Appeal No. 00-16401

In The United States Court of Appeals
For The Ninth Circuit

NAPSTER, INC., a corporation,
Petitioner/Appellant,
v.
A & M RECORDS, INC., a corporation, et al.

NAPSTER, INC., a corporation,
Petitioner/Appellant,
v.
JERRY LEIBER, individually and doing business as JERRY LEIBER MUSIC, et al.

Appeal from the United States District Court for the Northern District of California, San Francisco Division Jointly Heard In Civil Nos. C 99-5183 MHG (ADR)(A&M Records) and C 00-0074 MHG (ADR)(Leiber) Judge Marilyn Hall Patel

Brief for Amici Curiae Association of American Physicians & Surgeons, Inc. and Eagle Forum Education and Legal Defense Fund

Filed in Support of Appellant Napster, Inc.
Supporting Reversal

Karen B. Tripp
1100 Louisiana St., Suite 2690
Houston, Texas 77002
Phone: (713) 658-9323

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

OTHER

Concise Statement of Identity of Amici Curiae, Interest in the Case, and Source of Authority to File

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter and journal and participates in litigation in furtherance of its goals of limited government and the free market. Central to the interests of AAPS are the First Amendment rights of association and speech at issue in the case at bar, which are essential to limiting government encroachment on the marketplace of ideas, values, and health. In particular, AAPS is concerned that the suppression of Web sites like Napster merely for referring internet[1] users to other information or other users is unjustified both economically and constitutionally. The injunction by the court below, if upheld, will likely have a profound chilling effect on the dissemination of important therapeutic medical information to users over the internet.

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF's mission is to enable conservative and pro-family men and women to

[1] The term "internet" is, like "television" and "telephone", merely a non-trademarked generic name for a pervasive new technology, and thus there is no basis for capitalizing it.

participate in the process of self-government and public policymaking so that America will continue to be a land of private enterprise, individual liberty, and respect for family integrity. The freedom of private citizens to associate over the internet for economic and cultural purposes is an objective that Eagle Forum ELDF defends through education and participation in significant legal cases. Eagle Forum ELDF is particularly concerned that the injunction by the court below, if upheld, will likely have a harmful effect on the dissemination of political, economic and cultural information over the internet.

Summary of Argument

Congress has intentionally refrained from regulating the internet, and consistent with this intent Napster has provided a directory service that facilitates the non-commercial sharing of music over the internet. This Napster innovation, based on advances in the internet, falls within the intention of Congress to keep the internet deregulated. Specifically, the Audio Home Recording Act ("AHRA") and the No Electronic Theft Act ("NET") fully allow the Napster innovation at issue here, and this Court should not impose a regulation on Napster that Congress itself has declined to impose. Internet innovations are vital to our economy and our

constitutional rights, and where Congress has refrained from interfering, so should this Court.

Indeed, the rapid advances in internet technology make it unlikely that the innovations could be stopped even if it were desirable to do so. Economically, it is not desirable or feasible to block innovations that, like the Napster innovation here, eliminate substantial transaction costs of distribution. As outdated methods of distributing information are supplemented by more efficient directory-based non-commercial distribution, the resultant reduction in transaction costs promotes more music creation. The internet is, above all, an eliminator of costs of distribution that burden the economy, and Nobel laureate economist Ronald Coase proved that an optimized economy results from a no-transaction-cost system. Just as our overall economy is lifted by the internet, the creation and consumption of music is lifted by non-commercial internet sharing as well.

A few special interests, such as plaintiffs, may find their role diminished in the new economy of the internet, but the rest of the world benefits greatly from removal of middlemen. The revenue to plaintiffs may even increase given a more music-educated public. Given the clear economic benefit of internet distribution – benefit even to plaintiffs due to

the popularity gain – one wonders if their real fear is even economic. As Napster provides artists with a new means of popularizing music, the real threat to plaintiffs may be a loss of control, and vulnerability to replacement by a more internet-friendly distributor of music in the new economy. Loss of control by an entrenched private party due to technological advances, however, is not an interest worthy of protection by this Court.

The ultimate threat to plaintiffs is not even from Napster, but is from the growing exercise of freedom of association rights by internet users. The internet facilitates peer-to-peer relations, and Napster is just one of many manifestations. The First Amendment protects these associative rights, and they cannot be infringed where, as here, there is no compelling state interest. When random individuals meet on the internet to discuss and share music, the plaintiffs risk losing some of their control. However, First Amendment rights do not lose their protections simply because someone else's interests are harmed, be it harm to a politician or harm to a profit-maximizing corporation. That plaintiffs' interests are harmed by an exercise of internet users' First Amendment associative rights is no justification for infringing on those rights. Moreover, the injunction below is overbroad because it quashes many indisputably lawful associations through Napster.

Enjoining the rights of Napster and its users here would have an enormous chilling effect on many other desirable internet ventures. Any Web site that brings individuals together, or points them elsewhere and thereby may incidentally facilitate unlawful activity, would be in jeopardy. Web sites that discuss medical treatments approved in foreign countries, but not approved in the United States, would be at risk of being shut down by the government in the name of reducing unlawful activity. Web sites where individuals may discuss civil disobedience would likewise be at risk. Investments in the Napsters-of-the-future in areas far afield from music would also be chilled due to a heightened risk of an injunction putting the Web site out of business.

At stake in this litigation is far more than how music is distributed. The remarkable potential of the internet in facilitating peer-to-peer communications and relationships is up for grabs in this dispute. Shall a special interest like plaintiffs', which is threatened by increased associative activity among the public, be able to shut down an internet facilitator of such associations? Shall an entity threatened by dissemination of information over the internet be able to censor such dissemination? To contemplate the implications of the injunction by the court below is to require reversal of it.

I. Congress Intended to Shield the Internet from Plaintiffs' Claims and from Regulation Generally.

The lower court injunction is a judicial attempt to regulate internet communications, and its character and scope are unlike anything that has been permitted before. Regulations of this sort have been consistently rejected by Congress.

A. Congress Shielded Internet Users from Infringement Claims in the AHRA.

When digital audio recording equipment first started to enter the consumer marketplace, the Supreme Court decided in favor of the new technology. See Sony v. Universal, 464 U.S. 417 (1984). When the industry turned to Congress for statutory relief, Congress debated many of the principles at issue here, and passed the 1992 Audio Home Recording Act ("AHRA"). 17 U.S.C. §§ 1000-1008. The statutory compromise was that the music industry would get a royalty on all equipment that was primarily for music, such as Digital Audio Tape ("DAT"), but that generic computer equipment like computer hard drives would be royalty-free. Congress codified the doctrine of Sony v. Universal as follows: "No action may be brought ... based on the noncommercial use by a consumer." 17 U.S.C. § 1008. As held by the Ninth Circuit, "the Act does not broadly prohibit digital serial copying of copyright protected audio recordings. Instead, the

Act places restrictions only upon a specific type of recording device." RIAA v. Diamond, 180 F.3d 1072, 1075 (9th Cir. 1999).

The lower court rejected application of the safe harbor provision of the AHRA by noting that the lawsuit was not brought under the AHRA. Opinion II.C n.19. But that misses the point of the AHRA exemption: Congress has determined that there is no direct infringement in "noncommercial use by a consumer" using computer equipment, including use over the internet. Without a basis for a direct infringement claim, plaintiffs lack any sustainable claim against Napster for contributory or vicarious infringement as well.

Congress was prudent in creating a safe harbor for computer equipment in passing the AHRA. As internet growth has demonstrated, computer use has a pervasive and highly beneficial impact on our entire economy. This is a decision for Congress to resolve, and Congress did resolve it in favor of computer users. To address the issue of royalties, Congress required royalties on music equipment even if used to copy non-musical data or to copy music with authorization, but Congress did not require royalties on computer equipment even if used to copy musical data without authorization. This was a sensible legislative compromise, and one that should not be altered by this Court.

As the Ninth Circuit held, the safe harbor for computer equipment was intentional:

> The district court concluded that the exemption of hard drives from the definition of digital music recording, and the exemption of computers generally from the Act's ambit, "would effectively eviscerate the [Act]" because "[a]ny recording device could evade [] regulation simply by passing the music through a computer and ensuring that the MP3 file resided momentarily on the hard drive." RIAA I, 29 F. Supp. 2d at 630. While this may be true, the Act seems to have been expressly designed to create this loophole.

RIAA v. Diamond, 180 F.3d at 1078. Professor Lessig reiterated this below: "The express intent of Congress in that [AHRA] act was to leave private, noncommercial home recording unregulated by copyright law." Lessig Decl. ¶ 46.

There are several reasons for Congress to draw the line for copyright where it did. First, by imposing a royalty and copying restrictions on digital audio recording equipment and not computers, Congress provided the music industry with an incentive to promote quality digital music on its own equipment, instead of just waiting to charge royalties for innovations developed independently by the computer industry. Second, the computer and digital network markets are more important to the economy and the public good than music, so Congress wanted to make sure that technological innovation in that broader market was not impeded by music royalty requirements. Third, personal noncommercial copying generally cannot be

stopped anyway without unacceptable intrusions into fundamental liberties. Fourth, the development of music will be better for all concerned if there is a certain amount of unlicensed music sharing, just as publishing is enhanced by a certain amount of "fair use" copying. All of these rationales support the safe harbor created by Congress for the activity at issue here.

Nor does the No Electronic Theft Act ("NET Act") prohibit the activity at issue here. 17 U.S.C. § 506. This Act sets a threshold of $1000 in retail value on the amount of permissible copying within a 180-day period, a threshold that most Napster users are unlikely to exceed. More importantly, the act only bars willful infringement, not just copying. The Act expressly provides that "evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement." Id.

The NET Act does not criminalize the copying that is authorized by the AHRA, and Congress has not otherwise undermined the safe harbor of the AHRA that protects the copying here. The NET Act imposes criminal penalties for infringement, and without infringement there is no penalty. The copying at issue here is within the AHRA safe harbor, and thus not criminalized by the NET Act.

The court below erred by not making a determination as to whether Napster users fit into the AHRA safe harbor. If AHRA protects most Napster use as legitimate, then the court should not impede the legitimate copying that Napster facilitates. To enjoin this internet innovation is to undermine the Congressional policy against regulating the internet.

B. This Court Should Refrain from Restricting New Internet Innovations such as Napster's.

Every new technology that is useful and cheap will be used, even if it tramples on the pre-existing economic order. It is inevitable that cheaper products will replace more expensive products, and that economically efficient services will replace inefficient ones. These changes are nearly universally recognized as good and progressive, and are largely unstoppable.

Napster offers internet and directory services that are convenient for music listening, and are not radically different from related services offered elsewhere. Nearly all computers now offer peer-to-peer networking and a file transfer protocol. Directory services such as those of Yahoo and AltaVista have become indispensable to modern life. Any attempt to hinder this progress would be misguided and would only delay economic progress. And if such an attempt is to be pursued, Congress would be the better forum for weighing the various issues and reaching a compromise.

When the video tape recorder (VCR) was developed and introduced in the market, and widespread unauthorized copying of broadcasts became commonplace, the Supreme Court pointedly refused to interpret the law in a way that would stifle a new technology, saying that only Congress should do that. "Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary." Sony, 464 U.S. at 431. Later, Congress refused to pass a law limiting the sales or use of VCRs, thereby confirming the wisdom of the Court's forbearance. This Court likewise should refrain from interfering with Napster's innovation.

C. Under Practice Management v. AMA*, Napster Has a Valid Copyright Misuse Defense.*

Plaintiffs cannot enforce copyrights that have been misused. Practice Management Information Corp. v. American Medical Ass'n, 121 F.3d 516 (9th Cir. 1997), modified, 133 F.3d 1140 (9th Cir. 1998), cert. denied, 119 S. Ct. 40 (1998). In that case, this Court flatly rejected claims by the copyright holder that disaster would occur if it could not enforce its copyright. Enforcement of a misused copyright is contrary to the public interest, and only a net overall public benefit can result from denying its enforceability. This precedent is binding and dispositive in this case to the extent any of the

plaintiffs has misused copyrights that they seek to enforce here. See also Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 977-79 (4th Cir. 1990) (copyright misuse defense "forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office"); DSC Communications Corp. v. DGI Techs., Inc., 81 F.3d 597, 601 (5th Cir. 1996); Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1337 (9th Cir. 1995); Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1408 (9th Cir. 1986).

There are two clear bases for finding that plaintiffs have misused the copyrights they seek to enforce here. First, there is overwhelming evidence that plaintiffs have engaged in price-fixing with respect to their copyrights. Several months ago, the FTC found the big five music labels guilty of a price-fixing scheme for retail music CDs, and just this month 28 states have filed a lawsuit for hundreds of millions of dollars in damages. See CNET, http://news.cnet.com/news/0-1005-200-2464013.html (quoting the New York Attorney General saying, "When there is illegal activity to fix prices -- as was the case here -- the consumer is always the loser.")[2]. The big five

[2] Amici hereby respectfully request that the Court take judicial notice of the publicly available documents referenced herein. Fed. R. Evid. 201(b)(c); Mendler v. Winterland Prod. Ltd. (9th Cir. Mar. 14, 2000. No. 98-16061) 2000 Daily Journal DAR 2742, 2743. 2000 Recorder CDOS 2007,

music labels have also made a concerted effort to thwart the availability of online MP3s. See Kohn Decl. ¶ 2 ("Emusic.com presently does not have licensing agreements with any of the five major record companies"). If true, this copyright misuse renders the copyrights unenforceable against Napster. See Practice Management, 121 F.3d at 520-21 (denying enforceability of AMA's copyright due to its misuse).

Second, the popularity of Napster is itself an indication that plaintiffs are impeding the efficiency of the market, by imposing inflated prices or obstructing ease of access. Other industries vulnerable to competition by the internet, such as the newspaper industry, do not see a stampede of angry users away from their product to obtain it on the internet. The public has demonstrated that it is willing to pay a fair and competitive price for a product even though it may be available for less through an unauthorized market. To the extent plaintiffs are losing business to Naspter use – which remains doubtful and unproven – that loss in business is likely attributable to plaintiffs' non-competitive pricing and distribution policies.

D. Congress Has Deliberately Left the Internet Unregulated so that It Can Grow to Its Potential.

(Ninth Circuit takes judicial notice of websites and publicly available information).

The internet is a peer-to-peer network, with servers being used for indexing and other functions. There is a consensus that growth of the internet will confer substantial benefits on the economy, and accordingly Congress has deliberately refrained from interfering with that growth with taxes or regulation. As with any technological innovation, there is the possibility that older industries and business models will be replaced by newer, more efficient ones, creating the possibility of using new technology for unauthorized or even illegal activities. While special interests have clamored for protection against the inevitable changes to be caused by the internet, Congress has properly "Just Said No" to demands for regulating the internet to protect special interests such as plaintiffs.

The injunction by the court below granted plaintiffs a remedy that Congress has repeatedly refused to give them. The issue of noncommercial digital copying was debated in Congress in conjunction with passing AHRA in 1992 and the NET Act in 1998. Both times Congress properly refused to enact the special protections that plaintiffs now seek from this Court. Congress has weighed the benefits to the public of an unregulated internet against the costs that technological change imposes on existing interests, and Congress has consistently chosen to keep the internet unregulated in all relevant respects – and this Court should do likewise. See, e.g., AT&T

Corp. v. City of Portland, 216 F.3d 871, 878-79 (9th Cir. 2000) (invalidating a local regulation concerning the internet because "[t]hus far, the FCC has not subjected cable broadband to any regulation, including common carrier telecommunications regulation. … Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters").

Most recently, Congress considered regulating against internet "piracy" in the "Collections of Information Antipiracy Act." H.R. 354. It has been introduced in the last two sessions of Congress and multiple hearings have been held. It would provide plaintiffs and others with the ability to assert an ownership-like interest in database listings against alleged "pirates" such as Napster in order to prevent them from posting directories on the internet. H.R. 354 was backed by numerous established industry interests, ranging from the real estate industry (worried about unauthorized internet postings of houses for sale) to the legal database industry (worried about unauthorized posting of court decisions) to the AMA (trying to reverse the Practice Management decision). See http://www.databasedata.org/hr-354/hr354.html (listing links to all relevant documents concerning H.R. 354, including testimony). Congress, in deference to the overall benefit from an unregulated internet, has properly refused to pass this bill.

The power and efficiency of the internet derive from its peer-to-peer communication. The architecture of the World Wide Web is decentralized and disorganized. What makes it useful for most people are the various directory services such as Yahoo, AOL, AltaVista and Napster. If this Court were to impose limits on those directories or search engines, then it would have a profound chilling effect on the efficiency of the internet. See, e.g., http://www.searchenginewatch.com (providing an overview of internet search engines). Millions of internet users depend entirely on links in the directories and search engines to find information and publish their facts and opinions. Like the inventions of the telephone, radio, television, photocopy machine, and VCR before it, the internet facilitates petty "piracy", but Congress and the Courts have always refrained from choking off new technology in order to stamp out a little "piracy".

The injunction below constitutes an unprecedented regulation of the internet. It mandates that servers providing directory functions must guarantee to copyright holders that no one is making contact with anyone else in order to exchange copyrighted material. The injunction subjects every directory service – and hence millions of Web sites – to the risk that an adversary or the government may obtain court-imposed restrictions on how its directory service is being used. The injunction below inevitably

chills the amount of information flowing over the internet, and thereby undermines the very benefits of the internet itself.

Regulation to chill communication on the internet should only come from Congress, if at all. The injunction below operates as a regulation beyond any regulation permitted by Congress to date. The injunction below should be vacated.

II. Plaintiffs' Self-Serving Attempts to Perpetuate Transaction Costs and Impose Output Constraints Are Unjustified.

Plaintiffs, as intermediaries, do not have the same interests as the artists or the public. By their very charters, plaintiffs are devoted to maximizing profits for their own shareholders – and therefore seek to perpetuate the traditional channel of distribution that generates those profits. To the extent plaintiffs' interests conflict with the purpose of the Copyright Clause and with economic efficiency, such interests are unworthy of protection here.

Here the issue is where to draw the line of music ownership demarcating plaintiffs' economic interests as intermediaries on one side, and the interests of the public in the creation and distribution of music on the other. While plaintiffs portray their interests as tracking the interests of the artists and the public in new music, that is clearly not correct. Rather,

plaintiffs have their own particular economic interest in distribution-related revenue consisting of mark-up costs to consumers. Under the plaintiffs' business model, consumers must pay substantial mark-up costs to intermediaries in obtaining music. Plaintiffs profit from these consumer transaction costs and thus seek to perpetuate them.

In addition, plaintiffs often find it profitable to restrict the creation of new music that might interfere with existing profitable product lines. For example, plaintiffs contractually require artists to limit their output in order to protect the current revenue stream. When the public is demanding more from a popular artist at a particular time, plaintiffs often use that demand to increase profits rather than artistic supply.

These activities – perpetuating transaction costs and restricting supply – are economically inefficient and contrary to the purpose of the Copyright Clause, which states that its purpose is "[t]o promote the Progress" of arts. U.S. Const. Art. I, sec. 8, cl. 8. In the absence of these transaction costs and output constraints, an optimal amount of music creation and consumption would occur "by the inexorable operation of the Coase Theorem." Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43, 59 (2d Cir. 1997) (Shadur, J., dissenting), cert. denied, 118 S. Ct. 1055 (1998). Cf. United Housing Found., Inc. v. Forman, 421 U.S. 837, 863 n.3

(1975) (Brennan and Marshall, JJ., dissenting) (citing article containing Coase Theorem in criticizing a narrow view of securities). There is no justification for judicial protection of the economic inefficiencies imposed by plaintiffs for their own financial benefit.

A. Plaintiffs' Attempt to Perpetuate Their Transaction Costs Is Unjustified.

In bypassing the intermediaries like plaintiffs, Napster has dramatically reduced the transaction costs associated with searching and obtaining music. A consumer who visits Napster is free from the inventory decisions made by intermediaies, and from the substantial transaction costs associated with searching for an inventory containing a desired work and then traveling there to examine and purchase the work. Under the Napster model of distribution, the consumer and artist are freed from the substantial mark-up in costs imposed by the intermediaries in distributing music in the customary manner. Napster creates an essentially transaction-cost-free world for the future distribution of music from artists to consumers.

This Court has observed that, "given a world of no transaction costs, economic optimality does not depend on the allocation of a property right … to one party or another; the two parties can simply bargain to the optimal solution." Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1071 (9th Cir. 1998)

(citing R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 2-15 (1960)). Hence, as long as transaction costs are not imposed, an optimal level of music creation and distribution will occur regardless of where the demarcation line of ownership is drawn between plaintiffs and the users of Napster. Plaintiffs' argument that allowing users of Napster to copy music would somehow inhibit the creation of music is economic nonsense under the above teaching of Leisnoi and Nobel Laureate Ronald Coase. Conferring the right to internet-based, non-commercial copying to Napster users does nothing to inhibit an optimal level of music creation and distribution.

The profits of plaintiffs, in contrast, require maintaining transaction costs that have inhibited music distribution in the past. Plaintiffs insist that the no-transaction-cost world of Napster be enjoined in order to continue their high-transaction-cost regime. Under the Coase Theorem, such an injunction can only thwart the optimal creation and consumption of music. See Leisnoi, supra. Those who profit from transaction costs, such as plaintiffs, are always threatened by a transformation to a Coasean world of no transaction costs. But plaintiffs' loss is the economy's gain, as the Coasean world ensures the optimal level of music creation and consumption for a net overall benefit. See, e.g., Chrysler Corp. v. Kolosso Auto Sales,

148 F.3d 892, 894 (7th Cir. 1998) ("The parties thus have divergent interests, but they can be expected to negotiate to the solution that maximizes the net benefits of their relationship.") (citing Coase, supra).

In an efficient market, noncommercial activity is rarely (if ever) any threat to commercial activity. Businesses provide goods and services that have value in the marketplace. When a business complains about competition from noncommercial activity, it is invariably because its prices are too high. There is no economic justification for protecting commercial businesses from noncommercial activity.

The attempt by plaintiffs to defend their entrenched economic interests is akin to horse-and-buggy manufacturers in the advent of the automobile era. A new technology arrived that changed the means of getting from here to there. New technology that brings greater efficiency can only increase the overall level of desired activity, be it visiting a friend or finding music to which to listen. The new technology dramatically reduces transaction costs and thereby greatly expands the public participation in the activity. This case is even more compelling than the horse-and-buggy example because it is not known whether plaintiffs will even be hurt by the innovation brought by Napster. Much like the positive impact of the internet

on newspapers, Napster may increase overall public interest in music to an extent that offsets any decline in profits to plaintiffs.

Music creation will not cease due to Napster any more than the news printed by newspapers could ever cease due to the internet. To the extent musicians are motivated by the music itself or by public acclaim and publicity, as most were for thousands of years, that incentive only increases with the efficient distribution which Napster brings. To the extent some musicians are motivated solely by financial reward, the Coase Theorem ensures that a more efficient level of compensation will develop upon removal of the transaction costs imposed by plaintiffs. The form of that compensation may not require an intermediary such as plaintiffs, and may consist of concert sales, pay-per-listens, web site ads, personalized songs-upon-request, advertising endorsements, or countless other ways to be determined best by the operation of the free market.

Economic efficiency militates for eliminating transaction costs – and so does the Copyright Clause. That Clause only contemplates legal incentives to create music, not legal protection of transaction costs imposed by intermediaries such as plaintiffs. Plaintiffs have overstepped their role by demanding perpetuation of transaction costs that frustrate more efficient and broader listening to music.

B. Neither Economic Efficiency Nor the Copyright Clause Supports Plaintiffs' Attempt Here to Restrict Output.

In addition to imposing transaction costs, plaintiffs also attempt to perpetuate the ability of its members to restrict the output of new music to the public. In maximizing their profits on existing product lines, plaintiffs routinely restrict the output of new music by artists, particularly at times when their music is in great demand. "[B]y restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices. Prices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available." Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995) (citing Philip Areeda & Donald F. Turner, Antitrust Law § 501, at 322 (1978) and Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986)). Plaintiffs even demand that artists contractually forgo their rights to distribute over the internet.

For example, the rock musician named Prince was one of the most creative and popular musicians of the past 20 years. He described the output restrictions placed upon him by a plaintiff as follows:

> Warner limited the amount of music he could release. "Warner wanted a record only every 18 months. I could release a record every

> seven months. I could not record when I wanted to." And when one of the label's best-selling recording artists wanted to release a three-CD set, "they said they don't want to do this," he added.

Reuters, Nov. 9, 1999, http://wallofsound.go.com/news/stories/theartist-110999.html.

Such restriction on output is economically inefficient. Restriction on output prevents certain original music from being created and distributed, music that could bring benefit to the public. No one, not even plaintiffs or the Recording Industry Association of America, Inc. ("RIAA"), can be as smart as the public itself in deciding what new music it would enjoy. Often the biggest hits are complete surprises to the recording industry and all the experts, and only became hits because of spontaneous caller demand to a remote radio station that perchance played them. The free market, not the profit motives of intermediaries such as plaintiffs, is the best facilitator of the efficient level of music creation. The suppression in output by plaintiffs frustrates this operation of the free market. By ensuring maximum output of music, Napster removes this artificial constraint imposed by plaintiffs.

Nor are plaintiffs' efforts to restrict output permissible under the Copyright Clause. That clause, in contrast to most other constitutional grants of authority to Congress, places an express limitation on its purpose: "To promote the Progress of Science and useful Arts." U.S. Const. Art. I,

sec. 8, cl. 8. Congress is thereby without authority under this clause to grant special rights to any group, such as plaintiffs, for a profit-maximizing purpose that does not "promote the Progress" of arts.

Limiting the output of creative artists plainly fails to "promote the Progress" of artistic works. Had Mozart worked under the thumb of an output limitation, some of his best works may never have been created and immediately enjoyed. No one tells Stephen King that he is writing too many novels. Artists are known to work in bursts of creativity, and it is contrary to the Copyright Clause for plaintiffs to limit musical output by shutting down Napster. Such an output limitation is directly contrary to the constitutional requirement that copyright protections be limited to the goal of promoting the progress of the arts.

III. Napster's Facilitation of Association by Internet Users is Entitled to Strict Scrutiny Review Under Recent Supreme Court Decisions.

As recently emphasized twice by the Supreme Court this year – in California Democratic Primary v. Jones and Boy Scouts v. Dale – the strict scrutiny standard of review protects associative rights. This standard of review must apply to association on the internet as strongly as it does off the internet. Infringements upon associative rights require a compelling state

interest, and even then the restriction must be tailored narrowly to satisfy such interest.

The court below failed to apply this standard in enjoining Napster's internet-based directory service. No compelling state interest exists for restraining Napster's facilitation of association by providing an internet-based directory service. Napster merely facilitates association by internet users for the purposes of chatting and exchanging music in a non-commercial manner. Plaintiffs' claims, even taken in a light most favorable to them, at most involves private monetary interests and does not implicate any injury to a public interest. Such private injury cannot justify infringing upon the First Amendment associative rights of Napster and its users.

Moreover, the restraint on Napster's exercise of its associative rights is not narrowly tailored to a state interest, as required by the Supreme Court. The injunction below is overbroad in its scope and infringes upon the lawful associative rights of Napster and its users to an extent far more than necessary. The potential violation of laws or rights by users of Napster's directory service does not justify censoring the directory service itself.

Amici oppose the chilling effect that the injunction against Napster would have against numerous Web sites. Many Web sites provide links or other information that enable visitors to engage in lawful as well as unlawful

activity. Health-related Web sites, for example, often discuss potentially life-saving therapies approved in foreign countries but not approved in the United States and, if the injunction against Napster is upheld then those Web sites may be shut down as well. Such infringement of the internet right of free association in the absence of a compelling state interest is unconstitutional. Shutting down the Napster Web site at the request of the private plaintiffs would impermissibly chill numerous other Web sites that facilitate associations by internet users.

A. There Is No Compelling State Interest in Shutting Down Napster's Directory Service.

In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Supreme Court emphasized that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, *and cultural ends.*" Id. at 622 (emphasis added). This fundamental principle was recently reiterated by the Supreme Court in Boy Scouts v. Dale, 120 S. Ct. 2446, 2451 (2000) (noting further that "protection of the right to expressive association is 'especially important in preserving political and cultural diversity and in shielding dissident

expression from suppression by the majority') (quoting Jaycees, 468 U.S. at 622) (emphasis added).

Providing a directory service so that individuals may associate with each other for musical purposes plainly falls within the "cultural ends" protected by the First Amendment. Under Jaycees and Boy Scouts, a directory service having "cultural ends" is on equal footing with a directory serving political, social, educational, or religious ends. Under these precedents, "cultural diversity" is entitled to as much First Amendment protection as "political … diversity."

Napster's enormous directory service for music – both music favored by the record industry and music disfavored by it – is the epitome of "cultural diversity" protected by the First Amendment above. Before Napster, a handful of plaintiffs selected and screened the music to be distributed to the public, and one fan of a work had no means of chatting with other fans of the same work. Cultural diversity in this music was also limited to the preferences and financial incentives of the plaintiffs. Napster, however, has opened the cultural diversity to the world's unbounded disk space. Napster's provision of a directory service to tap into this enormous cultural diversity, and allow fans to find each other based on music titles and

to chat with each other, is protected by the First Amendment against restraints lacking a compelling state interest.

No such compelling state interest could possibly be shown in this case. There's no risk to public safety at issue here, or threat to our form of government. Even if plaintiffs' claims were true, then the only risk is merely how many zeros there are in plaintiffs' annual profits. Such private interest does not even remotely justify an infringement on the First Amendment rights of Napster and its visitors.

B. The Injunction Against Napster's Directory Service is Overly Broad and Unnecessarily Burdensome.

Even if there were a compelling interest to infringe upon the rights of Napster and its visitors, the infringement must be narrowly tailored to such interest. California Democratic Primary v. Jones, 120 S. Ct. 2402 (2000). "'Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest.'" Id. at 2412 (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

Many uses of Napster's directory service are clearly non-infringing, and the court below concedes that a substantial percentage of use on Napster is unquestionably proper. Opinion II.B.2 (finding, in reliance on plaintiffs' own experts, that more than 70% of the music copied "may be owned or

administered by plaintiffs," thereby conceding that up to 30% of the copying is unchallenged in this litigation). Visitors to Napster's Web site who find and copy music lacking any copyright restriction against such use is plainly non-infringing. Over time, as plaintiffs' control over music subsides in the face of Napster and other developing alternative channels of distribution, the quantity of material copied in a clearly non-infringing manner over Napster would inevitably increase.

The injunction below, however, operates to prevent perfectly lawful activity as well as arguably infringing activity. The court placed the burden on Napster to guarantee that no copying, not even fair use copying, can occur without authorization. "Defendant must ensure that no work owned by plaintiffs which neither defendant nor Napster users have permission to use or distribute is uploaded or downloaded on Napster." Order at 39. This unnecessarily chills Napster (and analogous Web sites) from facilitating lawful activity, and thereby constitutes an unconstitutionally overbroad injunction. The Court could easily have required plaintiffs first to identify specific music and demonstrate that plaintiffs can block copying of it, and only then require Napster to take steps to restrict sharing of that music to be within reasonable fair use limits.

C. Shutting Down Napster's Directory Service Would Have an Undesired Chilling Effect on Many Other Beneficial Web Sites.

Amici are particularly opposed to the precedent that the injunction against Napster would establish with respect to numerous other directory services, search engines, and Web sites on the internet. Shutting down a directory service because some use it for arguably unlawful purposes would have a dreadful chilling effect on other Web sites that can arguably be used for unlawful purposes, too. Even worse, mainstream search engines could be forced to filter their query results based on criteria supplied by special-interest groups such as plaintiffs or the RIAA.

For example, a large percentage of internet users search for medical information, often for life-threatening illnesses such as AIDS or terminal cancer. Medical Web sites providing references to users inevitably facilitate the procurement by users of therapeutic drugs that are approved in foreign countries but not in the United States. The same reasoning behind the injunction against Napster would chill or even require shutting down Web sites that provide medical information to internet users. The government could simply cite the Napster injunction as precedent for shutting down any Web site that may incidentally facilitate unlawful activity, including Web

sites that provide or reference discussions of therapeutic drugs not approved in the United States.

Or suppose a mother has a boy with attention-deficit disorder and is considering a recommendation that he take Ritalin. A quick search on Yahoo normally yields a variety of sites including support groups, pharmacies, instructions and warnings about safe usage, alternative medications, diagnostic criteria, and sites that are critical of the use of Ritalin for a variety of reasons. But "Ritalin" is a registered trademark, and some of the official information is copyrighted. What if the owner of Ritalin asserted its intellectual property rights, and demanded that Yahoo only provide authorized links on Ritalin? The outcome would be that criticism of the use of Ritalin would be effectively silenced.

Indeed, already the venture capital available to fund internet-based information providers has been threatened by this litigation. As reported in the widely-respected *Economist*, the chilling effect on investment in the internet from this litigation could be enormous:

> The legal juggernaut set in motion by the recording industry to rid itself of Napster is threatening to take with it more than just the upstart firm whose software enables music fans to share each other's CD collections free on the Internet. … If … things go badly for Napster in the higher courts, litigious music and film companies will most likely turn their sights on the venture-capital firm that backed Napster, Hummer Winblad, and the programmers who made Napster possible. At first sight, this looks like a denial of two well-established

> points of law: the idea that the sins of a corporate entity cannot be visited on its investors; and the traditional defence of people who make things such as guns and cars that they cannot be held responsible for the way others use their products. … Backers of Napster-like "peer-to-peer" start-ups, which harness the power of millions of linked personal computers to create huge networks, could become vulnerable even if their role in infringing copyright is deemed inadvertent.

"Hummer's Napster Bummer," *The Economist*, Aug. 12-18, 2000, http://www.economist.com/editorial/freeforall/current/index_wb0340.html.

IV. Conclusion.

The decision below should be reversed in its entirety.

Respectfully submitted,

_____

Karen B. Tripp
Attorney at Law
1100 Louisiana St., Ste. 2690
Houston, Texas 77002
Phone: (713) 658-9323
Fax: (713) 658-9410
Ktripp@tripplaw.com

Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 00-16401

I certify that: (check appropriate options(s))

____1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

ÿ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

ÿ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,0000 words or 650 lines of text).

____2. The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

ÿ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

ÿ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

ÿ Proportionately spaced, has a typeface of 4 point or more and contains _____ words,

or is

ÿ Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

____3. Briefs in Capital Cases

ÿ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

ÿ Proportionately spaced, has a typeface of 14 points or more and contains _____words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

or is

ÿ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

_X_ 4. Amicus Briefs

ÿ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

or is

ÿ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

or is

ÿ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

_____ _____

Date Karen B. Tripp, Esq.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent, by overnight delivery, this __ day of August, 2000, to the attorneys of record listed on the attached sheet:

_____
Karen Tripp, Esq.

Appeal No. 00-16401

In The United States Court of Appeals
For The Ninth Circuit

NAPSTER, INC., a corporation,
Petitioner/Appellant,
v.
A & M RECORDS, INC., a corporation, et al.

NAPSTER, INC., a corporation,
Petitioner/Appellant,
v.
JERRY LEIBER, individually and doing business as JERRY LEIBER MUSIC, et al.

Appeal from the United States District Court for the Northern District of California, San Francisco Division Jointly Heard In Civil Nos. C 99-5183 MHG (ADR)(A&M Records) and C 00-0074 MHG (ADR)(Leiber) Judge Marilyn Hall Patel

Brief for Amici Curiae Association of American Physicians & Surgeons, Inc. and Eagle Forum Education and Legal Defense Fund

Filed in Support of Appellant Napster, Inc.
Supporting Reversal

Karen B. Tripp
1100 Louisiana St., Suite 2690
Houston, Texas 77002
Phone: (713) 658-9323