they characterize as prerequisites that a defendant must show
13 before invoking the staple article of commerce doctrine. With the exception of the *In*
14 *re Aimster*³⁶ decision, Plaintiffs’ inventions have no basis in the law.

15 First, Plaintiffs make much of the distinction between a “product” and a
16 “service,” arguing that any “ongoing relationship” between StreamCast and its users
17 makes the *Sony-Betamax* doctrine somehow inapplicable. There is no basis for this
18 artificial distinction. Plaintiffs support their invention with a misleading quotation
19 from the following section of *Sony-Betamax*:

20 [T]he label “contributory infringement” has been applied in a number of lower
21 court copyright cases involving an ongoing relationship between the direct

22 _____
23 ³⁵ Plaintiffs’ claim that under *Napster* the *Sony-Betamax* defense is not
24 applicable to vicarious liability. StreamCast respectfully disagrees with the Ninth
25 Circuit’s decision on this issue but understands that this Court is bound to follow the
26 *Napster* decision. StreamCast reserves the right to raise this argument on appeal.

27 ³⁶ Plaintiffs repeatedly cite to the *Aimster* case in their brief. StreamCast
28 respectfully suggests that because Judge Aspen’s discussion fails to heed the
29 teachings of *Napster II*, it is of limited value to courts within the Ninth Circuit. *See*
30 *Aimster*, at *2 fn. 4 (“[T]he *Napster* decision, while certainly persuasive on some
31 points, is simply not precedential authority in this circuit.”) Second, *Aimster*’s
32 system operated differently from the Morpheus software, relying on a centralized
33 architecture that gave *Aimster* control over its users. *See id.* at *3-6.

1 infringer and the contributory infringer at the time the infringing conduct
2 occurred.

3 *Sony-Betamax*, 464 U.S. at 437. In the very next sentence, however, the Court
4 singles out the distinguishing feature of these cases—that the ongoing relationship in
5 each case was of a sort that gave rise to control over the infringements of the direct
6 infringer.

7 In such cases, as in other situations in which the imposition of vicarious
8 liability manifestly just, the “contributory” infringer *was in a position to*
9 *control the use of copyrighted works by others and had authorized the use*
10 *without permission from the copyright owner.*

11 *Id.* (emphasis added). As an examination of the entire passage makes clear, the
12 Supreme Court nowhere endorses a simple “device/service” distinction, but rather
13 looks to whether knowledge of the infringing activity is conjoined with the ability
14 “to control the use of copyrighted works by others.” Moreover, while the district
15 court’s first preliminary injunction ruling in *Napster* embraced the “device/service”
16 distinction, see *Napster I*, 114 F.Supp.2d at 916-17, the Ninth Circuit rejected this
17 artificial approach on appeal for the straightforward rule discussed above, holding
18 *Napster* liable for having specific knowledge of infringing activity, and for failing to
19 act on it, see *Napster II*, 239 F.3d at 1021-22.

20 In any event, contractual relationships and some degree of contact with users
21 cannot render *Sony-Betamax* inapplicable to distribution of the Morpheus software
22 program. “Staple articles of commerce” such as video recorders commonly come
23 with warranties; they are commonly leased as well as sold; they commonly are
24 repaired after delivery; they are commonly registered by their users; and they
25 commonly come with restrictions against user misconduct that may or may not be
26 enforced by their distributors. Under Plaintiffs’ theory, a warranty registration of a
27 *Betamax* would have required a contrary result in *Sony-Betamax*.

1 Second, Plaintiffs baldly assert that the *Sony-Betamax* doctrine has no
2 application to anything other than “private home copying” technologies, and that the
3 doctrine does not reach distribution technologies. There is absolutely no basis for this
4 assertion. While the *Sony-Betamax* opinion may have addressed the VCR, there is
5 nothing in its rationale to suggest that the Court intended to limit its reach solely to
6 technologies capable only of private copying. Such a reading would effectively leave
7 all other technology vendors at the mercy of contributory infringement actions,
8 thereby extending Plaintiffs’ copyright monopoly to encompass communications
9 technologies, including copiers, telephones, fax machines, routers, and the entire
10 infrastructure of the Internet. Such a reading of the *Sony-Betamax* opinion would be
11 particularly unjustified in light of the fact that the Betamax recorded onto *removable*
12 video-cassettes, and thus was itself a distribution technology, as well as a
13 reproduction technology (one could send a recorded tape to a friend by mail, for
14 example).

15 Third, Plaintiffs argue that the *Sony-Betamax* doctrine does not apply where a
16 technology is “specifically designed for infringing use,” citing *A&M Records v.*
17 *Abdallah*, 948 F. Supp. 1449 (C.D. Cal. 1996). To the extent the Court credits the
18 dicta³⁷ that Plaintiffs cite, Plaintiffs here have not produced a scintilla of evidence
19 suggesting that the Morpheus software was “specifically manufactured” for
20 infringing purposes. Moreover, *Abdallah* is distinguishable, in that the district court
21 also found (in determining liability) that there were no substantial non-infringing
22 uses because of the tapes’ nonstandard sizes, focusing on the fact that Abdallah had
23 received legitimate recordings from counterfeiters, timed these recordings for them,
24 and manufacture custom cassettes that fit the specific recordings to be counterfeited.

25 ³⁷ In *Abdallah* the defendant was actively involved in the counterfeiter’s
26 enterprise and directly assisted and *financed* the counterfeiters. *See Abdallah*, 948 F.
27 Supp. at 1457. As a result, the court held the defendant liable for his conduct and
28 involvement with the counterfeiting enterprise, not for the mere sales of time-loaded
cassettes, stating that “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.* at 1457

1 Here, StreamCast did not custom design the Morpheus software at the behest of
2 known counterfeiters, nor have Plaintiffs produced any evidence suggesting
3 otherwise.³⁸

4 Finally, Plaintiffs assert that the *Sony-Betamax* doctrine does not apply where
5 a technology can be redesigned to eliminate infringing uses while preserving
6 noninfringing uses. This very argument was flatly rejected in the *Sony-Betamax* case
7 itself, where the movie studio plaintiffs (whose corporate descendants are Plaintiffs
8 in this action) suggested that the infringing uses of the Betamax could be easily
9 addressed by either 1) removal of the tuner or 2) incorporation of a “jamming
10 system” that would require VCRs to respond to “no copy” markers embedded into
11 television signals. *See Universal*, 480 F. Supp. at 462. Plaintiffs’ conception gets the
12 analysis precisely backward—the Supreme Court’s opinion in *Sony-Betamax* makes
13 it clear that, so long as a technology is capable of substantial noninfringing uses, its
14 vendor is not liable under contributory infringement principles and thus has *no*
15 *obligation* redesign the product to the copyright owners specification.³⁹

16 **C. There is Insufficient Evidence to Establish that Morpheus Users**
17 **Have Directly Infringed All of the Works at Issue**

18 Plaintiffs claim that the evidence of direct copyright infringement is
19 “overwhelming.” That is not the issue. What is at issue is whether Plaintiffs have

20 ³⁸ Similarly, in *RCA Records v. All-Fast Systems, Inc.*, 594 F. Supp. 335
21 (S.D.N.Y. 1984) also cited by Plaintiffs, the court concluded in a direct infringement
22 action that an injunction could issue against infringing (but not noninfringing) uses
23 of defendant’s tape duplication machines. Crucial to this exercise of remedial power
24 was the court’s finding that the defendant exercised “complete control” over the
25 machines in question. *See RCA*, 594 F. Supp. at 339. In the instant case, of course,
the scope of the Court’s remedial powers are not at issue, since StreamCast has not
been found liable. Moreover, as discussed below, Plaintiffs’ evidence certainly does
not establish that StreamCast has “complete control” over third parties who use the
Morpheus software.

26 ³⁹ The cases cited by Plaintiffs to support this assertion are entirely inapposite.
27 *RCA v. Allfast* was a simple direct infringement case, where contributory
28 infringement was not at issue. In *Compaq Computer v. Procom Tech.*, 908 F. Supp.
1409 (S.D. Tex. 1995), the defendant found no shelter under the staple article of
commerce doctrine because the feature in question had no substantial noninfringing
uses.

1 proven that users of the Morpheus software directly infringed the works at issue in
2 the Plaintiffs' motion. They have not.

3 Plaintiffs' rely on two pieces of evidence to show direct infringement by
4 Morpheus users: 1) notice letters sent by Plaintiffs' representatives which invariably
5 list a variety of allegedly copyrighted works that are "available" for downloading on
6 the FastTrack or Gnutella user network (but not necessarily being offered by *users* of
7 the Morpheus software)⁴⁰; and 2) testimony by one or more declarants trying to
8 prove that the files allegedly available on the network are what they purported to be
9 (i.e., copyrighted works).⁴¹ The Record Company Plaintiffs, however, have failed to
10 verify that the works that they found on the user network are, in fact, what they
11 purport to be: a substantially correct copy of copyrighted music owned by one of the
12 Record Company Plaintiffs. *See* Creighton Decl. ¶ 16, 17 and 32 (general allegations
13 of downloading by others); Lapple Decl. Ex. 4 (Creighton Depo. T.) 130:6-13;
14 92:14-93:6. The law requires that the content of a user file be "substantially similar"
15 to the content of the copyrighted work before direct infringement will be found.
16 *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992). The mere
17 correlation of a file name and the name of a copyrighted work does not satisfy this
18 burden. *See Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990). Even Plaintiffs'
19 counsel agree that it is their burden to prove this.⁴² Because proof of direct
20

21 ⁴⁰ StreamCast cannot be held responsible for the infringement by users of
22 other software products. Yet, Plaintiffs are improperly charging StreamCast with
contributing to the infringement of all users that are connected to the user network.

23 ⁴¹ Plaintiffs also cite to the *Napster* opinion as to why the Court should make a
24 finding of direct infringement. But, that is wholly insufficient; there still must be
evidence submitted to make such a determination.

25 ⁴² "There is not going to be any doubt at the liability phase that the files we
26 move on are, in fact, our[s]. And they are, in fact, real files and not spoofs.
27 Spoofing is a form of anti-piracy protection. But as to the files at issue [in] this
28 phase, it's going to be out [sic] burden to prove those are our files. And those are
actually the real thing. We're going to do that." David Kendall, lead counsel for
some of the motion picture studio plaintiffs at July 8, 2002 hearing *See* Lapple Decl.
Ex. 1.

1 infringement of the Record Company Plaintiffs' works is lacking, summary
2 judgment for these Plaintiffs is improper.⁴³

3 Moreover, all of the Plaintiffs have failed to prove that any direct infringement
4 resulted from the use of StreamCast's software. Plaintiffs claim that because *they*
5 downloaded copies of their copyrighted works from users of *Defendants' systems*
6 that this amounts to sufficient proof of direct infringement. However, as recently
7 held in *Arista Records, Inc. et al. v. MP3Board, Inc.*,⁴⁴ slip. op. 00 CV. 4660 (SHS)
8 (S.D.N.Y. filed August 29, 2002), that type of evidence is insufficient to support
9 summary judgment.⁴⁵

10 The Plaintiffs rely here on the same evidence (and even some of the some
11 declarants) to try to prove-up their direct infringement case. But as in the *MP3Board*
12 case, there are material fact issues concerning underlying direct infringement by
13 users of Morpheus and thus, summary judgment should be denied.

14 **D. There Are Disputed Issues of Fact Whether StreamCast Materially**
15 **Contributes to Infringement**

16 Plaintiffs claim that they satisfy the "material contribution" standard under
17 *Fonovisa* and *Napster I* because they allege that StreamCast, through its software

18 ⁴³ Plaintiffs have also failed to show that they used the Morpheus software to
19 conduct their searches or downloads. Their declarants have instead made
20 generalized statements of using the "Morpheus system." See Declaration of
21 Jonathan Cole. Moreover all of the Plaintiffs' declarations filed to prove ownership
of the works at issue, for example, refer to downloading of works "from the
FastTrack network via the Grokster system." See Decls. of Eisenberg, Cottrell, Seklir
and Ostroff. Of course, evidence that may implicate Grokster surely does not suffice
as to what is available on the Morpheus user network.

22 ⁴⁴ See Ex. 12, Lapple Decl.

23 ⁴⁵ In *MP3Board*, the plaintiffs, many of which are plaintiffs in this case,
24 moved for summary judgment as to contributory and vicarious liability claiming that
25 MP3Board contributed to direct infringement of copyrighted music. As part of their
26 summary judgment motion, plaintiffs (like here) submitted evidence that their
27 investigators, and certain employees of their lawyers, had downloaded the works
28 using MP3Board's "system." Judge Stein denied the record companies' summary
judgment motion, finding that there was no *direct* evidence of infringement showing
the downloading of copyrighted files. Additionally, Judge Stein held that the record
company plaintiffs' had failed to show a violation of their distribution rights because
the plaintiffs failed to produce evidence that there had been an actual dissemination
of copies of their works. See *MP3Board*, slip. op. at pp. 7-8.

1 and support services, has provided the means, environment, and support to allow
2 infringement. Plaintiffs, however, cannot obtain summary judgment on their
3 contributory infringement claim because there exists disputed issues of fact
4 regarding the *substantiality* of StreamCast’s contribution to infringement.

5 Unlike the swap meet vendor in *Fonovisa* who provided the actual physical
6 environment (or the “site” and “facilities”) and related support services (parking,
7 advertising, and the ability to exclude), StreamCast only provides the software that
8 may or may not be used to infringe. Smith Opp. Decl. ¶ 34. It does not supply the
9 “site” for infringement (any alleged infringement occurs on the users’ computer,
10 which StreamCast does not own, operate or control) nor does StreamCast provide
11 any services that provide StreamCast with any knowledge regarding, or control over,
12 the file-sharing activities of users. Smith Opp. Decl. ¶ 34; Gribble Opp. Decl. ¶¶ 41,
13 42(f), 43-46 and 49. Simply put, StreamCast’s distribution of the Morpheus software
14 no more “materially contributes” to the infringing activities of users than would the
15 sale of tables and chairs to the booth vendors in *Fonovisa*.

16 Merely supplying the “means to accomplish an infringing activity,” and even
17 encouraging that activity through advertising, cannot give rise to the imposition of
18 liability for contributory copyright infringement. *Sony-Betamax*, 464 U.S. at 436; *see*
19 *also Napster II*, 239 F.3d at 1020-21. Instead, “material contribution” requires that
20 participation in the infringement be substantial, that the provided assistance must
21 bear a direct relationship to the infringing acts, and the contributory infringer must
22 have acted in concert with the direct infringer. *Marvullo v. Gruner & Jahr*, 105 F.
23 Supp. 2d 225, 230 (S.D.N.Y. 2000); *RTC v. Netcom*, 907 F. Supp. at 1375;
24 *Demetriades v. Kaufmann*, 690 F. Supp. 289, 293-94 (S.D.N.Y. 1988).

25 Not only has StreamCast disputed much of the evidence⁴⁶ Plaintiffs have
26 submitted to show that StreamCast provides the site, facilities and the necessary

27 ⁴⁶ The majority of Plaintiffs’ evidence in this regard is made up of self-
28 serving, conclusory statements and opinions from Prof. Kleinrock that lack proper
foundation. *See*, SGF §§ 6(i), 7 and 8(c).

1 support services that substantially assist its users in downloading music, that
2 evidence, even if true, is still insufficient because *all* of the incidental “services”
3 StreamCast allegedly provides do not assist in, or bear any relationship to, the
4 infringing activity.

5 **V. PLAINTIFFS’ COPYRIGHT MISUSE PRECLUDES SUMMARY**
6 **JUDGMENT**

7 A copyright owner may be prohibited from prosecuting a claim of
8 infringement if the owner 1) violates the antitrust laws; 2) seeks to illegally extend
9 its monopoly beyond the scope of its copyright; or 3) violates the public policies
10 underlying the copyright laws. *In re Napster, Inc. Copyright Litigation*, 191 F. Supp.
11 2d 1087 (N.D. Calif. 2002).

12 In the *Napster* case, Napster argued, in the face of a similar liability summary
13 judgment motion, that the plaintiffs’ entry into the digital distribution market was
14 rife with anti-competitive effects and potential antitrust concerns. Napster’s
15 arguments were based primarily on the declaration of Dr. Roger Noll⁴⁷, a Stanford
16 professor who specializes in antitrust economics and the recording industry. Dr. Noll
17 concluded that some of the plaintiffs’ joint ventures, MusicNet and *pressplay*,⁴⁸ have
18 anti-competitive features and facilitate collusive activity. Judge Patel found that
19 based on Dr. Noll’s declaration, Napster had raised “serious questions” with respect
20 to possible copyright misuse, and denied the plaintiffs’ summary judgment motion
21 under Rule 56(f) in order to allow discovery to sufficiently oppose plaintiffs’ motion
22 for summary judgment. *See In re Napster, Inc. Copyright Litigation* at 1109.

23 StreamCast is in the same position as Napster. Based on the record established
24 in *Napster*,⁴⁹ StreamCast should be allowed, as Napster was, to develop this defense.

25 _____
26 ⁴⁷ See Lapple Decl. Ex. 13.

27 ⁴⁸ Many of the motion picture plaintiffs recently announced the formation of a
similar joint venture called MovieLink.

28 ⁴⁹ StreamCast asks the court to take judicial notice of the filings in that case.

1 Copyright misuse discovery has not been fully developed at this point in the
2 litigation because the focus of the discovery to date has been on liability issues, not
3 defenses.⁵⁰ Accordingly, Plaintiffs' motion for summary judgment should be denied,
4 and StreamCast should be allowed to conduct discovery to establish the necessary
5 evidence in support of its copyright misuse defense.

6 **VI. CONCLUSION**

7 For these reasons, the Court should deny Plaintiffs' Motion for Summary
8 Judgment.

9
10 Dated: October 21, 2002

Respectfully submitted,
BROBECK, PHLEGER & HARRISON LLP

11
12
13 By _____
14 Charles S. Baker

15 Attorneys for Defendants MusicCity.com, Inc. (now
16 known as StreamCast Networks, Inc.) and MusicCity
17 Networks, Inc.

18
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20
21
22
23
24 _____
25 ⁵⁰ The focus of this phase of the litigation, as even Plaintiffs concede, has been
26 on Defendants' liability under *Napster* and *Sony-Betamax*. Accordingly,
27 StreamCast's other defenses to liability and damages (including the applicability of
28 the DMCA) are not foreclosed for future consideration by this Court.