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NAPSTER, INC.

15 UNITED STATES DISTRICT COURT  
16  
17 NORTHERN DISTRICT OF CALIFORNIA

18 IN RE NAPSTER, INC. COPYRIGHT  
19 LITIGATION

Case No. C-MDL-00-1369 (MHP)

**NAPSTER'S THIRD CONSOLIDATED  
REPORT OF COMPLIANCE WITH THE  
MODIFIED PRELIMINARY  
INJUNCTIONS ENTERED IN CASE  
NOS. C99-05183 MHP, C00-0074 MHP,  
C00-2638 MHP, C00-3997 MHP, AND  
C00-4068 MHP AND RESPONSE TO  
PLAINTIFFS' REPORT ON NAPSTER'S  
NON-COMPLIANCE WITH MODIFIED  
PRELIMINARY INJUNCTIONS**

26 **COMPLIANCE REPORT NUMBER 3**

27 **DATED APRIL 3, 2001**  
28

1 Napster, Inc. (“Napster”) hereby submits its Third Consolidated Report of Compliance  
2 (“Third Report”), identifying the steps it has taken to comply with the Court’s Orders for the  
3 period from March 16, 2001 through March 30, 2001, and its Response to Plaintiffs’ Report on  
4 Napster’s Non-Compliance With Modified Preliminary Injunctions (“Plaintiffs’ Report” or “Plfs.  
5 Rep.”).

6 **I. INTRODUCTION**

7 The success and timeliness of Napster’s exclusion of file names that include *accurate*  
8 artist and title information is now incontrovertible: in less than three weeks the number of files  
9 per user now listed on the Napster index has dropped by more than half, as Napster’s screens  
10 have excluded file names corresponding with Plaintiffs’ notices.

11 Since its last Report on March 20, 2001, Napster has (1) increased its compliance staff by  
12 15 people, (2) adopted a policy to terminate users who modify file names to circumvent Napster’s  
13 blocking of infringing files, and (3) improved and refined its exclusion algorithms continuously.  
14 These improvements include blocking user *searches* of its index whenever search terms  
15 correspond to the names of infringing files, and implementing a new “keyword” identification of  
16 variant names of artists and titles by using partial names or phrases. These improvements are  
17 already working, and they have very substantially enhanced the effectiveness of Napster’s  
18 exclusion devices even in the time since Plaintiffs’ Report was filed.<sup>1</sup> *See* Part II, *infra*.

19 Plaintiffs assert that Napster has not complied with this Court’s modified preliminary  
20 injunctions (“Orders”). But those arguments have little to do with compliance with the letter of  
21 the Court’s Orders. Rather, Plaintiffs object fundamentally to the allocation of burdens and duties  
22 mandated by the Ninth Circuit and reflected in this Court’s Orders. We address each of these  
23 objections—which seek to relitigate issues already decided—below. *See* Part III, *infra*.

24 Plaintiffs have also, both publicly and before this Court, adopted a practice of sharp  
25 criticism of Napster’s efforts to comply with the Court’s Orders and, indeed, a criticism of the  
26

27  
28 <sup>1</sup> For example, many of the types of variant file names that previously were not screened will  
now be excluded. *See* Part II, *infra*.

1 Orders themselves.<sup>2</sup> Yet, when compared to the language of the Orders and the documented facts  
2 regarding Napster's compliance, Plaintiffs' characterizations are regrettable, for they are not  
3 designed to help facilitate the cooperation among the parties that this Court expects and requires,  
4 and that Napster is more than willing to extend to Plaintiffs. They are unfair in light of the extent  
5 of the good-faith effort that Napster has already expended (as will be described in this Third  
6 Report). And they make no sense, because they are based upon an attempt to circumvent the  
7 requirements set by the Ninth Circuit and contained in this Court's orders.<sup>3</sup> By electing to use the  
8 compliance process as a vehicle for advancing positions that have nothing to do with the parties'  
9 respective burdens under the Court's Orders, Plaintiffs are impeding the very process they  
10 maintain should be accelerated.

11 In any event, Napster is continuing its efforts—which have been Napster's first and  
12 overriding priority since entry of the Orders—to develop and refine appropriate means and  
13 techniques of file blocking. It will continue to do so with the assistance of the Neutral Expert  
14 appointed to address compliance issues. And it will continue its evaluation of potential, but  
15 unproven, screening technologies. *See* Part IV, *infra*.

16 It is Napster's hope and expectation that Plaintiffs will cooperate in that process for the  
17 parties' mutual benefit. In all events, all will benefit from the Court's resolution of certain  
18 disputes addressed below. *See* Part V, *infra*.

19 **II. NAPSTER IS COMPLYING IN GOOD FAITH WITH THE COURT'S MODIFIED**  
20 **PRELIMINARY INJUNCTIONS**

21 **A. Napster's Efforts to Date**

22 During the period from March 16, 2001 to April 2, 2001, Napster has entered into its  
23 negative database and excluded from its index approximately 87,000 unique artist/song title pairs

24 <sup>2</sup> For example, Plaintiffs claim that Napster "contemptuously refuses to employ an effective  
25 filter" (Plfs. Rep. at 2) "cynically claims that it is doing all that it can," (*id.*), has engaged in  
26 "almost willful disobedience" of this Court's Orders (*id.* at 4), is merely giving "lip-service to  
removing infringing material" (*id.*) and "dishonestly hides" certain matters related to file names.  
*Id.* at 7.

27 <sup>3</sup> For example, Plaintiffs request that this Court enjoin authorized uses of the Napster system as  
28 well as allegedly infringing uses. Plfs. Rep. at 22. But such relief contradicts the Ninth Circuit  
Opinion, this Court's Orders, and the holding of the United States Supreme Court in *Sony Corp.*  
*v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). *See infra* III.D.1.

1 and over 550,000 normalized file names purportedly corresponding to those artist/title pairs. In  
2 total, Napster now has excluded from its index approximately 311,504 artist/song title pairs and  
3 approximately 1,717,602 normalized file names. Supplemental Declaration of Richard Ault in  
4 Support of Napster's Third Consolidated Report of Compliance ("Supp. Ault Decl."), ¶ 12.  
5 Napster has added an additional 138,000 variant artist names and song titles, bringing the total  
6 variants to 142,000. *Id.* Napster has also implemented new file blocking approaches, as  
7 discussed below.

8 In its First Consolidated Compliance Report ("First Report" or "First Rep."), Napster  
9 described the basic exclusion mechanism it had devised and employed: a two-stage filter to  
10 review and block all file names at the time of user log-in, *prior* to those files being made available  
11 on the Napster system. First Rep. at 2-3. In its Second Consolidated Compliance Report  
12 ("Second Report" or "Second Rep."), Napster outlined its continuing efforts to block identified  
13 file names and its progress toward excluding variants through its licensing of the Gracenote  
14 technology. Second Rep. at 3.

15 Since the filing of its First and Second Reports, Napster has built upon its efforts to review  
16 and improve its exclusion mechanisms and has implemented additional procedures to further  
17 police its system. Many of these improvements became effective after the March 27 filing of  
18 Plaintiffs' Report, and therefore the results are not reflected therein.

19 *First*, Napster has added a *third* filter to its system that prevents searches for artist/title  
20 pairs ("ATPs") previously identified as infringing from returning *any* results. Supp. Ault Decl.  
21 ¶ 16. For example, if a user now were to search for the artist/title pair "Metallica" and "Enter  
22 Sandman"—*including these exact terms or any identified variants thereof*—the search itself will  
23 be blocked and no results will be returned. While the first and second filters prevent files with a  
24 specific word combination from being indexed, the third filter will even prevent searches for that  
25 word combination, thereby entirely redressing the fundamental concern expressed by Plaintiffs.  
26 *See* Plfs. Rep. at 1, 9.

27 *Second*, Napster is improving its exclusion algorithm to exclude ATPs based on even a  
28 *partial* match with the keywords in the artist name or song title. For each artist and title

1 combination submitted, Napster selects keywords to be added to the negative database. For  
2 example, from “Jimi Hendrix – Purple Haze,” Napster might select as keywords “Jimi,”  
3 “Hendrix,” “Purple,” and “Haze” and therefore block any file with the words “Jimi” and “Purple”  
4 regardless of whether it, in fact, matches the ATP. Supp. Ault Decl. ¶ 17. As described in detail  
5 below, this process (which is both onerous and time-consuming for Napster), together with its  
6 new search block filter, will substantially address the variant problem.

7 *Third*, as part of its ongoing effort to improve the screening process, Napster has  
8 implemented additional mechanisms in its algorithm to block users’ attempts to circumvent its  
9 filters. For example, users have attempted to evade Napster’s exclusionary filters by adding  
10 numbers to the beginning or end of a word in the file name. Those numbers will now be treated  
11 as separate words, so that the file name will be recognized as one to be excluded.<sup>4</sup> Napster’s filter  
12 will now also ignore two symbols sometimes used interchangeably with the apostrophe (which  
13 the screen has always ignored) and will now also recognize certain foreign language characters  
14 apparently utilized by users to circumvent Napster’s blocking efforts. Supp. Ault Decl. ¶ 24.  
15 Thus the fact that a word in a file name contains or is followed by those characters will not  
16 prevent the file name from being blocked. *Id.*

17 *Fourth*, Napster has continued its efforts to identify variants of the names of artists and  
18 song titles. At a very substantial cost (Supp. Ault Decl. ¶ 7), Napster has fully implemented—at a  
19 cost of \$750,000 for six months (*Id.* ¶ 7)—its access to Gracenote’s database of approximately  
20 140,000 variations and misspellings of artist names and song titles, and approximately 3 million  
21 variations and misspellings of file names.<sup>5</sup> Napster has also hired 15 new employees to manually  
22 identify and enter artist name and song title variations into the negative database and now devotes  
23 approximately 30 percent of its workforce to this task. Supp. Ault Decl. ¶¶ 3, 7. The capabilities  
24 of the “police bot” described in Napster’s First Report have also been improved to find variations

25 <sup>4</sup> For example, if a user names a file “Jimi Hendrix, All2 Along2 the2 Watchtower2,” the Napster  
26 system will treat the numbers added to each word as separate words, and the file will be  
27 recognized as one containing keywords “Hendrix” and “Watchtower” and thereby be excluded  
28 without the need to add it to the variants database. Supp. Ault Decl. ¶ 24.

<sup>5</sup> The variations in the Gracenote database have been and will be provided to Napster in batches.  
Only as the Gracenote system is fully implemented is Napster able to take full advantage of the  
system. Supp. Ault. Decl. ¶¶ 11-13.

1 in artist names and song titles more effectively. Supp. Ault Decl. ¶ 27. Thus, Napster has now  
2 added over 142,000 variations and misspellings of artist names and file names to its negative  
3 database. Supp. Ault Decl. ¶ 7.

4 *Fifth*, Napster has amended its terms of service to advise its users that if they change or  
5 otherwise disguise the names of their files to circumvent Napster's filters, their access to  
6 Napster's system will be terminated. Supp. Ault Decl. ¶ 8.

7 *Sixth*, Napster has implemented a protocol for the systematic review of its bulletin board  
8 postings to identify and delete postings by users suggesting techniques by which users can  
9 circumvent Napster's filters. Napster has also removed users' ability to post anonymously.<sup>6</sup>  
10 Supp. Ault Decl. ¶ 9.

11 *Seventh*, Napster has prevented its users from using Aimster's Pig Latin encoder and has  
12 secured Aimster's consent to remove its "Pig Encoder Software" from its website. *See* Second  
13 Rep. at 3-4.

14 These efforts are in addition to Napster's continuing efforts to respond to Plaintiffs'  
15 specific notices within the Court-mandated 72-hour deadline.

16 **B. The Impact of Napster's Efforts**

17 These iterative improvements in Napster's exclusion devices are improving Napster's  
18 ability to exclude file names corresponding to Plaintiffs' protected works. For example:

- 19 • Whereas the average Napster user had 220 songs available for sharing prior to  
20 Napster's implementation of its negative database, now the number has decreased  
by over 50%. Supp. Ault Decl. ¶ 13.
- 21 • Whereas Plaintiffs' experiment claimed to find over 70% of their works simply by  
22 searching for the actual artist and title names, Napster's improvements reduce that  
23 number to zero. Declaration of Donald Searles in Support of Napster's Third  
Compliance Report ("Searles Decl.") ¶ 3.
- 24 • Whereas Plaintiffs claimed to be able to find virtually all of their remaining works,  
25 as well as their 75 pre-release works and Metallica's songs tracked by Mr. King,  
26 the same searches now reflect that in the majority of instances no results are

27 <sup>6</sup> Although Plaintiffs contend that Napster's users are using chat rooms and bulletin boards on the  
28 Napster system to disseminate information on ways of circumventing Napster's filters (*see*  
Pierre-Louis Decl. ¶ 17), they have supplied no evidence from chat rooms where, in contrast to  
bulletin board postings, conversations are not preserved for review.

1 returned, and when results are returned, they are almost always unusual variants.  
2 Searles Decl. ¶¶ 4-18.

3 In short, Napster's enhancements have resolved the primary issues raised in Plaintiffs'  
4 Report. Songs like Sting's "Fields of Gold," or Jimi Hendrix's "Purple Haze" can no longer be  
5 found. Supp. Ault Decl. ¶ 17; Searles Decl. ¶¶ 16, 17. And, if Plaintiffs cooperate with Napster  
6 in identifying variants, improvements in file blocking will advance even more rapidly.

7 **III. PLAINTIFFS' "NON-COMPLIANCE" REPORT IS BASED ON POSITIONS**  
8 **INCONSISTENT WITH THE NINTH CIRCUIT'S HOLDINGS AND THE**  
9 **TERMS OF THE MODIFIED PRELIMINARY INJUNCTIONS**

10 Plaintiffs' assertions of Napster's "non-compliance" (and their attempts to justify their  
11 own defective notices) are based on positions inconsistent with both the Ninth Circuit's holdings  
12 in *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001), and this Court's Orders. Indeed,  
13 the basic thrust of Plaintiffs' Report appears to be an attempt to return to the original preliminary  
14 injunction that was stayed by the Ninth Circuit because it was "overbroad" and placed "on  
15 Napster the entire burden of ensuring that no 'copying, downloading, uploading, transmitting, or  
16 distributing' of plaintiffs' works occur on the system." 239 F.3d at 1027.

17 **A. Plaintiffs' Notices Do Not Comply With This Court's Orders or the Ninth**  
18 **Circuit Opinion Concerning Plaintiffs' Burden to Provide File Names**

19 The Ninth Circuit Panel "place[d] the burden on plaintiffs to provide notice to Napster of  
20 copyrighted works *and files containing such works* available on the Napster system *before*  
21 Napster has the duty to disable access to the offending content." 239 F.3d at 1027 (emphasis  
22 added). Accordingly, this Court required that "[p]laintiffs shall provide notice to Napster of their  
23 copyrighted musical compositions by providing for each work: (A) the title of the work; (B) the  
24 name of the composer of the work; (C) *the name(s) of one or more files available on the Napster*  
25 *system containing such work*; and (D) a certification that Plaintiffs own or control the rights  
26 allegedly infringed." Orders, ¶ 2 (emphasis added). Moreover, Paragraph 3 of the Orders  
27 requires "all parties" to ascertain the actual identity (title and artist name) of the work" when "it is  
28 reasonable to believe that a file available on the Napster system is a variation of a particular work  
or *file identified by plaintiffs*." (emphasis added). These holdings were based on the finding that

1 Napster does not read the content—as opposed to the file name—of the files shared by its users.

2 Plaintiffs do not comply with the notice requirements established by the Ninth Circuit  
3 panel and this Court in two crucial respects. *First*, Plaintiffs assert that they are not required to  
4 provide *any* file names to Napster. *Second*, even where Plaintiffs do identify file names,  
5 Plaintiffs have failed to verify that those file names correspond to Plaintiffs’ copyrighted works.

6 **1. Plaintiffs maintain that they have no duty to provide any file names to**  
7 **Napster**

8 Despite the clear terms of the panel Opinion and this Court’s Orders, Plaintiffs have  
9 served on Napster multiple notices of hundreds of thousands of allegedly copyrighted works  
10 without *any* corresponding names of files available through the Napster system. Indeed, the  
11 A&M Plaintiffs now acknowledge that more than half of the 660,000 ATPs provided to Napster  
12 have not been supported by file names showing a single work on the Napster system. Plfs. Rep.  
13 at 4. The *Leiber* Plaintiffs searched for some 26,000 compositions but could find file names for  
14 only 6,000. Declaration of Michael C. Keats (“ Keats Decl.”), ¶ 18. The Harry Fox Agency  
15 apparently believes Napster must search for and exclude 2.5 million song names provided on a  
16 database that identifies no file names at all. *Id.* ¶ 26. These practices are entirely inconsistent  
17 with both the letter and the spirit of the Court’s preliminary injunctions for the following reasons:

18 First, Plaintiffs assert that they “are not required to provide a file name prior to obtaining  
19 preliminary relief” (Plfs. Rep. at 17-18)<sup>7</sup> and that Paragraph 4 of the Orders relieves them of the  
20 obligation to identify *any* names of infringing files actually available on the Napster system. In  
21 fact, Paragraph 4 states that “it would be difficult for plaintiffs to identify *all* infringing files on  
22 the Napster system.” (emphasis added). However, such a reading of Paragraph 4, obviating the  
23 duty to provide notice of *any* infringing file (rather than, as it states, “all infringing files”), renders  
24 Paragraphs 2 and 3 of the Orders meaningless. It also contravenes the Ninth Circuit’s mandate to  
25 narrow the original injunction—that is, to require Plaintiffs to *first* provide notice of an infringing  
26 file “*before* Napster has the duty to disable access to the offending content.”

27 <sup>7</sup> Similarly, by letter dated March 9, 2001, Plaintiffs have rejected Napster’s repeated requests for  
28 file names, maintaining that they “are not required to provide any individual file names, or any  
information other than lists of copyrighted recordings that they own or control.” Pulgram Decl.  
Exh. 4.



1 Second, Plaintiffs argue that their interpretation is justified because they construe the  
2 Ninth Circuit Opinion as directing entry of, in effect, *two* different preliminary injunctions: one  
3 based on the theory of contributory infringement and the other based on the theory of vicarious  
4 liability.<sup>8</sup> They maintain that Paragraph 2 of the Orders requires Plaintiffs to provide notice to  
5 Napster because notice is required for contributory infringement, but Paragraph 4 exempts  
6 Plaintiffs from such notice because it is not required for vicarious liability. That reading—under  
7 which the Orders simultaneously impose and exempt Plaintiffs from burdens of notice—renders  
8 superfluous the duty to provide notice of infringing files and cannot reasonably be attributed  
9 either to this Court’s Orders or to the panel’s Opinion.

10 Moreover, the argument that requiring Plaintiffs to identify file names creates “an  
11 unprecedented burden for copyright owners” (Plfs. Rep. at 2) effectively attempts to relitigate the  
12 holdings of the Ninth Circuit and has no place here. First, Plaintiffs’ cases are inapposite because  
13 (1) Napster has not been found liable for direct infringement, and (2) Napster has been found to  
14 be a provider of a staple article of commerce.<sup>9</sup> Second, Plaintiffs’ argument directly contravenes  
15 the Ninth Circuit holding—compelled by *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S.  
16 417 (1984) and consistent with *Religious Technology Center v. Netcom On-Line Communications*

17  
18 <sup>8</sup> Although the Ninth Circuit Panel distinguished between these forms of liability for purposes of  
19 applying the staple article of commerce doctrine adopted in *Sony Corp. v. Universal City Studios,*  
20 *Inc.*, 464 U.S. 417 (1984), this distinction did not extend to the requirements of notice for  
21 purposes of injunctive relief. See 239 F.3d at 1027 (providing that Plaintiffs bear the burden of  
providing notice of works *and files* before Napster has a duty to disable access to infringing  
content).

22 <sup>9</sup> Each of *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990), *RCA/Ariola Int’l, Inc. v.*  
23 *Thomas Grayston & Co.*, 845 F.2d 773 (8<sup>th</sup> Cir. 1988), *West Publishing Co. v. Mead Data*  
24 *Central, Inc.*, 799 F.2d 1219 (8<sup>th</sup> Cir. 1986) *cert. denied* 479 U.S. 1070 (1987), *Swallow Turn*  
25 *Music v. Wilson*, 831 F. Supp. 575 (E.D. Tex. 1993), *Marvin Music Co. v. BHC Limited*  
26 *Partnership*, 830 F. Supp. 651 (D. Mass. 1993), and *Basic Books, Inc. v. Kinko’s Graphics Corp.*,  
27 758 F. Supp. 1522 (S.D.N.Y. 1991), concerns direct infringement. *Sega Enters. Ltd. v. MAPHIA*,  
28 857 F. Supp. 679 (N.D. Cal. 1994), is not relevant because, *inter alia*, the defendant in that case  
sold video game copiers that were used solely for infringing purposes and copyrighted material  
was actually stored on the defendant’s system. Plaintiffs also cite *Hulex Music v. Santy*, 698 F.  
Supp. 1024 (D.N.H. 1988) and *Broadcast Music, Inc. v. Niro’s Palace, Inc.*, 619 F. Supp. 958  
(N.D. Ill. 1985) for the proposition of disproportionate burden on Plaintiffs. Each of these cases  
also involves direct infringement, not secondary infringement based on use of a technology  
capable of substantial noninfringing uses.

1 *Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)<sup>10</sup>—that Plaintiffs carry the burden “to provide  
2 notice to Napster of copyrighted works and files . . . before Napster has the duty to disable access  
3 to the offending content.”<sup>11</sup>

4 Finally, as a practical matter, Plaintiffs’ position *cannot* be correct. If an Internet Service  
5 Provider, such as Napster, can be “put on notice”—and required to block and patrol its system—  
6 simply by being provided with catalogues of millions of artists and titles absent *any* proof of  
7 availability of the copyrighted works on the ISP’s system, the operation of Internet technologies  
8 would be seriously compromised.

9 **2. The notices of file names that Plaintiffs have provided do not comply**  
10 **with this Court’s Order**

11 This Court’s Orders state (at ¶ 3): “If it is reasonable to believe that a file available on the  
12 Napster system is a variation of a particular work or file identified by Plaintiffs, *all parties* have  
13 an obligation to ascertain the actual identity (title and artist name) of the work.” (emphasis  
14 added). Plaintiffs have not complied with this provision.

15 The *A&M* Plaintiffs concede that they have provided Napster millions of file names to be  
16 blocked (purporting to correspond to particular artist and song titles) without any verification that  
17 those file names correspond to Plaintiffs’ copyrighted works.<sup>12</sup> As a result, they delivered to  
18 Napster close to a million non-compliant notices. Supplemental Declaration of Dr. Rajeev  
19 Motwani, Ph.D. in Support of Napster’s Third Consolidated Compliance Report (“Supp. Motwani  
20 Decl.”) ¶ 21, Exh. A.

21 Effectively, Plaintiffs have shifted to Napster the entire burden of ascertaining the actual  
22 identity of the work contained in the noticed file names. Of the roughly 8 million allegedly

23 <sup>10</sup> The *Sony* Court squarely rejected the proposition that a provider of a duplicating technology  
24 can be secondarily liable for direct infringement unless that provider had specific knowledge,  
25 control, and authorization of the infringement. *Id.* at 438.

26 <sup>11</sup> Plaintiffs’ provision of notice obviously does not conform to the requirements of the Digital  
27 Millennium Copyright Act, which requires notice of specific file names and locations and/or  
28 users before an ISP is required to disable access. *See* 17 U.S.C. §512(c)(3)(A) and 17 U.S.C. §  
512(d)(3)(1).

<sup>12</sup> As explained in the Declaration of Stanley Pierre-Louis (“Pierre-Louis Decl.”), Plaintiffs used  
an automated search, operated by an unidentified “consultant” and using an unidentified  
methodology, to generate the millions of file names they served on Napster. Pierre-Louis Decl.  
¶ 18. Plaintiffs checked only for “formatting or other obvious irregularities.” *Id.* ¶ 27.

1 infringing file names provided to Napster by the A&M Plaintiffs through March 28, 2001,  
2 approximately 10% appear to be misassociated with the artist name and song title with which they  
3 are associated. *See* Supp. Motwani Decl. ¶ 21. Other notices lack artist or title information or  
4 include vague designations, such as “various” artists, that do not supply adequate notice. *Id.* ¶ 22;  
5 Supp. Ault Decl., Exh. 4 These non-complying file names do not appear in discrete groups, but  
6 rather are interspersed throughout the data that Plaintiffs have provided to Napster. Supp. Ault  
7 Decl. ¶ 35.<sup>13</sup> Plaintiffs are aware that this burden is enormous, recognizing that it would take a  
8 team of six people over a “week of round-the-clock review” to complete this task for only a  
9 portion of the notices. Keats Decl. ¶ 20.

10 Because this burden is not feasible for Napster to perform alone within a 72-hour period,  
11 the inevitable consequence of Plaintiffs’ practice of noticing millions of file names without  
12 performing any verification has been Napster’s overblocking of potentially hundreds of thousands  
13 of works in which Plaintiffs have no rights. Indeed, the works of a number of artists that have  
14 affirmatively made their music available through the Napster system have been blocked as a

15 <sup>13</sup> Plaintiffs assert that, generally, at least one of many file names identified for a given work is  
16 accurate. Even if correct, that assertion misses the point, because Napster must determine *which*,  
17 if any, of the millions of noticed file names are accurate. Further, Plaintiffs concede that they  
18 have noticed numerous file names, *none* of which corresponds to the copyrighted work with  
19 which they were associated. *See* Pierre-Louis Decl. ¶¶ 20, 22. An anecdotal review of some of  
the file names noticed by Plaintiffs shows that many of those file names bear no relation to the  
works that Plaintiffs have alleged that they infringe. *See* Supp. Ault Decl. ¶ 33, Exhs. 4 & 5. For  
example, Plaintiffs’ notices have listed as Artist; Album; Song Title; and File name the following  
mismatches:

- 20 • Various Artists; Stoned Immaculate: Tribute To The Doors; The end;  
1:11\My Files\A Means To An End – The Music Of Joy Division –  
21 Various Artists – Kendra Smith – Heart And Soul  
([www.questioncentral.com](http://www.questioncentral.com)) mp3.
- 22 • The Beach Boys; NULL; Fun, Fun, Fun; C:\My Documents\Lori’s  
folder\fun stuff\Venga Boys – Sex On The Beach.mp3.
- 23 • Various Artists; Bach to Rock; Lullaby; D:\Mp3\Om Lounge – Various  
24 Artists – J Boogie’s Dubtronic Science – Oceanic Lullaby.mp3.
- 25 • Tom Wilson; Tom Wilson Slim X; Joyride;  
C:\Fuzzy\mp3music\Junkhouse – fuzz – 01 – Joy Ride.mp3.
- 26 • Richard Elliot; Power of Suggestion; Judy’s Song; d:\mp3\Flora Purim –  
Stories To Tell – Search For Peace.mp3.
- 27 • Leonard Bernstein; Shostakovich: Symphony No. 1 in F Minor, Op. 10  
and No. 6 in B Minor, Op. 54; II. Allegro; 1:11\MP3s\Debussy, Claude –  
28 Leonard Bernstein – La Mer – L’Apres-midi d’un faune – Jeux –  
Nocturnes – 02 – La Mer – II. Jeux de vagues. Allegro.mp3.

1 result. *See generally* Declarations of Scott Ross, Kathleen Lynch, and Richard Egan. Plaintiffs  
2 should share their part of the burden of determining whether a particular file name actually  
3 contains a work in which they own the copyright so that this overblocking does not continue.

4 **B. Plaintiffs' Demands That Napster Monitor User Content Are Inconsistent**  
5 **With The Ninth Circuit Holding That Napster's Burdens Are Limited To**  
6 **"Policing The System Within the Limits of Its System"**

7 Plaintiffs' assertion that Napster is non-compliant because Napster does not use "readily  
8 available, superior filtering methods, including the use of an MD5 hash or checksum, a digital  
9 fingerprint, [or] a track unique identifier" (Plfs. Rep. at 3) is nothing other than a claim that  
10 Napster bears the burden to check the *content* of user files. As a threshold matter, the compliance  
11 process is not the appropriate vehicle for resolving Plaintiffs' claim because there is nothing  
12 presently in the record that would entitle Plaintiffs to injunctive relief on any basis other than that  
13 identified by the Ninth Circuit panel. As the panel stated, (1) Napster can do "'a text search of  
14 the file names,'" 239 F.3d at 1012 (quoting this Court), but (2) Napster's duty to police its system  
15 is "cabined by the system's current architecture" in that "the Napster system does not 'read' the  
16 content of indexed files, other than to check that they are in the proper MP3 format." *Id.* at 1024.  
17 The panel also stated that "[i]n crafting the injunction on remand, the district court should  
18 recognize that Napster's system does not currently appear to allow Napster access to users' MP3  
19 files." *Id.* at 1027.

20 There is no record to support granting preliminary relief to Plaintiffs on any other basis,  
21 such as a check of the content of user files through an MD5 hash or a checksum. If Plaintiffs  
22 wish to relitigate the issues addressed at the preliminary injunction phase, after the Ninth Circuit  
23 has ruled and after this Court has issued a modified preliminary injunction, they are required to do  
24 so at trial. Napster respectfully submits that they may not properly do so in the present process,  
25 which is designed to test Napster's compliance with the preliminary injunction that was actually  
26 issued, based on the Ninth Circuit's ruling and the record the parties actually made. In any event,  
27 were Plaintiffs now to try to develop an appropriate record for the relief that they seek with no  
28 basis, they would be unable to do so because the technologies Plaintiffs request this Court to

1 implant into the Napster system are not presently workable. *See infra* Section IV.

2           **C.       Plaintiffs Have Not Complied With This Court’s Order That All Parties “Use**  
3           **Reasonable Measures in Identifying Variations”**

4           Plaintiffs do not assert that Napster has failed to block file names containing the artist and  
5 title combinations identified by Plaintiffs. Instead, the examples provided by Plaintiffs in the  
6 McDevitt Declaration consist of file names containing variations on those artist and title pairs.<sup>14</sup>  
7 In attacking Napster’s efforts to address the variation issue, Plaintiffs fail to acknowledge: (1) the  
8 burden of determining user variations for hundreds of thousands of works; and (2) Plaintiffs’  
9 failure to date to play any role in sharing that burden (as this Court required).<sup>15</sup>

10           Pursuant to this Court’s injunction, both parties were to adopt “reasonable measures in  
11 identifying variations of the filename(s), or of the spelling of the titles or artists’ names.” As the  
12 Ninth Circuit held, Napster and Plaintiffs have “equal access” to Napster’s search functions.  
13 239 F.3d at 1024. This Court similarly required that “[a]ll parties shall use reasonable measures  
14 in identifying variations of the filename(s), or of the spelling of the titles or artists’ names.”  
15 Orders, ¶ 3 (emphasis added). This Court also held that “[i]f it is reasonable to believe that a file  
16 available on the Napster system is a variation of a particular work or file identified by Plaintiffs,  
17 all parties have an obligation to ascertain the actual identity (title and artist name) of the work.”

18           <sup>14</sup> These variants fall into several categories: (1) files with random words injected into the song  
19 titles (2) random numbers or letters added to the beginning or ending of words, and (3) misspelled  
20 and omitted words. The following ten examples from the McDevitt Declaration are illustrative:

<u>Artist</u>	<u>Title</u>	<u>File name</u>
Beatles	Eight Days a Week	Beatles-Eight (piss-off RIAA) Days a Week
John Lennon	Imagine	John Llennon-Imagine
Beatles	Penny Lane	Beatles – 1 Penny Lane
Beatles	Strawberry Fields Forever	Beatles – Strawberry fFields Forever
Beatles	Lucy in the Sky with Diamonds	Beatles- Lucy and the sky with diamonds
Beatles	Here Come the Sun	The Beatles – Here Comes Thee Sun
Beatles	While My Guitar Gently Weeps	Beatles-While My Guitar Guitar Gently Weeps
Beatles	Come Together	Beatles- Come tTogether
Beatles	Let it Be	Beatles – Let t Be
Beatles	Hey Jude	Beatles-Hey 2 Jude

26           <sup>15</sup> For example, Plaintiffs claim to have found certain works by entering “obvious misspellings”  
27 such as “Elivs,” “Christina Agulara” and/or “with a common word or a number added” such as  
28 adding the word “and” in between the words of ” the song title “Inside Out.” Needless to say, the  
process of identifying such variations for hundreds of thousands of works is not one that can be  
accomplished overnight. The enormous burden of the task is one of the reasons that variant  
identification necessarily must be a cooperative task.

1 *Id.* (emphasis added).

2 Napster has, as explained in Section II above, adopted such measures (several of which  
3 were implemented after Plaintiffs' searches). These measures are designed to identify and  
4 preclude access to variants with maximum efficiency in a manner that will benefit all parties. For  
5 example, Napster's new third level search blocking will by itself eliminate most variation types  
6 identified by Plaintiffs. Most variants that are not captured may be blocked by the key word  
7 blocking or other changes to the exclusion algorithm.<sup>16</sup> At some point, user variants adopted to  
8 avoid Napster's filtering will bear so little resemblance to the titles of the alleged copyrighted

9  
10 <sup>16</sup> Moreover, every one of the file name variations identified in these examples can now be  
11 excluded under Napster's new algorithm and use of partial variants. As explained in the  
Supplemental Ault Declaration at Paragraph 25, the use of keyword variants will substantially  
enhance exclusion of file names including

- 12 • word insertions
- 13 • minor word deletions
- 14 • numbers added to either end of key words
- 15 • names out of sequence
- 16 • partial artist names
- 17 • partial titles
- 18 • misspellings of words

19 By contrast, Plaintiffs have ignored the clear justification for *not* adopting the standard  
20 conventions they suggest, *i.e.*, blocking by artist only, or title only, or by part of a name.

- 21 • Napster has proven that many names have been given to multiple works,  
22 such that adopting as a standard convention exclusion by song title only  
23 results in substantial exclusion of authorized works. First Rep. 17-22.  
24 Plaintiffs' own notices to Napster, which frequently search and provide file  
names by title only—such as the works “Menuetto” or “Sounds”—have  
confirmed that this convention results in massive overblocking and is  
entirely unacceptable. Supp. Ault Decl. ¶ 30, Exh. 5 (sub-Exhs. D, F).
- 25 • Napster has shown that adopting the convention of blocking by artist name  
26 only also substantially overexcludes. First Rep. 17-22. Again, Plaintiffs'  
27 search results, delivered to Napster for blocking of files, demonstrate the  
28 unacceptable reach of such exclusion-blocking all files containing the word  
“Slaughter” or “Say what” merely because some band uses that name. *Id.*  
Exh. 5 (sub-Exhs. E, G).

Plaintiffs' suggestion of an automatic convention to block based on either a *partial* song or  
*partial* artist name obviously compounds the foregoing problems. Napster exclusion based on  
partial artist names plus partial titles, designated individually rather than by random computer and  
chance, will achieve the result Plaintiffs suggest, but without the overbreadth. Finally, Plaintiffs  
suggest that Napster must modify its exclusion mechanism to ignore the word sequence in an  
artist name or song title. This modification, however, is not technologically feasible in the  
Napster system. Napster is cabined by its system architecture. Declaration of Edward Kessler in  
Support of Napster's Third Compliance Report (“Kessler Decl.”) ¶ 23.

1 works that the files will not be shared in any event.

2 As Napster has implemented these measures, Plaintiffs have not—despite repeated  
3 requests from Napster—provided any variant artist and title pairs to Napster. Notwithstanding  
4 Plaintiffs’ public attacks on Napster’s purported non-compliance, Napster first learned of the  
5 variations identified in Plaintiffs’ “Non-Compliance Report” on March 27, the day Plaintiffs filed  
6 their Report with the Court. Napster then promptly took action to preclude access to such  
7 variants.

8 Plaintiffs assert that they have sent Napster variant *file names* without identifying the  
9 particular artist variant or title variant for entry into the Napster system. To the extent it has  
10 received variant file names, Napster has input and blocked those file names for its file name  
11 blocking screen. Supp. Ault Decl. ¶ 7. However, thousands of these variant file names have no  
12 relation to any artist/title pair that the Plaintiffs have claimed. *See* Part III, *infra*. Moreover, as  
13 Plaintiffs know, providing a file name does not create a text-based screen for variants; the text-  
14 based screen requires identification and entry of the particular variant into the artist name field,  
15 and/or the song name field. Supp. Ault Decl. ¶ 22. For example, sending Napster an electronic  
16 database containing the file name “Madanna-Like A Virgine” among millions of others does not  
17 input either “Madanna” or “Virgine” into Napster’s database for text-based screening, as is  
18 required for effective variant screening. *Id.*

19 Plaintiffs have attempted to transform this Court’s Orders that “all parties use reasonable  
20 measures in identifying variations” into a requirement that Napster research, anticipate, and block  
21 (under pain of contempt) every possible variation of artist name, song title, or file name. Such  
22 duties, which would force a shut down of Napster, are not what this Court imposed, and are not  
23 consistent with the Ninth Circuit’s holding that Napster’s duties to police must be “within the  
24 limits of the system”—particularly given that such policing cannot be “an exact science in that the  
25 files are user named.” 239 F.3d at 1027.

26 **D. Plaintiffs May Not Insist on Filtering Methods That Will Result in**  
27 **Overblocking**

28 Plaintiffs assert that “Napster’s oft-repeated ‘defense’ of overfiltering is an unnecessary

1 problem of its own making” (Plfs. Rep. at 3), and that Napster must block files “even at the risk  
2 of some over-filtering.” Plfs. Rep. at 22. By contrast, the Ninth Circuit held that Napster’s  
3 system, and authorized uses of that system, could not itself be enjoined under *Sony*, and noted that  
4 “Plaintiffs did not seek to enjoin this or any other noninfringing use of the Napster system.”  
5 239 F.3d at 1019.

6 To assist in ensuring that noninfringing uses were not enjoined, this Court required that  
7 Plaintiffs provide notice to Napster, including song title, artist or composer name, at least one  
8 infringing file available on the Napster system, and a certification of ownership or control.  
9 Orders, ¶ 2. This Court also provided that “[f]or compositions for which there might be a number  
10 of compositions of the same name, the burden will rest with Plaintiffs to identify those  
11 compositions to which they own or control the copyright.” *Id.* Finally, this Court provided that  
12 Napster and Plaintiffs use “reasonable measures in identifying variations,” *id.*, ¶ 3, and that “[a]ll  
13 parties” had the obligation to “ascertain the actual identity” of artist and title where a variation is  
14 identified. *Id.* All of these requirements in the Orders seek to ensure that there is no  
15 overblocking of noninfringing uses.

16 Plaintiffs, in effect, ask this Court to enjoin authorized uses as well. That request directly  
17 conflicts with *Sony*’s holding that the limited monopoly granted by copyright law does not allow  
18 the copyright holder “to extend his monopoly beyond the limits of his specific grant.” *Id.* at 441.  
19 That concern is particularly serious where, as here, the technology over which Plaintiffs seek to  
20 extend their copyright monopoly is “capable of substantial noninfringing uses.” *Id.* at 442. As  
21 the Ninth Circuit Opinion stated in its mandate to this Court, “[w]e are bound to follow *Sony*”  
22 concerning Napster’s noninfringing uses, 239 F.3d at 1020, and “depart from the reasoning of the  
23 district court that Napster failed to demonstrate that its system is capable of commercially  
24  
25  
26  
27  
28



significant noninfringing uses.” *Id.* at 1021.<sup>17</sup>

**IV. PLAINTIFFS’ ASSERTIONS THAT NAPSTER SHOULD BE ORDERED TO  
ADOPT NEW CONTENT-BASED TECHNOLOGIES ARE NOT SUPPORTABLE**

**A. Napster Has Adopted the Proper Exclusion Screen**

Napster’s general exclusion algorithm is, and must be, based on conventions that generally can be applied with only moderate overbreadth. Only then can Napster both exclude copyrighted works and permit the substantial non-infringing uses recognized by the Ninth Circuit. *See* First Rep. at 5-7; Second Rep. at 12-14.

Plaintiffs propose that Napster should use an exclusion algorithm identical to its search engine used to locate files on the Napster system, characterizing the latter as “smarter” than the former. Plfs. Rep. at 9. However, Napster’s search functionality is not smarter, it is merely broader, seeking inexact matches as well as exact matches. It is intended to enable a user to locate a work on the system even if the user is not sure of the title or artist. Napster’s search mechanism is intended to be *inclusive*, as is most browser technology. The search engine relies on the human user to be “smart” and select whichever one of the results is the correct one.

By contrast, Napster’s basic blocking algorithm is intended to operate automatically, without human oversight. It must exclude files identified as infringing and still permit other unblocked and authorized files to be included. Supp. Ault Decl., ¶ 29. Using Napster’s search algorithm to exclude files would inevitably result in massive overexclusion—as Plaintiffs admit. *See* Keats Decl. ¶¶ 18-21; Ault Decl. ¶ 29-30, Exhs. 5, sub-Exhs. D-G.<sup>18</sup> Further, Plaintiffs’ suggestion that Napster should easily be able to apply the same logic to its filters that it uses in its

<sup>17</sup> Plaintiffs cite two cases in support of their attempt to relitigate this issue. Both are inapposite. In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9<sup>th</sup> Cir. 1997), the Ninth Circuit held that an entire book could be enjoined because the infringer had decided after suit was instituted to go ahead and bind the book with an infringing cover and illustration. In *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979), a pre-*Sony* case, the court enjoined the infringement of future registered works as well as future infringements of certain works. In each, injunctive relief was entered against a *direct* infringer, not a party held to be a secondary infringer on the basis of use of technology capable of “substantial noninfringing uses.”

<sup>18</sup> For example, when the *Leiber* Plaintiffs used automated searches with the Napster search engine to attempt to locate files containing their copyrighted works, “[s]cores of songs had to be deleted from the lists for lack of matching song titles and recording artists.” Keats Decl. ¶ 21. (emphasis added). Similarly, when Mr. McDevitt searched by song name for the song “Abracadabra”—presumably a distinctive name—the 20 file names included different works by at least six different artists. McDevitt Decl., Exh. 4.

1 search engine is a vast oversimplification, and ignores the fact that the two functions present  
2 entirely different issues from a computational perspective. Kessler Decl. ¶ 23.

3 The only equitable solution to the variant problem based upon the Ninth Circuit's  
4 recognition of the relative rights of the parties is not to implement inherently overbroad screen  
5 algorithms, but rather to impose an effectual third filter—as Napster has done—and to continue to  
6 improve the two-step filter and identification of variants specific to particular files. Napster is  
7 committed to the continued development and refinement of these processes.

8 **B. Plaintiffs' Reliance on Emerging Technologies is Misplaced**

9 As set forth above in Part III, Plaintiffs' assertions that Napster is obligated to adopt new  
10 content-based technologies to block the sharing of files are both (1) inconsistent with the Ninth  
11 Circuit's holding that Napster's duty extends only to blocking on the basis of file *name*, and  
12 (2) not supported by the record before this Court. It is, therefore, a trial issue, though one that  
13 Napster is willing to submit for evaluation by the Neutral Expert outside the context of  
14 compliance with this Court's modified preliminary injunctions. In any case, Napster's ongoing  
15 review of such technologies demonstrate that Plaintiffs' content-based approaches are based on  
16 emerging technologies that presently are not feasible. Napster reports on the current conclusions  
17 of that review below.

18 **1. MD5 Checksums**

19 Plaintiffs request that the Court require Napster to identify and block users' files based on  
20 the MD5 hash codes associated with the file. This approach is extremely inefficient and unlikely  
21 to enhance the efficacy of Napster's blocking process, in part because songs are not uniquely  
22 identified with MD5 hash codes. In fact, the same song may generate a different MD5 code:  
23 (1) each time a CD is "ripped" into MP3 format (as Plaintiffs concede at Declaration of Daniel  
24 Farmer ¶ 17), even if the same ripping software is used to create the MP3 file; (2) if even a  
25 fraction of a second of the recorded music is left off of the beginning or end of the song; and (3) if  
26 users take advantage of widely available software and freeware to alter the MD5 code (just as  
27 users alter file names). Kessler Decl. ¶ 6.

28 Thus, blocking by MD5 codes will not block all versions of a song, or even two different

1 files containing that song created by the same user. Indeed, there are potentially many more MD5  
2 checksums for any given work than there are file names. Metallica's second notice to Napster,  
3 containing a list of checksums for song files as well as a list of the file names, included the  
4 checksum for each file identified, and suggested that Napster could block files that matched the  
5 checksums. Metallica's notice identified over 470,846 distinct checksums for approximately 96  
6 of Metallica's works; in other words, there were almost 5000 checksums for any single work.<sup>19</sup>  
7 With this many different checksums for just 100 songs, there would be *billions* of checksums for  
8 the millions of songs which Plaintiffs claim to own. *See, e.g.,* Keats Decl. ¶¶ 3, 7.

9 In fact, even if Napster could design and operate such a system, this would not prevent or  
10 improve the blocking of the listing of Plaintiffs' works on the Napster index. New and unique  
11 checksums continually are generated as new MP3 files are ripped from the same source CDs.  
12 Kessler Decl. ¶ 6. Users can easily alter MD5 checksums just as they can generate variants for  
13 file names. Thus, if Napster begins filtering based on MD5 hash codes, it would be a simple  
14 matter for users to circumvent such a filtering regime. And, since an MD5 checksum can be  
15 determined only from an MP3 being shared, pre-release works could be excluded *only* after  
16 already being made available. Kessler Decl. ¶ 12.

17 In short, using MD5 checksums to identify and block users' files simply is not an  
18 acceptable technological method for accomplishing the mutual objectives confronting the parties.

## 19 2. Audio Fingerprinting

20 Plaintiffs also request that the Court require Napster to license proprietary audio  
21 fingerprinting technology from any of a variety of third-party vendors, which Plaintiffs contend  
22 are "well-known in the industry." Plaintiffs neglect to advise the Court that this technology: has  
23  
24  
25

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26 <sup>19</sup> In his declaration in response to Napster's First and Second Reports, Metallica's attorney,  
27 Howard King, mistakenly asserts that Metallica previously had provided Napster with only  
28 55,645 distinct MD5 hashes corresponding to Metallica's works. King Declaration, ¶ 6. This is  
not true. Metallica's Notice of Alleged Infringement of Copyright, dated May 18, 2000,  
contained 470,846 distinct MD5 signatures. *See* Searles Decl., Exh. 20.

1 only been developed in the last several months,<sup>20</sup> has yet to be implemented in any application of  
2 significant scale and remains, at the present day, more a theoretical solution than a commercially  
3 practicable one. Declaration of Jack Wolosewicz in Support of Napster's Third Consolidated  
4 Compliance Report ("Wolosewicz Decl."), ¶ 9.

5 In fact, Napster has evaluated and continues to evaluate the technology (Kessler Decl.,  
6 ¶ 13), and has concluded for a variety of reasons that at present it is not a feasible alternative.  
7 The vendors of this audio fingerprinting technology identified by Plaintiffs only maintain  
8 databases that represent, at most, a small fraction of commonly played songs. Wolosewicz Decl.  
9 ¶ 10. Moreover, the speeds at which the vendors identified by Plaintiffs claim to be able to  
10 perform such an audio fingerprint identification are likely to be too slow to be a viable solution  
11 the Napster system at the present time. *Id.* ¶ 11; Kessler Decl. ¶ 15.<sup>21</sup>

### 12 3. Gracenote's Title Unique Identifier Technology

13 Plaintiffs also request that Napster be ordered to license and deploy Gracenote's  
14 proprietary title unique identifier ("TUID") technology, which is designed to stamp a unique  
15 number that corresponds to Gracenote's database inside a part of a music file's "ID3 tag."<sup>22</sup>  
16 Wolosewicz Decl. ¶ 16. However, Gracenote's TUID technology was only developed within the  
17 past year and is not incorporated in the vast majority of MP3 encoders currently in use. *Id.* ¶ 17.  
18 At present, Gracenote is able to evaluate approximately one thousand files per second, not the  
19 100,000 or more per second that Napster would require. Wolosewicz Decl. ¶ 19. This  
20 technology, therefore, currently is much too slow to provide a feasible solution for Napster and,

21 <sup>20</sup> The "evidence" that Plaintiffs present to the Court in support of this technology is simply  
22 Internet promotional materials of companies that claim to be building this technology. Plaintiffs'  
23 own experts do not assert that the technology has actually been adopted in the marketplace. For  
24 example, Bruce Block (an RIAA employee) simply asserts that he has attended various trade  
shows or otherwise met with vendors who "claim to have developed some form of proprietary  
content identification technology."

25 <sup>21</sup> Plaintiffs' assertion that Napster must be ordered to deploy "fingerprinting" technologies  
26 should be foreclosed in any event by their refusal to provide any documents concerning Napster's  
27 ability to prevent the copying of Plaintiffs' works by Napster's users, including audio  
fingerprinting technology. *See e.g.*, Searles Decl., Ex. 19, Request 78 (a true and correct copy of  
UMG Recordings, Inc.'s Response to Napster's Fourth Request for Product of Documents).  
Plaintiffs' current and selective reliance on hearsay Internet advertising renders their entire  
submission on the subject inherently suspect.

28 <sup>22</sup> ID3 tags are generated at the time a CD is "ripped" using an MP3 encoder.

1 as with file names and MD5 hash codes, it is a simple matter for a user to alter or even remove  
2 the TUID number, making this solution no more secure than relying on Napster's current  
3 architecture of term-based and file name filters.

4 **V. THE COURT SHOULD PROVIDE GUIDANCE ON ADDITIONAL ISSUES IN**  
5 **DISPUTE**

6 Within a matter of weeks, and against the Court ordered 72-hour deadlines, Napster has  
7 blocked a huge number of appropriately designated infringing files from its index. However, as a  
8 consequence of Plaintiffs' narrow interpretation of their responsibilities under this Court's  
9 Orders, several impediments to Napster's ability to comply with the injunction with the greatest  
10 speed and efficacy remain to be surmounted. Unfortunately, Napster must seek the Court's  
11 intervention on these issues.

12 **A. Plaintiffs' Obligation to Specify Which Particular Plaintiff Owns or Controls**  
13 **Rights in the Noticed Works**

14 Napster seeks clarification from the Court that, pursuant to Paragraph 2(D) of the Orders,  
15 Plaintiffs must certify which particular Plaintiff, out of the 18 companies named in the *A&M*  
16 *Records* action, claims to own or control the works sought to be excluded from Napster. The  
17 Plaintiffs have identified the particular companies claiming to own each of the works attached as  
18 Exhibits A and B to their Complaint in this action, but generally not supplied such identification  
19 with their thousands of other notices. Plaintiffs have asserted that they have spent hundreds of  
20 hours "[r]eviewing company records to certify ownership or control of certain rights associated  
21 with the identified copyrighted works, often by conducting careful review of contractual  
22 provisions" (Pierre-Louis Decl. ¶¶ 9-10). Accordingly, they certainly know who claims to own  
23 which work. Indeed, at the March 2, 2001 hearing, counsel for the *A&M* Plaintiffs urged the  
24 Court to allow a simple certification, rather than a declaration of ownership from each of the  
25 *A&M* Plaintiffs since they intended to certify that, for a particular list of albums noticed, "the  
26 *particular plaintiff* owns or controls the rights in th[e] sound recordings on those albums."  
27 3/02/01 Tr. at 20:7-9 (emphasis added). Unfortunately, the *A&M* Plaintiffs' actual certifications  
28 fall far short of those promised at the March 2 hearing.

1           Instead, the *A&M* Plaintiffs generally have described only vague and collective rights,  
2 without identifying any particular Plaintiff. Their standard letter “certification” purports to  
3 transmit, *e.g.*, “over 125,000 copyrighted works that the *A&M Records* Plaintiffs certify they own  
4 or control.” Pierre-Louis Decl., Exh. 1 (various notification letters sent by the *A&M* Plaintiffs).  
5 Plaintiffs sometimes blur the rights owned by the *A&M* Plaintiffs *or by an RIAA member*.<sup>23</sup> Their  
6 “certification” consists of letters that refer to multiple files of data sent to Napster’s FTP sites—  
7 files which generally bear a title of a “parent group” such as Universal, or EMI, but which bear no  
8 indication of the actual Plaintiff company within that group which purports to own the right, nor  
9 any certification by that Plaintiff or its parent group. Supp. Ault Decl. ¶ 43. Indeed, files labeled  
10 “WMG” (Warner Music Group) have been transmitted under generalized “certification” letters  
11 sent by lawyers that represent other labels, but not Warner. Ault Decl., Exh. 2; Pierre-Louis  
12 Decl., Exh. 1 (letter of March 15, 2001).

13           Having purportedly searched for confirmation of ownership before giving notice,  
14 Plaintiffs have been, and should be, supplying the “particular Plaintiff” information they  
15 promised. The Ninth Circuit held that it is the Plaintiffs’ burden, not Napster’s, to identify the  
16 works they own or control. The individual named Plaintiffs in this case must assume this  
17 responsibility. Generalized certifications allow the *A&M* Plaintiffs to obscure the many  
18 complicated issues relating to ownership—issues that are likely to be heavily contested in this  
19 litigation—and render it difficult to verify or challenge the certifications under which Napster  
20 operates under pain of contempt.

21           For these reasons, Napster respectfully requests that the Court clarify that Paragraph 2(D)  
22 requires the particular named Plaintiff purportedly owning each work to certify that it owns or  
23 controls rights in the work(s) for which it has to date provided, and in the future provides, notice  
24 to Napster. In addition, Napster respectfully requests that the Court adopt a procedure for

25 <sup>23</sup> See Pierre-Louis Decl. ¶ 25 (stating that “the [*A&M*] Plaintiffs (or other RIAA member  
26 companies)” own or control most of the sound recordings identified from the file name  
27 information gathered for a particular recording, and referencing an exhibit containing a list of  
28 recordings that “the [*A&M*] Plaintiffs or other RIAA member companies own or control.” The  
RIAA has hundreds of members, the vast majority of which are not parties to this action. See  
Supp. Ault Decl., Exh. 11. ***In fact, some of these non-party RIAA member companies, including  
TVT Records, have expressly authorized the trading of their sound recordings through  
Napster.***

1 resolving disputes by challengers to Plaintiffs' claims of ownership and for facilitating the  
2 unblocking of access to non-copyright-protected works, such as those described in the Gottlieb,  
3 Ross and Lynch Declarations.

4 **B. The Scope of the Provisions of the Orders relating to "Pre-Released" Works**

5 Paragraph 7 of the Orders creates a narrow exception for pre-release works and was  
6 intended to apply only when a work that one of the *A&M* Plaintiffs intends to release has not yet  
7 appeared on the Napster system. It was not intended to allow the *A&M* Plaintiffs to expand  
8 Napster's obligations (and minimize their own) merely by neglecting to provide Napster a file  
9 name. Moreover, Paragraph 7 should have no applicability whatsoever with respect to recordings  
10 that the *A&M* Plaintiffs do not intend to release, or in which they do not certify they own or  
11 control the rights, as this would impose an unfair and unjustified burden on Napster. Yet, through  
12 a series of boilerplate notifications regarding "pre-release" works, the *A&M* Plaintiffs have  
13 noticed: (1) works already known to be available on the Napster system (including works  
14 scheduled for release the very next day); (2) works that they do not even anticipate or expect to  
15 release; (3) works as to which they have specified no release date (as required by paragraph 7);  
16 and (4) works in which they have not certified their ownership or control of the rights in such  
17 works. *See* Supp. Ault Decl. Exhs. 12-14. A chart summarizing the *A&M* Plaintiffs' non-  
18 compliant pre-release notices is attached as Exhibit 2 to the Supplemental Ault Declaration.

19 Accordingly, Napster requests that this Court clarify that Paragraph 7 applies only under  
20 the following circumstances: (1) the *A&M* Plaintiffs actually intend to release the work(s), on a  
21 specified release date;<sup>24</sup> and (2) the appropriate *A&M* Plaintiff certifies that it currently owns or  
22 controls rights in the work(s). In addition, Napster requests that this Court clarify that where files  
23 names are ascertainable—that is, that the Plaintiffs know or could reasonably ascertain that a  
24 particular work is already available on Napster—the provisions of Paragraph 2 control.

25 **C. Requirements For Composition Notices**

26 Napster also seeks clarification from the Court on two issues relating to the *Leiber* Order:

27 <sup>24</sup> The *A&M* Plaintiffs have never represented, either in their notification letters or to this Court,  
28 that they were unable to locate file names for their unreleased recording. Rather, they have  
represented merely that it would be difficult for them to do so. Pierre-Louis Decl. ¶ 24.

1 (1) whether the *Leiber* Plaintiffs should be expressly required to supply performing artist  
2 information, when known or reasonably available, to enable more effective blocking of their  
3 compositions; and (2) the extent to which the Order requires the *Leiber* Plaintiffs to distinguish  
4 their compositions from other compositions of the same name in which they do not claim a  
5 copyright interest.

6 The *Leiber* Plaintiffs have provided Napster with performing artist information for the  
7 majority of their compositions. Although their provisions of this information has facilitated  
8 Napster's ability to block their compositions, their contention that Napster has refused to block  
9 their compositions without such information is inaccurate. *See* Pulgram Decl., Exh. 10. To the  
10 contrary, Napster informed the *Leiber* Plaintiffs that it would block their compositions upon  
11 receipt of notice in compliance with Paragraph 2 (song title, composer, file name and certification  
12 of ownership), and simply asked them to *consider* providing performing artist information to  
13 increase the effectiveness of Napster's blocking efforts. *Id.* As detailed in Napster's First Report,  
14 blocking by song title and performing artist, rather than by song title and composer, is the most  
15 effective means of locating and blocking a specific work. First Rep. at 20-22.

16 Requiring disclosure of performing artist information is also warranted by the fact that the  
17 *Leiber* Plaintiffs are required to take reasonable steps to verify that each of the compositions  
18 contained in their notifications does not bear the same title as other compositions in which they  
19 do not hold a copyright interest, and for any such compositions that do, to provide some means of  
20 distinguishing any such identically named compositions. This Court contemplated the problems  
21 that might occur when several songs are identically or similarly named (and which are set forth in  
22 detail in Napster's First Report at 18-22), by including a requirement in the Order that "[f]or  
23 compositions for which there might be a number of compositions of the same name, *the burden*  
24 *will rest with plaintiffs to identify those compositions to which they own or control the rights.*"  
25 *Leiber* Order, ¶ 2(D) (emphasis added). For the reasons previously set forth, the best—and  
26 easiest—means for the *Leiber* Plaintiffs to fulfill this burden is to provide performing artist  
27 information for such compositions.

28 For all of these reasons, Napster requests that Paragraph 2 of the Order be modified to



1 require the *Leiber* Plaintiffs to provide performing artist information for their compositions, when  
2 known or reasonably available to them.

3 **D. Plaintiffs' Lists of Protected Works are Not Confidential**

4 Plaintiffs claim that the lists of protected works they have provided to Napster are  
5 confidential, and thus subject to the Protective Order entered in this action. This claim is now  
6 based on their assertion that the particular "combination" of information contained in these lists—  
7 consisting of artists, album and song titles—is not readily available to the public. The *Leiber*  
8 Plaintiffs make their current claim of confidentiality (Supp. Ault Decl. Exh. 19) despite having  
9 disclosed their lists publicly and in court filings seven months ago. *Id.* ¶ 52. They do not  
10 suggest, however, that Napster ever disclosed this compilation to the public. Indeed, Napster  
11 expressly stated that it would not disclose, and in fact has not disclosed, such information.<sup>25</sup>

12 Nonetheless, as Napster previously has explained to the Court, for a multitude of  
13 reasons—including the fact that information regarding artist names, album titles, song titles, and  
14 ownership of sound recordings of such songs is widely disseminated and available to the public—  
15 Plaintiffs' lists fall within the public domain and therefore cannot qualify as confidential under  
16 the Protective Order. *See* Second Rep. at 14-15. Indeed, the only information contained in  
17 Plaintiffs' lists that is not readily available to the public is the erroneous data contained in such  
18 lists.

19 As this Court has noted, it is a "public forum" (12/05/00 Tr. At 82:1-8), and Napster's  
20 response to Plaintiffs' overbroad and non-complying notices, and erroneous data, are a matter in  
21 which the public has a right to know, and in which it takes great interest, as demonstrated by the  
22 interest of responsible press organizations. *See* Matt Richtel, *Music Industry and Napster Still at*  
23 *Odds*, N.Y. Times, March 21, 2001. Even more significantly, artists and their fans have the  
24 legitimate need and desire to know whether their works have been excluded—and, if so, whether

25 <sup>25</sup> Contrary to Plaintiffs' assertions, Napster has neither released Plaintiffs' lists to the public, nor  
26 did it provide a copy of its Second Report to a reporter prior to serving it on Plaintiffs. *See* Supp.  
27 Ault Decl., ¶ 52, Exhs. 21-22. Moreover, at no time have the Plaintiffs claimed any or loss of  
28 confidential information resulting from Napster's inclusion of the FTP password in the exhibits  
filed with its First Report. Supp. Ault Decl. ¶ 53. On the other hand, Plaintiffs fail to mention  
that they posted Plaintiffs' Report to the world on the RIAA's website but did not serve Napster  
until Napster's counsel telephoned Plaintiffs' counsel to request it, after seeing portions on the  
RIAA's website. *Id.*, Exh. 22.

1 they have been excluded wrongfully. For each of these reasons, Napster seeks clarification from  
2 this Court that Plaintiffs' lists of protected works are not confidential, and thus not governed by  
3 the Protective Order in this action.

4 **E. Variants**

5 Napster also respectfully requests that the Court clarify Plaintiffs' burden with regard to  
6 providing Napster notice of variants they have found. If Plaintiffs find variants of specific artist  
7 names or song titles, they should be obligated to provide them to Napster in that form so that  
8 Napster can add them to the list of artist names and song titles in the negative database. To the  
9 extent that Plaintiffs provide variants in the form of specific file names, Napster will exclude  
10 those file names. However, to exclude as many variants as possible, Napster also needs to know  
11 about variants of artist names and song titles, independent of specific file names. Requiring  
12 Plaintiffs promptly to disclose known variants will therefore expedite compliance.

13 **F. Previously requested clarification relating to file names**

14 As requested in its First Report, Napster respectfully requests that the Court also:  
15 (1) clarify that Plaintiffs must provide compliant notices, including file name(s), before Napster  
16 has a duty to respond; (2) order that non-complying notices may be ignored; and (3) order that  
17 Plaintiffs provide file names to Napster only after particularized review to determine the actual  
18 title and artist therein. First Rep. at 33-37.

19 As discussed in previous Reports, Plaintiffs' erroneous submissions have required Napster  
20 to expend additional resources to check their accuracy. As Plaintiffs' submission of erroneous  
21 file names represents a clear violation of Paragraph 3 of the Court's Orders, which requires  
22 Plaintiffs to ascertain the actual identity of file names before submitting them to Napster for  
23 incorporation into Napster's negative database—Napster also respectfully requests that this Court  
24 order Plaintiffs to compensate Napster for the actual time and expense it has incurred in adding,  
25 validating, and removing these erroneous file names from its negative database.

26 **CONCLUSION**

27 Napster continues to comply with the letter and spirit of the Court's injunction. It seeks  
28 the cooperation of the Plaintiffs to effectuate that injunction properly, and will work with the

1 Neutral Expert and the Court to continue to improve the exclusion mechanisms in every  
2 reasonable manner.

3 Dated: April \_\_, 2001

Respectfully submitted,

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