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18 MusicCity Networks, Inc.

19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

21 METRO-GOLDWYN-MAYER	}	Case No.: 01-8541 SVW (PJWx)
22 STUDIOS INC., et al.,		DEFENDANTS STREAMCAST
23 Plaintiffs,		NETWORKS, INC.'S (f/k/a
24 vs.		MUSICCITY.COM, INC.) AND
25 GROKSTER, LTD., et al.,		MUSICCITY NETWORKS,
26 Defendants.		INC.'S REPLY BRIEF IN
		SUPPORT OF MOTION FOR
		PARTIAL SUMMARY
		JUDGMENT

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1 The MusicCity defendants file this reply memorandum in support of their
2 motion for partial summary judgment. To ease the Court’s burden, MusicCity
3 furnishes an identical reply to the oppositions filed by the plaintiffs in the MGM
4 and Leiber cases.

5 INTRODUCTION

6 Plaintiffs’ oppositions to MusicCity’s motion for partial summary judgment
7 create a dust storm of distractions equal to any special effects Hollywood can
8 muster. Intent on removing the Morpheus software from the market, they have
9 employed a variety of devices to obscure both the nature of MusicCity’s motion
10 and the undisputed factual basis for the motion:

- 11 • They fail to acknowledge the limited scope of the motion, which is
12 directed solely to the question of contributory copyright infringement
13 liability arising from the distribution of the Morpheus software to the
14 general public.
- 15 • While pointing to and misdescribing irrelevant facts, they fail to carry
16 their burden of raising a triable issue with respect to the subject of this
17 motion: whether the Morpheus software product is incapable of
18 substantial noninfringing uses.
- 19 • Instead, they attempt to shift the focus to what they call the
20 “Morpheus System and Service.”¹ Plaintiffs’ blurring tactic

21
22 ¹ The MGM plaintiffs have revealingly defined what they call the “Morpheus
23 System and Service” in their discovery requests as follows:

24 “Morpheus System and Service” means that collection of technology,
25 including hardware and software (whether installed and run on
26 computers operated by users or on computers operated by MusicCity or
27 any other defendant) that enables users to connect to one or more
28 servers controlled by MusicCity or to a computer network consisting of
other Morpheus, Grokster, and/or KaZaA Media Desktop users wherein
users can make available, locate, or download files in various digital
formats, either compressed or uncompressed; and all related
technology, support, and services associated with those functions.

(continued...)

1 underscores their attempt to evade the legal distinctions between
2 product and service, between article and activity, between a machine's
3 capability and a human's behavior.

- 4 • In an effort to equate MusicCity with Napster, plaintiffs misdescribe
5 both MusicCity's technology and the Ninth Circuit's *Napster*
6 decision.²
- 7 • They articulate a reading of *Sony-Betamax* under which even Sony
8 would have been held liable for contributory infringement, and which
9 would jeopardize the makers of all types of copying technology.
- 10 • Finally, to avoid a ruling on this motion, plaintiffs assert a need for
11 additional discovery, despite the fact that this discovery will not
12 further illuminate the single issue posed by this motion.

13 Plaintiffs' papers betray contempt for new technologies that give consumers
14 control over digital media. Plaintiffs presume to be able to dictate how new
15 technologies should be *designed* not merely how they are *operated*. *See, e.g.,*
16 *MGM Opp.* at 20:25-21:2.

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19
20 (...continued from previous page)

21 Reply Declaration of Andrew P. Bridges ("Bridges Reply Decl.") ¶¶ 2-3, Exs. A,
22 B.

23 Taken literally, this includes all personal computers, modems, hard drives, RAM
24 chips, keyboards, monitors, mouses, power supplies, Internet routers and switches,
25 and other technology involved in connecting Morpheus users with each other. By
26 plaintiffs' definition, the "Morpheus System and Service" includes nearly all the
27 components of the Internet itself.

28 ² Moreover, plaintiffs' attempt to play upon references to MusicCity or
Morpheus as "the next Napster" is misguided. Press reports have identified a wide
variety of companies and technologies as "the next Napster" -- including libraries.
See Bridges Reply Decl. ¶ 4 and Ex. C.

1 Plaintiffs' hostile attitude toward technology, particularly technology that
2 gives control to users rather than centralizing it in major media companies, shows
3 clearly how many technologies – not just PCs and CD burners -- are really at stake
4 in this case. Virtually every computer technology relies on the doctrine announced
5 in the *Sony-Betamax* case, a doctrine that has protected innovation in technology
6 against litigation aimed at expanding the copyright monopoly. Plaintiffs have
7 themselves reinforced MusicCity's argument on that point.

8 ARGUMENT

9 I. PARTIAL SUMMARY JUDGMENT IS PROCEDURALLY PROPER 10 AND IS CUSTOMARILY USED TO NARROW ISSUES.

11 In challenging the propriety of partial summary judgment, plaintiffs ignore
12 abundant authority justifying partial summary judgment as an effective and
13 appropriate tool for narrowing issues in the case. This Court is well versed in the
14 propriety of partial summary judgment and has used it when appropriate to narrow
15 issues for trial. *See, e.g., Rothstein v. Prudential Life Ins. Co. of Am.*, 2001 WL
16 793130 at *1 (C.D. Cal. July 10, 2001)(Wilson, J.)(partial summary judgment
17 granted on issue of standard of review in ERISA case); *Nixon-Egli Equip. Co. v.*
18 *John A. Alexander Co.*, 949 F. Supp. 1435, 1444-45 (C.D. Cal 1996)(Wilson,
19 J.)(partial summary judgment granted on issue of future damages from
20 subsidence); *Mori Seiki USA, Inc., v. M.V. Alligator Triumph*, 1991 WL 432054 at
21 *3 (C.D. Cal. Oct. 16, 1991)(Wilson, J.) (partial summary judgment granted on
22 issue of limitation of available damages); *Johnson v. Reserve Life Ins. Co.*, 765
23 F. Supp. 1478, 1484 (C.D. Cal. 1991) (partial summary judgment granted as to
24 COBRA continuing coverage issue); *Johnson v. Reserve Life Ins. Co.*, 761 F.
25 Supp. 93, 95 (C.D. Cal. 1991)(partial summary judgment granted as to whether
26 health insurance was an ERISA plan).

1 Here, partial summary judgment addresses a substantial issue in the case:
2 the question of contributory copyright infringement liability, one of only two
3 causes of action in the Complaint, for distribution of the Morpheus software. It will
4 clarify issues in this case, not the least of which is the proper scope of remedies,
5 and will streamline proceedings.

6 **II. PLAINTIFFS BEAR THE BURDEN OF ESTABLISHING A**
7 **TRIABLE ISSUE OF FACT REGARDING CONTRIBUTORY**
8 **INFRINGEMENT LIABILITY FOR DISTRIBUTION OF THE**
9 **MORPHEUS SOFTWARE PROGRAM.**

9 Plaintiffs bear the burden of establishing contributory infringement. They
10 therefore have the burden of showing that the Morpheus software product is
11 incapable of substantial noninfringing uses.

12 As this Court has noted, “The parties’ respective burdens on summary
13 judgment are inextricably tied to their burdens of proof at trial. . . . [W]here the
14 burden of proof on an issue would ultimately lie with the non-moving party, the
15 moving party only needs to point to a lack of evidence supporting the non-moving
16 party’s burden. The non-moving party then has the burden to point to evidence
17 from which a reasonable jury could conclude that she has met her burden of
18 proof.” *Nixon-Egli*, 949 F. Supp. at 1441 (citations omitted).

19 In *Sony-Betamax*, the Supreme Court squarely placed the burden on
20 plaintiffs: “To prevail, [plaintiffs] have the burden of proving that users of the
21 Betamax have infringed their copyrights and that Sony should be held responsible
22 for that infringement.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S.
23 417, 434, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984)(“*Sony-Betamax*”). In *Sony-*
24 *Betamax*, the Court stated “[i]n this case, respondents [the movie studios] failed to
25 carry *their burden* with regard to home time-shifting.” 464 U.S. at 451 (emphasis
26 added).

1 There is ample support for this view. In *Nixon-Egli*, this Court carefully
2 distinguished between an affirmative defense and a statutory exception, holding
3 that the issue in that case was a statutory exception as to which the plaintiff had the
4 burden. 949 F.Supp. at 1442-43. In the analogous patent-law context, which
5 provided the basis for the Court’s ruling, see *Sony-Betamax*, 464 U.S. at 440 and
6 n.20 (noting patent law analogy), the “substantial noninfringing use” issue is also a
7 statutory exception in Section 271 of the Patent Act, 35 U.S.C. § 271, as to which a
8 plaintiff bears the burden of proof. *Cybiotronics, Ltd. v. Golden Source Elec., Ltd.*,
9 130 F. Supp. 2d 1152 (C.D. Cal. 2001); *U.S. Surgical Corp. v. Hospital Prods.*
10 *Int’l Pty Ltd.*, 701 F. Supp. 314, 350 (D. Conn. 1988); *Sing v. Culture Prods., Inc.*,
11 469 F. Supp. 1249, 1255 (E.D. Mo. 1979).

12 **III. PLAINTIFFS HAVE NOT ESTABLISHED A GENUINE DISPUTE**
13 **REGARDING CONTRIBUTORY INFRINGEMENT LIABILITY**
14 **ARISING FROM DISTRIBUTION OF THE MORPHEUS**
15 **SOFTWARE TO THE GENERAL PUBLIC.**

16 **A. Plaintiffs Have Failed to Adduce Evidence that the Morpheus**
17 **Software Program is Incapable of Substantial Noninfringing Uses.**

18 Plaintiffs cannot show that the Morpheus software program is incapable of
19 substantial noninfringing uses. The Morpheus software program is a tool that
20 allows users to trade a wide array of digital content. In its moving papers
21 MusicCity set forth, as examples, five substantial categories of noninfringing
22 content which can be, and in fact are, exchanged using the Morpheus software
23 program: Project Gutenberg and other public domain ebooks, U.S. government
24 documents, authorized media content, public domain content such as the Internet
25 Archive and the Prelinger Archives, and computer software authorized for
26 distribution. See MusicCity Opening Brief at 10-14.

27 Plaintiffs have not raised a genuine challenge to the *capability* of the
28 Morpheus software program to facilitate these noninfringing uses. Instead,

1 plaintiffs base their challenge on the current proportions of noninfringing and
2 infringing uses of the Morpheus software program.

3 Under both *Sony-Betamax* and later decisions (including those cited by
4 plaintiffs), however, it is wrong to focus merely on current use in analyzing
5 whether a product qualifies as a staple article of commerce. *See Sony-Betamax*,
6 464 U.S. at 442 (holding that the distribution of a product does not constitute
7 contributory infringement so long as the product is merely “capable of substantial
8 noninfringing uses”); *A&M Records, Inc., v. Napster, Inc.*, 239 F.3d 1004, 1021
9 (9th Cir. 2001)(stating that the district court improperly confined the use analysis
10 to current uses); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 263-68 (5th
11 Cir. 1988) (invoking the staple article of commerce doctrine after finding only a
12 single, narrow noninfringing use).

13 In fact, as pointed out in MusicCity’s opening brief, on this very point the
14 Ninth Circuit flatly disagreed with the district court in the *Napster* case, stating
15 that:

16 We depart from the reasoning of the district court that Napster failed to
17 demonstrate that its system is capable of commercially significant
18 noninfringing uses. The district court improperly confined the use
19 analysis to current uses, ignoring the system’s capabilities.

20 Consequently, *the district court placed undue weight on the proportion*
21 *of current infringing use as compared to current and future*
22 *noninfringing use.*

23 *Napster*, 239 F.3d at 1021 (emphasis added; citations omitted).

24 Notably, the Ninth Circuit in *Napster* expressly cited *Vault* for the point that
25 a “single noninfringing use implicated *Sony*.” *Napster*, 239 F.3d at 1021.

26 *Sony-Betamax* adopted the staple article of commerce doctrine from patent
27 law where it is clear that “[u]nless a commodity ‘has *no use* except through
28

1 practice of the patented method,’ the patentee has no right to claim that its
2 distribution constitutes contributory infringement.” *Sony-Betamax*, 464 U.S. at
3 441 (citing *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 198 (1980))
4 (citations omitted; emphasis added). There is no genuine issue of fact that the
5 Morpheus software program is capable of, and is in fact used for, the exchange of
6 noninfringing content.

7 Plaintiffs cannot establish that the Morpheus software program’s only use is
8 for infringement. The Declarations of M. Tally George and Gregory Newby
9 demonstrated actual, substantial noninfringing uses. The declarations of Clay
10 Shirky, Brewster Kahle, Richard Prelinger, and Sean Mayers illuminated the
11 undeniably important potential uses of the Morpheus software program. These are
12 far broader than the single use that precluded contributory infringement liability in
13 *Vault*.

14 In fact, plaintiffs’ own declarations further demonstrate the Morpheus
15 software’s substantial noninfringing capabilities.

16 Mayers’ uncontroverted testimony is that J!VE Media built its business to
17 enable content providers to use many different networks, including the peer-to-peer
18 FastTrack network (created by the Morpheus software and the other defendants’
19 products) to distribute content “[c]ompletely free-to-consumer and legal for
20 sharing on a global scale.” MGM Declaration of Sean Mayers ¶¶ 6-13. J!VE
21 Media’s successful business and contracts with “record companies, television
22 networks and movie studios” are uncontested evidence of a current commercially
23 significant noninfringing use of MusicCity’s Morpheus product and undeniable
24 proof of Morpheus’ capability of such use. *Id.* ¶ 7.

25 Plaintiffs attempt to dilute, *but fail to contradict*, evidence of substantial
26 noninfringing uses of Morpheus by proffering the results of a transparently flawed
27 search for public domain works. Plaintiffs’ vehicle is the Declaration of Frank
28

1 Creighton (“Creighton Decl.”) ¶¶ 32-36, which described a search of a short list of
2 digital public domain works. Mr. Creighton limited his searches to only 187 public
3 domain works. Creighton Decl. ¶ 33. Mr. Creighton apparently based the number
4 on a partisan calculation of the “representative sample” of public domain works
5 available as ebooks *highlighted* in the Declaration of Gregory Newby (“Newby
6 Decl.”) filed by MusicCity. Mr. Newby explicitly referred, however, to a list
7 attached as Ex. A to his declaration, identifying over 4,500 Project Gutenberg
8 ebooks in the public domain or otherwise authorized for distribution. Newby Decl.
9 ¶ 7. Nor did the Creighton Declaration take into account the numerous sources of
10 other public domain works identified by MusicCity, such as U.S. government
11 documents.

12 In any event, the Creighton Declaration ultimately supports both the
13 capability of, and the actual use of, the Morpheus software program for substantial
14 noninfringing uses. Employing a blinkered search strategy,³ Mr. Creighton still
15 could not avoid finding one Shakespeare work, the King James Bible, the Koran,
16 the Communist Manifesto, and several Platonic dialogues by using the Morpheus
17 software. Creighton Decl. ¶ 36, Ex. 10.

18 Plaintiffs also argue that *Sony-Betamax* offers no protection where the
19 defendant “specifically designed its systems for infringing use.” MGM Opp. at 20;
20 Leiber Opp. at 11. Even if there were evidence that MusicCity did so (there is
21 not), plaintiffs misstate the law. The Supreme Court, discussing the patent law
22 origins of its copyright ruling, stated:

23
24
25 ³ Mr. Creighton’s efforts are notable for the apparent self-imposed, narrow
26 limitations on the searches (using the “precise” author’s name and the “precise”
27 document title, in his words) and the failure to furnish copies of any screen shots
28 for those searches (unlike Mr. Creighton’s practice with plaintiffs’ sound
recordings).

1 The prohibition against contributory infringement is confined to the
2 knowing sale of a component especially made for use in connection
3 with a particular patent. There is no suggestion in the statute that one
4 patentee may object to the sale of a product that might be used in
5 connection with other patents. Moreover, the [Patent] Act expressly
6 provides that the sale of a “staple article or commodity of commerce
7 suitable for substantial noninfringing use” is not contributory
8 infringement. 35 U. S. C. § 271.

9 *Sony-Betamax*, 464 U.S. at 440.

10 Following this principle, the Supreme Court set a very high standard to
11 exclude a product from the marketplace on a contributory infringement theory.

12 The Court stated:

13 [I]n an action for contributory infringement against the seller of
14 copying equipment, the copyright holder may not prevail unless the
15 relief that he seeks affects only his [works], or unless he speaks for
16 virtually all copyright holders with an interest in the outcome.

17 *Sony-Betamax*, 464 U.S. at 446.

18 In this case, plaintiffs seek to ban Morpheus, but plainly they do not speak
19 for all copyright holders. The declarations of author and songwriter John Perry
20 Barlow (¶¶ 8-9) and Sean Mayers (¶¶ 7, 17) filed by MusicCity establish that fact
21 without dispute. More importantly, in a case involving a technology for
22 communication of public domain materials protected by the First Amendment,
23 plaintiffs cannot speak for all lawful content providers and distributors. The
24 declarations of Gregory Newby (¶ 12), Brewster Kahle (¶¶ 14, 19-20), and Richard
25 Prelinger (¶ 17) establish that fact without dispute.

26 Faced with uncontrovertible evidence of actual and potential substantial
27 noninfringing uses, the MGM plaintiffs rely on three trial court decisions to
28

1 support their assertion that MusicCity has made an insufficient showing that the
2 Morpheus software program is actually used for *commercially significant*
3 noninfringing purposes; the MGM plaintiffs rely on one of them to argue (Opp. at
4 20) that *Sony-Betamax* does not apply to products specifically manufactured for
5 counterfeiting activity, even if the products have substantial noninfringing uses.
6 Each of those cases, however, dealt with products that had no substantial
7 noninfringing uses, or with situations where the defendant was liable as a result of
8 active, direct involvement in the infringing activities of third parties.

9 In *A&M Records v. Abdallah*, 948 F.Supp. 1449, 1456-57 (C.D. Cal. 1996)
10 (referred to by plaintiffs as *A&M Records v. General Audio Video Cassettes*), the
11 court found that, even if *Sony-Betamax* applied to protect products “specifically
12 manufactured” for infringing purposes (in that case, blank, custom manufactured
13 audiocassettes with tape precisely measured to fit exactly the length of counterfeit
14 recordings), the products had no substantial noninfringing uses because of their
15 nonstandard sizes.⁴

16 In *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679, 685 (N.D. Cal.
17 1994), the issue was the promotion and distribution of video game copiers used for
18 the making of unauthorized copies of Sega’s video game programs. At the
19 preliminary injunction stage, the district court found that the plaintiff would likely
20 succeed in its contributory infringement claim based on the game copier sales
21 because the plaintiff had introduced un rebutted evidence suggesting the absence of
22

23 ⁴ Moreover, as the Leiber plaintiffs acknowledge, there the defendant was
24 actively involved in the counterfeiter’s enterprise and directly assisted the
25 counterfeiters. As a result, the court held the defendant liable for his conduct and
26 involvement with the counterfeiting enterprise, not for the mere sales of time-
27 loaded cassettes, stating that “even if *Sony* were to exonerate [defendant] for his
28 selling of blank, time-loaded cassettes, this Court would conclude that [defendant]
knowingly and materially contributed to the underlying counterfeiting activity.”
Id. at 1457.

1 noninfringing uses. 857 F. Supp. at 685. Here, the unrebutted evidence of actual
2 and potential noninfringing uses renders *MAPHIA* inapposite.⁵

3 Similarly, *Certain Personal Computers*, No. 337-TA-140, 224 U.S.P.Q. 270
4 (U.S. Int’l Trade Comm’n 1984), involved the importation of computers, which
5 could *only be made operational* by inserting computer operating system programs
6 for which plaintiff owned the copyright. There, the Commission found no
7 evidence of a commercially significant noninfringing use.

8 None of these cases establish a standard of “commercial significance” that
9 the Morpheus software cannot meet.

10 **B. Plaintiffs Cannot Adduce Evidence to Make *Sony-Betamax***
11 **Inapplicable.**

12 **1. Plaintiffs’ Effort to Focus on Alleged Services of MusicCity**
13 **and not the Morpheus Software Itself is a Deliberate**
14 **Distraction from the Narrow Focus of this Motion.**

15 Plaintiffs are relentless in their effort to distract attention from the Morpheus
16 software product. Instead, they argue that “[i]t is about defendants’ operation of
17 commercial businesses” (*e.g.*, Leiber Opp. at 1:13-14), “[defendants’] services”
18 (*e.g.*, *id.* at 1:19), “[d]efendants’ elaborate, illegal scheme” (*e.g.*, *id.* at 2:19), and
19 “[MusicCity’s] services’ close identity to the system previously offered by
20 Napster” (*e.g.*, MGM Opp. at 1:16-18). The Leiber plaintiffs have stated, in their
21 Opposition at 2:15-21:

22 Defendants’ motion is spurious on its face because it seeks summary
23 judgment on a straw man claim – i.e., that defendants are liable solely

24 ⁵ Interestingly, in ruling on a later motion for summary judgment, the court in
25 *MAPHIA* did not premise contributory liability on sales of game copiers, instead
26 focusing on the defendants operation of a video game bulletin board system.
27 *MAPHIA*, 948 F. Supp. at 933. That ruling brought the case into alignment with
28 *Napster*, where the defendant was held liable for its conduct in connection with
operation of a computer service, not for distribution of software.

1 for the distribution of software. Plaintiffs have never asserted such a
2 “claim.”

3 The question of liability for distribution of the Morpheus software is no
4 straw man claim.⁶ Plaintiffs seek to kill or seize control of the technology, just as
5 the movie industry attempted to do to VCRs in *Sony-Betamax*, the recording
6 industry tried to do with MP3 players in *Recording Indus. Ass’n of Am. v. Diamond*
7 *Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999)(“*Diamond Multimedia*”), and
8 the motion picture and television industries are now trying to do to a new
9 generation of video recorders in *Paramount Pictures Corp. v. Replay TV Inc.*,
10 No. 01-CV-9358 (C.D. Cal. filed Oct. 31, 2001).

11 This motion seeks a ruling focused on the question of liability for
12 distribution of the Morpheus software program. Any alleged conduct of MusicCity
13 – whether it is the alleged operation of a commercial business, unlawfully
14 attracting users to web sites, or other activities – will be left at issue in this case
15 after this motion is decided.

16 **2. Plaintiffs’ Assertions Regarding MusicCity’s Alleged**
17 **Knowledge Do Not Preclude Partial Summary Judgment.**

18 Plaintiffs argue that MusicCity loses the protection of *Sony-Betamax*
19 because of MusicCity’s alleged knowledge that the Morpheus software is capable
20 of infringing uses. That knowledge – even the knowledge that a product *is* being
21 used by some persons for infringing uses – does not create liability for distribution
22 of a staple article of commerce to the general public.

23 In the *Sony-Betamax* case, *actual infringing uses of the product were*
24 *apparent*: the Supreme Court noted that surveys conducted by both sides showed

25 _____
26 ⁶ Nor are plaintiffs evidently willing to leave distribution of the software itself
27 unchallenged. If they were, the parties could quickly stipulate as to this issue and
28 continue with the rest of the case.

1 that “a substantial number of [Betamax owning] interviewees had accumulated
2 libraries of tapes.” *Sony-Betamax*, 464 U.S. at 423. Notwithstanding the
3 inescapable actual knowledge flowing from those surveys, the Supreme Court did
4 not apply contributory infringement liability to Sony for general distribution of its
5 video recorder.

6 Plaintiffs invoke *Napster* to argue that presumed general knowledge of
7 public infringements is a bar to partial summary judgment here.⁷ In doing so they
8 fail to acknowledge the very real differences between the *Napster* case and the
9 *Sony-Betamax* case. *Napster* discussed knowledge of a “computer system
10 operator” who “learns of specific infringing material available on his system.” *See*
11 *Napster*, 239 F.3d at 1021. This case is very different, because MusicCity does not
12 have any central file-indexing role like the one *Napster* had.⁸

13 Moreover, the Ninth Circuit did not state that *Napster*’s knowledge made
14 *Sony-Betamax* inapplicable. The Ninth Circuit stated: “We observe that *Napster*’s

16 ⁷ Plaintiffs charge MusicCity with knowledge of press reports. This effort is
17 undermined because included among those press reports was a widely reported,
18 alleged e-mail message from the head of the Recording Industry Association of
19 America to several plaintiffs and plaintiff-related companies in the MGM case.
20 That e-mail message allegedly referred to “spoofing” (using false information) and
interdiction techniques, as a possible part of a coordinated attack on peer-to-peer
technologies. Bridges Reply Decl. ¶ 5 and Ex. D. Any “knowledge” allegedly
imputed to MusicCity about alleged activities of the public would be undermined
by the publicity that the RIAA and its companies were deliberately creating
misleading evidence which makes the alleged “general knowledge” unreliable.

21 ⁸ This also makes inapplicable the “site and facilities” argument plaintiffs
22 make based upon *Fonovisa v. Cherry Auction*, 76 F.3d 259 (9th Cir. 1996). The
23 Ninth Circuit treated *Napster*’s central file name index service as providing the
“site and facilities” for infringement. *See Napster*, 239 F.3d at 1022; *cf. id.* at 1024
24 (“the file name indices are within the ‘premises’ that *Napster* has to police”). The
Morpheus software program is very different; a program distributed to millions of
25 users cannot be considered a relevant “site and facilities” any more than millions of
Betamax VCRs in the hands of consumers would be a “site and facilities.” Even if
26 the distributed software were tortuously considered to be a “site and facilities” for
infringement, the evidence is unrefuted that the software can be used for its file-
27 sharing functionality without MusicCity’s involvement – in which case the
software on users’ computers is not *MusicCity*’s site and facilities.

1 actual, specific knowledge of direct infringement renders *Sony's* holding of limited
2 assistance to Napster.” *Napster*, 239 F.3d at 1020. The Ninth Circuit did not rely
3 on general knowledge; as demonstrated in the quotation above, it required *specific*
4 knowledge of the conduct alleged to be the basis of the contributory infringement.
5 Moreover, in the context of the discussion of Napster’s knowledge, the Ninth
6 Circuit carefully distinguished between architecture and activity: “We are
7 compelled to make a clear distinction between the architecture of the Napster
8 system and Napster’s conduct in relation to the operational capacity of the system.”
9 *Id.* In *Napster* the knowledge was thus tied to Napster’s operation of a system, not
10 the creation and distribution of its technology.

11 Plaintiffs also wish to impose contributory infringement liability based on
12 MusicCity’s alleged actual knowledge resulting from infringement notices they
13 have sent to MusicCity or alleged statements by users of the Morpheus software
14 product in chat rooms, on discussion boards, or to the press. But, as noted in
15 MusicCity’s opening brief (at 19) and the Griffin Decl. (§ 4), all such knowledge
16 of infringing uses by a user comes (by necessity) after distribution of the software
17 to the allegedly infringing user. It is impossible for MusicCity to have distributed
18 the software with specific knowledge of infringing activities, if that alleged
19 knowledge arrives after the distribution has occurred.

20 Finally, plaintiffs seek to bar partial summary judgment by raising alleged
21 issues of fact with respect to personal downloads by MusicCity’s former CEO. In
22 that effort, however, plaintiffs omit Mr. Weiss’s deposition testimony establishing
23 that the downloads they refer to were of *music already owned by him*, to make a
24 convenient party mix CD for an anniversary party, that may constitute “space-
25 shifting” fair use under *Diamond Multimedia*, 180 F.3d at 1079. *See* Weiss
26 Transcript 217-219 (attached to A.J. Thomas Decl. as Ex. A in Leiber case). In
27 any event, knowledge on the part of MusicCity personnel regarding the uses that
28

1 the Morpheus software might be put to, even if backed by personal experience with
2 the product, is irrelevant to the *Sony-Betamax* analysis.⁹

3 The contrary view, pressed by plaintiffs, leads to insupportable results.
4 Under plaintiffs' reading of *Sony-Betamax*, Xerox today could be contributorily
5 liable for distributing photocopiers to *any* infringer if any Xerox management
6 employee happened to use a photocopier for infringing purposes. Similarly, under
7 plaintiffs' theory, if Sony's CEO today builds a library of videotaped television
8 programs for repeated viewing, a new *Sony-Betamax* case would have to be
9 decided differently, and Sony's VCRs could no longer be distributed.

10 **3. Plaintiffs' Allegations of MusicCity's Encouragement of**
11 **Infringement Do Not Make *Sony-Betamax* Inapplicable.**

12 Plaintiffs allege that MusicCity has encouraged copyright infringement.
13 That is not the case, as is evident in the terms of service shown in plaintiffs'
14 Ex. 1.¹⁰ Even if that were the case, however, that would not authorize contributory
15 infringement liability for distribution of the Morpheus software program to the

16
17 ⁹ Plaintiffs remain free, of course, to assert direct infringement claims against
any individual.

18 ¹⁰ Plaintiffs misleadingly state that MusicCity "brazenly continued to provide
19 the very same system held to be unlawful in *Napster*." MGM Opp. at 5 (emphasis
20 omitted). MusicCity responded to notices of alleged infringement by disabling
21 access of users alleged to have engaged in the infringements alleged in the notices
and ultimately ceased operating an OpenNap service. Reply Declaration of Darrell
Smith ("Smith Reply Decl.") ¶ 5.

22 In addition, plaintiffs disingenuously assert that MusicCity hides the identity of
its users through encryption. MGM Opp. 6:27-7:2; Leiber Opp. 23:14-15.
23 However, as plaintiffs clearly show in the very same filing, they have no problem
24 identifying Morpheus users or the files they list for sharing. [MGM] plaintiff's
Appendix of Exhibits in Support of [Opposition to] defendant MusicCity's Motion
25 for Partial Summary Judgment, 168-408, 418-609, 620-700. Indeed, any user of
26 Morpheus, including plaintiffs, can communicate directly with every other user
and find the address of that user. Smith Reply Decl. ¶ 2. The use of encryption by
27 the Morpheus software is a red herring; it has no role in hiding alleged
infringement by Morpheus users. *Id.* ¶¶ 2-4. Plaintiffs have failed to produce any
28 evidence to the contrary.

1 general public. As the Supreme Court stated, referring to Court precedent on
2 contributory infringement:

3 Respondents argue that *Kalem* [*Co. v. Harper Bros.*, 222 U.S. 55, 32
4 S.Ct. 20, 56 L.Ed 92 (1911)] stands for the proposition that supplying
5 the “means” to accomplish an infringing activity and encouraging that
6 activity through advertisement are sufficient to establish liability for
7 copyright infringement. This argument rests on a gross generalization
8 that cannot withstand scrutiny.

9 *Sony-Betamax*, 464 U.S. at 436. In *Sony-Betamax*, the district court had found that
10 Sony had advertised the use of Betamax for compiling a library of favorite shows,
11 but such encouragement did not create liability. *Universal City Studios, Inc. v.*
12 *Sony Corp. of Am.*, 480 F.Supp. 429, 460 (C.D. Cal. 1979).

13 **4. Allegations of an Ongoing Relationship Do Not Create an**
14 **Issue of Liability for Distribution of the Morpheus**
Software.

15 Plaintiffs attempt to distinguish the Morpheus software from the Betamax,
16 and instead liken MusicCity to Napster, by asserting that MusicCity offers an
17 integrated system that has an ongoing relationship with its users. MGM Opp.
18 at 19; Leiber Opp. at 6. Plaintiffs have failed to provide any evidence that the
19 alleged “system” is indeed “integrated.” They have failed to adduce any evidence
20 to challenge the undisputed fact that the Morpheus software can function without
21 any connection whatsoever with MusicCity. Declaration of Darrell Smith (“Smith
22 Decl.”) ¶¶ 23-24.

23 The MGM plaintiffs distort the facts when they argue that MusicCity seeks
24 to portray itself as a mere purveyor of a Morpheus software product. MGM Opp.
25 at 7. MusicCity acknowledges that it offers chat rooms and a discussion board.
26 MusicCity also acknowledges that it sends to users advertisements that are
27 displayed on the Morpheus user interface. It also allows users to establish a
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1 username and password that enable a user to be uniquely identified to other users.¹¹
2 Smith Decl. ¶ 11. If MusicCity bears liability for any of these actions, that liability
3 will not be affected by this motion, which is directed simply to the distribution of
4 the Morpheus software.¹²

5 Although MusicCity normally validates usernames and passwords to ensure
6 that users of Morpheus display a unique identity to the user network, and although
7 MusicCity normally sends advertisements to users that are displayed on the
8 Morpheus user interface, plaintiffs cannot dispute that *the Morpheus software*
9 *program continues to function fully for file searching and trading activities when a*
10 *connection to MusicCity is unavailable*, such as when MusicCity’s servers are
11 down because of technical difficulties. Smith Decl. ¶ 23. The Morpheus software
12 program can execute searches and send and obtain files without any involvement
13 by MusicCity. *Id.* This establishes indisputably that there is no “integrated”
14 service involved – in sharp (and dispositive) distinction from Napster where, when
15 Napster’s central server was taken down, the file-sharing capability of the Napster
16 software was destroyed. *See In re Napster, Inc.*, No. MDL 00-1369 MHP, slip op.

17
18 ¹¹ Plaintiffs make an important concession in the Declaration of Frank
19 Creighton. Mr. Creighton declared that “[d]isabling or deleting users accounts . . .
20 is largely ineffective in preventing the infringement of sound recordings. . . . The
21 only effective way to prevent infringement of a particular sound recording is to
22 block or filter all copies of that sound recording from the system, something that I
23 understand Napster was ultimately ordered to do.” Creighton Decl. ¶ 26. In light
24 of the practical ineffectiveness of registration deletion, MusicCity should bear no
25 liability from the username registration function. Indeed, it is because of the very
26 process of username registration that plaintiffs are in a position to attribute
27 particular conduct to particular users. *See Creighton Decl.* ¶ 17.

28 ¹² Plaintiffs assert that “MusicCity regularly updates the software it has
distributed to its users,” citing Creighton Decl. ¶ 17 as support. MGM Opp. at 7.
The citation does not support that statement. Mr. Creighton merely stated:
“Defendants provide their users with upgrades of defendants’ software free of
charge.” *See Creighton Decl.* ¶ 17. There is no evidence that MusicCity updated
previously distributed software. Offering new versions of software is different
from updating previously distributed software, which would imply control over the
previously distributed software.

1 at 28 (N.D. Cal. Feb. 21, 2002) (electronic PDF version available at
2 www.cand.uscourts.gov under “recent orders”).

3 In any event, contractual relationships and some degree of contact with users
4 cannot render *Sony-Betamax* inapplicable to distribution of the Morpheus software
5 program. “Staple articles of commerce” such as video recorders commonly come
6 with warranties; they are commonly leased as well as sold; they commonly are
7 repaired after delivery; they are commonly registered by their users; and they
8 commonly come with restrictions against user misconduct that may or may not be
9 enforced by their distributors. Under plaintiffs’ theory, a warranty registration of a
10 Betamax would have required a contrary result in *Sony-Betamax*.

11 **5. Plaintiffs Have Not Provided any Evidence of MusicCity’s**
12 **Control over Allegedly Infringing Activities by Morpheus**
Users.

13 The MGM plaintiffs, at 19, distort *Sony-Betamax*’s discussion of when it is
14 “manifestly just” to impose contributory infringement liability by combining
15 phrases from two different sentences. The Court in fact stated:

16 [T]he label “contributory infringement” has been applied in a number
17 of lower court copyright cases involving an ongoing relationship
18 between the direct infringer and the contributory infringer at the time
19 the infringing conduct occurred. In such cases, as in other situations in
20 which the imposition of vicarious liability is manifestly just, the
21 “contributory” infringer was *in a position to control the use of*
22 *copyrighted works* by others and *had authorized the use* without
23 permission from the copyright owner.

24 *Sony-Betamax*, 464 U.S. at 437-38 (emphasis added).

25 In this case, there is no evidence that MusicCity is “in a position to control
26 the use of copyrighted works by others and had authorized the use without
27 permission from the copyright owner.” To the contrary, the evidence is
28

1 indisputable that users may use Morpheus without any involvement by MusicCity,
2 much less any control over infringing uses.

3 Plaintiffs also invoke MusicCity’s “terms of service” in an attempt to show
4 that MusicCity exerts ongoing control over uses of Morpheus. Their own evidence
5 cannot support that assertion, and plaintiffs’ discussion of the terms of service
6 omits critical language. MusicCity’s terms of service as shown in MGM plaintiffs’
7 Appendix to Opp. Ex. 1 included the following provisions:

8 MUSICCITY NETWORKS DOES NOT CONTROL OR HAVE
9 KNOWLEDGE OF ANY OF THE AVAILABLE CONTENT
10 SHARED USING MUSICCITY NETWORKS OR THE MORPHEUS
11 CLIENT SOFTWARE.

12 MGM Opp. Ex. 1 at 2 (capital letters in original).

13 MusicCity Networks reserves the right to unilaterally terminate the
14 account of any person, *to the [extent] technically feasible to do so . . .*

15 *Id.* at 4 (emphasis added).

16 MusicCity Networks is technically not able to monitor the information
17 users transmit or store when using the MusicCity network.

18 *Id.* at 5.

19 MusicCity Networks will, *to the extent technically possible*, terminate
20 the accounts of users who violate copyrights or other intellectual
21 property rights of third parties if we receive “actual knowledge” of their
22 infringing activities. . . . Those users deemed “repeat offenders” by
23 MusicCity Networks will have their MusicCity Networks account
24 permanently cancelled, *to the extent technically feasible to do so. . . .*

25 MusicCity Networks will enforce this policy *to the extent it is technically*
26 *feasible to do so.*

27 *Id.* at 5 (emphasis added).

28

1 Those terms, omitted by plaintiffs, highlight the limits on MusicCity’s ability to
2 control even uses that are forbidden by its terms of service. Plaintiffs’ failure to
3 acknowledge this language demonstrates the lengths to which they will go to create
4 the illusion of “control” by MusicCity.¹³

5 **IV. PLAINTIFFS HAVE SHOWN NO REASON TO DEFER THE**
6 **GRANT OF PARTIAL SUMMARY JUDGMENT.**

7 Plaintiffs do not suggest – nor can imagination supply – any means by which
8 further discovery would lead to proof that the Morpheus software is incapable of
9 substantial noninfringing uses, that any general awareness of the potential for
10 public infringements can create contributory infringement liability, or that any
11 post-distribution knowledge of particular infringements by Morpheus users can
12 create contributory infringement liability for distribution of Morpheus to the
13 general public. There is no reason to delay the grant of partial summary judgment
14 to the MusicCity defendants.¹⁴

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16
17 ¹³ The MGM plaintiffs argue at 8-9 that “[a]lthough MusicCity has exercised
18 control over the system to protect its *own* rights, it has done nothing to respect the
19 rights of plaintiffs.” In support of that argument, they refer to paragraph 31 of the
20 Creighton Declaration and paragraphs 6-9 of the Nigam Declaration. Neither
21 declaration provides any support for the statement that MusicCity has exercised
22 any control over its “system.” Although the plaintiffs bandy the term “control”
23 about, it appears that what they are referring to is that MusicCity released a new
24 version of its software in order to provide improved security. That improved
25 security minimized the chance of pernicious hacking that could exploit the
26 Morpheus user network for denial of service or other attacks. Smith Reply Decl.
27 ¶ 4. The mere offering of an improved version of a product is no evidence of
28 control.

23 ¹⁴ The Leiber plaintiffs distort the events of the Weiss deposition in order to
24 create the appearance that they have been frustrated in their discovery efforts.
25 Leiber counsel Kelli Sager subpoenaed Mr. Weiss for deposition and noticed his
26 deposition for the same time as the MGM plaintiffs’ deposition; she announced her
27 participation at the outset of the deposition; and she was present for the entire
28 deposition. Ms. Sager could have asserted her prerogative to engage in
questioning during the seven hours if she had wished. Bridges Reply Decl. ¶ 6 and
Ex. E.

1 **CONCLUSION**

2 Plaintiffs argue that “MusicCity could have either created a system that
3 filtered the infringing activity while permitting noninfringing uses to continue
4 and/or can change its system to allow for differentiation to permit copying and
5 distribution of noninfringing files while preventing copyrighted works to be
6 swapped on the system without authorization.” MGM Opp. at 20-21. In other
7 words, plaintiffs argue that MusicCity should be required to design a different
8 product with different characteristics, dictated by a small but powerful group of
9 copyright owners, to avoid liability. It is precisely this radical view, that copyright
10 law somehow conveys a veto power over technology, that the Supreme Court
11 rejected in *Sony-Betamax*. 464 U.S. at 441 n.21 (“It seems extraordinary to suggest
12 that the Copyright Act confers upon all copyright owners collectively, much less
13 the two respondents in this case, the exclusive right to distribute VTRs simply
14 because they may be used to infringe copyrights”).

15 The Ninth Circuit in *Napster* specifically refused to find fault with Napster’s
16 architecture or require its modification; it found liability for Napster’s operation of
17 its central file-indexing service, which Napster controlled. *See Napster*, 239 F.3d
18 at 1021. Plaintiffs want far more in this case than the Court of Appeals would
19 permit in *Napster*.

20 Plaintiffs want the courts to be a technological battleground in which
21 developers or distributors are held to account for unlawful acts of those who use
22 their products, even when others can use the products for legitimate purposes. The
23 answer to plaintiffs is simple: if you want new law to regulate technology, go to
24 Congress, not the courts. In the words of District Court Judge Ferguson in the
25 *Sony-Betamax* case:

26 [T]his court recognizes that the full resolution of these issues is
27 preeminently a problem for Congress.... Obviously there is much to be
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1 said on all sides. The choices involve economic, social and policy
2 factors that are far better sifted by a legislature. The possible
3 intermediate solutions are also of the pragmatic kind legislatures, not
4 courts, can and should fashion.

5 *Universal*, 480 F.Supp at 469. The Supreme Court in affirming the district court in
6 *Sony-Betamax* agreed that it is Congress's role to adapt copyright law to new
7 technologies. *See Sony-Betamax*, 464 U.S. at 456.

8 Plaintiffs have remedies for copyright infringement, which they may seek
9 against persons actually engaging in, or actually in a position to control, infringing
10 activities. Plaintiffs have in Congress an avenue to seek limits on the design of
11 new technology products that they perceive to threaten their copyright interests.¹⁵
12 There, all of the constituencies with a stake in the issue, most of whom are not
13 before this Court, may participate. Plaintiffs have no need for a dramatic judicial
14 expansion of copyright liability that would threaten a wide variety of technologies
15 from broadband modems to CD burners to PCs.

16 Moreover, if the Court grants partial summary judgment in this motion,
17 plaintiffs will not lose their ability to seek remedies against MusicCity for any
18 alleged "services" or other activities for which it may be responsible.

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22 ///

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24 ¹⁵ Congress has shown no shyness in regulating technologies with copyright
25 implications at the urging of plaintiffs. Among the many recent enactments
26 achieved by plaintiffs are the Digital Millennium Copyright Act, which regulates
27 "anticircumvention" technologies that may defeat copyright protection methods,
28 and the Audio Home Recording Act, which imposes design requirements on digital
audio recording devices. *See* 17 U.S.C. §1201(b)(1) (anticircumvention device
restrictions of DMCA); 17 U.S.C. §1002 (design requirements of AHRA).

1 For these reasons, the Court should grant partial summary judgment to the
2 MusicCity defendants on the issue of contributory copyright infringement liability
3 arising from the distribution of the Morpheus software program to the general
4 public.

5
6 February 25, 2002

Respectfully submitted,

WILSON SONSINI GOODRICH &
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10 By: _____
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13 Networks, Inc., (formerly known as
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