

1 CAREY R. RAMOS (admitted pro hac vice)
 AIDAN SYNNOTT (admitted pro hac vice)
 2 THEODORE K. CHENG (admitted pro hac vice)
 MATTHEW KALMANSON (admitted pro hac vice)
 3 PAUL, WEISS, RIFKIND, WHARTON & GARRISON
 1285 Avenue of the Americas
 4 New York, New York 10019-6064
 Telephone: (212) 373-3000
 5 Facsimile: (212) 757-3990

6 KELLI L. SAGER (State Bar No. 120162)
 ANDREW J. THOMAS (State Bar No. 159533)
 7 EDWARD M. ANDERSON (State Bar No. 198183)
 DAVIS WRIGHT TREMAINE LLP
 8 865 S. Figueroa St., Suite 2400
 Los Angeles, California 90017-2566
 9 Telephone: (213) 633-6800
 Facsimile: (213) 633-6899

10 Attorneys for Plaintiffs

11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
 13

14 JERRY LEIBER individually and
 15 d/b/a JERRY LEIBER MUSIC,
 MIKE STOLLER individually and
 16 d/b/a MIKE STOLLER MUSIC,
 PEER INTERNATIONAL
 17 CORPORATION, CRITERION
 MUSIC CORPORATION, and
 18 FAMOUS MUSIC CORPORATION,
 on behalf of themselves and all others
 19 similarly situated,

20 Plaintiffs,

21 v.

22 CONSUMER EMPOWERMENT BV
 a/k/a FASTTRACK,
 23 MUSICCITY.COM, INC.,
 MUSICCITY NETWORKS, INC.,
 24 and GROKSTER, LTD.,

25 Defendants.

} Case No. CV 01-09923-SVW (RNBx)
 }
 } [Related to Case No. CV 01-8541-
 } SVW (PJWx)]

**LEIBER PLAINTIFFS'
 OPPOSITION TO DEFENDANTS'
 MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

Date: March 4, 2002
 Time: 1:30 p.m.
 Court: 6

[Statement Of Genuine Issues Of
 Material Fact, Evidentiary
 Objections, Declarations Of Carey
 R. Ramos, Theodore K. Cheng And
 Andrew J. Thomas filed
 concurrently.]

1 Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-2, Plaintiffs
 2 Jerry Leiber individually and d/b/a Jerry Leiber Music, Mike Stoller individually and
 3 d/b/a Mike Stoller Music, Peer International Corporation, Criterion Music
 4 Corporation, and Famous Music Corporation, on behalf of themselves and all others
 5 similarly situated ("Plaintiffs" or "Leiber plaintiffs") submit this opposition to
 6 Defendants' motion for partial summary judgment.

7 This opposition is based on the attached Memorandum of Points and
 8 Authorities in Opposition to Defendants' Motion For Partial Summary; the
 9 concurrently-filed Declaration of Theodore K. Cheng with Exhibits A to C; the
 10 concurrently-filed Declaration of Carey R. Ramos with Exhibits A to EE; the
 11 concurrently-filed Plaintiffs' Statement of Genuine Issues; the concurrently-filed
 12 Plaintiffs' Evidentiary Objections to Defendants' Declarations and Exhibits in
 13 Support of Motion for Partial Summary Judgment; and the concurrently-filed
 14 Declaration of Andrew J. Thomas with Exhibit A.

15
 16 Dated: February 15, 2002

17 PAUL, WEISS, RIFKIND, WHARTON & GARRISON
 18 CAREY R. RAMOS
 19 AIDAN SYNNOTT
 20 THEODORE K. CHENG
 21 MATTHEW KALMANSON

22 DAVIS WRIGHT TREMAINE LLP
 23 KELLI L. SAGER
 24 ANDREW J. THOMAS
 25 EDWARD ANDERSON

26 By: Kelli L. Sager / AJT
 27 Kelli L. Sager

28 Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I SUMMARY OF ARGUMENT

- Steve Griffin, CEO of Defendants MusicCity: *"I'm like William Wallace. We've got 32 million people standing behind us. Instead of sticks and rocks, we've got CD burners and PCs . . ."*¹
- Michael Weiss, former CEO of Defendant MusicCity: *"The industry needs to listen to consumers: Free and easy file sharing is what they want."*²
- Niklas Zennstrom, Chief Executive, of Defendant Kazaa: *"We see ourselves as powering the next Napster."*³
- *"In the span of one evening, we found all top 20 Billboard singles; several movies in current cinematic release, including 'Rush Hour 2' and 'Jay and Silent Bob Strike Back' . . . If you're looking for the next Napster, [Morpheus] is it."*⁴

This case is not about enjoining Defendants' distribution of software or an attempt by Plaintiffs to stifle "new technology." It is about Defendants' operation of commercial businesses that actively encourage the wholesale infringement of Plaintiffs' copyrighted musical compositions ("Systems and Services").

Defendants portray themselves alternatively as pugnacious revolutionaries ("I'm like William Wallace...") or public-spirited altruists championing the so-called "right" of millions of people to steal copyrighted music. In this fantasy world, Defendants go so far as to claim that their 32 million users are using their services to exchange classic works of literature from Project Gutenberg, rather than copyrighted material. But in reality, Defendants are operating a commercial business – a business

¹ Declaration of Carey R. Ramos ["Ramos Dec."], Exh. O, Brian Grow, Can Morpheus Prevail Where Napster Failed, BusinessWeek Online, November 15, 2001.

² Ramos Dec., Exh. FF, Chris Taylor, The Next Napsters, Time Magazine, September 15, 2001.

³ Ramos Dec., Exh. AA, Tom Spring, Napster Fans Find Lively Alternative, CNN.com, July 16, 2001.

⁴ Ramos Dec., Exh. L, San Jose Mercury News, Bootleg Bonanza Free Music Alternatives Rise From Napster's Ashes, September 6, 2001.

1 | whose profitability depends on the ability of its users to infringe Plaintiffs'
2 | copyrights. Defendants earn advertising revenue by attracting millions of users to
3 | their websites by offering users a treasure trove of copyrighted works – for free and
4 | without any compensation to the copyright owners. In a cynical attempt at hair-
5 | splitting, Defendants disclaim any knowledge of “future” infringement by specific
6 | users, but notably avoid mentioning the pink elephant in the room – the massive
7 | copyright infringement taking place on their online services, of which they
8 | unquestionably have knowledge.

9 | Yet, prior to any depositions of Defendants’ principals or any response to
10 | Plaintiffs’ outstanding document requests, Defendants’ motion for partial summary
11 | judgment seeks dismissal of Plaintiffs’ contributory infringement claims “with
12 | respect to distribution to the general public of the Morpheus software program,”
13 | based on the so-called “Sony defense.” (See MusicCity’s Notice of Motion and
14 | Motion for Partial Summary Judgment at 2.)

15 | Defendants’ motion is spurious on its face because it seeks summary judgment
16 | on a straw man claim – i.e., that Defendants are liable solely for the distribution of
17 | software. Plaintiffs have never asserted such a “claim.” Defendants’ distribution of
18 | software that enables infringement of copyrighted works is only one part of
19 | Defendants’ elaborate, illegal scheme. In effect, Defendants seek partial summary
20 | judgment on a piece of evidence that is unquestionably relevant to plaintiffs’
21 | contributory and vicarious infringement claims. This is not a proper use of Rule 56.

22 | More fundamentally, Defendants completely misconstrue Sony and its
23 | progeny. Defendants’ assertion that, to survive summary judgment, Plaintiffs must
24 | “provide evidence that the Morpheus program is *incapable* of substantial non-
25 | infringing uses,” is simply false. (See MusicCity’s Memorandum of Points and
26 | Authorities [“Def. Br.”] at 16.) Defendants couple their willful misreading of the
27 | Sony case with a purported list of twenty “uncontroverted facts,” virtually all of
28 | which Plaintiffs emphatically dispute, and most of which are irrelevant.

1 As a matter of law, the Sony defense is not available to Defendants. Among
2 other things, the Sony defense does not apply to persons, like Defendants, who
3 deliberately design a system to infringe, have knowledge of the infringement, and
4 actively influence and encourage its users to infringe.

5 Summary judgment may well be appropriate in this case – in Plaintiffs' favor,
6 as Plaintiffs expect to show after they have had the opportunity to conduct full
7 discovery into Defendants' unlawful schemes.

8 II. 9 THE UNDERLYING DISPUTE

10 The Leiber plaintiffs are songwriters and music publishers that own and/or
11 control copyrights in some of the most recognizable musical compositions recorded
12 in the Twentieth Century, including "Jailhouse Rock" by Jerry Leiber and
13 Mike Stoller, "These Boots Are Made For Walking" by Lee Hazlewood, and
14 "Moon River" by Henry Mancini and Johnny Mercer. (Ramos Dec., Exh. A, ¶ 2.)

15 Plaintiffs in a related action are motion picture studios and record labels,
16 including Metro-Goldwyn-Mayer Studios, Inc., Columbia Pictures Industries, Inc.,
17 Disney Enterprises, Inc., Time Warner Entertainment Company, L.P., Arista
18 Records, Inc., Atlantic Recording Corporation, Capitol Records, Inc. and Interscope
19 Records ("MGM Plaintiffs"). (Ramos Dec., Exh. B, ¶¶ 1, 4-35.)

20 Both lawsuits allege that defendants Consumer Empowerment BV, now
21 known as Kazaa BV ("Kazaa"), MusicCity Networks, Inc. and MusicCity.com, Inc.
22 (collectively "MusicCity"), and Grokster, Ltd. ("Grokster") (collectively
23 "Defendants") are facilitating, contributing to, benefiting from, and encouraging
24 infringement of the world's most popular songs and movies by operating Napster
25 "copycat" services. (Id. Exh. A, ¶ 3; Exh. B, ¶ 1.) Plaintiffs further allege that
26 Defendants' Systems and Services were created and offered by Defendants with the
27 intention to siphon users of the Napster "peer-to-peer" service who, in the wake of
28 the federal court rulings ordering Napster to remove infringing content, see, e.g., A &

1 M Records, Inc. v. Napster, 239 F.3d 1004, 1019 (9th Cir. 2001), are seeking a new
2 haven for music piracy. (Id. Exh. A , ¶¶ 3-4; Exh. B, ¶ 1.)

3
4 **III.
PROCEDURAL SUMMARY**

5 Both the MGM and Leiber actions are in their early stages. The MGM
6 plaintiffs filed their complaint on October 2, 2001. (Id. ¶ 3.) The MGM parties held
7 their initial Rule 26(f) conference in December 2001. (Id. ¶ 4.) Since then, the
8 MGM plaintiffs have pursued discovery, exchanging initial disclosures; propounding
9 several document requests and interrogatories against Defendants; serving numerous
10 subpoenas for documents from third-parties; and noticing and taking the deposition
11 of Michael Weiss, MusicCity's former CEO. (Id. ¶¶ 4, 7.)

12 The Leiber plaintiffs filed their Complaint on November 19, 2001. (Id. ¶ 4.)
13 The parties in the Leiber action held their initial Rule 26(f) conference less than three
14 weeks ago, on January 28, 2002. (Id. ¶ 4.) Since then, the Leiber plaintiffs have
15 begun to pursue discovery diligently, including noticing the deposition of Michael
16 Weiss, serving document requests and exchanging initial disclosures. (Id. ¶¶ 6, 7.)⁵

17 The parties in both actions have recently stipulated to a joint status conference
18 before this Court on March 4, 2002, where the parties hope that this Court will set a
19 schedule for the orderly prosecution of these actions.⁶ Despite this impending date

20
21 ⁵ Although Kelli L. Sager, counsel for the Leiber plaintiffs, took part in the
22 Weiss deposition, counsel for MusicCity and for Mr. Weiss stated on the record
23 MusicCity's position that Ms. Sager was not permitted to conduct any examination of
24 Mr. Weiss in this action because counsel for the MGM plaintiffs already had
25 questioned Mr. Weiss for seven hours that day. (Thomas Dec. ¶ 8; Exh. A, February
26 7, 2002 Michael Weiss Deposition Transcript ["Weiss Dep."], at 222-23, 360-62.)
27 Consequently, Ms. Sager was unable to ask even a single question.

28 Additionally, certain portions of Mr. Weiss' deposition transcript may become
designated "confidential – attorneys' eyes only." Because those portions have yet to
be identified, plaintiffs, in good faith, have filed relevant excerpts under seal as
Exhibit A to the Declaration of Andrew J. Thomas.

⁶ On February 7, 2002, the Leiber plaintiffs, with the consent of the MGM
plaintiffs, also filed a motion to consolidate the two actions for all discovery and
pretrial purposes. This motion is noticed for March 4, 2002 as well.

1 and in the face of numerous outstanding discovery requests, MusicCity filed a motion
2 in MGM on January 22, 2002, requesting "partial summary judgment in their favor
3 on the issue of contributory copyright infringement liability with respect to
4 distribution to the general public of the Morpheus software program, up to and
5 including Morpheus version 1.3." (Id. ¶ 4.) Defendants Grokster and Kazaa joined
6 in this motion shortly thereafter. (Id. ¶ 4.)

7 At the January 28 Leiber Rule 26(f) conference, MusicCity requested that the
8 Leiber plaintiffs waive the 20-day meet-and-confer so that an identical motion could
9 be filed in this action. (Id. ¶ 4.) The Leiber plaintiffs consented, and accordingly,
10 MusicCity filed its motion in Leiber on February 11, 2002. (Id. ¶ 4.) Defendants
11 Grokster and Kazaa joined in this motion as well. (Id. ¶ 4.)⁷

12 **IV.**
13 **SUMMARY JUDGMENT SHOULD BE DENIED AS A MATTER OF LAW**

14 For the reasons demonstrated below, this Court should deny Defendants' ill-
15 advised and premature partial summary judgment motion. In addition, Plaintiffs join
16 in and incorporate by reference the MGM plaintiffs' opposition to Defendants'
17 motion, including all declarations and exhibits.⁸

18 **A. Defendants May Not Use A Summary Judgment Motion To
19 Suppress Relevant Evidence Of Their Wrongdoing.**

20 This is a highly unusual and fundamentally flawed motion. Under the guise of
21 a summary judgment motion, Defendants improperly invoke Rule 56 in an attempt to

22 ⁷ This Court should deny the requests of Grokster and Kazaa to join in
23 MusicCity's motion. These joinders fail to meet the requirements of Fed. R. Civ.
24 P. 56 and Local Rule 56-1 in two critical ways. First, neither joinder includes any
25 evidence concerning the facts pertaining to these two defendants that are material to
26 the legal basis on which MusicCity claims an entitlement to partial summary
27 judgment. Second, neither provides a separate proposed statement of uncontroverted
28 facts. In any event, even if Grokster and Kazaa had complied with these
29 requirements, their motions would still fail for the reasons set forth in this
30 memorandum.

31 ⁸ Plaintiffs in this case will be submitting all declarations and exhibits
32 submitted by the MGM plaintiffs under separate cover on Tuesday, February 19,
33 2002.

1 preclude a piece of evidence unquestionably relevant to Plaintiffs' contributory and
2 vicarious infringement claims. Defendants ostensibly purport to request for summary
3 judgment "on the issue of contributory copyright infringement liability with respect
4 to distribution to the general public of the Morpheus software program." But
5 Plaintiffs did not allege such a claim. The distribution of software is only one piece
6 of evidence with respect to Defendants' unlawful scheme.

7 Plaintiffs allege that Defendants are operating and profiting from integrated
8 Systems and Services – a multifaceted scheme – that facilitates, materially
9 contributes to, and encourages the wholesale infringement of Plaintiffs' copyrighted
10 works. Accordingly, Plaintiffs alleged in their complaint that Defendants:

- 11 • "provide their respective users with the infrastructure, facilities,
12 technological means, and ongoing support and services to infringe
13 copyrighted musical compositions," (Id. Exh. A, ¶ 24);
- 14 • provide an encryption service, in order to keep "their services anonymous"
15 and allow their users to infringe in secrecy, (Id.);
- 16 • connect the user to a Supernode, a service "specifically designed for . . .
17 sharing a large number of files," (Id. ¶ 32);
- 18 • create "the connection between the user who has selected a music file for
19 copying and the user who is offering the selected file," (Id. ¶ 48);
- 20 • "monitor [their] thousands of users to keep track of when they log on and
21 off," (Id. ¶ 34);
- 22 • "update [their] database thousands of times daily," (Id.);
- 23 • assist "users in circumventing 'firewalls,' which are maintained by
24 computer networks to prevent the importation of unknown, unlawful, or
25 suspect data," (Id. ¶ 48);
- 26 • provide their users with "a host of other features and services, including a
27 discussion 'forum' that permits users to exchange information about the
28 location of infringing files," (Id. ¶ 50); and

- 1 • “display extensive paid advertising on their network and charge fees for
2 such advertising,” (Id. ¶ 68).

3 Because Defendants are offering a broad array of services to the general
4 public, they cannot unilaterally and arbitrarily parse them into individual components
5 of their liking in hopes of suppressing them from further adjudication. And yet, this
6 kind of piecemeal litigation is precisely what they propose to do here. Defendants
7 have chosen just one piece of relevant evidence among many about their Systems and
8 Services – the distribution of software – and seek to have it precluded under the guise
9 of a Rule 56 motion. This Court should not condone such a transparent attempt to
10 subvert the Federal Rules.

11 **B. Defendants Are Not Entitled To The Sony Defense As A
12 Matter of Law.**

13 Defendants willfully misconstrue the applicable law. Defendants rest their
14 argument in favor of partial summary judgment solely on Sony Corp. of America v.
15 Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed.2d 574 (1984)
16 (“Sony”). But Defendants have selectively quoted from the Supreme Court’s opinion
17 and failed to address key legal issues necessary to establish the defense.

18 The Sony case involved a lawsuit by copyright holders in a great number of
19 television shows and motion pictures, against manufacturers of the “Betamax,” an
20 early generation video cassette recorder (VCR). The plaintiffs argued that, because
21 the Betamax was being used to copy copyrighted works without authorization, the
22 defendants were liable for contributory copyright infringement.

23 The Supreme Court disagreed, reasoning that, although the defendants knew
24 that the Betamax was capable of infringing uses, the defendant’s only contact with an
25 infringer was at the point of sale, and thus, the defendant had no actual knowledge of
26 any infringements. See Sony, 464 U.S. at 437-438, 104 S. Ct. at 787. The Court
27 concluded that the defendant could only have had constructive knowledge of primary
28 infringement. The Court, however, refused to impute constructive knowledge to the

1 defendants solely because the Betamax could be used to infringe the plaintiffs'
2 copyrights. Rather, the Court analogized to patent law, noting that, when "a charge
3 of contributory infringement is predicated entirely on the sale of an article of
4 commerce that is used by the purchaser to infringe a patent, the public interest in
5 access to that article of commerce is necessarily implicated." Id. at 440. With that in
6 mind, the Court held that it would not impute constructive knowledge to the
7 defendants from the mere fact that the Betamax could be used to infringe copyrights,
8 if the Betamax was also "capable of substantial noninfringing uses" that were
9 "commercially significant." Id. at 442, 104 S. Ct. at 789.

10 The Court found the predominant use of the Betamax – "private non-
11 commercial time-shifting in the home" – satisfied this standard. Id. The Court
12 defined "time-shifting" as "the practice of recording a program to view it once at a
13 later time, and thereafter erasing it." Id. at 423, 104 S. Ct. at 779. The Court noted
14 that a large number of copyright owners, including sports leagues (e.g., Major
15 League Baseball) and religious and educational broadcasters (e.g., the company that
16 owned *Mr. Rogers' Neighborhood*), authorized the practice of time-shifting. Id. at
17 443-46, 104 S. Ct. at 789-91. Furthermore, the Court held, time-shifting by home
18 users of the Betamax – as opposed to collecting copies of copyrighted works – was
19 protected by the fair use defense. Id. at 454-54, 104 S. Ct. at 795.

20 Significantly, the Sony Court also rested its holding on the fact that the
21 defendant was not "in a position to control" the infringing conduct and had not
22 "influenced or encouraged" any direct infringing conduct. Id. at 437-38, 104 S. Ct. at
23 787. Indeed, the Court described a finding of liability as "manifestly just" in cases
24 "involving an ongoing relationship between the direct infringer and the contributory
25 infringer at the time the infringing conduct occurred." Id. at 437, 104 S. Ct. at 787
26 (emphasis added).

1 In contributory copyright infringement cases decided since Sony, courts have
2 narrowly construed the applicability of the defense.⁹ The Ninth Circuit in Fonovisa,
3 Inc. v. Cherry Auction, Inc., for example, held that a defendant may be liable for
4 contributory copyright infringement if it knowingly provides the site and facilities for
5 infringing activity. 76 F.3d 259, 264 (9th Cir. 1996). Fonovisa involved a swap
6 meet operated by the defendant. Vendors paid a daily fee to have booths at the swap
7 meet and shoppers paid an entrance fee. Additionally, defendant "supplie[d] parking,
8 conduct[ed] advertising and retain[ed] the right to exclude any vendor for any reason,
9 at any time." Id. at 261. Some vendors at the swap meet sold counterfeit
10 copyrighted musical recordings, and the local sheriff's office had put the defendant
11 on notice of this fact. The plaintiff, whose copyrights had been infringed by virtue of
12 the sale of counterfeit recordings at the swap meet, sued the defendant for
13 contributory copyright infringement.

14 The defendant filed a motion to dismiss, which the district court granted. Id. at
15 260. The Ninth Circuit reversed, however, holding that the defendant could be found
16 liable for contributory copyright infringement under the facts alleged. The court
17 noted that the defendant not only had knowledge of the infringing activity, but the
18 defendant also provided "the environment and the market for counterfeit recording
19 sales to thrive." Id. at 264. "Indeed," the court further observed, "it would be
20 difficult for the infringing activities to take place in the massive quantities alleged
21 without the support services provided by the swap meet." Id. Although the Fonovisa

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23
24 ⁹ See, e.g., A&M Records, Inc. v. General Audio Video Cassettes, Inc., 948 F.
25 Supp. 1449, 1456-57 (C.D. Cal. 1996) (holding that Sony is not valid defense to
26 contributory infringement where defendant did not merely sell products with
27 infringing uses, but also engaged in other activities to assist primary infringement);
28 see also RCA Records v. All-Fast Sys., Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984)
(holding that Sony does not provide defense where contributory infringer is in
position to control primary infringement); Columbia Pictures Indus., Inc. v. Aveco,
Inc., 800 F.2d 59, 62 & n.3 (3d Cir. 1986) (holding business that controlled access to
infringing material was liable as contributory infringer, even though it did not supply
infringing material).

1 court cited Sony, thus evincing its awareness of the precedent, it notably did not hold
2 that the defendant qualified for the defense, strongly implying that, when a defendant
3 has actual knowledge of infringement and actively provides the site and facilities for
4 such infringement to occur, the defense is simply unavailable.

5 The Ninth Circuit further refined the Sony defense in A&M Records, Inc. v.
6 Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) ("Napster"). Napster concerned an
7 integrated system and service that encouraged the wholesale piracy of copyrighted
8 musical recordings. Like Defendants' Systems and Services, the Napster system
9 facilitated "peer-to-peer" file transferring; that is, Napster provided the site and
10 facilities, including software, so that users could download pirated copies of
11 copyrighted musical works from each other. The defendants in Napster, like
12 Defendants here, argued that they qualified for the Sony defense.

13 The Ninth Circuit disagreed. First, it ruled that the district had not erred when
14 it held that the users of Napster's system did not have a fair use defense. Id. at 1019.
15 The court also noted that the users were not entitled to the defense because, unlike
16 the users in Sony, they were distributing copyrighted material to the general public.
17 Id. Second, the court held that, "Napster's actual, specific knowledge of direct
18 infringement renders Sony's holding of limited assistance to Napster." Id. at 1020.
19 That is, if "a computer system operator learns of specific infringing material
20 available on his system and fails to purge such material from the system, the operator
21 knows of and contributes to direct infringement." Napster, 239 F.3d at 1021.

22 Similarly, in RCA Records v. All-Fast Systems, Inc., 594 F. Supp. 335
23 (S.D.N.Y. 1984), the court held that, where an operator of a cassette copying
24 machine had control over its use, contributory infringement was appropriate even if
25 the machine was capable of non-infringing uses. The court observed that the Sony
26 Court:

27 recognized that contributory infringer status had traditionally been given
28 to those who were "in a position to control the use of copyrighted works

1 by others and had authorized the use without permission from the
2 copyright owner.” It did not purport to alter this long-standing rule. The
3 manufacturer of the machine does not fit this definition since it has no
4 such control once the machine is sold. Defendant, in contrast, is in
5 position to exercise complete control over the use of the . . . machine.
6 Id. at 339 (internal citations omitted). The court also noted that the defendant could
7 easily prevent infringing uses of its product while permitting alleged non-infringing
8 uses to continue. Id.

9 In General Audio Video, supra, this Court held that the Sony defense also does
10 not apply where defendants specifically manufactured their products for infringing
11 use. 948 F. Supp. at 1456. There, the defendants had manufactured special “time
12 loaded” blank audio cassettes that ran for a specific amount of time, specified by the
13 customer buying the cassettes. The defendants’ customers ordered tapes of a certain
14 length in order to record and sell copyrighted musical recordings. The court rejected
15 the defendants’ argument that they were protected from liability by the Sony
16 doctrine, holding that “protection would not extend to products specifically
17 manufactured for counterfeiting activity, even if such products have substantial
18 noninfringing uses.” Id. at 1456; see also Cable/Home Comm. Corp. v. Network
19 Productions, Inc., 902 F.2d 829, 846 (11th Cir. 1990) (holding that, even though
20 “other uses” existed, defendants were liable where they “utilized and advertised these
21 devices primarily as infringement aids and not for legitimate, noninfringing uses”).

22 Given the foregoing authority, the Sony defense is unavailable whenever any
23 of the following exists: (1) there is an ongoing relationship between the defendant
24 and the infringer; (2) the defendant has actual knowledge of infringement; (3) the
25 defendant provides the site and facilities for infringement; (4) the defendant can
26 control or prevent the infringing conduct; (5) the defendant manufactured the
27 products specifically for infringing use; (6) the defendant actively encourages the
28

1 | infringing conduct; (7) the product is not capable of substantial non-infringing uses;
2 | and/or (8) the substantial non-infringing uses are not commercially significant.

3 | Under this proper understanding of Sony and its progeny, Defendants are
4 | foreclosed from invoking the Sony defense. To take just one example, in Sony, the
5 | defendant's role in any infringement ended at the point of sale of a product. Here,
6 | Defendants maintain an ongoing relationship with their users – which is essential for
7 | Defendants to commercialize, and profit from, their schemes. Defendants' Systems
8 | and Services are a virtual version of the swap meet in Fonovisa, which the Ninth
9 | Circuit held is not covered by Sony defense. Like the swap meet owners, Defendants
10 | provide “the environment and the market for” infringement to thrive. Fonovisa, 76
11 | F.3d at 261. The Ninth Circuit's reasoning in that case could not be more apropos:
12 | “Indeed, it would be difficult for the infringing activities to take place in the massive
13 | quantities alleged without the support services provided” by Defendants.

14 | **C. Defendants Are Not Entitled To The Sony Defense As A**
15 | **Matter Of Fact.**

16 | As detailed below, the evidence adduced to date precludes summary judgment
17 | in Defendants' favor on their purported Sony defense. At a minimum, in any event,
18 | there exist numerous disputed issues of material fact relevant to that defense.¹⁰

19 | The evidence shows that Defendants have specific knowledge that Plaintiffs'
20 | copyrighted works are being infringed on their Systems and Services, and yet, have
21 | failed to “purge” such material. Upon service of the Leiber Complaint, Defendants
22 | were put on explicit notice that the specific musical compositions named in the
23 | Complaint were being infringed through Defendants' Systems and Services. (Id.
24 | ¶¶ 19, 21; Exh. A, ¶¶ 18-21.) Several searches performed during this past week,
25 | however, revealed that those very same musical compositions were still available in
26 | large numbers for distribution and copying. (Cheng Dec. ¶ 2; Exhs. A-D.)

27 | ¹⁰ Pursuant to Local Rule 56-2, Plaintiffs concurrently are filing a “Statement
28 | of Genuine Issues.”

1 Whether Defendants obtained notice specifically from Plaintiffs is beside the
2 point, for such instances of infringement are practically common knowledge. The
3 San Jose Mercury News reported, for example, that "it took [them] less than a minute
4 to download Alicia Keys' single "Fallin'," a copyrighted work.¹¹ While the Saint
5 Paul Pioneer Press noted how college students can "now download scores of songs
6 in minutes" using Morpheus.¹² Another article stated the obvious, "[l]ike the old
7 Napster, Kazaa lets people find just about any piece of popular music" for
8 download.¹³ "Morpheus is the program that Napster refugees have been waiting for,"
9 another article reported.¹⁴ One Morpheus user, named Matt Bellamy, interviewed by
10 the Guardian, meekly admitted "[p]erhaps I shouldn't be saying this, but I've got AI
11 and all these films that haven't come out yet downloaded on my computer."¹⁵

12 Indeed, the one deposition that has been taken in this case – that of the former
13 CEO of MusicCity, Michael Weiss – unqualifiedly demonstrates MusicCity's actual
14 knowledge that infringements were occurring on its Systems and Services and its
15 efforts to destroy such evidence. (Weiss Dep. at 331-32, 335.) Mr. Weiss made
16 several significant admissions, many of which were directly relevant to the issue of
17 actual, personal knowledge of infringement, as well as to MusicCity's ability to
18 monitor and control the infringing activity. (Weiss Dep. at 216-19, 229-30, 258, 261,
19 266).

20
21 ¹¹ Ramos Dec., Exh. L, Dawn C. Chimelski, Bootleg Bonanza: Free Music
22 Alternatives Rise From Napster's Ashes, San Jose Mercury News, September 6,
2001.

23 ¹² Ramos Dec., Exh. M, Leslie Brooks Suzukamo, Who Needs Napster?, Saint
24 Paul Pioneer Press, October 29, 2001.

25 ¹³ Ramos Dec., Exh. N, Tim Barmann, Cybertalk – This File-Share Plan Won't
26 Be Caught Napping, The Providence Journal Bullenn, August 6, 2001.

27 ¹⁴ Ramos Dec., Exh. R, Holly M. DiJulius, Can't Stop the Music: Meet the
28 New Boss (Morpheus) Same as the Old Boss (Napster), September 3, 2001.

¹⁵ Ramos Dec., Exh. K, Will Hodgkinson, Interview with Matt Bellamy, The
Guardian, August 17, 2001.

1 Additionally, MusicCity's own Legal Notice and Terms of Service – which
2 until recently was found on its website¹⁶ – establishes genuine issues of material fact
3 as to its ability to monitor and control infringement. The Terms of Service stated to
4 potential users that “MusicCity Networks shall have the right to terminate the
5 account of any MusicCity Networks users who repeat copyright infringements.”
6 (Ramos Dec., Exh. W.) The Terms of Service further stated that MusicCity has the
7 ability to “permanently ban [users and their] computers from accessing MusicCity
8 Networks and other MusicCity Network services” if they are using Defendants’
9 “products and services” to distribute child pornography or other obscene material.
10 Id. The terms of service for Kazaa and Grokster similarly state that they have the
11 right to terminate users’ access to the Systems and Services, without prior notice, for
12 copyright infringement, distribution of child pornography, or, notably, users’
13 infringement of the copyright on Defendants’ own proprietary software.¹⁷

14 Plaintiffs believe that, based on the evidence adduced to date, summary
15 judgment would be warranted in Plaintiffs’ favor as to Defendants’ actual knowledge
16 of copyright infringement by users of their Systems and Services. Plaintiffs believe
17 that discovery will uncover additional evidence of Defendants’ actual knowledge. In
18 any event, there is certainly no basis for rendering summary judgment for
19 Defendants.

20 Further disputed issues regarding Defendants’ ability to monitor and control
21 infringement and its ongoing relationship with users are shown by MusicCity’s own
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23
24 ¹⁶ Apparently, MusicCity modified its Terms of Service after the
25 commencement of this lawsuit, most likely realizing that its then Terms of Service
26 undermined its efforts to establish a viable Sony defense. The current Terms of
27 Service simply states that, “[d]ue to the nature of peer-to-peer software, StreamCast
28 Networks is unable to monitor or control the types of files shared within the
Morpheus community. If you locate a file being shared by a user who you believe
may be in violation of copyright law, please report your concerns to the user
directly.” (Ramos Dec., Exh. X.)

¹⁷ Ramos Dec., Exh. U; Exh. V.

1 admissions: (1) that it maintains ongoing and contact with its users through a user
2 interface which “give[s] MusicCity the chance to broadcast messages to Morpheus
3 software users, and permit[s] advertising”, (Darell Smith Declaration in Support of
4 Defendants’ Motion for Partial Summary Judgment (“Smith Dec.”) ¶ 16); (2) that
5 users log-in and register with Defendants’ central servers before users download any
6 content, (*id.* ¶ 11); (3) that users view advertisements from Defendants’ central
7 servers as they search for and download content, (*id.* ¶ 16); (4) that Defendants
8 provide their users with updated versions of their software, (Ramos Dec., Exh. EE);
9 and (5) that Defendants provide their users with a list of supernodes, (*see* Def. Br. at
10 5; Smith Dec. ¶¶ 10).

11 Finally, Defendants have made several public statements that contradict many
12 of the assertions presented before this Court. For the Court’s convenience, examples
13 of these statements are set forth in Appendix A to this memorandum. At a minimum,
14 these admissions raise numerous genuine issues of material fact precluding the entry
15 of summary judgment.

16
17 **V.**
18 **IN THE ALTERNATIVE, DEFENDANTS’ MOTION
SHOULD BE DENIED UNDER RULE 56(F) BECAUSE
PLAINTIFFS HAVE NOT CONDUCTED DISCOVERY**

19 In the alternative, Defendants’ motion should be denied under Federal Rule of
20 Civil Procedure 56(f).

21 **A. Standards for Relief Under Rule 56(f).**

22 Rule 56(f) of the Federal Rules of Civil Procedure “provides a mechanism
23 whereby a party opposing a motion for summary judgment may, by affidavit, state
24 valid reasons why he is temporarily unable to present ‘facts essential to justify the
25 party’s opposition’ to such a motion.” *Weinberg v. Whatcom County*, 241 F.3d 746,
26 750-51 (9th Cir. 2001).¹⁸ To obtain relief under this provision, the party opposing

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28 ¹⁸ Rule 56(f) provides: “Should it appear from the affidavits of a party
opposing the motion that the party cannot for reasons stated present by affidavit facts

1 summary judgment must establish “(1) that they have set forth in affidavit form the
2 specific facts that they hope to elicit from further discovery, (2) that the facts sought
3 exist, and (3) that these sought-after facts are ‘essential’ to resist the summary
4 judgment motion.” California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998).

5 The decision to grant Rule 56(f) relief is within the sound discretion of the
6 district court. Maljack Prods., Inc. v. Goodtimes Home Video Corp., 81 F.3d 881,
7 887 (9th Cir. 1996). The Ninth Circuit has instructed that “a district court should
8 continue a summary judgment motion upon a good faith showing by affidavit that the
9 continuance is needed to obtain facts essential to preclude summary judgment.”

10 Campbell, 138 F.3d at 779. Put differently, “the denial of a Rule 56(f) application is
11 generally disfavored where the party opposing summary judgment makes (a) a timely
12 application which (b) specifically identifies (c) relevant information, (d) where there
13 is some basis for believing that the information sought actually exists.” Visa
14 International Serv. Ass’n v. Bankcard Holders of Am., 784 F.2d 1472, 1475 (9th Cir.
15 1986). Denial of a Rule 56(f) motion is “especially inappropriate where [like here]
16 the material sought is also the subject of outstanding discovery requests” (Everett
17 Assocs., Inc. v. Transcontinental Ins. Co., 57 F. Supp. 2d 874, 887 (N.D. Cal.
18 1999)), or where the “facts are in possession of the moving party.” Rogers v. Home
19 Shopping Network, Inc., 57 F. Supp. 2d 973, 985 (C.D. Cal. 1999); see also Rustin v.
20 City of Seaside, No. C-95-2384, 1995 WL 492629, *2 (N.D. Cal. 1995) (“[a] grant of
21 summary judgment is improper when basic discovery is not yet completed,
22 particularly when the moving party has exclusive access to the evidence necessary to
23 support the nonmoving party’s claims”).

24 Visa International illustrates the application of Rule 56(f). That case
25 concerned whether the enforcement of a stipulated judgment involving a trademark

26 essential to justify the party’s opposition, the court may refuse the application for
27 judgment or may order a continuance to permit affidavits to be obtained or
28 depositions to be taken or discovery to be had or may make such other order as is
just.”

1 would result in public confusion. After the defendant moved for summary judgment,
2 the plaintiff moved to stay the motion pursuant to Rule 56(f) and to compel responses
3 to outstanding interrogatory and document requests. The district court granted the
4 summary judgment motion and concomitantly denied the Rule 56(f) motion. In
5 reversing the district court, the Ninth Circuit held that, because the plaintiff's ability
6 to establish its case relied upon its ability to "probe the facts and circumstances
7 relating to public confusion," and the plaintiff had requested and identified, in its
8 56(f) motion, "probative evidence of such confusion," denial of the stay constituted
9 an abuse of discretion. Id., 784 F.2d at 1474-76; see also Everett Assocs., 57 F.
10 Supp. 2d at 888 (denying summary judgment on damages claim because party
11 opposing summary judgment "had made an adequate showing that discovery disputes
12 regarding documents relevant to this issue hampered its efforts to ascertain the
13 reasonableness" of damages claim).

14 As demonstrated below, whether the Defendants' Systems and Services
15 qualify under the Sony defense is a fact-laden inquiry, as to which discovery is
16 necessary. Because Defendants have moved for summary judgment in such an early
17 stage of the litigation, Plaintiffs request dismissal of the motion.

18 **B. Plaintiffs Are Entitled to Rule 56(f) Relief.**

19 Plaintiffs have complied with all of the requirements for Rule 56(f) relief.
20 Plaintiffs timely brought this motion, as the hearing before this Court on Defendants'
21 partial summary judgment motion is still more than two weeks away. See Ashton-
22 Tate Corp. v. Ross, 916 F.2d 516, 519-20 (9th Cir. 1990) (holding that motion for
23 Rule 56(f) relief must be filed before summary judgment hearing).

24 Plaintiffs also have diligently pursued their discovery opportunities as soon as
25 feasible after the parties' Rule 26(f) conference on January 28, 2002.¹⁹ (Id. ¶ 6.) On
26

27 ¹⁹ Before this date, no discovery is permitted to occur. See Fed. R. Civ. P.
28 26(d).

1 February 4, 2002, Plaintiffs noticed the deposition of the former CEO of MusicCity,
2 Michael Weiss, to take place on February 7, 2002, the date previously noticed for the
3 deposition by the MGM plaintiffs. (Ramos Dec. ¶ 7.)²⁰ Counsel for the Leiber
4 Plaintiffs appeared for the deposition on February 7. The next day, Plaintiffs served
5 Grokster with a request for the production of documents and things. (Id. ¶ 6.) On
6 February 11, 2002, all the parties exchanged their initial disclosures pursuant to Rule
7 26(a). (Id. ¶ 4.) On February 12 and 13, Plaintiffs served Kazaa and MusicCity,
8 respectively, with requests for production of documents and things. (Id. ¶ 6.)

9 Plaintiffs' diligent pursuit of discovery underscores the premature nature of
10 Defendants' motion for partial summary judgment and their attempt to stifle
11 meaningful discovery from occurring at all. Indeed, at the Weiss deposition, counsel
12 for Defendants instructed Mr. Weiss not to answer questions concerning the very
13 subjects at issue in Defendants' motion, such as Defendants' knowledge of infringing
14 activity. (Weiss Dep. at 266, 319, 324.)²¹

15 **C. Plaintiffs Have Made A Good Faith Showing By Affidavit That**
16 **Relevant Issues Of Fact Will Be Ascertained In Discovery.**

17 As Plaintiffs' Rule 56(f) affidavit and Defendants' motion papers themselves
18 demonstrate, Plaintiffs need discovery on a number of facts relevant and material to
19 their claims of contributory copyright infringement and the Sony defense. Those
20 facts are all the subject of outstanding discovery requests, and Plaintiffs have a good
21 faith basis that the following facts may be elicited from further discovery,
22 categorized by the issue to which they are relevant.

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25 ²⁰ The concurrent notice was undertaken at the request of Mr. Weiss' counsel.
(Id.)

26
27 ²¹ For example, Mr. Weiss was instructed not to answer whether there was
28 "any discussion [at board meetings] about whether users of the Morpheus software
were engaged in copyright infringement by using that software." (Weiss Dep. at
324.)

1 **1. There Is An Ongoing Relationship Between Defendants And**
2 **The Users Of Their Services.**

3 Plaintiffs believe that there is an ongoing relationship between Defendants and
4 the users of their Systems and Services. Among other things, Plaintiffs believe that
5 Defendants: (1) maintain and supervise chat rooms and bulletin boards;²² (2) provide
6 support to ensure that users have access to all of Defendants' Systems and Services;
7 (3) assist users in circumventing "firewalls," which are designed to prevent the
8 downloading of suspect materials; (4) register, identify, and log-in the user before the
9 user can begin their infringing activities; (5) provide users with new versions and
10 upgrades (or "fixes") of the software to ensure the continued viability of Defendants'
11 Systems and Services; (6) provide users with new versions of the software to ensure
12 that "spyware" software continues to operate on the users' computers;²³ (7) provide
13 users with updated lists of supernodes where additional copyrighted material can be
14 found; (8) supervise and maintain the communications and information exchange
15 between the supernodes, the users, and their central servers; and (9) update the
16 advertisement banners that users are forced to view on their computer screens.
17 (Ramos Dec. ¶ 14.) Plaintiffs believe that evidence of these facts will be further
18 confirmed through the depositions of Defendants' principals, employees, and others
19 with knowledge of these matters. (*Id.* ¶ 15; Exhs. C-F.)
20
21

22 ²² Smith Dec. ¶ 21; Weiss Dep. at 330-338.

23 ²³ Installed "spyware" software permits Defendants to monitor the usage of
24 their users, thus presenting yet another issue of fact relevant to Defendants' ongoing
25 relationship with their users and control over the systems. (*Id.*, Exh. Z, Salon.Com,
26 The Parasite Economy, August 2, 2001). Kazaa, for instance, requires its users to
27 download several plug-ins, one of which is called "Cydoor." Those plug-ins
28 "automatically 'phone home' to outside servers on the Net (to upgrade themselves, or
retrieve ads)." (*Id.*) One privacy consultant remarked: "When you're skulking
around the hidden recessed of someone's system, placing hidden software that
captures activity and sends it home to the mothership, you have the capability to do
anything." (*Id.*)

1 Plaintiffs also believe that evidence will be further confirmed in the technical
2 documents used to develop Defendants' Systems and Services; documents that
3 describe the nature, use, function, and purpose of all of Defendants' Systems and
4 Services; documents that describe why Defendants update their software and other
5 services; Defendants' internal memoranda, correspondence, and e-mail;
6 communications between Defendants themselves; communications between
7 Defendants and the individuals described above; and Defendants' business plans.
8 (Id. ¶ 15; Exhs. C-F.) An inspection of Defendants' Systems and Services also will
9 uncover substantial evidence of an ongoing relationship between Defendants and the
10 users of their infringing Systems and Services. (Id. ¶ 15.)

11 **2. Defendants Have Actual Knowledge Of Direct Infringement.**

12 Plaintiffs further believe that Defendants have actual knowledge of direct
13 infringement. Among other things, Plaintiffs believe that Defendants: (1) designed
14 their Systems and Services with the goal of generating revenues based upon the
15 nature and extent of their users' infringing conduct; (2) designed their Systems and
16 Services to be the next "Napster"; (3) supervise and monitor chat rooms and bulletin
17 boards where users make clear their intent to download and copy copyrighted
18 musical compositions; (4) allow their officers, directors, employees, investors,
19 shareholders, and representatives to download and copy copyrighted material;
20 (5) operate a supernode, which indexes a list of copyrighted content; (6) provide
21 users with an updated list of supernodes; (7) sell advertising based upon rates
22 correlated to the millions of users who infringe copyrighted material on their Systems
23 and Services; and (8) sell space within their software to embed other software based
24 upon rates correlated to the millions of users who infringe copyrighted material on
25 their Systems and Services. (Ramos Dec. ¶ 18.)

26 The depositions and discovery requests referenced above are expected to
27 uncover ample additional evidence of these facts. (Id.)
28

1 **3. Defendants Provide The Sites And Facilities That Enable**
2 **Copyright Infringement To Occur.**

3 As noted, the Sony defense applies only to articles of commerce, not
4 businesses like Defendants' that provide the sites and facilities that enable copyright
5 infringement to occur. Among other things, Plaintiffs believe that Defendants
6 provide: (1) chat rooms and bulletin boards; (2) a "help" page to ensure that users
7 have access to all of Defendants' Systems and Services; (3) a log-in server where
8 users are registered, where updates of the software can be downloaded, and where
9 Defendants can broadcast messages to users; (4) supernodes where copyrighted
10 material can be found; and (5) an advertisement server where users can become
11 aware of other businesses and services. (Id. ¶ 40.)

12 Plaintiffs believe that more evidence of the nature of the Defendants' Systems
13 and Services will be ascertained in discovery through the depositions and discovery
14 requests described above. (Id.)

15 **4. Defendants Can Control And Prevent The Infringing Activity.**

16 Plaintiffs also believe that Defendants can control and prevent the infringing
17 activity of their users. Indeed, on their website, Defendants assert the right to
18 "terminate" the account of any "repeat copyright offenders," as well as the accounts
19 of individuals who are using Defendants' Systems and Services to distribute child
20 pornography. (Id. ¶ 52; Exh. W.) Among other things, discovery is necessary to
21 explore: (1) whether Defendants have terminated users from their Systems and
22 Services; (2) whether Defendants' Systems and Services permit them to control or
23 monitor their users' activities; (3) how Defendants provide users with new versions
24 of their software; (4) Defendants' response to the efforts of third parties to access
25 their closed network; (5) what types of "spyware" programs are Defendants bundling
26 with their software; (6) whether these "spyware" programs permit Defendants to
27 monitor and control their users' activities; (7) what information Defendants collect
28 regarding their users' activities from the use of spyware; (8) whether Defendants

1 keep a list of supernodes that they provide their users; (9) what information
2 Defendants collect from the chat rooms and bulletin boards they operate; and (10)
3 what communications and information have been exchanged between Defendants,
4 their users, and the supernodes. (*Id.* ¶ 42.)

5 Further discovery also is needed to determine how Defendants' Systems and
6 Services can foreclose the possibility of infringement taking place, such as, through
7 the use of filtering technology. (Ramos Dec. ¶ 43.)²⁴ Plaintiffs believe that the
8 deposition and discovery requests described above will establish ample additional
9 evidence of Defendants' ability to prevent infringing activity. (*Id.*)

10 **5. Defendants' Systems And Services Were Specifically Designed**
11 **For Infringing Use.**

12 Plaintiffs further believe that Defendants' systems were and are specifically
13 designed for infringing use. Among other thing, Plaintiffs believe that Defendants:
14 (1) designed their services to be the next "Napster"; (2) provide encryption to ensure
15 that their users may infringe anonymously; (3) provide chat rooms and bulletin
16 boards so that users can find copyrighted content more easily; (4) sell advertising
17 based upon rates correlated to the millions of users who infringe copyrighted material
18 on their Systems and Services; and (5) sell space within their software to embed
19 other software based upon rates correlated to the millions of users who infringe
20 copyrighted material on their Systems and Services. (*Id.* ¶ 51.)

21 Plaintiffs already have adduced ample evidence of Defendants' actual
22 knowledge. Plaintiffs believe the depositions and discovery requests referenced
23 above will uncover further evidence to confirm Defendants' knowledge. (*Id.* ¶ 58.)

24 **6. Defendants Actively Encourage Direct Copyright**
25 **Infringement.**

26 ²⁴ For instance, a recent "security update" to Morpheus "allow[ed] users to
27 filter out file names that use sexually explicit language." (*Id.* Exh. Y, Webnoize,
28 Showing Signs of Network Control, FastTrack Thwarts Open-Source Clones,
October 3, 2001.)

1 Even if Defendants' Systems and Services are capable of non-infringing uses,
2 Defendants would not be entitled to summary judgment on Plaintiffs' contributory
3 copyright infringement claims if, as Plaintiffs believe and the available evidence
4 indicates, Defendants actively encourage and facilitate direct infringement. See
5 General Audio Video, 948 F. Supp. at 1456. Among other things, Plaintiffs believe
6 that Defendants: (1) designed their Systems and Services to be a "Napster copycat";
7 (2) maintain and supervise chat rooms and bulletin boards so that users can easily
8 find copyrighted material; (3) provide support to ensure that users have access to all
9 of Defendants' Systems and Services; (4) assist users in circumventing "firewalls,"
10 which are designed to prevent the download of suspect materials; (5) provide users
11 with new versions and upgrades (or "fixes") of the software to ensure the continued
12 viability of Defendants' Systems and Services; (6) promulgated a business plan
13 where their revenue streams are directly correlated to the millions of users who
14 participate in their Systems and Services to infringe copyrighted material; (7) encrypt
15 their Systems and Services so that users can infringe copyrights anonymously; (8)
16 provide users with updated lists of supernodes where copyrighted material can be
17 found; (9) encourage users to become supernodes; and (10) encourage users to
18 register other individuals for Defendants' Systems and Services. (Id. ¶ 62.)
19 Plaintiffs believe the depositions and discovery requests referenced above will
20 uncover ample evidence of these facts.

21 **7. Defendants' Systems And Services Are Not Capable Of**
22 **Substantial Non-Infringing Uses.**

23 Plaintiffs also dispute Defendants' unsupported claim that their Systems and
24 Services are capable of substantial non-infringing uses. Defendants have attached to
25 their motion declarations from individuals who assert that their Systems and Services
26 are capable of non-infringing uses. Much of the evidence that Defendants introduce
27 on that issue (and others), however, is inadmissible. (See Plaintiffs' concurrently
28 filed Evidentiary Objections.) Plaintiffs request that the portions of the declarations

1 attempting to introduce inadmissible evidence should not be considered by this Court
2 in deciding Defendants' motion.²⁵

3 In contrast to Defendants' inadmissible and self-serving declarations, Plaintiffs
4 believe that the overwhelming majority of the content on Defendants' Systems and
5 Services is copyrighted and is being downloaded and copied without permission. (Id.
6 ¶ 65.) Indeed, some of the materials that Defendants claim that they found on their
7 Systems and Services, specifically, the audio and video recordings of speeches given
8 by Presidents Franklin D. Roosevelt and George W. Bush, likely are copyrighted.²⁶
9 (Id. ¶¶ 21-28; see Declaration of M. Tally George Declaration in Support of
10 Defendants' Motion for Partial Summary Judgment ("George Dec.") ¶¶ 3-
11 4 (admitting to downloading of audio and video recordings, but failing to
12 acknowledge that, while the underlying speech may be in public domain, the
13 recordings themselves – of broadcasts by network or cable news organizations –
14 almost certainly are copyrighted)).²⁷

15 Plaintiffs believe that their discovery requests, listed previously, will disprove
16 Defendants' assertion that their services are capable of substantial non-infringing
17 uses.

18
19
20 ²⁵ Rule 56(e) requires that the declarations "shall be made on personal
21 knowledge, shall set forth such facts as would be admissible in evidence, and shall
22 show affirmatively that the affiant is competent to testify to the matters stated
23 therein." Fed. R. Civ. P. 56(e).

24 ²⁶ Plaintiffs have asked for, and are waiting to receive, all documents
25 concerning any communications between Defendants and the various declarants, as
26 well as all document concerning any searches promulgated to find noninfringing
27 uses. (Id., Exh. C.)

28 ²⁷ Ironically, the screenshot Mr. George attaches to his declaration showing the
availability of President's Roosevelt's "A Date Which Will Live in Infamy Speech"
also contains a link to download a copyrighted song from the album "Infamy" by the
rap group "Mobb Deep." (See George Dec., Exh. A; Ramos Dec. ¶ 28, Exh. J.)
Moreover, one of the screenshots Mr. George attaches showing the availability of
President Bush's speeches suggests that the source for those speeches is the cable
news channel CNN. (See George Dec., Exh. B; Ramos Dec. ¶ 27.)

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8. **Any Alleged Non-infringing Uses Are Not Commercially Significant.**

Finally, even if Defendants' Systems and Services could be used for any non-infringing uses, Sony requires that those used be commercially significant. See Sony, 464 U.S. at 442, 104 S. Ct. at 789 (defense applies only where product is "capable of substantial noninfringing uses" that are "commercially significant"). Defendants admit that millions of individuals are using their services. It is preposterous for Defendants to suggest that millions of people are going to their services to find Project Gutenberg eBooks, Prelinger Films, or the writings of John Perry Barlow. (See Declaration of George Newby in Support of Defendants' Motion for Partial Summary Judgment ¶ 12; Declaration of Richard Prelinger in Support of Defendants' Motion for Partial Summary Judgment ¶ 18; Declaration of John Perry Barlow in Support of Defendants' Motion for Partial Summary Judgment ¶ 9.) Plaintiffs believe that evidence of this fact will be further confirmed through the depositions and document requests described above.

**VI.
CONCLUSION**

For the foregoing reasons, Defendants' motion should be denied as a matter of law, or, in the alternative, pursuant to Rule 56(f).

DATED: February 15, 2002

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
CAREY R. RAMOS

DAVIS WRIGHT TREMAINE LLP
KELLI L. SAGER
ANDREW J. THOMAS

By: Kelli L. Sager / AJT
Kelli L. Sager

Attorneys for Plaintiffs