

1 DAVID E. KENDALL (pro hac vice)
WILLIAMS & CONNOLLY LLP
2 725 Twelfth Street, N.W.
Washington, DC 20005
3 Telephone: (202) 434-5000
Telecopy: (202) 434-5029

4 *Attorneys for the Motion Picture Studio Plaintiffs*
5 *(Other than the Time Warner studio plaintiffs)*

6 RUSSELL J. FRACKMAN (Cal. Bar No. 49087)
MITCHELL SILBERBERG & KNUPP LLP
7 11377 West Olympic Boulevard
Los Angeles, California 90064
8 Telephone: (310) 312-2000
Telecopy: (310) 312-3100

9 *Attorneys for the Record Label Plaintiffs*
10 *(Other than the Time Warner record label plaintiffs)*

11 ROBERT M. SCHWARTZ (Cal. Bar No. 117166)
O'MELVENY & MYERS LLP
12 1999 Avenue of the Stars, Seventh Floor
Los Angeles, California 90067-6035
13 Telephone: (310) 553-6700
Telecopy: (310) 246-6779

14 *Attorneys for the Time Warner Plaintiffs*

15 [Full counsel appearances on signature page]

16
17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 METRO-GOLDWYN-MAYER
20 STUDIOS INC., *et al.*,

21 Plaintiffs,

22 v.

23 GROKSTER, LTD., *et al.*,

24 Defendants.

25
26 AND RELATED COUNTERCLAIM.
27
28

Case No. CV 01-08541 SVW (PJWx)

**PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION
FOR PARTIAL SUMMARY
JUDGMENT OF DEFENDANTS
STREAMCAST NETWORKS,
INC., (FORMERLY KNOWN AS
MUSICCITY.COM, INC.) AND
MUSICCITY NETWORKS, INC.**

Hearing Date
Time
Place

March 4, 2002
1:30 p.m.
Courtroom 6

MEMO OF POINTS & AUTHORITIES IN OPP. TO MOT. FOR PARTIAL SUM. JUDG. OF DEFENDANTS

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1 *"When the lights went out at Napster, where did everybody go?*
2 *MusicCity."*

3 -- Advertisement on MusicCity.com Web site, shortly after Napster
4 experienced an outage of its servers in 2001.¹

5 *"Beatles, Led Zeppelin, Michael Jackson, Bee Gees. There were several*
6 *others."*

7 -- Michael Weiss, MusicCity's former President and CEO, listing
8 names of performers of some of the approximately one hundred copyrighted
9 recordings he downloaded (copied) using the Morpheus system.²

10 With more than 600,000 people simultaneously accessing its Morpheus
11 system in order to copy, time and time again, from among the more than 70 million
12 music, video, and other works that are available at any one time, MusicCity is one
13 of the most massive infringers of copyright in history. Declaration of Thomas G.
14 Hentoff ("Hentoff Dec."), Ex. 25. As recently noted in the press, Morpheus "has
15 surpassed even the infamous Napster in the number of copyrighted tunes being
16 illegally swapped online today."³ Defendant MusicCity's motion is fatally infirm
17 and should be denied for multiple independent reasons, not the least of which is the
18 services' close identity to the system previously offered by Napster.

19 Like the "infamous" Napster before the Ninth Circuit affirmed the injunction
20 against it on all liability issues, see A&M Records, Inc. v. Napster, Inc., 239 F.3d
21 1004 (9th Cir. 2001), MusicCity's Morpheus permits millions of registered users, to
22 take advantage of a digital smorgasbord of music files being illegally distributed by
23 fellow registered users, enabling quick and easy copying of an immense selection of

24 ¹ Deposition of Michael Weiss ("Weiss Dep.") 134 (Declaration of George M. Borkowski
25 ("Borkowski Dec."), Ex. 16).

26 ² Weiss Dep. 218, 229 (Borkowski Dec., Ex. 16).

27 ³ M. McCance, Tech Notes, Richmond Times-Dispatch, Dec. 30, 2001, at D8.
28 Defendants MusicCity.com, Inc. (now known as Streamcast Networks, Inc.) and
 MusicCity Networks, Inc. are collectively referred to herein as "MusicCity"). Consumer
 Empowerment BV (now known as KaZaA BV) ("KaZaA") and Grokster, Ltd.
 ("Grokster") each filed a motion seeking to join in MusicCity's motion. Plaintiffs'
 opposition to those motions is being filed separately.

1 songs by major recording artists and composers, all without the permission of the
2 copyright owners. Declaration of Frank Creighton ("Creighton Dec.") ¶ 7-6.
3 Morpheus goes beyond Napster by permitting the distribution and copying of
4 unauthorized video and other files as well, thus bringing to millions of home
5 computers what previously had only been slipped under the table in back rooms --
6 bootleg copies of first-run motion pictures that are still in theatrical release, such as
7 Black Hawk Down and Monsters, Inc. See Declaration of Hemanshu Nigam
8 ("Nigam Dec.") ¶¶ 5, 8-9, Ex. 12-14.

9 Everyone who even briefly uses MusicCity's service realizes that, like
10 Napster, it attracts and keeps its millions of registered users -- for one reason: it
11 provides vast selections of unauthorized copies of music and motion pictures that
12 are available for free.

13 MusicCity's motion for partial summary judgment on the issue of liability for
14 contributory copyright infringement should be denied for many separate and
15 independently sufficient reasons.

16 First, by seeking only a contributory-infringement ruling regarding only one
17 aspect of its conduct, the free distribution of its Morpheus software, while seeking
18 to ignore all other aspects of its conduct, including its continual and persistent
19 contacts with its registered users, MusicCity asks this Court to decide a
20 hypothetical --and irrelevant -- question that cannot form the basis for summary
21 dismissal.

22 Second, MusicCity's attempt to seek protection in the Supreme Court's
23 holding in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417,
24 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) ("Sony-Betamax"), regarding the liability
25 of a manufacturer of a "staple article of commerce" fails for numerous reasons.
26 These failures include: (1) defendants, having actual knowledge of infringements,
27 cannot claim protection under Sony-Betamax; (2) Sony-Betamax applies to
28

1 manufacturers of a “staple article of commerce,” not to providers of a live system
2 with support services; (3) the doctrine does not protect unauthorized, widespread
3 distribution of infringing works; (4) the doctrine does not apply where the
4 defendant has specifically designed its product for infringing use; and (5) the
5 doctrine does not apply where the infringing activity can be prevented while
6 permitting alleged noninfringing uses to continue.⁴ Further, even if the doctrine did
7 apply, MusicCity has utterly failed to establish (let alone as a matter of undisputed
8 fact) the commercially significant noninfringing uses required for protection under
9 Sony-Betamax. Indeed, as set forth herein, virtually none of the public domain and
10 other supposedly noninfringing works that MusicCity touts in its declarations
11 supporting its motion is available on the MusicCity system. Nor can MusicCity
12 escape this Circuit’s controlling precedent, as set forth in Napster and Fonovisa,
13 Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996), that knowingly providing
14 the site and facilities for copyright infringement and failing to lift a finger to stop it
15 constitutes contributory copyright infringement.

16 Third, MusicCity’s motion in any event rests on purportedly
17 “uncontroverted” facts – such as that “MusicCity cannot prevent or control uses of
18 the Morpheus software program by the general public” (MusicCity’s Statement of
19 Uncontroverted Fact ¶ 16) – that are the subject of discovery requests that plaintiffs
20 recently served at the first opportunity and that MusicCity has yet to answer.
21 Plaintiffs have a right to test these supposedly uncontroverted facts through
22 discovery. If for no other reason, the motion should be denied pursuant to Fed. R.
23

24 ⁴ Parroting an argument made unsuccessfully by Napster (and using one of Napster’s
25 declarants), MusicCity attacks a straw man when accusing plaintiffs of opposing peer-to-
26 peer “technology.” Mem. 3. As MusicCity’s own declarant, Sean Mayers of JIVE Media
27 points out in a follow-up declaration submitted with this Opposition, “[c]ontent creators
28 are interested in new distribution mediums, but want their content safeguarded and want
to maintain control over the works they authored or control It is our experience that
these companies are not anti-technology.” Mayers Dec. ¶ 7 (emphasis added). No one is
against peer-to-peer technology. What plaintiffs seek relief from is the use of that
technology by a service to knowingly facilitate massive copyright infringement.

1 Civ. P. 56(f).

2 One court has already seen through the argument of one of the defendants in
3 this case that it has no knowledge, no control, and therefore no responsibility for its
4 actions. On November 29, 2001, acting on a lawsuit by a music publishers'
5 licensing organization, a Dutch court ordered KaZaA, a Dutch company, to stop
6 infringing plaintiffs' copyrights via its system, explaining in part: "The fact that the
7 eventual provision of music files from one user to another runs via a peer-to-peer
8 network and not actually via KaZaA's website makes no difference" with regard to
9 KaZaA's liability. "This manner of electronic provision is but a part of the system
10 designed by KaZaA, which system can be regarded as a technical unity and is
11 designed" so that in order to obtain access to unlawfully available files, one must
12 "use[] this system designed by KaZaA." Declaration of Otto Volgenant, Ex. 30
13 (attaching KaZaA B.V. / Buma-Stemra, Dist. Ct., Amsterdam, Nov. 29, 2001;
14 KaZaA B.V. / Buma-Stemra, Dist. Ct., Amsterdam, Jan. 31, 2002 (Ex. 31)).⁵

15 MUSICCITY'S SYSTEM

16 MusicCity's motion relies on its claim that it does not know why millions of
17 people use its service every day, and that even if it did know, it is helpless to
18 prevent its users' infringement. This wholly implausible argument is contradicted
19 by the evidence already available. While discussing its selective version of the
20 history of copyright law, MusicCity ignores its own history -- as a knowing
21 copyright infringer even in the months before the launch of its current service. In
22 early 2001, after the district court had enjoined Napster, MusicCity offered a file-
23 copying and distribution service exactly like Napster. Creighton Dec. ¶ 22-24.
24 Napster rose to prominence offering a wildly popular system permitting users to
25 perform simple word searches whereby they could easily find copyrighted musical
26

27 ⁵ KaZaA appears to have responded to the decision by selling certain assets to an entity
28 called Sharnan Networks, which now purports to offer the KaZaA system and service
from Australia.

1 works on the hard drives of other users and, with a simple click, download the
2 works to their own computer. Napster, 239 F.3d at 1012. In affirming the
3 preliminary injunction against Napster, the Ninth Circuit held that engaging in this
4 conduct while turning a blind eye to the infringing activity (and at the same time
5 benefiting from the user base attracted to the infringement), exposed Napster to
6 liability for contributory and vicarious copyright infringement. See id. at 1020-22.

7 Notwithstanding the Napster opinions, MusicCity began to operate a so-
8 called "Open Nap" network – providing servers that enabled users to duplicate
9 precisely the Napster experience. MusicCity even advertised itself as a Napster
10 alternative. Weiss Dep. 74 (Borkowski Dec., Ex. 16); Creighton Dec. ¶ 23. After
11 the Ninth Circuit issued its decision on February 12, 2001 – holding that judicial
12 action to prevent this sort of "participation in copyright infringement is not only
13 warranted but required," 239 F.3d at 1027 – MusicCity brazenly continued to
14 provide the very same system held to be unlawful in Napster. Id. MusicCity did so
15 even after the Recording Industry Association of America, Inc. ("RIAA"), on
16 behalf of its member companies, many of whom are plaintiffs in this case, notified
17 MusicCity of specific copyrighted works that were available on and must be
18 removed from the system. Creighton Dec. ¶ 24.

19 In April 2001, after receiving these notices from the RIAA, MusicCity found
20 a way to continue to provide its users with the easy ability to infringe copyrights,
21 without using the Napster interface. MusicCity licensed from defendant KaZaA, a
22 new Napster-like system. Kazaa Counterclaim ¶ 109. KaZaA developed a system
23 called the FastTrack network and offered licenses to the other defendants, enabling
24 them to display their own unique interface to the user, while sharing the same user
25 group. MusicCity, KaZaA itself, and defendant Grokster all joined together to
26 provide KaZaA's file-copying and distribution system and share the same network
27 of users. Mem. 3 n.3. MusicCity called its system "Morpheus."
28

1 As with Napster, to begin using the Morpheus system, a user must first
2 download a software program, which MusicCity provides for free. Before the
3 program will launch for the first time, a user must agree to MusicCity's "terms of
4 service," by clicking to indicate acceptance of a 20-paragraph end user license
5 agreement. Id. ¶ 8, Ex. 1. After the user has accepted the agreement and registered
6 on the system, Morpheus automatically creates a "share directory" to be used for
7 making files available for distribution for other users, and shows the user how to
8 select which other folders can be used for distribution to others. Id. ¶¶ 10-14.

9 As with Napster, a simple interface makes it easy to search for, find, and
10 make unauthorized copies of works. One need only type in a word search (such as
11 the name of a song or recording artist, or the name of a motion picture), and
12 Morpheus immediately displays an index of files from other users' hard drives that
13 satisfy the search criteria. With a click of a button, the user begins to download a
14 file. Morpheus searches out other, identical copies of the file to speed the
15 download and all the while monitors the progress of the download until complete.
16 Id. ¶¶ 12-14. Thus, whether using Napster or Morpheus, a user need merely search,
17 for example, for his favorite Beatles or Michael Jackson song, as did MusicCity's
18 then-CEO Weiss, and within seconds have his own copy of the song for free (and
19 may effortlessly repeat the process hundreds of times). That unlawful copy is then
20 immediately available for distribution to other Morpheus users (and then to others,
21 and so on).

22 To speed the copying and distribution process, the Morpheus program is able
23 to identify exact copies of a file being downloaded, so that an interrupted download
24 may be resumed at the same point even if the original uploading user is no longer
25 available, and is able to locate numerous identical copies of the same file, to enable
26 expedited downloading of one file from several sources at the same time. Id. ¶ 14.
27 And to shield users from the consequences of their infringing activity, the system
28

1 allows users to copy and distribute files anonymously and encrypts certain user
2 communications to make them harder to detect. Id. ¶ 16.

3 The one difference between the two systems on which MusicCity seeks to
4 stake its defense is that Napster's indexes displaying file names are generated by
5 Napster's central servers, whereas MusicCity's indexing function is transferred to
6 an ever-changing set of users' own computers. Each of these so-called
7 "supernodes," all designated by the Morpheus system, indexes the contents of a
8 group of computers connected to it, and then connects to other supernodes, so that
9 an index made up of all the computers connected to a set of supernodes is displayed
10 for the searching user. Creighton Dec. ¶ 12. This shift, done for the sole purpose
11 of attempting to avoid liability, does not in fact change MusicCity's knowledge or
12 ability to prevent infringement such that MusicCity may avoid liability.

13 Although MusicCity seeks to portray itself as a mere purveyor of a Morpheus
14 "software product," with no continued involvement in the infringements of its
15 users, this attempt is flatly contradicted by the evidence already available at this
16 early stage of the proceeding. MusicCity's continuing relationship with its
17 infringing users, as well as its control of the system are demonstrated by the
18 following facts, among others:

19 MusicCity regularly updates the software it has distributed to its users.
20 Creighton Dec. ¶ 17. In late 2001, when a group of hobbyists succeeded in
21 cracking defendants' encryption and gaining unauthorized access to the FastTrack
22 system (meaning that users could make FastTrack an "open" system for which
23 defendants could not be the gatekeepers), defendants immediately distributed across
24 their network a "patch" that apparently updated the encryption and kept hackers off
25 the system. Id. ¶ 17.

26 • MusicCity's servers continually send promotional and other messages
27 to users, which are displayed in the Morpheus program. Thus, MusicCity can at
28

1 any time “broadcast messages” to users regarding news they may need to know to
2 enhance their use of the service. Mem. 5. For example, MusicCity is currently
3 notifying its users that claims of a “security hole” in Morpheus are untrue, and that
4 they can continue using the software without fear that others will “hack” into their
5 computers. Hentoff Dec., Ex. 25.

6 • MusicCity’s servers continually send advertisements to users who are
7 logged on to the Morpheus system and service. Mem. 5-6. The more MusicCity
8 can succeed in attracting users to Morpheus, and keeping them on the service, the
9 more advertising revenue it can generate for itself and its investors.

10 • Although MusicCity now chooses to call Morpheus a “product” in an
11 attempt to fit under the Sony-Betamax doctrine, its end user license agreement tells
12 its registered users the opposite – that Morpheus is an ongoing, interactive service
13 that MusicCity can terminate at any time. See, e.g., Creighton Dec., Ex. 1, ¶ 8 (“we
14 reserve the right to permanently ban you and your computers from accessing
15 MusicCity Networks and other MusicCity Networks services”). The continuing
16 involvement between MusicCity and users is further evidenced by the fact that by
17 accepting the end user license agreement, users participate in an ongoing
18 contractual relationship with MusicCity. See id. ¶ 14 (“users agree to
19 indemnify . . . MusicCity Networks” for any claim “arising out of content you
20 submit, post to or transmit through the Service”).

21 • Every time a user begins a new session on Morpheus, his computer
22 sends his username and password to MusicCity’s servers for verification of identity.
23 Id. Dec. ¶ 17.

24 • MusicCity has in the past directly operated servers that helped users
25 find supernodes. MusicCity 1/25/02 Response to Interrogatories, No. 21 (Hentoff
26 Dec. ¶ 26).

27 • Although MusicCity has exercised control over the system to protect
28

1 its own rights, it has done nothing to respect the rights of plaintiffs. Indeed, the
2 RIAA on behalf of the record company plaintiffs, and the Motion Picture
3 Association of America ("MPAA") on behalf of the motion picture studio plaintiffs,
4 sent MusicCity a series of letters and reports detailing over 20 million instances of
5 infringements of copyrighted works occurring on the system. Creighton Dec. ¶ 31;
6 Nigam Dec. ¶ 6-9.

7 • MusicCity has provided chat rooms and bulletin boards – which
8 Morpheus users can reach with a single click. On these chat rooms and bulletin
9 boards users explicitly seek and obtain assistance in using the system to infringe
10 copyrights. See, e.g., Hentoff Dec. ¶ 4, Ex. 27 (discussing how to play the movie
11 Shrek) (posting by Borgdrone 1 of 2, Dec. 31, 2001); Declaration of Nancy K.
12 Schafer ¶ 9, Ex. 23 ("So far I have Pulp Fiction. I had gladiator, but the quality was
13 bad."). MusicCity employees have monitored the bulletin boards, Weiss Dep. 332
14 (Borkowski Dec., Ex. 16), and provided technical support to users, Hentoff Dec.,
15 Ex. 27. Remarkably, although MusicCity has let stand posts about infringing the
16 copyrighted works of others, it has actually edited other posts to obscure references
17 to MusicCity's business competitors. See, e.g., Hentoff Dec., Ex. 27 (posting by
18 Jay_Dogg187) ("IS THERE ANY WAY TO FIX IT!!! or do I have to continue
19 using #####, #####, and iMesh more than this?"); id. (posting by Mog) ("I have to
20 agree, having used Napster in the past, and more recently BearShare and #####, I
21 find Morpheus the fastest yet"). Thus, once again, MusicCity has chosen to
22 exercise control over its system only to protect its own interests, while feigning
23 ignorance about the violation of the rights of plaintiff copyright owners.

24 ARGUMENT

25 To prevail on summary judgment, a defendant must demonstrate "that there
26 is no genuine issue as to any material fact and that the moving party is entitled to a
27 judgment as a matter of law." Fed. R. Civ. P. 56(c). When, as here, a defendant
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1 seeks summary judgment in connection with an affirmative defense, as to which it
2 bears the burden of proof, see A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d
3 896, 912 (N.D. Cal. 2000) (“substantial noninfringing use” is affirmative defense),
4 aff’d in part, 239 F.3d 1004 (9th Cir. 2001), its “showing must be sufficient for the
5 court to hold that no reasonable trier of fact could find other than for the moving
6 party.” Carnegie Mellon Univ. v. Hoffmann-La Roche, Inc., 148 F. Supp. 2d 1004,
7 1009 (N.D. Cal. 2001). For many separate and independently sufficient reasons,
8 MusicCity cannot begin to meet its burden. Its motion must be denied.

9
10 **I. DEFENDANT’S MOTION SHOULD BE DENIED BECAUSE IT IS**
PROCEDURALLY IMPROPER.

11 In calling its motion for summary judgment “partial,” MusicCity is guilty of
12 significant understatement. Its motion relies on only a “partial” set of facts about
13 its conduct and thus seeks to eliminate one “part” of one element of a single claim.
14 This is precisely the sort of “piecemeal” summary judgment motion that courts
15 reject as diserving the Federal Rules’ policy in favor of speedy and efficient
16 litigation. At this beginning stage of the litigation, MusicCity is improperly asking
17 this Court to rule on a hypothetical set of facts – what would its liability be on the
18 issue of contributory infringement (but not on plaintiffs’ vicarious infringement
19 claim) if its only conduct were the distribution of the Morpheus software for
20 download? For this reason alone, the motion should be denied.

21 MusicCity’s current challenge to the complaint could hardly be narrower.
22 Plaintiffs have brought claims for vicarious copyright infringement and
23 contributory copyright infringement. Compl. ¶ 55. MusicCity does not dispute that
24 its users – those who are personally distributing and copying the billions of files
25 containing copies of plaintiffs’ copyrighted works – are “direct infring[ers].”
26 Napster, 239 F.3d at 1013 n.2; id. at 1014 (“users who upload file names to the
27 search index for others to copy violate plaintiffs’ distribution rights” and “users
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1 who download files containing copyrighted music violate plaintiffs' reproduction
2 rights"). Nor does MusicCity challenge plaintiffs' claims of vicarious liability,
3 which require proof that "a defendant has the right and ability to supervise the
4 infringing activity and also has a direct financial interest in such activities." *Id.* at
5 1022 (quotation omitted).

6 MusicCity challenges, only in part, plaintiffs' contributory liability claims.
7 A contributory infringer is "one who, with knowledge of the infringing activity,
8 induces, causes or materially contributes to the infringing conduct of another." *Id.*
9 at 1019 (quotation omitted). MusicCity does not contest here the "contribution"
10 element of contributory infringement. Instead, it challenges only the "knowledge"
11 element, and then only argues about how a discreet set of facts should be judged
12 under that element, contending that under the Sony-Betamax doctrine it cannot be
13 held liable for copyright infringement merely for distributing the Morpheus
14 software. Mem. 2-3.

15 The procedural deficiency with this argument is immediately apparent.
16 Plaintiffs' claim of contributory infringement is based on significant conduct by
17 MusicCity in addition to its distribution of the Morpheus software, just a few
18 examples of which are set forth, supra, at pp. 7-9. In determining whether a
19 defendant may be contributorily liable for "knowingly" facilitating copyright
20 infringement, a court looks at the totality of defendant's conduct in connection with
21 the infringing activity, not whatever subset of facts the defendant would like to
22 select. See, e.g., Fonovisa, 76 F.3d at 264. Litigating issues in such "piecemeal
23 fashion" is improper because it "would waste judicial resources in almost every
24 case." Capitol Records, Inc. v. Progress Record Distrib., Inc., 106 F.R.D. 25, 29
25 (N.D. Ill. 1985); accord In re U.S. Grant Hotel Assoc. Ltd. Sec. Litig., 1990 WL
26 260536, *2 (S.D. Cal. 1990). MusicCity's motion should be denied.

1 II. THE MOTION SHOULD BE DENIED BECAUSE SONY-BETAMAX
2 DOES NOT SHIELD MUSICCITY FROM LIABILITY UNDER
3 CONTROLLING NINTH CIRCUIT PRECEDENT.

4 The sole basis for MusicCity's motion for partial summary judgment is that
5 its conduct is immunized as a matter of law by Sony-Betamax because MusicCity
6 purportedly does nothing more than distribute a "software product" that is capable
7 of "substantial, noninfringing use." Mem. 3. Even if the motion were procedurally
8 proper, it should be rejected for numerous reasons.

9 Under controlling Ninth Circuit precedent, those who knowingly provide the
10 site and facilities for copyright infringement are contributorily liable for their users'
11 direct infringement. Sony-Betamax does not change that result, for a number of
12 reasons, including: (1) Defendants with actual knowledge of demonstrated
13 infringing uses of their system are not protected by the Sony-Betamax doctrine; (2)
14 Sony-Betamax applies only to the manufacturers of a "staple article of commerce,"
15 such as a video recorder, and not to the operators of an integrated system that has an
16 ongoing relationship with its infringing users; (3) Sony-Betamax does not provide a
17 defense to the violation of a plaintiff's distribution rights; (4) Sony-Betamax does
18 not protect a defendant who specifically designed a product in order to assist
19 infringement; (5) Sony-Betamax does not apply when a defendant can prevent
20 infringement without removing its product from the market; and (6) MusicCity has
21 failed to, and cannot, establish that its system is capable of commercially significant
22 noninfringing uses. MusicCity has not established, nor could it establish that
23 material facts relating to these issues not only support defendant but are undisputed.

24 A. The Sony-Betamax Case.

25 Sony-Betamax reaffirmed that the law of copyright recognizes claims for
26 contributory copyright infringement. The dispute in the litigation arose between the
27 manufacturer of the Betamax home video tape recorders ("VTR") and copyright
28 owners of television programs who alleged that VTR consumers recorded
copyrighted works. The plaintiffs in Sony-Betamax, with the benefit of a fully

1 developed trial record, failed to show that the defendant had direct knowledge of
2 infringing activity. 464 U.S. at 437. The Court considered the very narrow issue of
3 whether the manufacturer of the VTR, which had no contact with customers after
4 the point of sale, could be held to have “constructive knowledge,” that its customers
5 used the equipment to make unauthorized copies of copyrighted material solely
6 because it supplied the means that could be used for such activity. In finding in
7 favor of Sony, the Court found that the “staple article of commerce” doctrine, does
8 not constitute contributory copyright infringement, applied in those instances in
9 which “[t]he only contact between [the seller and buyer] occurred at the moment of
10 sale,” 464 U.S. at 438,⁶ and where none “of the copies . . . were influenced or
11 encouraged by the [the seller’s] advertisements,” *id.* (quotation omitted). By
12 contrast, the Court found the imposition of liability “manifestly just,” where the
13 contributory infringer was “in a position to control the use of the copyrighted works
14 by others and had authorized the use without permission from the copyright
15 owners.” *Id.* at 437 (emphasis added).

16 In applying the limited “staple article of commerce” doctrine from patent
17 law, the Sony-Betamax Court held that the “question is . . . whether [the product] is
18 capable of commercially significant noninfringing uses.” *Id.* at 442. MusicCity’s
19 failure to address whether the noninfringing uses it identifies are “commercially
20 significant,” and its failure to offer any evidence of such uses is yet another basis
21 for denying its motion.

22 B. MusicCity’s Knowledge of Infringement on Its System Disqualifies It
23 From Protection of *Sony-Betamax*.

24 The Napster decision provides no support for MusicCity because the Ninth
25

26 ⁶ If MusicCity’s system and service could be a “staple article of commerce,” then so could
27 a swap meet (and numerous services held to be contributory infringers), which may
28 provide various products and services that are capable of “substantial noninfringing uses.”
Indeed, the swap meet in Fonovisa, 76 F.3d 259, had these characteristics, but no court
seriously would have entertained the argument that it was a “staple article of commerce.”

1 Circuit clearly set forth the circumstances in which the operator of a computer
2 system may not invoke the Sony-Betamax doctrine and will be held liable for
3 contributory infringement.

4 The court of appeals in Napster held that because the defendant had actual
5 knowledge of infringement by its users, the Sony-Betamax doctrine did not apply to
6 shield it from liability for contributory copyright infringement. Napster, 239 F.3d
7 at 1020-21 (“if a computer system operator learns of specific infringing material
8 available on his system and fails to purge such material from the system, the
9 operator knows of and contributes to direct infringement;” liability may also be
10 imposed when a defendant that materially contributes to copyright infringement has
11 constructive knowledge of infringing activity); see also Costar Group, Inc. v.
12 Loopnet, Inc., 164 F. Supp. 2d 688, 697 (D. Md. 2001) (construing Napster as
13 “distinguishing Sony on the basis of Napster’s ‘actual, specific knowledge’ of
14 direct infringement”).

15 Similarly, in Fonovisa, the Ninth Circuit found that operators of a swap meet,
16 where third-party vendors sold counterfeit recordings that infringed on the
17 plaintiff’s copyrights, could be held liable for contributory copyright infringement.
18 76 F.3d at 260. The Court found that the swap meet operators “were aware that
19 vendors in their swap meet were selling counterfeit recordings in violation of
20 Fonovisa’s trademarks and copyrights.” Id. at 261. To establish this knowledge,
21 the plaintiffs alleged that (1) a Sheriff’s department had raided the Cherry Auction
22 swap meet and seized 38,000 counterfeit recordings; (2) the Sheriff sent a letter
23 notifying Cherry Auction of the on-going sales of infringing materials; and (3)
24 Fonovisa sent an investigator to the Cherry Auction site and observed sales of
25 counterfeit recordings. Id. The Ninth Circuit found that on these facts, “[t]here is
26 no question that plaintiff adequately alleged the element of knowledge,” id. at 264,
27 and moved directly to consider the question of contribution. On this, the Court had
28

1 “little difficulty” finding that the allegations in the complaint were sufficient, for “it
2 would be difficult for the infringing activity to take place in the massive quantities
3 alleged without the support services provided by the swap meet.” Id.

4 MusicCity ignores Ninth Circuit precedent when it argues that it cannot be
5 liable because it “has no particular knowledge, at the time it delivers its product,
6 that the product will be used by a specific consumer for infringing or noninfringing
7 uses.” Mem. 2 (emphasis added). The evidence considered in this Circuit to be
8 dispositive on the knowledge issue already exists here to defeat summary judgment,
9 and will further be developed through discovery. The very first piece of evidence
10 that the Napster court cited to demonstrate Napster’s culpable actual knowledge
11 was a statement by a Napster executive about the general conduct of its users, a
12 statement which did not even remotely mention a specific user of a specific file.
13 239 F.3d at 1020 & n.5.

14 Statements by MusicCity executives on the public record demonstrate that
15 they, like Napster’s executives, acknowledge the obvious – their millions of users
16 use the system to infringe plaintiffs’ copyrights. See, e.g., B. Grow, Can Morpheus
17 Prevail Where Napster Failed?, Business Week Online, Nov. 15, 2001 (Hentoff
18 Dec., Ex. 28) (Chairman and CEO Steven Griffin: “I’m like William Wallace.
19 We’ve got 32 million people standing behind us. Instead of sticks and rocks, we’ve
20 got CD burners and PCs”).

21 MusicCity derives further actual knowledge from postings on its own bulletin
22 boards, where users freely talk about the copyright infringement they are
23 committing using Morpheus. See Hentoff Dec., Ex. 27 (postings admitting that
24 MusicCity monitors bulletin boards); Ex. 29 (“I download movies or t.v. shows all
25 the time. . . [m]ost of the movies I download are barely in the theaters and definitely
26 not in the rental places”) (posting by 169mmm, Jan. 10, 2002) (emphasis added).⁷

27
28 ⁷ MusicCity asserts that “[p]laintiffs have not challenged the chat and discussion board
services of MusicCity,” Mem. 6 n.4. This is not so. Paragraph 47 of the complaint quite

1 These boards are monitored by MusicCity, and former MusicCity President Weiss
2 admitted that he himself had responded to queries on the boards. Weiss Dep. –
3 329-332 (Borkowski Dec., Ex. 16).

4 Napster and Fonovisa both also held that notices to defendants of
5 infringements provided further actual knowledge of infringement. See Napster, 239
6 F.3d at 2020 n.5 (RIAA “informed Napster of more than 12,000 infringing files,
7 some of which are still available”); Fonovisa, 76 F.3d, at 261 (“[T]he Sheriff sent a
8 letter notifying Cherry Auction of the on-going sales of infringing materials”).
9 Here, the plaintiffs have given reams of just such notices to MusicCity – for
10 example, in one notice, the RIAA identified more than 3.5 million infringing files
11 available on Morpheus, Creighton Dec. ¶ 31, Ex. 7, and the MPAA gave notice of
12 hundreds of motion pictures that were found via a mere sampling of the system,
13 many blatantly illegal bootlegs of current theatrical releases, Nigam Dec. ¶¶ 6-9 and
14 MusicCity, like the defendants in the other cases, has failed to do anything about
15 them.

16 Similarly, the evidence of constructive knowledge of infringement on which
17 the Napster court relied is present here, and must therefore defeat summary
18 judgment for MusicCity. The Ninth Circuit affirmed that Napster had constructive
19 knowledge based on “(a) Napster executives have recording industry experience;
20 (b) they have enforced intellectual property rights in other instances; [and] (c)
21 Napster executives have downloaded copyrighted songs from the system.” Napster,
22 239 F.3d at 1020 n.5. Here, similar evidence exists of constructive knowledge. By
23 way of example only (since plaintiffs have had almost no discovery yet),
24 MusicCity’s former CEO testified that he sought licenses from two record

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26 clearly alleges that these services are part of the integrated system MusicCity offer to
27 encourage and facilitate piracy: “Defendants provide their users with facilities, such as
28 online chat rooms and message boards, in which their users – with Defendants’ full
knowledge – regularly make clear that the primary use of Defendants’ system is the
unlawful distribution and reproduction of copyrighted works.” Compl. ¶ 47.

1 companies before abandoning his efforts. He also testified that he had extensive
2 experience with video rental industries, and that he had secured or sought to secure
3 copyright licenses in other instances. Weiss Dep. 32-34, 39-42, 49-50 (Borkowski
4 Dec., Ex. 16). MusicCity has protected its intellectual property rights, as evidenced
5 by the notices in its end user license agreement warning against unlawful copying
6 of its own intellectual property. See Creighton Dec., Ex. 1. And, like the Napster
7 executives, former MusicCity CEO Weiss downloaded approximately 100
8 copyrighted songs via Morpheus. Weiss Dep. 218-219-229-231 (Borkowski Dec.,
9 Ex. 16).

10 MusicCity thus has both actual and constructive notice aplenty of the fact
11 that its systems are being continuously used to infringe plaintiffs' copyrighted
12 works. Its purported ignorance of the massive direct infringement of plaintiffs'
13 works on its systems calls to mind Casablanca's amiable Captain Louis Renault,
14 who, upon visiting Rick's Café Americain, declares himself to be "shocked,
15 shocked to find that gambling is going on here."⁸

16 MusicCity's assertion that it is powerless to stop infringement on its service
17 that it knows about, Mem. 6-7, is refuted by its own Terms of Service. See
18 Creighton Dec., Ex. 1, ¶ 7 ("Your license to use MusicCity Systems service and
19 Morpheus Client software is subject to the condition that you shall not infringe the
20 intellectual property rights of others in any way. MusicCity Systems shall have the
21 right to terminate the account of any MusicCity Systems users who repeat copyright
22 infringements"). Further, the facts already developed demonstrate that MusicCity
23 can prevent infringement on its system. When the encryption on the FastTrack
24 system was hacked by hobbyists who wanted "open" access to the system without
25 connecting to defendants' advertising servers, KaZaA, swiftly distributed a patch
26

27 ⁸ The croupier then replies, "Your winnings, sir." Casablanca (1942) (Warner Brothers).
28 (Plaintiffs were able easily to download a copy of Casablanca using the FastTrack system,
see Creighton Dec. ¶ 38).

1 for users, so that defendants could continue to profit from the system. See
2 Creighton Dec. ¶ 17. MusicCity suppressed on its bulletin boards references to
3 commercial competitors but chose to permit statements encouraging copyright
4 infringement. See Hentoff Dec., Exs. 27, 29. Why does MusicCity purport to have
5 the ability to take aggressive action against child pornography, but not copyright
6 infringement?⁹ If Morpheus cannot distinguish, or be made to distinguish, between
7 infringing and authorized files, how does the service manage to locate multiple
8 exact copies of obviously infringing files – such as recent theatrical releases like
9 Black Hawk Down – so that users can infringe these works at an expedited pace?
10 See Creighton Dec. ¶ 31; Nigam Dec., Ex. 8.¹⁰

11 The evidence of MusicCity's knowledge of massive infringement on its
12 system, and of MusicCity's refusal to take available steps to counter it, alone
13 requires the denial of this motion.

14
15 C. The Sony-Betamax Doctrine Does Not Apply to
16 MusicCity's Conduct.

17 Although, as discussed above, MusicCity's knowledge of infringement
18 disqualifies it from protection under Sony-Betamax, there are a number of
19 additional reasons why MusicCity's attempts to come within the ambit of the Sony-
20 Betamax decision fail completely.

21 The issue in Sony-Betamax was whether liability could be imposed on the

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23 ⁹ Paragraph 6 of the MusicCity Legal Notice and Terms of Service states that "We do not
tolerate child pornography on the MusicCity system" and urges users to report any such
instances to MusicCity directly at abuse@MusicCity.com. Creighton Dec., Ex. 1.

24 ¹⁰ MusicCity's assertions that the Morpheus service "would still function" even without
25 the involvement of MusicCity's servers to transmit advertisements and verify usernames,
26 Mem. 7, is both untested and beside the point. These, among many other aspects of
27 MusicCity's continuous interaction with its infringing users, are part of its ongoing efforts
28 to make its site and facilities more attractive to infringers, and more lucrative for it. If the
swap meet operator in Fonovisa prevented sales of counterfeit records, the infringing
vendors might very well meet across the street the next weekend, and the defendant could
not stop them. But there is no suggestion that that could in any way absolve the defendant
of liability.

1 manufacturer of a staple article of commerce by attributing constructive knowledge
2 to the defendant merely because of the nature of the product. The Sony-Betamax
3 plaintiffs could not show that the defendant had direct or constructive knowledge of
4 infringing activity. 464 U.S. at 437. As demonstrated above, the Ninth Circuit has
5 held that a defendant computer system operator's actual knowledge (as well as
6 constructive knowledge from a variety of sources) of infringement renders Sony-
7 Betamax inapplicable.

8 First, Sony-Betamax applies to a "staple article of commerce," a "thing" not
9 a "service," 464 U.S. at 442. MusicCity claims that its "product is exactly the kind
10 of technology protected under the Sony-Betamax and Napster decisions." Mem. 2.
11 However, as MusicCity's own end user license agreement states, defendant is not
12 simply selling a product ("an article of commerce") like the VTR machine; the
13 defendant provides an integrated, ongoing system that include services, promotes,
14 facilitates, and contributes to infringement. In Sony-Betamax, the Supreme Court
15 described as "manifestly just" imposing liability in cases, such as the one at bar,
16 "involving an ongoing relationship between the direct infringer and the contributory
17 infringer at the time the infringing conduct occurred," 464 U.S. at 437. At a
18 minimum, the nature and extent of MusicCity's ongoing contacts with its infringing
19 users is not an undisputed fact favoring MusicCity and thus cannot support
20 summary judgment.

21 Second, Sony-Betamax does not protect unauthorized, widespread
22 distribution of infringing works, which is one of at least two rights under copyright
23 that MusicCity users are violating. See id. at 425 ("No issue concerning the
24 transfer of tapes to other persons . . . was raised."); N.Y. Times Co. v. Tasini, 533
25 U.S. 483, 121 S. Ct. 2381, 2393, 150 L. Ed. 2d 500 (2001) (Sony-Betamax
26 inapposite where defendant electronic publishers are "not merely selling
27 'equipment'; they are selling copies of [plaintiffs' copyrighted works]") (emphasis
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1 added). The conduct held to be fair use in Sony-Betamax was of individuals who
2 “time-shifted” television programs for their own use. 464 U.S. at 425. Here,
3 MusicCity makes each user a distributor of plaintiffs’ music and motion pictures for
4 copying by innumerable other users.

5 Third, Sony-Betamax does not apply where the defendant, like the one here,
6 specifically designed its systems for infringing use. A&M Records, Inc. v. Gen.
7 Audio Video Cassettes, Inc., 948 F. Supp. 1449, 1456 (C.D. Cal. 1996) (“[Sony-
8 Betamax’s] protection would not extend to products specifically manufactured for
9 counterfeiting activity, even if such products have substantial noninfringing uses”)
10 (emphasis added). In the one deposition that has occurred in this case so far, former
11 MusicCity CEO Michael Weiss admitted that one reason the company switched
12 from its “Open Nap” service to Morpheus was to continue providing file-copying
13 and distribution services while attempting to avoid legal liability. Mr. Weiss
14 indicated that one “major consideration” was to find a way to offer music without
15 paying licensing fees. See, Borkowski Dec., Ex. 16 (Weiss Dep. 99, 291).
16 Combined with MusicCity’s track record as a knowing infringer of copyrights in
17 the months before it launched Morpheus, and the absence of discovery to date, there
18 is a substantial basis to dispute MusicCity’s claim that it did not design its system
19 to infringe.

20 Fourth, Sony-Betamax does not apply where the infringing activity can be
21 avoided while permitting alleged noninfringing uses to continue. See RCA Records
22 v. All-Fast Sys., Inc., 594 F. Supp. 335, 339 (S.D.N.Y. 1984); cf. Sony-Betamax,
23 464 U.S. at 440-41 & n.21 (finding of contributory infringement would be
24 “functional equivalent” of completely removing the article from the public). Yet,
25 here, MusicCity could have either created a system that filtered the infringing
26 activity while permitting noninfringing uses to continue and/or can change its
27 system to allow for differentiation to permit copying and distribution of
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1 noninfringing files while preventing copyrighted works to be swapped on the
2 system without authorization. See Creighton Dec., ¶ 7-14.

3 D. MusicCity Has Failed To, and Cannot, Establish Commercial
4 Significant Noninfringing Uses of Its System and Service.

5 Even if Sony-Betamax somehow could apply here, MusicCity has failed to
6 establish that its system has ever been used for commercially significant
7 noninfringing uses or is capable of such cases. As posited in Sony-Betamax, “[t]he
8 question is . . . whether the Betamax is capable of commercially significant
9 noninfringing uses.” 464 U.S. at 442 (emphasis added). Though Defendant bears
10 the burden of proof on this point, Defendant has not come forward with any
11 evidence that the uses it touts as noninfringing have any commercial significance.
12 See Creighton Dec., ¶ 36, Mayers Dec., ¶¶ 6-8, 13.

13 MusicCity does not even begin to provide evidence that Morpheus actually is
14 used for any of the “exciting” public-domain or government-document uses touted
15 by MusicCity and its declarants. Mem. 11-14. By way of example, plaintiffs
16 conducted on two separate occasions a search on Morpheus for the 187 public-
17 domain works identified in the MusicCity declarations and were unable to locate
18 178 of those works on the system (and only one copy of each of the located works
19 was typically available). Creighton Dec. ¶¶ 33-34, 36. By contrast, an identical
20 search on Morpheus for the 24 recordings in the complaint and the Sound Scan
21 “Hot 100 Singles” found unauthorized copies of every one of the 124 recordings,
22 and an average of 106 available copies each. Id. ¶¶ 32, 33, 35. No court has
23 considered absolving a defendant of infringement without some showing that the
24 product in question actually is used for some noninfringing purpose. See, e.g.,
25 Napster, 239 F.3d at 1021 (district court should have compared current infringing
26 use with “current and future noninfringing use”) (emphasis added); General Audio
27 Video Cassettes, 948 F. Supp. at 1456 (“insubstantial” noninfringing uses not
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1 sufficient); Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 685 (N.D. Cal. 1994)
2 (“incidental capabilities” insufficient); In re Certain Personal Computers, 224
3 U.S.P.Q. 270, 280 (U.S. Int’l Trade Comm’n 1984) (“commercially significant”
4 use necessary). MusicCity has failed to produce any evidence, let alone evidence so
5 overwhelming as to compel summary judgment, that its system and service is or is
6 capable of commercially significant noninfringing uses.

7 As is readily apparent to anyone using Morpheus, its overwhelmingly
8 primary use is for infringing distribution and copying of copyrighted files. Indeed,
9 Sean L. Mayers of J!VE Media, one of the witnesses whose declaration MusicCity
10 submitted with its motion for partial summary judgment, testifies in a second
11 declaration to the readily observable and obvious fact that MusicCity dare not
12 admit: “Unfortunately, it appears that the majority of files currently available” on
13 systems like Morpheus “are often current popular music and movie files.”
14 Declaration of Sean Mayers ¶ 12.

15 **III. THE MOTION SHOULD BE DENIED BECAUSE MUSICCITY HAS**
16 **PRODUCED ALMOST NO DISCOVERY REGARDING THE FACTS IT**
17 **CLAIMS TO BE MATERIAL AND UNDISPUTED.**

18 Plaintiffs can test MusicCity’s assertions by discovering information that is
19 in large part uniquely within MusicCity’s control. Discovery has only just begun.
20 However, MusicCity has interposed numerous objections and refused to produce
21 information in response to plainly proper requests, requiring plaintiffs to send a
22 meet-and-confer letter regarding MusicCity’s written discovery responses and
23 instructions not to answer at the single deposition that has taken place. MusicCity
24 moved for summary judgment while at the same timing refusing to produce any
25 documents and withholding a number of interrogatory responses – on the ground
26 that the parties had not yet agreed upon the terms of a protective order. See David
27 E. Kendall Dec., ¶ 5. And plaintiffs have served numerous third party document
28 subpoenas in an attempt to discover information about MusicCity’s conduct, but the

1 third parties have not yet produced responsive documents.

2 Where it appears that "the party cannot . . . present . . . facts essential to
3 justify the party's opposition," the court "may refuse the application for judgment
4 or may order a continuance to permit affidavits to be obtained or deposition to be
5 taken or discovery to be had." Fed. R. Civ. P. 56(f). Because of MusicCity's haste
6 to file this motion before any substantial discovery has occurred, plaintiffs'
7 response is necessarily limited. Plaintiffs have been actively pursuing such
8 discovery. Indeed, plaintiffs speedily served document requests, and interrogatories
9 on MusicCity and have sought a meet-and-confer session to resolve pending
10 discovery disputes. Thus, submitted herewith is a Rule 56(f) declaration of David
11 E. Kendall setting forth why MusicCity's motion should be denied and why
12 discovery should be permitted to proceed expeditiously.

13 CONCLUSION

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15 The motion for partial summary judgment should be denied.

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17
18 Respectfully submitted,

19 By

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David E. Kendall

21 DATED: February 15, 2002.
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DAVID E. KENDALL
ROBERT J. SHAUGHNESSY
LAURA H. PARSKY
WILLIAMS & CONNOLLY LLP

GREGORY P. GOECKNER
MARK D. LITVACK

JAN B. NORMAN

Attorneys for Plaintiffs Metro-Goldwyn-Mayer Studios Inc., Columbia Pictures Industries, Inc., Disney Enterprises, Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, and Universal City Studios, Inc.

ROBERT M. SCHWARTZ
JESSICA DAVIDSON MILLER
JANE E. LIPPMAN
O'MELVENY & MYERS LLP

Attorneys for Plaintiffs Time Warner Entertainment Company, L.P., New Line Cinema Corp., Atlantic Rhino Ventures Inc., Elektra Entertainment Group, Inc., London-Sire Records Inc., Warner Bros. Records Inc., WEA International Inc., and WEA Latina Inc

RUSSELL J. FRACKMAN
GEORGE M. BORKOWSKI
NICOLE L. HARRIS
MITCHELL SILBERBERG
& KNUPP LLP

MATTHEW J. OPPENHEIM
DEAN GARFIELD
RECORDING INDUSTRY
ASSOCIATION OF AMERICA

Attorneys for Plaintiffs Arista Records, Inc., Atlantic Recording Corporation, Bad Boy Records, Capitol Records, Inc., Hollywood Records, Inc., Interscope Records, LaFace Records, Motown Record Company, L.P., The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment, Sony Music Entertainment Inc., UMG Recordings, Inc., Virgin Records America, Inc., Walt Disney Records, and Zomba Recording Corporation