

Appeal Nos. 00-16401 and 00-16403

**UNITED STATES COURT OF APPEALS
NINTH CIRCUIT**

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

A & M RECORDS, INC., a corporation,

(For Full Caption See Following Pages)

Plaintiffs-Appellees.

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

JERRY LEIBER, individually and dba JERRY LEIBER MUSIC,

(For Full Caption See Following Pages)

Plaintiffs-Appellees.

**Appeal from the U. S. District Court Northern District of California
Civil Nos. C 99-5183 MHP (A&M Records) &
C 00-0074 MHP (Leiber) Judge Marilyn Hall Patel**

DEFENDANT-APPELLANT NAPSTER, INC.'S OPENING BRIEF

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Appeal No. 00-16401

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

A & M RECORDS, INC., a corporation, GEFEN RECORDS, INC., a corporation, INTERSCOPE RECORDS, a general partnership, SONY MUSIC ENTERTAINMENT INC., a corporation, MCA RECORDS, INC., a corporation, ATLANTIC RECORDING CORPORATION, a corporation, ISLAND RECORDS, INC., a corporation, MOTOWN RECORD COMPANY L.P., a limited partnership, CAPITOL RECORDS, INC., a corporation, LA FACE RECORDS, a joint venture, BMG MUSIC d/b/a THE RCA RECORDS LABEL, a general partnership, UNIVERSAL RECORDS INC., a corporation, ELEKTRA ENTERTAINMENT GROUP INC., a corporation, ARISTA RECORDS, INC., a corporation, SIRE RECORDS GROUP INC., a corporation, POLYGRAM RECORDS, INC., a corporation, VIRGIN RECORDS AMERICA, INC., a corporation, WARNER BROS. RECORDS INC., a corporation,

Plaintiffs-Appellees.

Appeal No. 00-16403

NAPSTER, INC., a corporation,

Defendant-Appellant,

v.

JERRY LEIBER, individually and dba JERRY LEIBER MUSIC, MIKE STOLLER, individually and dba MIKE STOLLER MUSIC, and FRANK MUSIC CORP., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In the fall of last year Napster introduced its revolutionary peer-to-peer file-sharing technology based on a real-time directory of Internet files created, named, and controlled by individual Internet users that are available for immediate sharing with other Internet users on a one-to-one basis.

Because of the advantages of peer-to-peer technology and the extent to which it empowers individual Internet users, the importance of Napster's technology has been widely recognized. Andy Grove, Chairman of Intel Corporation, has said that "the whole Internet could be rearchitected by Napster-like technology" (ER01339-ER01344), and Yahoo President Jeff Mallett has stated that "Peer to Peer is going to change traditional companies' models . . . and change the model for Internet companies as well." Washington Post, July 18, 2000 p. 2. Even the head of the Recording Industry Association of America, Hilary Rosen, acknowledged with respect to Napster technology that:

"Not only could it be used legitimately, there are certainly no illusions by me or anybody else that I work with that somehow, depending on the outcome of this lawsuit, file sharing or file copying gets put back in the box. . . . Innovation is certainly here to stay. Peer-to-peer is here to stay." CNET News.com July 20, 2000.

Although Napster's Internet directory can be used for a large variety of files,

the primary initial use of the technology (and the purpose for which it was initially designed) is to provide Internet users with a list of other users who are prepared to share, on a one-to-one non-commercial basis, certain music files. Non-commercial sharing of music among individuals is common, legal (expressly approved, *inter alia*, by 17 U.S.C. §1008), and accepted. Even the President of the Recording Industry Association of America acknowledges: “it’s cool to make tapes, it’s cool to trade them with your friends. It’s good to share music.” Transcript: *Talk of the Nation: Debate Over New Software That Lets People Trade and Download Music Over the Internet for Free* (National Public Radio broadcast, June 7, 2000)(transcript available on Lexis-Nexis).

The District Court entered a preliminary injunction against Napster, based on its conclusion that Napster was being widely used for illegal distribution of copyrighted music. In so doing the court resolved several issues of first impression against Napster, in favor of the record industry, and in a way that limits the exchange over the Internet of information that could indisputably be lawfully exchanged in other ways. The court resolved other important issues contrary to prior opinions in this and other circuits, contrary to recent statements by this Court (which the court below considered “dicta”), and contrary to principles articulated in controlling Supreme Court precedent.

Napster cannot comply with the District Court’s order as drafted and

continue to operate its peer-to-peer system. More generally, if the decision of the District Court is permitted to stand, every new technology used to transmit, route, or exchange data subject to the copyright laws using the Internet – and many existing technologies – will be affected.

The decision of the District Court imposed an injunction of unparalleled scope. The District Court ordered Napster to redesign its technology in a way that deprive Napster's users and the 98% of artists Plaintiffs do ***not*** represent of Napster's revolutionary peer-to-peer Internet technology. It ordered Napster to do so without determining that any such redesign was actually feasible (it is not) and without consideration of the detriment to functionality that even theoretical redesign would impose. As the following will show, these and other issues are of vital importance, were wrongly decided by the trial court, and compel this Court not only to reverse the injunction issued by the District Court, but to issue a ruling addressing the above issues and directing the District Court to proceed consistent with the conclusions of this Court.

II. STATEMENT OF JURISDICTION

Jurisdiction in the District Court exists under 17 U.S.C. §§101 *et seq.* and 28 U.S.C. §1338(a) based on Plaintiffs' claims of contributory and vicarious copyright infringement. On July 26, 2000, the District Court entered a preliminary injunction. On July 27, 2000, Napster timely filed an appeal pursuant to Rule 4(a)

of the Federal Rules of Appellate Procedure. This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that §1008 of the Audio Home Recording Act (“AHRA”)¹ only applies to actions brought under the AHRA and not to all actions brought under Title 17.

2. Whether noncommercial consumer copying permitted under the AHRA loses the protection of the AHRA solely because of the potential scale of such copying permitted by the Internet, when neither the AHRA nor applicable precedent limits the scale of noncommercial consumer copying of music.

3. Whether the District Court erred in holding that the standards for contributory and vicarious infringement set out in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), do not apply to file-sharing software and an Internet directory, such that the supplier would be guilty of contributory and vicarious copyright infringement even though the software and directory were capable of, and were already being used for, several substantial non-infringing uses.

4. Whether an Internet Service Provider (ISP) may be contributorily or vicariously liable for unauthorized copying by its subscribers where the ISP has

¹ The AHRA Statute is attached as Addendum A15-A30.

only general knowledge that copyrighted works are available through its service, but not specific knowledge or ability to differentiate between infringing and non-infringing uses of its system.

5. Whether the safe harbor provision of §512(d) of the Digital Millennium Copyright Act (“DCMA”)² protects an ISP against claims of vicarious or contributory liability where the ISP timely responds to notices of alleged copyright infringements to bar access to the identified location of the allegedly infringing material.

6. Whether the District Court erred in holding that the defendant in a preliminary injunction hearing has the burden of proof as to the validity of affirmative defenses.

7. Whether the injunction issued below was impermissibly broad in ordering Defendant to prevent its users from sharing any of millions of works in which Plaintiffs claim copyrights, where Defendant could not (and Plaintiffs were not required to) identify those works, and where the effect of the injunction therefore would be to

A) require Defendant to close its service completely or face potential contempt;

B) require Defendant to develop a system of prior restraint limiting

² The DCMA Statute is attached as Addendum A1-A14.

legitimate sharing of information over the Internet; and

C) require Defendant to redesign its technology in a manner that was both impracticable, and that would convert a decentralized peer-to-peer file-sharing network into a centralized source of authorized material.

8. Whether the District Court's requirement of only a \$5 million bond, without explanation, was error, where the preliminary injunction threatens the continued viability of Defendant's business, which the District Court itself valued at between \$60 and 80 million.

IV. STATEMENT OF THE CASE

On December 6, 1999, 18 record company affiliates of the 5 major labels filed an action seeking damages and injunctive relief against Defendant Napster, Inc. They alleged that Napster's peer-to-peer file-sharing technology and Internet directory service made Napster contributorily and vicariously liable for its users' alleged copyright infringement, and related state law violations. ER0001-ER0023. On January 7, 2000, Jerry Leiber, Mike Stoller and Frank Music Corp. filed a second action alleging similar claims. ER00053-ER00060.

Plaintiffs in both actions jointly moved for a preliminary injunction on June 12, 2000. The District Court denied Napster's request for an evidentiary hearing, ER03975-ER03976, and on July 26, 2000, granted Plaintiffs' motion. The court enjoined Napster from "causing, or assisting, or enabling, or facilitating, or

contributing to all copying, duplicating or otherwise other infringement upon copyrighted songs, musical compositions, or material in which Plaintiffs hold a copyright or with respect to Plaintiffs' pre-1972 recordings in which they hold the rights." ER04212 (Tr. 7/26).³ The order was to take effect midnight, July 28, 2000. The court denied Napster's request that the injunction be limited to the works in suit, or in the alternative, that Plaintiffs be required to provide a list of the works in which they claimed a copyright. ER04213-ER04215 (Tr. 7/26).

On July 27, 2000, Napster filed an emergency motion for a stay of the District Court's order pending appeal and a motion for expedited appeal pursuant to Circuit Rule 27-3. The next day, the emergency panel granted Napster's motions, finding that Napster "raised substantial questions of first impression going to both the merits and the form of the injunction", and set an expedited briefing schedule.

On August 10, 2000, the District Court filed a written opinion further broadening the scope of the injunction to enjoin Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing Plaintiffs' copyrighted" works "without express permission of the rights owner." ER04262 (Op. (underline added)).

³ References to transcripts below are cited as (Tr. [*date in 2000*])." References to the District Court's August 10, 2000 opinion are cited as "(Op.)."

V. STATEMENT OF FACTS

A. Digital Music and MP3 Files.

In 1987, the Moving Picture Experts Group promulgated a standard, the MPEG-3 (or MP3) file format, which compresses digital audio files by a factor of about 12:1. ER01811 ¶4; ER01977-ER01980 A CD music file of 40-50 megabytes per song can be compressed to 3-4 megabytes. The MP3 file has lower audio quality, but because it is smaller and requires less disk space, less memory, and less transmission time, it has, at least for the time being, become the *de facto* standard for transmitting over the Internet. ER01811 ¶4; ER01979-ER01982; ER04226 (Op.). Neither CD music files nor the resulting MP3 files contain any copyright notices, and it is therefore impossible to determine from the files themselves if they have been authorized for distribution or not. ER018159 ¶15; ER01821 ¶¶30-34; ER04251 (Op.); ER04267 (Op.).

Plaintiffs do not sell music in MP3 format. *See, e.g.*, ER02273. Most MP3 files are created by consumers, who copy original CD audio files to their disk drives, then compress those files into the MP3 format using software provided by numerous vendors (ER01981) by a process colloquially called “ripping.” ER01811 ¶4; ER01822 ¶32; ER04226 (Op.). This practice is so commonplace and accepted that virtually every song issued on a CD to date has been converted to an MP3 file and is potentially available to be sent or found over the Internet using

standard search engines, email, or any other file transfer protocol. *See, e.g.*, ER02874. As detailed below (pp. 62-64), Plaintiffs have not only tolerated this form of copying of CDs onto computers in MP3 format, they have encouraged consumers to create and share, and have stated that they will not pursue claims against any consumer for making, noncommercial MP3 files.

In addition to making MP3s from their own CDs, consumers can obtain MP3-formatted audio files directly from web-based search engines, such as altavista.com, or through literally hundreds of websites. ER01471 ¶¶2; ER01875 ¶4. Tens of thousands of artists make their music freely available to the public in MP3 format. ER01471 ¶2; ER01473 ¶8; ER01475-ER01615; ER01981. As this Court noted last year,

“the Internet also supports a burgeoning traffic in legitimate audio computer files. Independent and wholly Internet record labels routinely sell and provide free samples of their artists’ work online, while many unsigned artists distribute their own material from their own websites. Some free samples are provided for marketing purposes or for simple exposure, while others are teasers intended to entice listeners to purchase either mail order recordings or recordings available for direct download (along with album cover art, lyrics, and artist biographies).” *RIAA v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1074 (9th Cir. 1999).

In addition, vast quantities of music artists have authorized for promotional reasons are freely available on the Internet. ER01473 ¶¶6-7 (Grateful Dead, Phish

trading websites; catalogue of hundreds of bands that authorize live concert recordings); ER01889 ¶¶52-53; ER01892 ¶58. Although technologies have been available for some time that would prevent MP3 files from being copied and recopied, Plaintiffs have only recently begun to implement technologies under the “Secure Digital Music Initiative” – which will prevent SDMI-compliant devices from playing unauthorized copies, and with which Napster complies as a member of SDMI. ER02009; ER01824 ¶36-ER01825 ¶37.

B. Napster’s Peer-to-Peer File-Sharing Software.

Napster makes its application software freely available for download by consumers from its website. This software allows users to connect their PCs to and participate in the Napster peer-to-peer file-indexing system. ER0182 ¶6. Users are not required to share any files with others, either as a condition of using the Napster system or in order to obtain files from other users. ER0182 ¶7. If a user chooses, however, to create a folder of files on his disk drive and make them available to others, each time he connects to the Napster system the file names he has on that occasion chosen to include (and only those file names) in that folder are automatically added to or deleted from a directory of all users’ files. ER01812 ¶¶7-8.

This constantly changing directory of users’ file names – but not any files themselves – is maintained on Napster’s servers. It may be searched or browsed

by other users. If one user wishes to obtain a copy of a file from another, she may click on that file name, which will initiate a technical process during which the Napster server will provide the individual Internet address of the user offering to share that file to the requesting user. The requesting user's computer then uses that address information to make a direct connection to the sharing user's application software, peer-to-peer, for transmission of the file. ER01814 ¶12. Napster does not create or copy any MP3 files; it does not store or make available any files on its servers; and no MP3 files pass through Napster's servers. Users may also participate in a community of music enthusiasts by browsing favorite user lists, chatting online, and exchanging instant messages with other users. ER01812 ¶¶6-8.

In addition to MP3, Napster has committed to supporting any security features in any music file formats, including SDMI. ER0182 ¶36-ER0183 ¶37. As early as November 1999, Napster began implementation of the secure Windows Media Audio ("WMA") format, and WMA files are now shared using the Napster technology subject to any security imposed by the files' creators. ER01824 ¶¶35-36, ER01825 ¶37.

C. The Importance Of Peer-to-Peer Technology.

Napster's peer-to-peer architecture offers at least three advantages over the pre-existing Internet model. Under the prior model, one centralized source served

many users. Large centralized file storage servers periodically searched public web domains, catalogued contents by use of robots, and provided whatever information they collected to many users. ER01929 ¶¶42, ER01931 ¶¶48. By contrast, the peer-to-peer system allows many sources to provide information to many users, multiplying the power of the Internet. ER01929 ¶¶42; ER01931 ¶¶48. *First*, as millions of ordinary individuals contribute their information to a collective directory, the amount of information made available for public use is vastly multiplied. *Second*, the collective directory tracks the users connected and files available in real time, displaying all, but only, file names that are immediately accessible. *Third*, the users are connected directly to each other for transmittal of information one-to-one, avoiding the expense and bottleneck of transmission through huge servers. ER01315 ¶¶5. *See also* ER01929 ¶¶42; ER01931 ¶¶48; ER03773-ER03775; ER0182 ¶¶7-8; ER01352 ¶¶3, 8. In the case of music, for example, this structure allows an artist to share and promote his works to millions worldwide at minimal cost without needing technical knowledge or any equipment other than a PC. ER01348 ¶¶10-ER01350 ¶¶13.

D. Napster's Inability To Distinguish Infringing From Non-Infringing Uses.

The same decentralized nature of peer-to-peer technology that provides many advantages also has inherent limitations. In the first place, because Napster

does not know what use any user makes of files she offers to share or receives, Napster cannot distinguish between whether its users are engaged in fair or unfair uses. ER01814 ¶12; ER01815 ¶¶14-16; ER01995.

More fundamentally, because users name and share their own files, and Napster (or any other peer-to-peer directory) merely compiles a list of those user-given file names, Napster is unable to distinguish files that are authorized for sharing from those that may be unauthorized. ER04232 (Op.). “The file-name index contains the names of MP3 files that on-line users save in their designated user directories.” ER04232 (Op.). “Users who wish to search for a song or artist may do so by entering the name of the song or artist in the search fields.” ER04232 (Op.). “The Napster application software does not search for a particular song or recording artist per se” (ER04232 (Op.)), but rather searches the index of file names for a text string entered as a search term. ER01814 ¶¶10-11. Because Napster does not control the file names, it cannot know the contents—much less the copyright status or use being made—of particular files.

File names do not themselves contain any indication of copyright status. ER04267 (Op.). This problem is compounded by the fact that Plaintiffs have refused even to identify all of the works in which they contended they hold copyright. ER01821 ¶28; ER02180; ER02900-ER02932; ER04141 (Tr. 7/26). Plaintiffs identified merely 200 or so songs and copyright registration numbers in

their complaints. ER00024-ER00036. But Plaintiffs’ counsel has explained that they claim copyrights “going back 40, 50 years” in “disparate catalogues . . . [totaling] maybe ten million” different sound recordings. ER00200-ER00201 (Tr. 5/15). In refusing Napster’s request for a list of those songs, the District Court deferred to Plaintiffs’ “claim that it would be burdensome or even impossible to identify all of the copyrighted music they own.” ER04260 (Op.).

Moreover, user-controlled file names are unreliable means to identify recordings. File names often do not distinctly identify the artist, the song title, or whether the music is from a CD (in which event the Plaintiff recording companies may own the rights) or a recording of a live concert (which many artists allow to be freely circulated widely and in various media for promotional reasons). For example, a file named “c:\\programmer\\winamp\\09.aquarius.mp3” does not identify which recording this might be among over 100 songs, 17 albums, or 5 artists similarly named.⁴ As another example, Metallica expressly authorized sharing of its concert recordings through Napster, but not its studio recordings of the same songs. ER04251 (Op.); ER02902; ER02915-ER02923; ER01823 ¶34.

⁴ In purporting to find that 87% of file names were “infringing,” Plaintiffs claimed that they had “conclusively” determined that this file and others were unauthorized. ER01387 ¶10. That figure is meaningless, however, since Plaintiffs did not listen to the files in question, and could not determine ambiguities nor whether they were from CDs or live recordings, authorized or unauthorized, or even subject to a valid copyright. ER01384 ¶6.

When Metallica attempted to identify unauthorized files by computerized searches of Napster's index for song titles, it misidentified tens of thousands of authorized recordings as being unauthorized. ER01819 ¶¶26-28.

Thus, it was undisputed that Napster's system cannot distinguish between authorized and unauthorized files. The District Court acknowledged that it may be "technologically impossible for Napster, Inc. to offer such functions as its directory without facilitating infringement" (ER04257 (Op.)) and that even a narrow injunction may "make its service technologically infeasible." ER04261 (Op.). Without attempting to determine the actual practicability of any potential modification of the Napster system, the Court ordered that Napster simply had to "figure out a way" to prevent any and all alleged infringing uses. ER04216 (Tr. 7/26).⁵

E. The District Court Erred in Placing the Burden of Proof on Napster and Denying Napster an Evidentiary Hearing on Disputed Issues of Fact.

1. The Burden of Proof.

The District Court held that Napster bore the burden of proving its affirmative defenses, relying on an Eleventh Circuit case on appeal from a final

⁵ The prejudice that these dual legal errors imposed was compounded further still by the high (in fact, drastic) cost of an erroneous result – a preliminary injunction would destroy Napster's business, and a preliminary injunction wrongly imposed would do so without basis, but irrevocably.

judgment. ER04241 (Op.); *see also* ER04198 (Tr. 7/26). This holding was important because in significant instances where Plaintiffs offered no proof on the relevant issues, where the court found the proof “limited”, as the court did with respect to waiver (ER04259 (Op.)), or “ambiguous”, as the court did with respect to non-infringing uses (ER04265 (Op.)), the court resolved the issue against Napster.

This was legal error. It is well-settled that the burden of a party seeking a preliminary injunction includes the burden of establishing that the plaintiff is likely to prevail against any affirmative defenses presented by defendant. *See, e.g. Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 837 (Fed Cir. 1992), *mot. granted, mot. denied*, 1993 U.S., Dist. LEXIS 8864 (N.D. Cal. June 30, 1993) (applying Ninth Circuit law to conclude that plaintiff seeking preliminary injunction bore the burden of showing a likelihood that it would overcome defendant’s copyright misuse defense); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1383 (N.D. Cal 1995) (party moving for preliminary injunction bore the burden of proving a likelihood of defeating defendant’s fair use defense); *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff’d*, 109 F.3d 1394 (9th Cir.), *cert. dismissed*, 521 U.S. 1146 (1997). (“The plaintiff’s burden of showing a likelihood of success on the merits includes the burden of showing a likelihood that

it would prevail against any affirmative defenses raised by the defendant.”)

In addition, at the time the District Court issued its preliminary injunction, it held that as an element of Napster’s fair use defense, Napster had the particular burden of showing that the sharing by Napster users would not adversely affect the market for the copyrighted work if it became widespread. ER04198 (Tr. 7/26). In the court’s subsequent written opinion, the court acknowledged that the law was to the contrary for noncommercial uses. ER04242 (Op.). However, the court appears to have continued in fact to place the burden of proof on Napster. For example, Plaintiffs’ claim of an adverse affect on the market for the copyrighted work was based on the Jay Report. The District Court recognized “the limitations of a survey that only targets college students” (ER04261 (Op.)), but went on to conclude that “the Jay Report *suggests* the *tendency* of Napster use to suppress CD sales” (emphasis added). Even assuming that an admittedly flawed report should be credited, and that the overwhelming evidence of a contrary report and five contrary independent studies should be wholly rejected, a “suggestion” of a “tendency” does not meet what is now conceded to be the legal standard.

2. The District Court’s Denial of an Evidentiary Hearing.

The District Court’s decision to deny Napster’s request for an evidentiary hearing and to decide the motion for a preliminary injunction entirely on the paper record deprived it of a possible chance to resolve critical disputed facts based on

live testimony and credibility of witnesses. An evidentiary hearing would have permitted the District Court to receive answers to questions it (but not the Plaintiffs) had of Professor Fader, and to determine the issue it left unresolved as to the feasibility of segregating non-infringing users.

This is not a case where time precluded an evidentiary hearing, or where an evidentiary hearing would not have been useful. (In *Sony*, for example, there were three years of litigation and five weeks of trial. *See Sony*, 480 F. Supp. at 432.) Plaintiffs complained to Napster in October 1999, sued Napster on December 6, 1999, and made their motion for a preliminary injunction on June 12, 2000. Napster submits that rejecting a request for an evidentiary hearing on hotly contested issues of fact, and instead resolving those issues against Napster by disregarding certain admissible testimony without hearing it, constituted abuse of discretion in these particular circumstances.

Each of the foregoing errors – the District Court’s allocation of the burden of proof to Napster and its denial of an evidentiary hearing – compounded the impermissible impact of the other. The party bearing the burden of proof must have factual uncertainties resolved against it. Indeed, just five days before Plaintiffs contended that it was “self-evident” that Napster is “eroding the marketability of recorded music (ER00364), the president of the RIAA acknowledged that “there’s obviously not a lot of concrete evidence one way or

another” whether Napster affects record sales. *Talk of the Nation: Debate Over New Software That Lets People Trade and Download Music Over the Internet for Free* (National Public Radio broadcast, June 7, 2000)(transcript available on Lexis-Nexis). The denial of an evidentiary hearing artificially increased both the incidence and amount of the factual uncertainty that the burden of proof allocates (and that the court improperly allocated here). In combination, these errors inevitably increased the frequency with which the court would (and did) improperly resolve disputed issues against Napster.

VI. STANDARD OF REVIEW

Orders granting or denying a preliminary injunction are reviewed for abuse of discretion, which will be found where the decision is based on (1) clearly erroneous findings of fact; or (2) application of an erroneous legal standard.

Neal v. Board of Trustees of Cal. State Univs., 198 F.3d 763, 766 (9th Cir. 1999).

A District Court’s application and interpretation of law, either relating to the legal standards governing the issuance of a preliminary injunction or the law relating to the merits of the underlying claim, is subject to *de novo* review. *Bay Area*

Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730

(9th Cir. 1999). Although the standard for review of fact finding on a paper record requires clear error, “[w]hen, as is the case here, the evidence relied upon by the district court in making its findings consists solely of documents in the record, the

burden of establishing clear error is not so great as where the court engaged in the judging of witness credibility or in some other way was in a superior vantage point for finding facts.” *Hall v. National Gypsum Co.*, 105 F.3d 225, 228 (5th Cir. 1997).

VII. ARGUMENT

A. The District Court Erred in Holding That the AHRA Was “Irrelevant” Because Plaintiffs’ Action Was Not Brought Under That Act.

Defendant is not charged with direct infringement, but only contributory/vicarious infringement. As a result, the District Court correctly held: “As a threshold matter, Plaintiffs in this action must demonstrate that Napster users are engaged in direct infringement.” ER04241 (Op.). The District Court erred, however, in holding that Plaintiffs had a likelihood of proving at trial that Napster’s more than 20 million users violated the copyright laws on a daily basis.

Napster asserted below that its users’ copying was protected by §1008 of the Audio Home Recording Act (AHRA), which immunizes all noncommercial consumer copying of music in digital or analog form.⁶ The District Court, relegating its entire analysis of this important issue of first impression to a

⁶ 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §8B.01 (2000) (hereinafter “*Nimmer*”). The District Court erroneously asserted that Napster argued that the AHRA immunizes only “the non-commercial use of Napster to space-shift music.” ER04266 (Op.). To the contrary, Napster argued that the AHRA immunizes *all* non-commercial copying of music by its users. ER00743-ER00744.

footnote, called the AHRA “irrelevant to the instant action” because Plaintiffs had not “brought claims under the AHRA.” ER04266 (Op.). However, the immunity of §1008 expressly applies to *all* suits for copyright infringement, not just those in which the plaintiff makes a claim “under” the AHRA:

“No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital music recordings or analog musical recordings.” 17 U.S.C. §1008 (emphasis added).

Section 1008 by its terms thus expressly bars *any* action “under this title” (i.e., Title 17),⁷ and Plaintiffs have certainly brought their copyright claims under Title 17. Moreover, it was uncontroverted that Napster users are “consumers” within the meaning of §1008, and Napster users’ sharing is noncommercial. Napster’s users do not charge or receive any fee, nor are their files “bartered,” in that making files available to others is purely voluntary and not a condition for use of the Napster system, and not a condition to obtaining files from other users. ER01812 ¶7; ER01354 ¶9.

This Court’s decision in *RIAA v. Diamond Multimedia Systems*, 180 F.3d

⁷ The immunity applies with respect to copyrights in both the sound recordings and any musical compositions embodied therein. Nimmer, *supra*, §8B.07[C][2], at 8B-90.

1072 (9th Cir. 1999), confirms that §1008 affords broad immunity to copying of digital audio recordings for noncommercial use:

“As the Senate Report explains, ‘[t]he purpose of [the AHRA] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.’ The Act does so through its home taping exemption, see 17 U.S.C. §1008, which ‘protects all noncommercial copying by consumers of digital and analog music recordings.’”

Diamond, 180 F.3d at 1079 (quoting S.R. 102-294 (1992) ER00823.)

The District Court labeled this passage “dicta” and found it to be “of limited relevance” since “plaintiffs have not made AHRA claims”. ER04267 (Op.). The court appears to have considered the *Diamond* language dicta because “the Ninth Circuit did not hold in *Diamond Multimedia* that the AHRA covers the downloading of MP3 files” ER04266 (Op.). However, this Court in *Diamond* considered both the royalty and serial copying provisions of the AHRA and the immunity provision of the AHRA. With respect to the former, the Court held that a computer hard drive was not a “digital audio recording device.” With respect to §1008, the Court made clear that the immunity granted by that section applied to all noncommercial consumer copying – in effect that “such a device or medium” in §1008 was not limited to specifically named devices or media. *Accord, Nimmer* §8B.07[C][4], at 8B-94. Contemporaneous comments by the RIAA also acknowledge that the immunity provisions of the AHRA were intended to have the

broadest scope.⁸ The line Congress drew was between commercial and noncommercial copying. If Plaintiffs have a quarrel with that line given the scale of noncommercial sharing that the Internet now facilitates, they must address those concerns to Congress, which indeed they already have.

The District Court also erred by finding the purpose of the AHRA to be limited to “the facilitation of *personal use*.” ER04266 (Op.) (emphasis added.) The error of the District Court’s attempt to read the word “noncommercial” out of the AHRA (and to add to the statute the word “personal”) is further underscored by section 109(b)(1)(A) of the Copyright Act. That section also draws a “commercial”/“noncommercial” distinction in the context of phonorecord distribution. The Record Rental Amendment of 1984 was passed in response to businesses that were renting authorized copies of phonorecords, which everyone knew would then be copied and returned to the business. Congress, which later passed a similar amendment with regard to software, perceived that these businesses threatened record sales and therefore created a narrow exception to the first sale doctrine by prohibiting the renting or lending of phonorecords for purposes of *commercial advantage*, but permitting all other lending or exchange

⁸ “The [AHRA] will eliminate the legal uncertainty about home audio taping that has clouded the marketplace. The bill will bar copyright infringement lawsuits for both analog and digital home audio recording by consumers” ER00956 (H.R. 4567, Serial No. 102-139 (March 1992) (Jason Berman, former head of the RIAA)).

regardless of scale and regardless of the relationship between the lending and copying parties. *See* H.R. Rep. 98-987, 98th Cong., 2d Sess., 1984 U.S.C.C.A.N. 2989, 1984 WL 37430 (Aug. 31, 1984).⁹ Congress provided in the Record Rental Amendment of 1984 (and the subsequently enacted Computer Software Rental Amendments of 1990) that the owner of a phonorecord or program could not lend it “for purposes of direct or indirect commercial advantage.” 17 U.S.C. §109(b)(1)(A) (emphasis added). As with the AHRA, the line that Congress chose to draw did not involve the scale of the distribution or the relationship of the participants in the transaction. Instead, well aware (1) that lending authorized copies of records and software facilitated the copying of those works and (2) that the first sale doctrine otherwise protected the lending of that work, Congress chose to remove that protection only for “commercial” lending while leaving all noncommercial lending protected. This section both reinforces the self-evident point that when Congress used the term “noncommercial” in the AHRA, it meant “noncommercial,” and makes clear that Napster users who make available authorized copies of copyrighted works for noncommercial purposes are not engaged in copyright infringement. The District Court’s conclusion that the immunity of §1008 does not apply to Napster’s users was plain error.

⁹ *See also* S. Rep. No. 265, 101st Cong., 2d Sess. 1990, 1990 WL 258937 (Apr. 19, 1990) (discussing the Record Rental Amendment’s “limited exception to the first sale doctrine”).

B. The District Court Erred In Holding That Napster's Technology Is Not Capable Of "Substantial Non-Infringing Use".

Even if the uses of Napster were not covered by the immunity granted by the AHRA, to the extent that a use is either authorized by a rights holder or, if unauthorized, constitutes "fair use" under 17 U.S.C. §107 and applicable precedent, there is no copyright infringement by the Napster user. Because Napster's system is already employed on millions of occasions for such non-infringing uses, Napster cannot be found secondarily liable. "Indeed, it need merely be capable of substantial noninfringing uses" in order for the public to be allowed the benefit of this new copying technology. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442 (1984) (emphasis added).

Courts have repeatedly recognized that they are ill-equipped to predict how a new technology will be used and adapted in the future. Consequently, when faced with attempts to shut down new technologies on grounds of contributory or vicarious infringement, courts have invariably refused and left it to Congress or to the market to balance the interests of consumers and the interests of copyright holders.

"Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably

implicated by such new technology.” *Sony*, 464 U.S. at 431.

Deference to Congress is, of course, particularly appropriate where, as here Congress has already addressed the issue. The infirmity of the District Court’s order goes beyond its refusal to adhere to the standard deference that protected piano rolls, radio, cable television, the Betamax, and Digital Audio Tape Recorders from the entertainment industry’s unfounded predictions of doom.¹⁰ The Court’s Order gives the Plaintiffs effective control over this technology and whether and how to roll it out. As the *Sony* Court noted with respect to VCR (or “VTR”) technology, “It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively, much less the respondents in this case, the exclusive right to distribute VTRs simply because they may be used to infringe copyrights. That, however, is the logical implication of their claims.” *Sony*, 464 U.S. at 442 n.21.¹¹

¹⁰ For example, Jack Valenti stated that the VCR was to the movie industry “as the Boston Strangler is to a woman alone.” ER01926 ¶32. Instead, as a result of the *Sony* decision and its progeny, the public benefited from VCR technology and the industry (as always) adapted.

¹¹ The fostering of technologies that facilitate copying “reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts” *Sony*, 464 U.S. at 431-32 (quotations omitted). The District Court failed entirely to consider the balancing of interests. Indeed, it held inadmissible (ER 04285) expert testimony that a “pre-authorization” scheme of the type the Court imposed would

Under *Sony*, it is enough that Napster has a single potential non-infringing use of social or commercial importance. *Vault v. Quaid*, 847 F.2d 255, 266-67 (5th Cir. 1988) (because technology which enabled unfettered copying of copy-protected software *could* be used to make archival copies of the software, the product was non-infringing; relative *proportion* of the single lawful use compared to unlawful copying not even considered); *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 776-77 (8th Cir. 1988) (court did not disturb a finding that a machine for duplicating cassette tapes, using tapes specifically timed to replicate specific copyrighted materials, was capable of substantial non-infringing uses – even though the only evidence of non-infringing uses was that the machine was advertised as suitable for duplicating spoken word recordings); *Mathieson v. Associated Press*, 23 U.S.P.Q.2d 1685, 1687 (S.D.N.Y. 1992) (single non-infringing use of news reporting, a traditional fair use, was sufficient).

Instead of engaging in this analysis, however, the court below applied a “primary purpose” test that had been rejected by the Supreme Court in *Sony*. Ignoring whether or not Napster was *capable* of substantial non-infringing uses,

convert Napster, any peer -to-peer system, and the World Wide Web “from a decentralized, ground-up information base to a centrally controlled, top-down distribution device,” causing attendant “severe technical difficulties.” ER02002-ER02003. That evidentiary ruling was not only an abuse of discretion; it reflects the District Court’s fundamental misperception of the legal framework.

the District Court focused instead on the *predominant* use of Napster in its first nine months. The Court assessed the “principal” (ER04247 (Op.)) and “primary role” of Napster (ER04249 (Op.)) and the single largest and “chief” use (ER04205 (Tr. 7/26)). The District Court’s ruling – that a technology must be enjoined if its initial predominant use is to enable copying of copyrighted materials – is precisely the position the Ninth Circuit took, but the Supreme Court rejected, in *Sony*.¹²

Applying the appropriate test under *Sony*, the Napster technology easily passes.

1. Millions of Authorized Uses of Napster, by Tens of Thousands of Artists, Render Napster Capable of Substantial Non-Infringing Use.

Napster presented compelling, indeed undisputed, evidence of the following authorized uses, each of which qualifies as a substantial non-infringing uses.

- As of July 3, 2000 more than 17,000 artists had expressly authorized Napster users to share their music. ER01744 ¶16; ER01729-ER01733. *See also* ER01471 ¶¶2-4; ER01772-ER01791.

¹² *See Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 975 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984) (“Videotape recorders are manufactured, advertised, and sold for the *primary purpose* of reproducing television programming. *Virtually all television programming is copyrighted material*. Therefore videotape recorders are not `suitable for substantial noninfringing uses.’”) (emphasis added).

- By contrast, the major labels together released a total of only 2,600 albums last year, and only 150 of those songs were played on the radio on a regular basis. ER02963-ER02965, ER03026.
- Copyright holders who expressly authorize Napster users to share their music include independent managers and record labels that are using Napster to promote and distribute their products worldwide. ER01738 ¶17; ER03781; ER01380 ¶11; ER02137 ¶¶6-8; ER01347 ¶6, ER01349 ¶11; ER03778-ER03779; ER01723 ¶¶4-7.
- Major stars like The Offspring and Chuck D also use Napster as a mechanism to reach fans directly, without having to rely on the whim and be bound by the “standard” financial terms of the major labels. ER01347 ¶6-ER01350 ¶13; ER10723 ¶¶7-9; ER02142 ¶¶9-11.
- Hundreds of artists allow the digital taping of their live performances and the trading of these recordings among their fans. ER01310 ¶¶8-9; ER01471 ¶2, ER01473 ¶8; ER01649-ER01694. For example, Metallica itself has authorized trading of hundreds of concert recordings on Napster, and Courtney

Love, The Offspring, the Beastie Boys, and Motley Crüe have made their concert recordings available in MP3 format.

ER01473 ¶9.

- Napster is used to share music that is not copyrighted, or as to which the copyright has terminated. ER01995.
- Napster permits the transfer of secure file formats, subject to the creators' conditions governing access to the file, thereby facilitating "viral distribution," which Plaintiffs themselves recognize as maximizing product penetration at little cost.

ER02525-ER02527; ER01348 ¶8.

The *Diamond* Court recognized the "burgeoning traffic" in freely distributed MP3 files released into the Internet (*Diamond*, 180 F.3d at 1074). Providing a facility that permits the sharing of music made by the more than 98% of artists Plaintiffs do not represent constitutes a substantial non-infringing use. *Sony*, 464 U.S. at 456 (substantial capability for noninfringing use found where the evidence "demonstrated a significant likelihood that substantial numbers of copyright holders . . . would not object to having their broadcasts copied through the technology in question). *See also* 180 F.3d at 446 ("stating that "in an action for contributory infringement against the seller of copying equipment, the copyright holder may not prevail unless the relief that he seeks affects only his

programs, or unless he speaks for virtually all copyright holders with an interest in the outcome”).

As an alternative means to reach a wide audience cheaply and to expose one’s music freely, Napster is important to established artists as well as new artists. ER01347 ¶6, ER01349 ¶12. The copyright law gives Plaintiffs no right to exclude Napster from offering its alternative distribution channel for works of artists whom they do not control.

2. Future Authorization and Sharing of Secured Files Render Napster Capable of Substantial Non-Infringing Use.

The District Court furthermore failed to consider potential *future* non-infringing uses. *Compare Sony*, 464 U.S. at 444-45 (the District Court properly concluded that there existed not only “significant quantity of broadcasting whose copying is now authorized” but also “a significant *potential for future* authorized copying”) (emphasis added). There is every reason to believe that authorized uses of Napster will continue to grow. In only a few months’ time, for example, the New Artist Program reached its July 3 level of over 17,000 artists. The artists who authorize their work to be shared by Napster users continue to increase rapidly. The major labels’ traditional dominance of distribution makes it unsurprising that much of the music initially being shared comes from only a small percentage of artists. As more and more artists use the Internet to break free of the major labels’

oligopoly, an ever increasing proportion of the materials shared using the Napster technology will have nothing to do with Plaintiffs. ER01350 ¶13; ER01311 ¶¶10-11.

Plaintiffs' own release of music in secure formats on the Internet will provide additional non-infringing uses. ER04228 (Op.). Such files may be shared through Napster subject to any and all copy limitations and rights management tools imposed by their creators. ER01825 ¶¶37-38. Plaintiffs themselves anticipate using "viral" file-sharing distribution of such secured files (ER02525-ER02527, ER02555-ER02582), distribution that Napster can effectuate on the same secured terms.

3. Space-Shifting of Copyrighted Music is a Fair Use.

Once the District Court concluded that Napster is used to copy copyrighted works as to which users had not previously obtained permission, it ended its inquiry, equating such sharing with copyright infringement. The "fair use" doctrine is to the contrary. 17 U.S.C. §107.¹³ Since fair use is a privilege that exempts the particular *use*, not the particular *user*, the nature of each use had to be distinctly analyzed. Thus, in *Sony*, where given users employed VCRs both for time-shifting (a use held to be fair) and for librarying (an unfair use), the nature of

¹³ Under 17 U.S.C. §107, fair use applies to all of the rights created under 17 U.S.C. §106, including the distribution right as well as the reproduction right.

each use had to be distinctly analyzed. *E.g.*, *Sony*, 464 U.S. at 450. The District Court erred by repeatedly blurring the distinctions between uses and users, and by failing to properly analyze each particular use.

“Space-shifting” is the practice of copying a musical recording to which the user already has access into another format or “space” for convenience. *Diamond Multimedia*, 180 F.3d at 1079. *See also* ER01980, ER02066 [Fader Rep. ¶75.] For example, an owner of a CD could either rip, or download, a track in MP3 format to play on a computer or portable device or to arrange into a playlist. Already having access to the recording in one medium, transferring to another space constitutes a fair use for the consumer’s convenience.

At the time it entered its preliminary injunction, the District Court recognized that “there may be a lot of space-shifting going on” through the Napster system.¹⁴ ER04203 (Tr. 7/26). In fact, the record was clear: Napster’s expert found that 70% of Napster users “sometimes, frequently or always” downloaded music they already owned (ER02066 ¶77), and Plaintiffs’ expert similarly found that 49% of college students space-shifted from 10% to 100% of the time. ER00489. By contrast, in its August 10 opinion the court unaccountably

¹⁴ Under *Sony*, the use is thus “substantial”; the only remaining question is whether, as shown in the above text, the use was fair use.

concluded that space-shifting is “de minimus”. ER04230 (Op.).¹⁵

The court also appears to hold that space-shifting could not be considered “substantial non-infringing use” under *Sony* because it occurred “in conjunction with” other uses, and was not the “principal use” of Napster. ER04203 (Tr. 7/26), ER04247 (Op.). This ruling essentially nullifies the fair use calculus. By collapsing a *user’s* different *uses* together, rather than assessing the legitimacy of the “particular use,” the District Court frustrated any determination of whether or not the particular use was a fair use.

Analysis of the particular use of space-shifting under the four fair use factors of §107 demonstrates its fairness. As to the first factor, the non-commercial nature of a use weighs strongly in favor of a finding of fair use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).¹⁶ The *Sony* court recognized that “time

¹⁵ The District Court purported to “recognize the Jay Report for what it is—a report that looks at only one segment of the Napster user population,” (that being college students) ER04275. Nonetheless, it improperly relied on the Jay Report to assess space shifting for the market as a whole. ER04247 (Op.). Older and employed Napster users, having larger collections of CDs or holding jobs where it was inconvenient to take CDs to work, would have greater likelihood of downloading MP3s they already owned. ER02066. Even if college students space shifted in limited amounts, the undisputed evidence shows substantial space-shifting among all users.

¹⁶ In addition, the transformative nature of a use weighs in favor of fair use. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 924 (2d Cir. 1995) (copying a work into a different format for use in a setting to which the original embodiment is not suited is transformative). The Napster user who space-shifts already owns the CD and is seeking to transform that version into a “more

shifting for private home use must be characterized as a non-commercial, non-profit activity.” 464 U.S. at 448. Likewise, this Court has recognized space-shifting of MP3 files to be the “paradigmatic noncommercial personal use.” *Diamond*, 180 F.3d at 1079. The District Court ignored this controlling law.¹⁷ It failed to analyze space-shifting independently, instead considering all “downloading and uploading of MP3 music,” together. ER04242 (Op.); ER04200 (Tr. 7/26). As to space-shifting, which has no purpose other than personal convenience in utilizing a product already owned, this was clear error.

The court’s error on the first factor was compounded by the court’s analysis of the fourth factor. *Sony* establishes a presumption that noncommercial use is fair use, and requires Plaintiffs affirmatively to prove, by a preponderance of the evidence, meaningful likelihood of future harm from the use in question if the use is found to be an infringement. *Sony*, 464 U.S. at 448, 451. The District Court, to the contrary, imposed on Napster the burden to prove fair use and lack of harm generally. ER04205 (Tr. 7/26); ER04241 (Op.). Moreover, the Court failed to analyze whether any harm resulted from space-shifting. This error is dispositive,

serviceable” MP3 format. *Cf. id.* at 923-24. The District Court ignored this factor. ¹⁷ The District Court dismissed this court’s *Diamond Multimedia* analysis saying “this dicta is of limited relevance” because Plaintiffs were not suing under the AHRA. ER204266 (Op). We have rebutted above the District Court’s holding that the immunity granted by the AHRA was limited to actions under it. In addition, this Court’s discussion of space shifting as a fair use was broader than the AHRA as this court’s discussion of *Sony* indicates. *Id.*

because Plaintiffs produced absolutely no evidence that space-shifting in any way harmed the market for their works. There was no evidence that space-shifters would pay again for songs they already owned. Plaintiffs' own witnesses showed that recording MP3 files merely displaced pre-existing copying to cassettes. ER02970-ER02976; ER03018-ER03115. Moreover, the only relevant survey results showed that those who space-shift with Napster buy as much (50%) or *more* (37%) music as before using Napster. ER0204 ¶¶62-63, ER02135.¹⁸

Similarly, the District Court conducted no independent analysis of space-shifting under the third fair use factor, instead concluding that any downloading of an entire work weighed strongly against fair use. ER04203-ER04204 (Tr. 7/26). *Sony* held, however, that for time shifting – where copying the entire work is necessary for such use – copying of the whole “does not have its ordinary effect of militating against a finding of fair use.” *Sony*, 464 U.S. at 450. Here, space-shifting, which also requires copying of the whole for such use, should be treated in accord.

Under the proper legal analysis, space-shifting is fair use. It is a use made today by millions of users, and is a substantial non-infringing use under *Sony*. Accordingly, the space shifting use alone precludes success on the merits and

¹⁸ The District Court cited evidence regarding the *extent* of space shifting but no evidence of *any market injury* to Plaintiffs.

issuance of an injunction.

4. Sampling of Copyrighted Music is a Fair Use.

The record below leaves little doubt, and the court below did not disagree, that the predominant use of Napster is to make temporary copies of a work to sample before buying.¹⁹ The audio quality of MP3 files is inferior to CDs. Napster's expert found that 84% of all Napster users download music to see if they want to buy it in higher quality CD form, and over 90% of the MP3 files are deleted after sampling. ER02053 ¶43; ER02065 ¶74. Even accepting Plaintiffs' study limited to college students, 68.2% responded to *Plaintiffs' survey* in a way consistent with sampling (*see* ER02131; ER00482). No court has ever previously held that making a temporary copy before buying is not fair use. The District Court's unprecedented ruling²⁰ rested on two fundamental legal errors.

First, the court erroneously concluded that the character of downloading in general was not consistent with "personal" use due to the widespread sharing by Napster users. ER04200; ER4202 (Tr. 7/26). However, the test for the first factor

¹⁹ Out of approximately 300 college students surveyed by Plaintiffs' own expert E. Deborah Jay who stated that Napster had an effect on their music purchases, nearly 100 stated that they used Napster to sample. Typical comments were "I can listen to it before I buy it" (ER00559), "To listen to some of the newer stuff before I buy it" (ER00559), "It lets you preview them before you buy them" (ER00560), "It lets me hear before I buy" (ER00561) and "I use Napster to sample songs on a CD before I buy it." (ER00571)

²⁰ Again, because of the substantiality of sampling, the only question is whether, as the above text indicates, the use is fair use.

is not whether such a use is “personal,” but whether the purpose and character of the use is noncommercial. As the court acknowledged, Napster users do not act for profit nor pay or receive a fee or any other consideration. ER04227 (Op.). In any event, the particular use of *sampling* through Napster is both a personal *and* a noncommercial activity, no less than a consumer listening to the radio, sampling at a listening station at a retail outlet, or listening to a neighbor’s CD. The customary price for sampling music is zero – indeed, the major labels expend considerable sums to ensure radio air time. ER02141 ¶8. As 90% of sampled music is deleted (ER00750; ER0896 ¶70), sampling does not substitute for a purchase, and no commercial advantage is obtained by the user. *See Harper & Row v. Nation Enterprises*, 471 U.S. 539, 562 (1985) (appropriate test is not whether the sole motive of the use is monetary gain but “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”).

Second, the District Court improperly denied Napster the presumption of fair use created by users’ noncommercial use (*see* p. 34, *supra*), and proceeded to rule against Napster on a record devoid of evidence that Plaintiffs are harmed, or likely to be harmed, by sampling. To the contrary, even Plaintiffs’ expert reported that 50% of college students purchase between 10% and 100% of the music they

download – a huge rate of return on sampling compared to radio listening.²¹

Professor Fader's study likewise reflected an overwhelmingly positive impact on users who sample: 42% increased their music purchasing, 53.3% stayed the same, and only 4.7% decreased purchases. ER02135. Indeed, it is undisputed that record sales increased at an 8% rate in Q1 2000 compared to Q1 1999 – a pace of over \$1 billion a year during the period of Napster's growth. ER02048; ER00406-ER0040. Every study that has looked at Napster users as a whole, including five independent studies described by Professor Fader, Professor Fader's own study (ER02135), and *two more independent studies by leading firms* released in the last few weeks²² have concluded that Napster users are buying at least the same or more music than before they began using the service.

²¹ The District Court hypothesized that Plaintiffs might in theory lose revenues from licensing fees in derivative markets or loss of sales of digital downloads. ER04200-ER04203 (Tr. 7/26). But there is no evidence in the record that there is a market of consumers who are willing to pay to sample music, that Plaintiffs would license individuals to offer tracks on a noncommercial basis, or that Plaintiffs have lost or will lose a dime of licensing revenue from commercial licensees due to Napster pending trial. (It also bears emphasis that Plaintiffs do not sell MP3 music and that the audio quality of such files is inferior to that of CDs.)

²² In results published July 20, 2000, Jupiter Communications reported that users of networked music-sharing technologies are 45% more likely to have increased their overall music purchasing than non-users. <<http://www.jup.com/company/pressrelease.jsp?doc=pr000721>> And in results published August 2, 2000, Angus Reid reported that its poll of 1,000 adults showed that 64% say that downloading has not affected their purchases of CDs and tapes, 22% said it has fueled their purchases, and only 12% say they buy less. <http://www.angusreid.com/media/content/displaypv.cfm?id_to_view=1063>.

The District Court ignored this overwhelming evidence of the positive impact of sampling and answered the wrong question, relying on evidence supposedly showing that downloading *generally* was displacing the market. ER04210; ER04211 (Tr. 7/26). If it were proper to assess the market effect of an alleged fair use by reference to a different and unfair use, the fair use doctrine would be meaningless. In any event, even as to the impact of Napster in general, it was clearly an abuse of discretion for the District Court to accept – particularly without an evidentiary hearing – Plaintiffs’ single survey of college students as outweighing a convergence of independent studies that have aligned with the study by Defendants’ expert in demonstrating that Napster is building CD sales, not hurting them.

The District Court further concluded that sampling is not a fair use because “it is likely that survey respondents who sample are primarily direct infringers.” (Op. at 22). This conclusion is directly contradicted by the actual data in the Jay Report upon which it relies. Of the 500 college students surveyed by Jay, in response to the question of how Napster had affected their music purchasing habits, only slightly over 300 identified any effect that Napster had on their music purchasing habits. ER00557-ER00584. Of that group of 300, as stated above, approximately 100 stated they used Napster to sample, an *additional* 40 stated that Napster had increased their music purchases, and an *additional* 19 stated that

Napster had exposed them to new artists.²³ Of the 100 who stated that their music purchasing was affected because they used Napster to sample, only *three* (ER00571, ER36122, ER36545) appear on a list of 68 respondents who stated that Napster decreased their music purchases. The Jay Report also assembles a list of 114 users (which heavily overlaps with the 68) who stated that they used Napster so they do not have to purchase CDs or can get free music. ER00491-ER00501.²⁴

²³ Sampling comments: 00004, 00060, 00096, 00146, 00220, 00229, 00346, 00347, 00376, 00401, 00409, 00416, 00504, 00515, 00571, 00668, 00789, 00804, 00917, 01074, 01105, 01268, 01560, 01581, 01767, 01830, 01865, 01879, 01954, 02045, 02156, 30008, 30020, 30028, 30087, 30245, 30263, 30282, 30309, 30368, 30727, 30914, 31129, 31134, 31140, 31171, 31235, 31299, 31303, 31466, 31661, 31957, 31997, 32194, 32321, 33456, 32614, 33492, 32592, 33642, 33655, 33683, 33842, 34067, 34161, 34165, 34242, 34290, 34456, 34532, 34576, 34698, 34863, 34996, 35006, 35181, 35221, 35755, 35878, 35912, 35940, 35947, 36078, 36082, 36123, 36348, 36418, 36424, 36426, 36545, 36673.

Increased purchases: 00036, 00053, 00096, 00287, 00448, 00522, 00773, 00811, 00839, 00858, 00874, 00884, 01511, 02143, 02234, 30013, 30275, 30549, 30620, 30766, 31271, 32289, 32693, 32386, 32871, 33851, 33973, 33983, 34167, 34473, 34558, 34694, 34704, 34809, 35074, 35886, 35976, 36005, 36161, 36449.

New Artists: 00256, 00975, 01014, 01541, 30103, 30441, 30488, 30646, 30740, 30815, 31786, 32559, 32634, 33512, 33637, 34437, 35275, 35281, 36112.

Jay Rep. App. B-3; ER00527-ER00582.

²⁴ Jay categorizes any respondent who said he uses Napster to get free music as suggestive of lost sales – a non sequitur in itself, since receiving a free sample does not imply willingness to buy the product. Professor Fader collected the real world evidence of Napster’s impact from numerous independent sources; analyzed Dr. Jay’s data; and submitted his own survey conducted through Greenfield Online. The District Court admitted Fader’s report ER04281, but discounted it for three reasons—each of which is unsupportable.

Even including the dubious entries discussed in the margin,²⁵ only 20 from the list of 100 samplers overlap with the list of 114 supposed “displaced sales” responses.

It is therefore clear that the District Court did not independently analyze the

First, the court critiqued Fader as not sufficiently knowledgeable about Greenfield’s activities. This critique literally ignored Fader’s declaration, which responded to each point raised. ER03979—ER03999. Fader had confirmed Greenfield’s qualifications through numerous sources. ER03981—ER03982. The Forrester Benchmark Study used to derive a sample population provided a well-accepted and reliable demographic model (ER03983—ER03984)—far more representative than taking *only* college students. The invitation to respondents was neutral. ER03985, ER03992—ER03994. And the representative nature of respondents was validated and ensured. ER03986.

Second, the District Court faulted Fader for supplying “almost no tables or other objective data” about responses. ER04280. However, all underlying data was produced in discovery (ER04190), and *Plaintiffs* never contended that the tables were insufficient. If the Court had concerns, an evidentiary hearing would have been appropriate. Moreover, Fader’s tables segregated the sampling and space-shifting issues (ER02135)—unlike Dr. Jay. Further, because the Fader Survey elicited multiple choice responses (ER02110—ER02118), tabulation of responses is inherently objective, and review of individual responses unenlightening.

Third, the District Court discounted the convergence of independent, non-litigation studies—which Fader catalogued regardless of favorableness to Napster (ER03989, ER02135)—all of which undermined Jay’s conclusion that Napster displaced CD sales. ER04281. While Fader did not conduct those studies, their independence enhances “convergent validity,” i.e., the “ability of a measurement instrument to correlate or ‘converge’ with other supposed measures of the same variable or construct.” ER03989. To simply ignore the plethora of data generated by the Napster phenomenon—as did Dr. Jay, Professor Teece, and the District Court—was to short-shrift the truth.

²⁵ These lists are themselves problematic. In many instances, full examination of the user’s comments to both questions 16 and 19 make clear that the user Jay claims is suggesting decreased purchasing is actually using Napster for completely different reasons than to replace CDs. See, e.g., responses of users 220, 917, 1268, 1573, 30245, 33655, 33842, 34161. ER00528—ER00578.

comments that the Jay Report provides in determining whether sampling reduced sales, or in reaching the erroneous conclusion that “it is likely that survey respondents who sample are primarily direct infringers.” ER04245 (Op.).²⁶ The failure to examine the comments is particularly suspect because the District Court cited the fact that the Jay Report provided the answers to the questionnaire (and the Fader report did not) as a justification for relying heavily on Jay and ignoring Fader completely. ER04202 (Tr. 7/26); ER04280. Moreover, the District Court ignored the evidence that “Jay arrives at her conclusions by subjectively interpreting responses to open-ended questions in a way that aggressively and relentless favors the plaintiffs in this litigation.” ER2041, ER2056-2062. By interpreting ambiguous responses as “suggestive” of displacement of sales, Jay exaggerated the numbers. For example, Jay counted as a “displaced sale” a respondent who says he uses Napster “because it’s the only one I know about,” and “it seems we get everything we type in pretty quickly.” ER2058. Similarly, Jay assumes that every user who says they use Napster “because its free” or “to get the

²⁶ The latter observation is, in addition to being inaccurate, irrelevant; the fact that a user samples one song and goes out to buy it, and then downloads another song with no intention of buying it, does not mean that the former use was any more unfair than a user who uses the VCR to time-shift on some occasions and build libraries on another. Moreover, a factual basis for the District Court’s surmise of what is “likely” appears nowhere in the record.

music I want” are displaced sales.²⁷ This is a non-sequitur, and assumes the very conclusion to be tested. Using a free service to hear music is not inconsistent with sampling or space-shifting, nor does it suggest one would have paid for the same service.

Citing three cases from the Plaintiffs’ brief, the court justifies its disregard of evidence that the Napster service drives CD sales with the statement that “courts have rejected the suggestion that a positive impact on sales negates the copyright holder’s entitlement to licensing fees or access to derivative markets.” ER04246 (Op.). In each of these cases of direct infringement, however, the infringing act was commercial and involved “appropriation without payment of a customary licensing fee” for the copyrighted work.²⁸ By contrast, the use of the Napster service to sample music is noncommercial and does not avoid payment of a

²⁷ This bias resulted in Jay categorizing numerous respondents as displaced, even where their complete responses showed that they bought *more* as a result of Napster. ER2059, ER02128.

²⁸ See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (fourth factor would favor copyright owner only if she “can show a ‘traditional, reasonable, or likely to be developed’ market for licensing her work” for the particular use); *DC Comics v. Reel Fantasy, Inc.*, 696 F.2d 24, 27 (2d Cir. 1982) (held that use of flyers advertising comic book store that “were obviously of a commercial nature” without payment of licensing fee). In *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp. 2d 349, 351 (S.D.N.Y. 2000), a case the District Court found “especially instructive,” the direct infringer copied works without payment of licensing fee to establish a business replaying the works for consumers. Op. at 23. The contrast between this business, and a consumer making a copy of a work to decide whether to buy it, is stark.

customary licensing fee because consumers, as discussed above, do not pay to sample works.

5. The District Court Erred As A Matter of Law In Relying On The Belief Of Sean Parker That Some Users Were Engaged In Infringement As Probative Of The Substantiality Of Non-Infringing Use.

In finding Napster's non-infringing uses insubstantial, the court below relied on the conclusion that Sean Parker knew of, and intended that the system be used for, the sharing of copyrighted material. ER04205 (Tr. 7/26); ER04249 (Op.). In *Sony*, the district court noted that defendant's national advertisements "exhort the public to 'record favorite shows' or 'build a library'", and that others "suggested recording 'novels for television' and 'classic movies.'" *Sony*, 480 F.Supp. at 436. The Supreme Court expressly rejected the claim that "supplying the means to accomplish an infringing activity and encouraging that activity through advertisements are sufficient to establish copyright liability." *Sony*, 464 U.S. at 436. Under *Sony*, knowledge of, or even intent to profit from, infringing uses does not justify foreclosing a new technology that is capable of substantial noninfringing uses.²⁹

²⁹ Reliance on prior "intent" is particularly inappropriate here. Plaintiffs point not to any management business plans, but rather to early brainstorming documents written by two 18-year-olds before the company had any professional management in place. ER03593, ER03599. Again, the District Court nakedly equated unauthorized copying with infringement, which ignores such things as fair use and

6. The District Court Erred In Concluding That Sony Is Inapplicable Because The Napster Directory Is Constantly Connected to Users and Updated.

The District Court ruled that Napster's peer-to-peer service was outside the *Sony* doctrine on the additional ground that Napster was not merely a manufacturer or seller, but also exercised substantial and ongoing control over its directory. ER04204 (Tr. 7/26). This conclusion applied the wrong legal standard for control. Plaintiffs urged that Napster can "control" its users by excluding all of them from the Napster service. ER00381. By this logic, the Betamax would have been enjoined, since *Sony* could have "controlled" infringement simply by keeping its product off the market, or by allowing a recording to be replayable only once, or by developing a jamming system to prevent unfair uses. *Sony DC*, 480 F.Supp. at 462 (rejecting such a theory). *See* ER1930—ER1931.³⁰

The District Court relied on cases in which the defendants, unlike Napster, were directly involved in controlling whether infringing or noninfringing uses were made of their technology.³¹ By contrast, the record provides no support for the

AHRA immunity.

³⁰ Professor Lesser testified as an expert on the relationship between regulation and cyberspace and, in particular, the impact of the law on changes in technologies of the Internet. *Id.* ¶¶3, 6. In rejecting this evidence as legal argument (ER 04282), the trial court erred by misconstruing the policy balancing it was required to undertake.

³¹ In each case cited, the deciding factor was the presence of direct participation in the infringement or direct control over the infringers' infringing activities. *See*

contention that Napster does or can exercise control by discriminating between infringing and noninfringing uses, or between authorized or unauthorized files.³² Indeed, the court acknowledged Napster's inability to determine infringement, stating that "I don't know how you're going to identify all those items," also stating that an injunction would not be denied "just because the nature of the technology is such that it's too hard to identify." ER04212-ER04213 (Tr. 7/26). *See also* pp. 12-14, *supra*.

No case cited by the court below required the wholesale redesign of a basic technology, let alone a redesign that would destroy the basic advantages of that

RCA/Ariola, 845 F.2d at 781 (defendant "picked the proper tape to reproduce a particular copyrighted work" and "helped the customers copy a whole tape"; "responded to an RIAA letter or complaint by assuring RIAA that [defendant] policed the use of the machines"; and "did supervise [operator] by writing them letters instructing them on what uses of the copiers to permit"); *RCA Records v. All-Fast*, 594 F.Supp. at 338, 339 (S.D.N.Y. 1984) (defendant retailer was "in a position to exercise complete control over the use" of the machine; itself "willingly and knowingly copied copyrighted tapes"); *Columbia Pictures Indus., Inc. v. Aveco*, 800 F.2d 59, 62 n.3 (3d Cir. 1986) (defendant who rented rooms for the public to watch copyrighted videocassettes monitored their use); *Sony*, 464 U.S. at 446.

³² At Plaintiffs' urging (ER04137 (Tr. 7/26)), the court below erred by assuming that knowledge that a work was copyrighted was equivalent to knowledge that the work was being infringed. ER04197 (Tr. 7/26). To the contrary, knowledge of infringement only arises if one knows the work is copyrighted, that its use is not expressly or implicitly authorized, and that the use is also not excused as a fair use, by the AHRA, or by one of the other excuses contained in §§107-122 of the Copyright Act. If mere knowledge of copyright status would suffice, as noted above, every provider of an Internet technology or service would be liable for infringement, because movement of copyrighted materials is the predominant use of the Internet.

technology.

C. The District Court Erred in Misconstruing Other Requirements of Vicarious/Contributory Liability.

1. Generalized Knowledge and Ability to Control is Insufficient to Impose Contributory and Vicarious Liability.

Although the District Court accepted evidence that Napster could not distinguish infringing from non-infringing files and uses (ER04251 (Op.)), it nevertheless proceeded to disregard such evidence and find contributory and vicarious liability based on Napster's generalized knowledge that some (unidentified) Internet users were allegedly infringing.

As discussed above, *Sony* had general knowledge that its VCR would be used for the unauthorized copying of copyrighted works; indeed, it advertised the VCR for just such a purpose. The Supreme Court expressly held that such generalized knowledge was insufficient to impose liability for vicarious or contributory infringement. *See Sony*, 464 U.S. at 434-442; Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1873 (2000).

The leading case on contributory liability in the online context is *Religious Technology Centers v. Netcom On-Line Communications Services*, 907 F.Supp. 1361 (N.D. Cal. 1995), which required that an ISP have knowledge of particular infringing activities for contributory liability. *See* H. Rep. 105-551 105th

Congress, 2nd Session, May 1998, p. 11 (House Judiciary Committee recognizes *Netcom* as leading and guiding case for DMCA).³³ *Netcom* held that even after the ISP had received actual notice from the copyright holder of a particular allegedly infringing activity, such knowledge would be insufficient for contributory liability where, as here, the ISP “cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder’s failure to provide the necessary documentation to show that there is a likely infringement.” *Id.* at 1374. Enforcing the *Netcom* standard is important to avoid inhibiting free speech rights. Yen, *supra*, at 1879-80; *see also id.* at 1969, 1892-93.

Netcom is in accord with other cases on contributory liability which require specific, rather than general knowledge of the infringing activities. For example, where the claim was based on the defendant’s provision of the infringed work to the direct infringer, the knowledge element was satisfied only where the defendant knew of a particular party’s intent to use the work in an infringing manner or failed to instruct the other party to obtain the required permissions. *Schuchart &*

³³ Requiring knowledge of a specific infringing act is consistent with the fact that contributory liability has its roots in enterprise liability. *See Prosser and Keaton on Torts* §72 (5th ed. 1984). An enterprise “is an undertaking to carry out a small number of acts or objects which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise.” *Id.*

Assocs. v. Solo Serve Corp., 220 U.S.P.Q. 170, at 1716-17 (W.D. Tex. 1983);
Gethers v. Blatty, 283 F.Supp. 303 (C.D. Cal. 1968).

Similarly, even where a defendant is asked by a customer to provide access to a tool for reproducing or performing a specific work, the knowledge element has only been found where the work, and its copyright, have been clearly shown. *See, e.g., RCA/Ariola*, 845 F. 2d at 777 (defendants presented with works clearly marked with copyright notice); *A&M Records, Inc. v. General Audio Video Cassettes, Inc.*, 948 F.Supp. 1449, 1456 (C.D. Cal. 1996) (defendant provided copy of copyrighted works to facilitate the creation of tapes of the customized length for use in unauthorized copying).

Unlike these cases, Napster does not hold and provide its users with any of Plaintiffs' works; Napster's facilitation of its users' exchange of works among themselves does not involve anyone at Napster ever reviewing or ascertaining the works' contents or status.

As for vicarious liability, the law similarly requires a specific right and ability to control or supervise the direct infringers: "one may be vicariously liable if he has the right and ability to supervise the *infringing activity* and also has a direct financial interest in such activities." *Fonovisa*, 76 F.3d at 262 (emphasis added). Vicarious liability has its roots in the doctrine of respondeat superior. *Id.* at 261-62. Under that doctrine, one party may be held liable for the actions of

another regardless of knowledge of the activity because the first party selected the actor and set the action in motion. *See Prosser, supra*, n. 30 §69. “Courts relying on this theory of third-party liability repeatedly have emphasized that some degree of control, or supervision over the individual(s) directly responsible for the infringement is of crucial importance.” *Demitriades v. Kaufmann*, 690 F.Supp. 289, 292 (S.D.N.Y. 1988).

As set forth above, the Napster peer-to-peer technology does not and cannot provide Napster with the right and ability to control the specific conduct of its users because Napster cannot differentiate between infringing and non-infringing activities. By contrast, in cases where vicarious liability has been imposed, the direct infringer and vicarious infringer both were commercial parties to a commercial endeavor, and, because of their relationship, one had a right to control the conduct of business of the other. *See e.g., Fonovisa*, 76 F.3d 259 (event organizer—vendor); *RCA/Ariola*, 845 F.2d 773 (manufacturer licensor-retailer licensee); *Gershwin*, 443 F.2d 1159 (agent-artist; local association—agent); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963) (department store—concessionaire). No such relationships exist between an ISP and the millions of Internet users spread around the world.

The common law rule requiring a specific right and ability to control or supervise the individuals directly responsible for the infringement is crucial in an

online setting. Imposing vicarious liability on an ISP such as Napster based solely on the existence of a contract that permits it to terminate a user for infringing conduct (and proof that Napster in the past has in fact done so) would expand vicarious liability beyond all bounds, unmooring it from its roots in the law of agency. Yen, *supra*, at 1844, 1858, 1863-65. Imposing vicarious liability so broadly would also require ISPs to police their systems in a manner that infringes on free speech. *Id.* at 1871-72.

Absent actual notice of a claim, Napster has no specific knowledge that any particular use of a file is claimed to be unauthorized. Napster cannot know, any more than a photocopier or video recorder manufacturer, which uses of its system are fair or not. But even apart from fair use, Napster cannot know the copyright status of users' files. Indeed, the Court below acknowledged as much, while simultaneously concluding that particularized knowledge was not required. ER04251 (Op.), ER04267 (Op.). Plaintiffs themselves claim to have no master list of songs to which they claim rights. Napster can hardly determine which works are protected if Plaintiffs themselves can only guess.

Moreover, an ISP has no affirmative duty to police its users, and cannot be expected to monitor individual users until put on notice by the copyright holder of

particular alleged infringing materials. 17 U.S.C. §512(m).³⁴

In sum, Napster has neither sufficient knowledge nor control of any infringing activity on its service to impose contributory or vicarious liability on it.

2. The District Court Also Erred In Applying The Additional Elements For Contributory Liability And Vicarious Liability.

Contributory infringement also requires “substantial participation” in a specific direct infringement. *See Netcom*, 907 F.Supp. at 1375 (citing *Apple Computer, Inc. v. Microsoft Corp.*, 821 F.Supp. 616, 625 (N.D. Cal. 1993), *aff’d*, 35 F.3d 1435 (9th Cir. 1994)). The District Court erred in applying this second prong of the contributory infringement test, relying principally on *Fonovisa*, 76 F.3d 259 (ER04251, ER04254 (Op.)), a case involving commercial flea markets. The District Court’s reliance on *Fonovisa* was misplaced. The market operator in *Fonovisa* entered into commercial contracts with a limited number of known vendors; it depended on its vendors’ sales of counterfeit goods to pay for daily booth rentals; it monitored and patrolled the confined grounds of the market; it controlled access into and out of the premises; and when notified of its vendors’ rampant commercial sale of counterfeit goods, it agreed to provide the names of individual vendors to the Sheriff but then later reneged. *Id.* at 261-262. Upon

³⁴ Imposing such a burden would encourage ISPs to enforce even marginal copyright claims of copyright infringement at the expense of free speech rights to avoid risk of liability. Yen, *supra*, at 1888.

these facts, the Court ruled only that a claim was stated. *Id.* at 264.

By contrast, Napster offers access to all comers, without meeting them and without distinction, including millions who may visit from any computer. ER01812 ¶6. No rents are paid by, nor are products sold on Napster by any Napster user. ER04227 (Op.). Napster does not, and cannot, patrol any confines. Napster allows free file sharing on a peer-to-peer basis, among an ever-changing public, with ever-changing files, and Napster has nothing approaching the knowledge or control of the operator of a commercial flea market. Commercial vendors who buy space at a swap meet are not anything like the individuals who use Napster.

The District Court also erred in finding direct financial benefit for the purpose of vicarious infringement, again relying principally on *Fonovisa*.

ER04255.³⁵ Merely attempting to monetize a user base and receiving money from investors is not direct financial benefit from infringing, as distinct from non-

³⁵ The District Court also relied on *Major Bob Music v. Stubbs*, 851 F.Supp. 475 (S.D. Ga. 1994), *Walden Music, Inc. v. C.H.W., Inc.*, 1996 WL 254654, at *5 (D. Kan. 1996), and *Broadcast Music, Inc. v Hobi, Inc.*, 1993 WL 404152, at *3 (M.D. La. 1993), for the proposition that a defendant need not derive a direct financial benefit in order for vicarious liability to attach. These cases do not stand for that proposition and are factually inapposite, in that they each involve an establishment (e.g., a bar or comedy club), where defendants knew of the specific infringing activity and reaped financial reward based on that specific infringing activity. *Major Bob* was also decided in the context of an attempted defense under 17 U.S.C. §110(4), which is not asserted here.

infringing, activity. *See e.g., Netcom*, 907 F.Supp. 1376 (a direct financial benefit is one that depends on the infringing nature of the activity of the person providing the benefit; a fixed fee charged to all does not establish direct financial benefit). Even if Napster were to attempt to monetize its user base, there is no evidence that the fees to be paid per user are based on whether that user is engaged in infringing activity.

D. The District Court Erred in Failing to Find Napster Within the Safe Harbor of Section 512(d) of the DMCA.

Section 512(d) of the DMCA immunizes “information location tools,” including a directory or index. The District Court correctly concluded that “essential functions [of Napster challenged by Plaintiffs] – including but not limited to the search engine and index – should be analyzed under subsection 512(d).” ER00179, Plaintiffs acknowledged that “it is Napster’s activities as an information location tool that form the basis of this action.” ER00164. However, in a mere seven lines of analysis in a footnote, the District Court erroneously rejected the applicability of the safe harbor of §512(d) to Napster.

1. Napster Satisfies The Section 512(i) Prerequisites.

To qualify for the immunity of §512(d), Napster must satisfy the threshold requirements of §512(i) that it (1) has adopted and reasonably implemented, and informs account holders of, a policy that provides for the termination in

appropriate circumstances of account holders who are repeat infringers, and (2) accommodates and does not interfere with standard technical measures that identify or protect copyrighted works. With respect to (2), the Napster system accommodates secure music file formats such as “Windows Media” (WMA) files and files compliant with the SDMI promoted by the Plaintiffs. ER01825 ¶37.

With respect to (1), the District Court previously found an issue of fact precluding summary adjudication in favor of Napster with respect to §512(i). ER00183. The District Court did not address this issue on the preliminary injunction motion, despite additional facts.

The new facts now in the record support a ruling that Napster is at least likely to prevail – if not entitled to a ruling as a matter of law – that it complies with §512(i). Napster has publicly posted its DMCA policy on its website. ER02166 ¶8, ER02172-ER02176; ER01816 ¶17; ER01316 ¶10. Napster reduced its policy to writing in February 2000 and expanded its description to the public of its policy at that time, plainly satisfying the DMCA’s requirements. Moreover, documents in the record confirm that Napster had a policy to terminate alleged infringers since at least August of 1999. ER02165 ¶7, ER02169-ER02171.

Napster has terminated every user for whom it has received notice under the DMCA, over 700,000 to date. ER01817 ¶20. Napster also has, since the District Court’s May 5 ruling, strengthened its method of terminating user accounts. It

now disables the user name and password *and* places a code on the user's computer to prevent further use of that computer to access Napster under *any* account name. ER01818 ¶¶23-24. This method of blocking is more technologically effective than blocking by IP address,³⁶ and cannot be readily circumvented. ER02108-ER02019, ER02022. *See also* A. Berschadsky, *RIAA v. Napster: A Window Onto the Future of Copyright Law in the Internet Age*, 18 J. COMP. & INFO. L.101, 128 (2000).

The safe harbors require only that a policy be adopted, reasonably implemented, and communicated to users. 17 U.S.C. §512(i)(1)(A). Napster has done so.

2. Napster Meets The Section 512(d) Requirements.

In addition, to qualify for the immunity of §512(d), Napster must also satisfy the requirements specific to that subsection.

With respect to the knowledge requirement, §§512(d)(1) - (3) require that, to qualify for the safe harbor, the ISP must not “have actual knowledge that the material or activity is infringing” or be “aware of facts or circumstances from which infringing activity is apparent,” or upon obtaining such knowledge or awareness, must “act expeditiously to remove, or disable access to, the material”

³⁶ The IP (or Internet Protocol) address of a user is the numerical identifier used to locate that computer on the Internet.

(emphasis added). The District Court erroneously ruled (in a footnote) that the safe harbor of §512(d) is unavailable if a defendant has actual or constructive knowledge under §512(d)(1)(A) or §512(d)(1)(B), and that §512(d) can therefore *never* shelter contributory infringers. ER4267 (Op.). This ruling completely and erroneously ignores §512(d)(1)(C), which provides that *even if* a service provider obtains actual or constructive knowledge of an infringement, the safe harbor is still available if the service provider acts expeditiously to remove, or disable access to, the particular allegedly infringing activity or material (i.e., takedown upon notice). Contrary to the District Court’s ruling, the legislative history makes clear that the §512(d) safe harbor was meant to apply precisely in situations that might otherwise constitute contributory liability. *See, e.g.*, S. Rep. No. 105-190 at 48 (1998) (“Section 512(d) provides a safe harbor that would limit the liability of a service provider that refers or links users to an online location containing infringing material or activity by using ‘information location tools’ ...”; liability based on mere referral or linking could only be contributory liability).

Further, the references to “material” and “activity” in all three of the subsections suggest that the DMCA safe harbor, like the common law, focuses on knowledge of *specific* infringing activity or material present on the ISP’s service. In addition, knowledge is imputed to an ISP upon the service of a notice of infringement only if the notice is compliant with the DMCA requirements that the

notice identify the specific *location* of infringing material to be disabled.

17 U.S.C. §512(c)(3)(A) & (B).

Similarly, with respect to the control requirement, §512(d)(2) requires that the ISP not receive a financial benefit directly attributable to the infringing activity “in a case in which the service provider has the right and ability to control such activity.” Again, the reference to “such activity” suggests an ability to control specific infringing acts, not a general ability to terminate all users (and, hence, the alleged infringing users) from the service. A contrary interpretation would set up an absurd Catch 22 under the DMCA: Because §512(i) *requires* that a service provider have a policy that provides for termination of account holders who are repeat infringers to qualify for any of the safe harbors, were the mere ability to terminate users enough to establish sufficient “control” over infringing activity to disqualify the service provider from the §512(d) safe harbor, the safe harbor would effectively *never* be available to a service provider.

To allow any generalized knowledge and control to establish ineligibility for the safe harbors, as the District Court erroneously held (ER04250, ER04254 (Op.)),³⁷ renders the safe harbors a nullity, for at least generalized knowledge or

³⁷ The District Court relied on *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971), *Cable/Home Comm. v. Network Products*, 902 F.2d 829, 846 (11th Cir. 1990), *Sega Enterprises Ltd. v. Maphia*, 857 F.Supp. 679 (N.D. Cal. 1994) (*Sega I*), and *Sega Enterprises Ltd. v.*

control will *always* be present in any case in which contributory or vicarious liability is imposed in the first place. By contrast, Congress made the judgment that the safe harbors do *not* depend upon an ISP “monitoring its service or affirmatively seeking facts indicating infringing activity.” 17 U.S.C. §512(m); *see also* S. Rep. 105-190 (1998) at 55.

E. The District Court Erred in Summarily Rejecting Napster’s Affirmative Defenses of Waiver, Abandonment and Implied License.

This Court recognizes that the equitable doctrine of waiver applies in the copyright context, and that rights of a copyright holder may be waived or abandoned, in whole or in part, through statements or conduct by the copyright holder that are inconsistent with those rights. *United States v. King Features Entertainment*, 843 F.2d 394, 399 (9th Cir. 1988). Waiver may be established

Maphia, 948 F.Supp. 923 (N.D. Cal. 1996), for the proposition that only generalized knowledge suffices for contributory infringement. Unlike the situation here, defendant in *Gershwin* had specific knowledge of the musical compositions included in the programs and performances that it organized. *Gershwin*, 443 F.2d at 1161. In *Cable/Home*, defendant “actually knew that the CMS computer program was copyrighted, and that he acted in direct defiance of this knowledge.” *Cable/Home*, 902 F.2d at 846. Although the court found that defendant’s “reason to know” would also suffice, this was reason to know the *specific* work involved and its copyright status. *Id.* The Sega cases also do not stand for the proposition. Indeed, the Sega I court held that the “uploading and downloading of unauthorized copies of Sega’s copyrighted video games is particularly known to Defendant (emphasis added).” *Sega I*, 857 F.Supp. at 683 (para. 16). Furthermore, the identification of the videogames as those belonging to, and copyrighted by Sega, suffered from none of the problems associated with identifying user-named music files.

through evidence of statements or conduct inconsistent with the right being waived. Related to waiver is the doctrine of copyright abandonment. *Micro Star v. Formgen*, 154 F.3d 1107, 1114 (9th Cir. 1998).

Also directly related to these equitable doctrines is the concept of implied license, where the right to use a copyrighted work arises through the copyright holder's express or implied conduct. *See, e.g., Effects Assoc., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990) *cert. denied*, 498 U.S. 1103 (1991) (a non-exclusive license may be implied from conduct); *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998). An implied license, for which no additional fee need be paid, can arise to cover any use that follows from a grant of permission to use a work combined with a failure to object to subsequent uses, or from any use that naturally follows from the copyright holder's encouragement to use the work in a particular manner. *See Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 752 (11th Cir. 1997); *Herbert v. United States*, 36 Fed. Cl. 299, 310 (Fed. Cl. 1996).

In applying these doctrines, the Ninth Circuit has recognized that where, as here, a copyright holder knowingly provides consumers with technology that is specifically designed to usurp certain of the copyright holders' exclusive rights (in this case, copying and distribution of MP3 files over the Internet), the copyright holder has then waived or abandoned its legal authority to exercise exclusive control over these rights. *See Micro Star*, 154 F.3d at 1114.

The District Court dismissed Napster's waiver and implied license defenses essentially on the basis that Napster failed to carry its burden of proof: the "limited evidence fails to convince the court that the record companies created the monster that is now devouring their intellectual property rights." ER04259 (Op.). Yet, the court had previously limited Napster's ability to obtain the necessary evidence, all but denying Napster's discovery requests at a May 26, 2000 hearing on the basis that such evidence was "not relevant." ER04151-04166 (Tr. 7/26). And, as discussed above (pp. 15-17), placing the burden of proof on Napster was error.

Nevertheless, Napster was able to present substantial evidence of Plaintiffs' relinquishment of rights, which fell generally into two categories: (1) Plaintiffs' acts of expressly inviting and encouraging individual consumers to download and share music in MP3 format; and (2) Plaintiffs' acts of acquiescing in, and even encouraging, wide-spread consumer access to and use of "ripping" software, thereby proliferating MP3 files that Plaintiffs themselves did not sell or distribute. ER02188-ER02189; ER02332-ER02333; ER02495; ER02516-ER02517; ER02942. The latter is particularly significant because ripping technology is not simply a means for copying; it is a technology designed to compress digital files into a size that will allow convenient Internet transfer. ER02348-ER02349.

Plaintiffs also made express public statements assuring consumers who were using these technologies – the alleged direct infringers upon which Napster's

liability is based – that Plaintiffs would not take legal action against them.

ER02352-ER02353; ER02371.

As a direct result of this course of conduct, the inevitable happened. Consumers began using ripping software for the very purpose it was intended, and a large number of MP3 music files were created from CDs and transferred over the Internet. Not only were Plaintiffs unsurprised by this result, they benefited from it. A Warner Music Group study in 1999, following the release of a Tom Petty track in MP3 format on the Internet prior to the album's street release, concluded that "it is clear that the first week sales were considerably higher than the first week for Petty's previous album, *She's The One*. Moreover, consumers were favorable about their downloading experiences and reported positive intent to purchase the album." ER02978-ER02979, ER03117-ER03118. The report even recommended future free online releases of tracks prior to an album's release. *Id.* Similarly, a UMG survey of people who download MP3 files found that 93 percent of the respondents indicated that they purchased more CDs as a result of downloading MP3 files. ER02546-ER02547.

Other evidence of Plaintiffs' plans to profit from the proliferation of MP3 music files available on the Internet is found in the introduction of new products designed to build on the proliferation of MP3 files that Plaintiffs encouraged. For example, Sony Corporation of America, which owns Plaintiff Sony Music

Entertainment, markets a portable listening device called the VAIO Music Clip, which plays MP3 files, regardless of whether the files were made with the authorization of the copyright holders. ER02486.

This is not a case where Plaintiffs have merely previously permitted the conduct which they now challenge as copyright infringement; this is a case where Plaintiffs have affirmatively encouraged consumers to engage in the same copying and sharing that Plaintiffs now seek to condemn. Nor is this a case where the copyright holder permitted one group to engage in copying and thereafter sought to allege copyright infringement by another group for engaging in the same or similar activity; this is a case where Plaintiffs seek to challenge the very same conduct (the ripping and sharing of MP3 files) by the very same people (consumers) that Plaintiffs have previously permitted and encouraged.

F. The District Court Erred in Ignoring the Substantial Evidence Demonstrating That Plaintiffs Are Misusing Their Copyrights in an Attempt to Control the Market for Electronic Music Distribution.

Again, though restricted by the District Court's discovery rulings, Napster was able to present ample evidence of Plaintiffs' improper attempt to combine their limited monopoly rights in copyrighted sound recordings to dominate and control the market for online music distribution affecting the music of others. That evidence precludes Plaintiffs from enforcing any rights to their copyrighted

recordings.³⁸ *Practice Management Info. Corp. v. American Med. Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997), *as amended* 133 F.3d 1140 (9th Cir.), *cert. denied*, 525 U.S. 1058 (1998); *e.g. Alcatel USA v. DGI Techs.*, 166 F.3d 772 (5th Cir.), *rehg, en banc, denied*, 180 F.3d 267 (5th Cir. 1999); *Lasercomb Am.*, 911 F.2d at 972; *QAD, Inc. v. ALN Assoc., Inc.*, 770 F.Supp. 1261, 1266-1270 (N.D. Ill. 1991), *aff'd in part, dismissed in part*, 974 F.2d 834 (7th Cir. 1992).

Plaintiffs' contemporaneous documents (as opposed to their testimony subsequent to commencing this litigation) showed they were not suffering any harm as the result of any lost sales of their copyrighted works (the injury the copyright laws protect against). What Plaintiffs were (and are) concerned about is the possibility that an independent Napster would "lower barriers of entry" and enable the 98% of artists who do not have RIAA member contracts to more effectively compete with the 2% of artists who do.³⁹ Indicative of Plaintiffs' plans collusively to use their copyrights to extend their control to online distributions are

³⁸ In its written order, the court below characterized the misuse defense as "antitrust violations" that "do not afford a valid defense against an infringement action." ER04257 (Op.). To the contrary, "A successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement." *Lasercomb Am. v. Reynolds*, 911 F.2d 970, 972 (4th Cir. 1990), *on appeal after remand*, 961 F.2d 211 (4th Cir. 1992). *See also Practice Management*, 121 F.3d at 520 & n.9.

³⁹ *E.g.*, ER03172-ER03216 (EMI document showing that their market share would shrink and that the share of independent labels would grow along with growth of alternative distribution channels such as the Internet).

UMG's documents that suggest they plan to make Napster an affiliate after this litigation concludes (ER02537, ER02591), and that UMG has its own plans for "viral" distribution of its music, i.e., spreading music files between and among consumers, which increases the market reach of the product without significant additional marketing costs. ER02525, ER02555-ER02582. In an internal document less than two months old, UMG's Global E group stated that UMG's "[g]oal is not just to equal Napster et al, but to surpass them." ER02531-ER02532, ER02630. Explaining this statement, Lawrence Kenswil, President of UMG's Global E group, stated that UMG wants to "move more files than Napster is now moving." ER02538. Under UMG's control, Napster would "provide the consumers with a front end for purchasing our content." ER02537, ER02646.

The District Court's oral July 26 order did not address Napster's copyright misuse defense. In the District Court's August 10 Opinion, the court rejected that defense on the grounds that "most of the cases defendant cites deal with improper attempts to enlarge a copyright monopoly through restricted or exclusive licensing" and that in this case, "plaintiffs have granted no licenses to defendant, let alone impermissibly restrictive ones." ER04257 (Op.). The court did not explain how a joint refusal to license at all is less an abuse than a restrictive license, and no prior case supports such a position. Nor did the court explain how even a non-collusive discriminatory refusal to license could escape being a

copyright abuse where its purpose was to use the copyright monopoly to avoid “lower barriers of entry” and to achieve control over a market (online distribution) not within the copyright monopoly.

G. The Scope Of The Injunction Was Impermissibly Broad And Must Be Vacated.

1. An Injunction Must Be Narrowly Tailored to Enjoin Only Infringement of the Works in Suit.

“An injunction should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), *on remand*, 607 F.2d 329 (9th Cir. 1979) (quotations omitted). This is particularly true when, as here, a preliminary injunction is involved.” *Zepeda v. United States Immigration and Naturalization Serv.*, 753 F.2d 719, 728 (9th Cir. 1983). The District Court’s order is far broader, and more damaging to Napster than necessary to provide Plaintiffs with the relief that they seek. Overly broad, non-specific language that merely enjoins a party to obey the law does not satisfy the requirements of Fed. R. Civ. P. 65(d) because it does not give the enjoined party fair notice of the precise conduct enjoined by the order. *Louis W. Epstein Family Partnership v. KMart Corp.*, 13 F.3d 762, 771 (3^d Cir. 1994).

The District Court ordered that “defendant. . . bears the burden of developing a means to comply with the injunction. 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.” ER04263 (Op.). The court expressly declined to order Napster to block only specific, identified works, and furthermore refused to order Plaintiffs to identify the works they owned. ER04208-ER04209 (Tr. 7/26). The lower court’s order is without precedent, is contrary to law, and violates Napster’s and its users’ First Amendment rights.⁴⁰

⁴⁰ In its oral ruling, the Court made clear that it had not attempted to determine the actual feasibility of any potential revision to the Napster architecture. ER04208-ER04209; ER04214; ER04216 (Tr. 7/26). The Court’s written opinion likewise makes no such determination, although it alludes to a reply declaration submitted by Plaintiffs’ expert Daniel Farmer. That conclusory declaration was submitted on July 13, without a chance for deposition or response by Napster, and in violation of the Court’s prior orders that Plaintiffs submit reports of such an expert by June 5 (ER00196; ER00218-ER0020 (Tr. 5/15)) and identify and make any witness on this issue available for deposition by May 30 (ER00265 (Tr. 5/26)). Any reliance on such evidence, without an opportunity for deposition or hearing, was plain abuse of discretion.

In any event, the declaration could not support any finding that Napster could practicably operate a peer-to-peer system distinguishing infringing from non-infringing uses. Farmer merely proposed that it may be technologically feasible for Napster to compile a database of authorized songs, and that it could then compare file name requests to that database to allow sharing only of file names listed on that database. ER03962 ¶3, 4. Farmer did not—and could not—refute the fact that (a) even if a database could be implemented, its use could be impossible because of performance constraints (ER01821 ¶30-ER01922 ¶31); (b) collection and validation of hundreds of thousands of authorized file names would be impracticable (ER02001; ER01821 ¶29); (c) the inherent fallibility of user-given file names would prevent reliable identification of content; and (d) such a system would fundamentally transform Napster from a decentralized, peer-to-peer system to one in which only selected, centralized data were made available on an extremely limited basis. ER02002-ER02003.

2. Both the Federal Rules and the Copyright Laws Require Plaintiffs to Identify Specifically the Works in Suit.

Rule 65(d) requires that an order granting an injunction, “shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained” The Supreme Court has stated that the specificity provisions of Rule 65 are “no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” *Schmidt v. Lessard*, 414 U.S. 473, 473-74 (1974) *on remand*, 413 F.Supp. 1318 (E.D. Wis. 1976). “Basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.” *Id. Schmidt*, 414 U.S. at 476.

Moreover, in a copyright case, 17 U.S.C. §411(a), “no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made.” “Copyright registration is not a prerequisite to a valid copyright, but it is a prerequisite to a suit based on copyright.” *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1211 (9th Cir. 1998) (citation omitted).

Here, Plaintiffs have identified only about 200 works in which they claim

copyrights. ER00024—ER00036. The District Court’s order thus violates the mandates of both Rule 65 and §411(a). The Court’s order affecting a large but unknown number of works, which both does not specify the works with particularity and fails to require proof of their registrations, is fatally defective. *Cf. Cole v. Allen*, 3 F.R.D. 236, 237 (S.D.N.Y. 1942).

Courts have routinely rejected as impermissibly vague similar orders which do not contain specific identification of the items or actions barred. *Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992); *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1411-12 (11th Cir. 1998); *United States v. Articles of Drug*, 825 F.2d 1238, 1247 (8th Cir. 1987), *appeal after remand*, 890 F.2d 1004 (8th Cir. 1989). Indeed, this Circuit (held in *Triad Systems Corp. v. Southwestern Express Co.*, 64 F.3d 1330 (9th Cir. 1995), that the plaintiff must provide such information where necessary to prevent an injunction from foreclosing legitimate activities.

For Napster, anything short of a complete shut down would fail to comply with the Order because it would not guarantee that only infringing files would be blocked, and at the same time would not block all noninfringing files. ER01821 ¶¶29-31, ER01826 ¶39. For example, assume the song name “Beatles Revolution” were somehow blocked, e.g., as Plaintiffs suggest, by comparison to some kind of database containing only “authorized” file names (which does not now exist).

When a user named a file merely “Revolution” and left out “Beatles,” the file would remain shareable because it did not match the database. *Id.* Conversely, if the database were set to exclude all sharing of files containing the single word “Revolution,” it would exclude authorized trading of the band “Of a Revolution.” ER03778 ¶8-9. The District Court’s order puts Napster to a Hobson’s choice of facing a contempt sanction from the Court if *any* copyrighted work were included under a user-chosen file name allowed to be shared, or to shut down entirely.

The Court's reliance on *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990), is misplaced. See ER04260 (Op.). That case involved a final injunction in a *direct* infringement suit, issued after a finding of liability had been determined, precluding future infringements of identifiable works (i.e., copyrighted Disney cartoon characters). It is a huge leap from that limited universe of potential characters to impose a *preliminary* injunction against *millions* of *unknown* – and unknowable – sound recordings owned by dozens of different companies and rights holders in a *contributory* infringement case, in a form that would shut down the defendant's operation prior to trial.

3. The District Court Erred by Placing the Burden on Napster To Redesign Its Functionality To Enable Only Non-Infringing Uses.

Moreover, even if any practical means to remain in operation existed, the Order’s plain terms require a complete technological redesign by Napster of its

architecture. This order is without precedent. When faced with analogous claims, the Supreme Court in *Sony* did not require that a device be reconfigured to exclude the possibilities of non-infringing uses (*see also Universal City, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 461-462 (C.D. Cal. 1979)), and no court in any reported decision has ever taken it upon itself to order such a reconfiguration. Were that the standard, the Supreme Court would have ordered that the Betamax be redesigned to record on tapes that were replayable only once—and thus suitable only for legitimate time-shifting, not illegitimate librarying. Where both infringing and non-infringing uses co-exist, the “public interest in access to that article of commerce is necessarily implicated.” *Sony*, 464 U.S. at 440. Indeed, even the Ninth Circuit’s decision in *Sony* did not order a redesign of the Betamax upon a finding of infringement, but rather suggested that a compulsory royalty could best balance the public’s right to access the technology and the rights holders need for compensation. 659 F.2d at 976.

4. The District Court’s Order Violated The DMCA’s Provision Concerning Injunctions and the First Amendment.

The DMCA requires that any court considering an injunction against a qualifying service provider determine, *inter alia*, (i) “whether such injunction . . . would significantly burden either the provider or the operation of the provider’s system or network”; (ii) “whether implementation of such an injunction would be

technically feasible and effective, and would not interfere with access to noninfringing material at other online locations”; and (iii) “whether other, less burdensome and comparably effective means of preventing or restraining access to the infringing material is available.” 17 U.S.C. §512(j)(2).

Protection of the public interest thus requires convincing proof that infringing uses could be feasibly eliminated, without undue burden on the system, and without interference with noninfringing materials. Plaintiffs have not met their burden on any of these factors, and the District Court erroneously failed to consider them, concluding, simply, that Napster was “stuck with the consequences,” whatever they may be (ER04213-ER04215 (Tr. 7/26)), that it was Napster’s “burden of developing a means to comply” (ER04263 (Op.)) and that an injunction would issue even if it would “make [Napster’s] service infeasible.” ER04261 (Op.).

Further, the heightened scrutiny applicable where First Amendment interests are in play at a minimum precludes unnecessary burdens on (or risks to) those constitutionally protected interests. *See Netcom*, 907 F.Supp. at 1383 (explaining that a “valid First Amendment question” is raised by “injunctive relief that is broader than necessary to prevent” the defendant “from committing copyright infringement”).

As discussed above, in order to implement the District Court’s order,

Napster would be forced to terminate its Internet directory, despite the fact that the directory serves numerous lawful purposes. Napster has First Amendment Rights to publish a directory; Napster users have First Amendment rights to have access to such a directory; and artists and others who rely on the directory to promote their works have First Amendment Rights to use such a directory for that purpose.⁴¹

Moreover, denying authorized users access to Napster because other users may engage in infringing activity violates the free speech rights of the authorized users.

Hunley v. Irish Am., 515 U.S. 557, 569-70 (1995).

The District Court's remedy means that the Plaintiffs will control whether and how peer-to-peer file-sharing network for music will be developed. By effectively lodging control over this revolutionary Internet communications technology in the hands of five record companies, the Court's order imposes a prior restraint upon the speech of Napster and its users that will strongly hinder (if not halt) the technology's development as an alternative platform for distributing protected expression that the RIAA does not control.⁴² The court's order will have

⁴¹ As the Supreme Court has recognized, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bk. of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); accord *Kleindiest v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'").

⁴² Cf. *Bernstein v. U.S. Dep't. of State*, 945 F.Supp. 1279 (N.D. Cal. 1996), where

precisely this effect by eliminating the ability of emerging and established artists to distribute music, and the ability of consumers to obtain it, using the decentralized peer-to-peer architecture.

As Judge Leval has recognized:

“The abhorrence of the First Amendment to prior restraint is so powerful a force in shaping so many areas of our law, it would be anomalous to presume casually its appropriateness for all cases of copyright infringement. When the interests protected by the copyright are in acute conflict with those represented by the First Amendment, courts should weigh cautiously whether a prior restraint in the form of an injunction is the appropriate remedy.” *New Era Pubs Int’l v. Henry Holt and Co.*, 695 F.Supp. 1493, 1525, 1527 (S.D.N.Y. 1988).⁴³

Indeed, such judicial caution is especially appropriate in regulating the Internet, which, as the Supreme Court has recognized, “provides relatively unlimited, low-cost capability for communications of all kinds.” *Reno v. A.C.L.U.*, 521 U.S. 844, 870 (1997) (holding Community Decency Act unconstitutional on First Amendment grounds). “From the publisher’s point of view, [the Internet]

the court below held that export restrictions on cryptographic software constitute a prior restraint.

⁴³ In *Religious Technology Center v. Netcom On-line Communications. Services, Inc.*, 907 F. Supp. at 1377, the court stated:

If Usenet servers were responsible for screening all messages coming through their systems, this could have a serious effect on what some say may turn out to be the best public forum for free speech yet devised.

constitutes a vast platform from which to address and hear from a world-wide audience of millions” (*id.* at 853), while for the listener, “the content on the Internet is as diverse as human thought.” *Id.* at 870. This “vast democratic fora” requires the highest level of First Amendment protection. *Id.* at 868, 870.

5. [The Injunction As Issued Is Overbroad Because Plaintiff Can Be Adequately Compensated by Damages in the Form of a Compulsory Royalty.](#)

Even if Napster were deemed to be incapable of substantial noninfringing uses, the only appropriate relief in a case seeking to restrict a new technology would be a compulsory royalty, not an injunction. When the Ninth Circuit found the Betamax technology to have insufficient noninfringing uses, it nonetheless stated that the appropriate remedy on remand could be a compulsory royalty. *Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963, 976 (9th Cir. 1981) *rev’d*, 464 U.S. 417, *rehg. denied* 465 U.S. 1112 (1984). *See also Diamond Multimedia*, 29 F.Supp. 2d at 633 (even if Rio player had been infringing, no preliminary injunction could issue where it can be used to record “legitimate music” and is a device with substantial beneficial uses).

H. [The Bond Imposed by the District Court Was Grossly Insufficient.](#)

Fed. R. Civ. P. 65(c) required Plaintiffs to provide a bond in an amount the court “deems proper” “for the payment of such costs and damages as may be

incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” The amount of the bond is significant because it may set the ceiling on the damages Napster may recover for wrongful injunction. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770 n.14 (1983). Indeed, setting a bond in an inadequate amount causes irreparable harm to the enjoined party. *Mead Johnson & Co. v. Abbott Labs*, 201 F.3d 883 at 888 (7th Cir. 2000) (“An error in setting the bond too high thus is not serious. . . . Unfortunately, an error in the other direction produces irreparable injury because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond.”)

At the hearing, the District Court dismissed out of hand the unrebutted evidence presented by Napster to the effect that the injunction would force Napster to close its business by quipping that Napster might stay open to continue “all those substantial non-infringing uses.” ER04218 (Tr. 7/26).

This premise is incorrect and not supported by the record. As set forth above, plainly authorized works, including not only those from the New Artists Program but also many others, can be found only through the same decentralized, user-named index that Napster would have to terminate to comply with the trial court’s injunction. Nothing in the record supports the trial court’s contrary assumption. Indeed, in its subsequent written order, the District Court directly asserted that “[a]lthough even a narrow injunction may so fully eviscerate Napster

Inc. as to destroy its user base or make its service technologically infeasible, the business interests of an infringer do not trump a rights holder's entitlement to copyright protection." ER04244 (Op.).

Moreover, while the injunction unquestionably has disastrous consequences to Napster, it does Plaintiffs very little good. The unrebutted record shows that peer-to-peer sharing of music files will continue irrespective of Napster, through alternatives such as Gnutella, AOL, Napigator and other Internet portals and search engines. ER01317, ER01811 ¶4; <<http://www.zdnet.com/zdhelp/stories/main/0,5594,2609080,00.html>>. Indeed, judicial notice can be taken of news media reports of the sharp increase in peer-to-peer sharing via these alternatives since announcement of the District Court's ruling. Had the court balanced the hardships, it should have come out overwhelmingly in favor of Napster.

Although in its August 10 order the court gave essentially no weight to the fact that the injunction would effectively destroy Napster by shutting it down until final judgment or reversal on appeal, such evidence was unrebutted. Thus, the bond should have been set in an amount sufficient to compensate Napster for the destruction of its business.

Plaintiffs' own expert estimated Napster's value at around \$60-80 million (ER00603-ER00604), and the Court accepted this figure. ER04288 (Op.). Napster introduced evidence that its value should the injunction ultimately be denied is

closer to between \$1.5 and \$2 billion. ER01898 ¶¶78-87; ER01315, ¶¶7-8.

Napster thus requested a bond of between \$800 million and \$1.5 billion.

ER04219-ER04230 (Tr. 7/26). The court, without explanation, instead set a bond at \$5 million, which is wholly inadequate and constituted an abuse of discretion.

See Gateway E. Ry. v. Terminal R.R. Ass'n of St. Louis, 35 F.3d 1134 (7th Cir.

1994) (court required to articulate reasons for bond amount).

VIII. CONCLUSION

For the reasons stated above, Napster respectfully requests that this Court reverse and vacate in its entirety the Injunction issued by the District Court.

Dated: August 18, 2000

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